No. 22-1165

IN THE
Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORPORATION, ET AL.,
Petitioners,

v.

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

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

BRIEF FOR RESPONDENT MOAB PARTNERS, L.P.

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QUESTION PRESENTED

Whether an omission of material information that Item 303 of SEC Regulation S-K requires issuers to disclose can be actionable under Rule 10b-5 if the plaintiff adequately and independently pleads all other elements of the Rule 10b-5 cause of action.

PARTIES TO THE PROCEEDINGS

Respondent Moab Partners, L.P. was the district court-appointed lead plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

The City of Riviera Beach General Employees Retirement System, on behalf of itself and all others similarly situated, was a plaintiff in the district court proceedings but did not participate in the court of appeals proceedings and so is not a respondent in the proceedings before this Court.

RULE 29.6 STATEMENT

Respondent Moab Partners, L.P., established in 2006, is an institutional investor located in New York, New York. Moab has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

For nearly a half-century, the Securities and Exchange Commission ("SEC" or "Commission") has enforced a requirement that a publicly traded company disclose management's analysis of important developments facing the company to investors. That narrative analysis (required by a regulation referred to as Item 303) supplies a vital tool investors use in assessing a company's financial results and business prospects. When companies knowingly violate that disclosure rule in deceptive and material ways, the Commission and private investors have sought appropriate remedies under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

Petitioners seek to negate that important enforcement tool. They request a blanket rule that omitting Item 303-required information is never the type of deceptive conduct § 10(b) and Rule 10b-5 prohibit. That sweeping proposal conflicts with the statutory and regulatory text, this Court's cases concerning omissions in similar contexts, the common law, and common sense. The logic of petitioners' theory also has no coherent endpoint. Because SEC rules contain many disclosure requirements, petitioners' submission would create broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose.

The fraud alleged here demonstrates why petitioners' blanket immunity rule is so unsound. After the International Maritime Organization announced that a form of heavy oil used in shipping would be phased out under rules to take effect in 2020 ("IMO 2020"), petitioners and their competitors knew that rule would upend their business. Yet petitioners lulled investors into thinking the opposite, by secretly flouting their disclosure obligations and declining to discuss in their SEC reports how the rule change likely would affect Macquarie Infrastructure Corporation's ("MIC") business. When the truth later emerged and the stock price plummeted, petitioners' fraud became clear to the markets.

In allowing this case to survive dismissal, the Second Circuit properly held that such omissions can support securities-fraud claims in appropriate cases. That judgment should be affirmed.

STATEMENT

A. Statutory And Regulatory Background

1. Congress enacted the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") to counter "rampant abuses in the securities industry [that] led to the 1929 stock market crash and the Great Depression." *Kokesh v. SEC*, 581 U.S. 455, 457-58 (2017). The Securities Act regulates initial offerings; the Exchange Act regulates secondary trading. *See Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1437 (2023). The latter also created and authorized the SEC to regulate the securities industry. *See Kokesh*, 581 U.S. at 458.

To "promote investor confidence" in the securities markets, *SEC v. Zandford*, 535 U.S. 813, 819 (2002), Congress "'substitut[ed] a philosophy of full disclosure for the philosophy of *caveat emptor*,'" *Kokesh*, 581 U.S. at 457-58 & n.1 (quoting *SEC v. Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186 (1963)). Congress recognized that "the hiding and secreting of important information obstructs the operation of the markets as indices of real value." *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988).

Exchange Act § 10(b) broadly prohibits deceptive conduct in connection with the purchase or sale of securities, making it "unlawful" for any person "[t]o use or employ, in connection with the purchase or sale of any security . . . [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). SEC Rule 10b-5 implements that prohibition by making it unlawful for issuers:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

17 C.F.R. § 240.10b-5.

This Court "has found a right of action implied in the words of [§ 10(b)] and its implementing regulation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). Congress "ratified the implied right of action" when it enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *Id.* at 165. This Court has recognized that "meritorious private actions to enforce federal anti-fraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013). In a private action under these provisions, "a plaintiff must prove '(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Id.* at 460-61 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011)).

When a claim alleges an omission, the withheld information must have been material, meaning there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32. Section 10(b) and Rule 10b-5 "do not create an affirmative duty to disclose any and all material information." *Matrixx*, 563 U.S. at 44. But misleading omissions are actionable because issuers have "the ever-present duty not to mislead." *Basic*, 485 U.S. at 240 n.18. A "duty to disclose" can render silence misleading. *Id.* at 239 n.17.

2. Exchange Act § 13 authorizes the SEC to establish requirements for periodic reporting by public issuers. *See* 15 U.S.C. § 78m(a)(2). It provides in pertinent part that securities issuers "shall file with the Commission . . . such annual [and quarterly] reports . . . as the Commission may prescribe." *Id.* The SEC implemented § 13 with regulations providing that issuers "shall file" periodic reports on forms prescribed by the SEC. 17 C.F.R. § 240.13a-1 (annual reports); *see id.* § 249.310(a) (Form 10-K for annual reports under § 13); *see id.* § 240.13a-13(a) (quarterly reports on "Form 10-Q"). Forms 10-K and 10-Q, in turn, specify the information issuers must include in those reports. *See* SEC, Form 10-K; *id.*, Form 10-Q. These required disclosures range from information about an issuer's directors and officers to specifics about the issuer's property and financials. *See, e.g.*, 17 C.F.R. §§ 229.102, 229.401(f). Regulation S-K implements one such requirement by prescribing "the content of the non-financial statement portions" of the "annual or other reports" issuers must file. *Id.* § 229.10(a)(2).

Regulation S-K's Item 303 requires periodic reports to include Management's Discussion & Analysis of Financial Condition and Operations, or "MD&A." *See id.* § 229.303. Item 303 is "[o]ften the most important textual disclosure item in Regulation S-K." II Louis Loss et al., *Securities Regulation* 294 (6th ed. 2019); *see* Thomas Lee Hazen, *The Law of Securities Regulation* 125 (8th ed. 2021) (describing MD&A as "particularly important"). The MD&A is "intended to provide, in one section of a filing," information enabling investors "to assess the financial condition and results of operations of the registrant, with particular emphasis on the registrant's prospects for the future." Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22,427, 22,428 (May 24, 1989).

The MD&A requirement "date[s] to 1968," and the SEC adopted the current framework in 1980. *Id.* at 22,427. "The Commission has long recognized the need for a narrative explanation of the financial statements, because a numerical presentation and brief accompanying footnotes alone may not enable an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance." Concept Release on Management's Discussion and Analysis of Financial Condition and Operations, 52 Fed. Reg. 13,715, 13,717 (Apr. 24, 1987).

During the relevant period here, the MD&A required petitioners 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). That provision created a "disclosure duty" mandating that issuers disclose any "trend, demand, commitment, event or uncertainty" that "is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation." 54 Fed. Reg. at 22,429.

The requirement to identify known trends and uncertainties is "[o]ne of the most important elements necessary to an understanding of a company's performance, and the extent to which reported financial information is indicative of future results." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056, 75,061 (Dec. 29, 2003). That requirement enables investors to review a company's MD&A and see, "in one section of a filing," 54 Fed. Reg. at 22,428, a discussion enabling them to "ascertain the likelihood that past performance is indicative of future performance," 68 Fed. Reg. at 75,056.

In November 2020, after the period relevant here, the SEC amended Item 303 to mandate that the registrant disclose any known trends or uncertainties "reasonably likely to cause a material change in the relationship between costs and revenues." 17 C.F.R. § 229.303(b)(2)(ii). The amendment changed the disclosure trigger from a "reasonably expects" threshold to a "reasonably likely" one. Its purpose was to provide "specific guidance" and "a tailored and meaningful framework" for issuers to "objectively analyze whether forward-looking information is required."

Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, 2094 (Nov. 19, 2020).

B. Factual Background

1. Petitioner MIC owned and operated several infrastructure businesses, including International-Matex Tank Terminals ("IMTT"), a large bulk liquid-storage provider. JA36 (¶ 37).[1] IMTT was MIC's most profitable business and the "key driver" of its performance, supplying 54% and 80% of its net income in 2016 and 2017, respectively. JA44-52 (¶¶ 61-79). During the Class Period (February 22, 2016 to February 21, 2018), IMTT's business hinged on "6-Oil," the industry term for high-sulfur heavy and residual fuels. JA21, 23, 52-53 (¶¶ 1, 5, 81, 83). 6-Oil requires expensive, specialized storage tanks. JA64-66 (¶¶ 116-117). Consumption of 6-Oil has declined over time, and by the start of the Class Period in February 2016, the primary remaining 6-Oil users were large shipping vessels. JA54-55 (¶¶ 86-89).

In October 2008, the IMO announced new regulations, effective January 2020, to largely ban 6-Oil's use in global shipping — IMO 2020. JA56-57 (¶¶ 90-92). Other industry participants recognized that IMO 2020 was a seismic event for oil-storage companies that dealt with 6-Oil. *E.g.*, JA57 (¶¶ 92-93).

After IMO 2020's announcement, but years before the Class Period, petitioners told investors they

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[1] The complaint's factual allegations are deemed true at the dismissal stage. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). MIC's co-petitioners were Macquarie Infrastructure Management — MIC's manager — as well as MIC's former CEO (James Hooke), Head of Investor Relations (Jay Davis), and CFO (Liam Stewart). Petitioner Richard Courtney was IMTT's CEO.

intended to reduce IMTT's 6-Oil storage. In May 2012, MIC's then-CEO, petitioner Hooke, told investors that MIC executives had "all read the articles" about the "uncertainty" and possible impact on the "demand for [6-Oil]" and explained that IMTT could shift to storing "clean products" through "a one-off increase in capital expenditures." JA60-61 (¶ 105). In November 2012, Hooke stated that IMTT had begun to reduce its 6-Oil storage, converting 1.2 million barrels of 6-Oil storage capacity to a lighter-grade fuel. JA61-62 (¶ 107). Those statements conveyed to investors that IMTT was moving away from 6-Oil and protecting its business from IMO 2020's impact. JA62-63 (¶ 109).

The opposite was true. Petitioners' statements misled the market because IMTT remained secretly reliant on 6-Oil. JA87-88 (¶¶ 180-184). In May 2018, months after the Class Period ended, petitioners revealed that 6-Oil had accounted for nearly 40% of IMTT's storage volume. JA97-99 (¶¶ 212-213). As petitioners knew — but never told investors — IMTT's hidden dependence on 6-Oil had left the company vulnerable to IMO 2020. JA66, 69-70 (¶¶ 118, 129). Indeed, the IMO 2020-driven collapse of the 6-Oil market crushed IMTT's revenues and forced MIC to spend millions of dollars repurposing its 6-Oil tanks. JA92-93 (¶ 196).

2. Petitioners concealed these risks from investors through an interlocking mix of misstatements and omissions. While industry observers and participants (including IMTT's competitors) warned during the Class Period that IMO 2020 would have "global repercussions" and was "one of the dominant issues facing the global refinery industry," JA59-60, 66-68 (¶¶ 101, 119-123) (emphasis omitted), petitioners kept quiet about MIC's exposure to IMO 2020's seismic impact. Petitioners' quarterly and year-end filings during the Class Period omitted any mention of 6-Oil and IMO 2020, including the risks they posed to IMTT's business, even though petitioners certified that the filings complied with § 13(a) and omitted no material facts that would render public statements misleading under the "circumstances." JA63-64, 73 (¶¶ 111-112, 140); MIC 2016 10-K, Exs. 31.1-31.2, 32.1-32.2.

In fact, petitioners misrepresented MIC's exposure to IMO 2020. On February 23, 2016, petitioner Hooke stated that IMTT was not "macroeconomically sensitive," claiming only "some sensitivity to end-user demand . . . least in the petroleum segment." JA107-08 (¶ 232) (emphasis omitted). On August 2, 2016, he assured investors that MIC's consistent performance was "a trend that is underpinned by" the "stable essential services nature of our businesses." JA113 (¶ 240) (emphasis omitted). And on November 1, 2016, Hooke claimed publicly that "none of MIC's businesses are exposed directly to the price of . . . petroleum products." JA70 (¶ 130) (ellipsis in original). Those statements concealed IMTT's exposure to 6-Oil and the IMO 2020-driven disruption of the 6-Oil market. With investors unaware of the truth, MIC common stock reached its Class Period high on November 1, 2016. *Id.* Likewise, in a secondary public offering of MIC common stock two days later ("Offering"), the Offering Documents made no mention of IMTT's dependence on 6-Oil or the risks threatened by IMO 2020. JA70-71, 164-70 (¶¶ 131-132, 354-365).

After the Offering, petitioners continued to omit any mention of 6-Oil or IMO 2020 — even while other industry participants acknowledged how the IMO

2020 changes would affect their businesses. JA73-75, 77, 89 (¶¶ 142, 147, 151, 186). Instead, in May and November 2017, petitioner Davis told investors that "[a] little over half" of IMTT's capacity was in petroleum products but "very little of that is in crude . . . or heavy product." JA117-19, 147 (¶¶ 248, 301) (emphases omitted). Davis also downplayed the extent that IMTT's customer base consisted of commodity traders who quickly could exit the market. JA117-19 (¶ 248). And on an August 2017 earnings call, Hooke told investors that IMTT remained "a case of steady as she goes" and disclaimed any "commodity-driven factors" or "counter-party issues" that would decrease utilization. JA76 (¶ 150) (emphases omitted). Those misleading assurances caused an industry analyst to predict growth for IMTT, even as IMTT's performance was falling. JA77 (¶¶ 151-152).

The truth finally emerged on February 21, 2018, when MIC cut its quarterly dividend guidance by 31% to reflect IMTT's declining performance. JA87-88 (¶¶ 180-182). MIC's new CEO blamed the bad news on one culprit: 6-Oil. JA88 (¶ 184). He explained that "a number of customers terminated contracts for a significant amount of 6 Oil capacity at IMTT's facility in St. Rose. . . . [I]n some cases, they shut down their operations and exited the industry" as a result of "structural decline in the 6 Oil market." JA88-89 (¶¶ 184-186) (emphasis omitted). Further, MIC belatedly admitted that it needed cash to repurpose its tanks "into the storage and handling of bulk liquids other than 6 Oil." JA92-93 (¶ 196). MIC's stock price plummeted in response.

C. Procedural History

On February 20, 2019, Moab filed an amended complaint on behalf of a class of persons who bought

MIC securities during the Class Period. Moab sued MIC, some MIC senior executives, Macquarie Management, and Barclays as the November 2016 Offering's underwriter.[2]

Moab's § 10(b) and Rule 10b-5 claim alleges that petitioners "carried out a plan, scheme, and course of conduct" to deceive investors. JA154 (¶ 318). Moab bases that claim on petitioners' false statements and misleading "half-truths," as well as on their failure to disclose material information Item 303 required them to disclose. The misrepresentations affirmatively deceived investors about IMTT's reliance on 6-Oil. JA29, 77, 97-98 (¶¶ 20, 151-152, 212). The omissions worked in tandem with those misstatements by withholding key information — about IMTT's secret, continued reliance on 6-Oil and its exposure to IMO 2020 — that both petitioners' own statements and Item 303 required them to disclose. JA63-64, 70, 73 (¶¶ 111-112, 130, 140).

Petitioners moved to dismiss, challenging falsity, scienter, loss causation, and standing. The district court dismissed the complaint for failing to plausibly allege false statements or omissions, and for failing to allege scienter as to the Exchange Act claims. In particular, the court held that Moab failed to allege a violation of Item 303 or that petitioners' omissions were material. App. 39a-40a. The court did not address petitioners' other motion-to-dismiss arguments.

The Second Circuit vacated the district court's judgment and reinstated Moab's claims under both

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[2] Moab also brought claims under Securities Act § 11 and § 12(a)(2) as well as control-person claims and an Exchange Act § 20A claim for insider sales. Because the certiorari petition did not encompass those claims, they remain pending in the district court.

the Securities Act and the Exchange Act. Most of the claims the Second Circuit revived do not turn on Item 303. As to Moab's § 10(b) claim, the court reasoned that Moab adequately alleged that petitioners made affirmative misstatements, including as to their "base of customers," which were "half-truths" that required petitioners to disclose information necessary to assess the risks from IMO 2020. App. 10a-11a. Moab also sufficiently alleged petitioners made other misrepresentations that were not "puffery or expression of corporate optimism." App. 7a & n.1. Further, the court held Moab adequately alleged scienter. App. 11a-12a.

The Second Circuit also revived Moab's § 10(b) and Securities Act claims because Moab adequately alleged that petitioners made material omissions under Item 303 in MIC's periodic reports. The court explained that failure to make a required Item 303 disclosure can support "a claim under Section 10(b) if the other elements have been sufficiently pleaded." App. 8a (citing *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101-04 (2d Cir. 2015)). Because petitioners allegedly knew that IMO 2020 would have a "reasonably likely" material effect on MIC's business, Item 303 required petitioners to inform investors of those risks. App. 9a. The court reasoned that, "[a]s pleaded," petitioners' failure to disclose the potential impact of IMO 2020 was not "objectively reasonable." *Id.* And Moab sufficiently alleged the omitted information was material and petitioners acted with scienter in refusing to make the required disclosures. App. 10a-12a. The court remanded for further proceedings.

SUMMARY OF ARGUMENT

I. A public company that deceives investors by omitting required, material information from a periodic report violates Exchange Act § 10(b) and Rule 10b-5. Filing an annual or quarterly report that purports to comply with the SEC's disclosure requirements but in fact deliberately omits required, material information is misleading because it leads reasonable investors to conclude that the omitted facts do not exist.

The deceptive omission of required, material information violates each of Rule 10b-5's three prongs. A periodic report is a "circumstance" where the omission of required information can render the issuer's other statements "misleading" because reasonable investors expect issuers to disclose all the information the SEC requires. *See* 17 C.F.R. § 240.10b-5(b). Omissions under those circumstances also violate the prohibitions on employing "any device . . . to defraud" or "act . . . which operates . . . as a fraud or deceit." *Id.* § 240.10b-5(a), (c).

Common law long has recognized that omissions can be fraudulent when they cause other statements to be misleading. This Court has recognized that an omission can mislead a reasonable person when the speaker's other statements suggest that the omitted information does not exist. Common-law fraud also can arise when nondisclosure violates an independent legal duty. This Court has applied that principle to hold nondisclosure actionable under the securities laws. The Court's cases explain that violation of a fiduciary duty can be fraudulent because a reasonable person expects the fiduciary to comply with that duty. A regulatory duty is no different. This case falls squarely within those principles.

II. Petitioners err in characterizing this case as involving a "pure omission." Petitioners were not silent. They filed an annual report with statements that petitioners' omissions rendered misleading. They also certified expressly that MIC's annual statements included all required information, which should have included the 6-Oil trend they deliberately concealed.

Petitioners' comparisons to Securities Act § 11 are unpersuasive. Section 10(b) is a broad, anti-fraud provision. The SEC recognized as much when it modeled Rule 10b-5 on Securities Act § 17(a) instead of § 11. And § 17(a)(2) incorporates § 11's "required to be stated" provision by enabling courts to consider the "circumstances" in which an omission occurs. The PSLRA is similarly of no help to petitioners because it recognizes that plaintiffs may bring claims based on omissions as well as conduct-based claims under Rule 10b-5.

Mischaracterizing this case as involving an "implied certification of completeness" does not support petitioners' argument. Unlike the False Claims Act, issuers expressly must certify completeness. This certification informs the "circumstances" or context in which reasonable investors understand a periodic report.

III. Petitioners' policy arguments cannot override the statute's plain text. Accepting petitioners' position would deprive the SEC of a critical enforcement tool, bolstered by private liability. Nor is there any basis to craft an Item 303-specific exception to § 10(b). Private liability turns on the established elements of the Rule 10b-5 cause of action. Materiality and scienter limit petitioners' concerns about Item 303's subjective nature, and many courts have adjudicated

Item 303-based claims. Moreover, petitioners' premise has no limiting principle. Their theory would immunize issuers for omitting any SEC required disclosure, thwarting Congress's policy of full disclosure. And petitioners' passing attempt to relitigate the Second Circuit's other holdings lacks merit.

IV. Respondent Barclays' requested relief is procedurally barred. Because Barclays did not file a cross-petition or raise the issue below, it cannot enlarge its rights by attacking the Second Circuit's judgment now. Nor does the Question Presented fairly encompass Barclays' request, which concerns different statutes.

ARGUMENT

I. AN ISSUER THAT DECEIVES INVESTORS BY PURPORTING TO INCLUDE BUT OMITTING REQUIRED INFORMATION FROM A PERIODIC REPORT FILED WITH THE SEC IS SUBJECT TO LIABILITY UNDER § 10(b)

A. Omitting Information The SEC Requires Issuers To Disclose Violates § 10(b) And Rule 10b-5

1. Section 10(b) broadly prohibits "any manipulative or deceptive device or contrivance in contravention of [the SEC's] rules and regulations" used "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). It is "a catch-all clause to prevent fraudulent practices." *Chiarella v. United States*, 445 U.S. 222, 226 (1980).

The statute's words cover misleading omissions. Both adjectives — "manipulative" and "deceptive" — reach all types of misleading activity. *See Webster's New International Dictionary* 679 (2d ed. 1937) ("deceptive" is "[t]ending to deceive" or "having power to mislead"); *see also id.* ("deceive" is "[t]o ensnare or mislead"); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) ("'Manipulation' is 'virtually a term of art when used in connection with securities markets' [and] refers generally to practices . . . intended to mislead investors[.]") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)). Congress's reference to "any" misleading "device or contrivance" likewise sweeps broadly, with no distinction between misstatements and omissions. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). A deliberate omission that deceives investors is no less a fraudulent "contrivance" than an affirmative lie. The text makes the former just as actionable as the latter.

2.a. The "rules and regulations [of] the Commission," 15 U.S.C. § 78j(b), likewise cover deceptive omissions. Rule 10b-5(b) says so expressly: it bars issuers from "omit[ting] 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). That language requires a contextual inquiry that turns on the speaker's other "statements" and their "circumstances." If an omission causes the other statements to mislead a reasonable investor, *see Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186 (2015), the omission violates the rule.

That principle applies to Item 303-mandated disclosures. Indeed, an annual report is one "circumstance" when the omission of required material information can render statements misleading. Exchange Act § 13(a) and SEC regulations require periodic reports. *See* 15 U.S.C. § 78m(a) ("shall file"); 17 C.F.R. § 240.13a-1 (same); *id.* § 249.310(a) ("shall" use Form 10-K); *see also* 15 U.S.C. § 78m(a); 17 C.F.R. § 240.13a-13(a) (quarterly reports). Those reports "as a class are formal documents, filed with the SEC" and subject to a litany of SEC requirements. *Omnicare*, 575 U.S. at 190. A reasonable investor thus expects that, when a company files a periodic report on Form 10-K or 10-Q, the report includes all the information the SEC requires. *See id.* (an "investor takes into account the customs and practices of the relevant industry," which include the operative legal framework).

The structure of an annual report reinforces that expectation. The cover page prominently identifies the report as an "Annual Report Pursuant to Section 13 . . . of the Securities Exchange Act of 1934." SEC, Form 10-K at 6. The report then addresses a list of numbered items that correspond to portions of the SEC's regulations implementing § 13. *See id.* at 8-11. And, post-2002, the report must include certifications by the company's CEO and CFO that the report "fully complies with the requirements of section 13(a) . . . of the [Exchange] Act." 18 U.S.C. § 1350(b). Readers of a company's annual report therefore reasonably expect the report to contain all material information under the SEC's regulations implementing § 13.

Form 10-K also requires issuers to "[f]urnish the information required by Item 303 of Regulation S-K" in the MD&A. SEC, Form 10-K, Item 7. Item 303 in turn requires the issuer to disclose known trends and uncertainties. If the MD&A discloses some trends but omits others, investors take that as a "tacit representation" no other trends exist. *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 189 (2016).

"[I]n the light of the[se] circumstances," the omission of a known trend or uncertainty from an Item 303 disclosure can render the MD&A's other statements misleading. 17 C.F.R. § 240.10b-5(b). This is so even if the statements are truthful in isolation; "literal accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another." *Omnicare*, 575 U.S. at 192. A periodic report that purports to comply with the SEC's requirements can mislead investors by suggesting falsely that the omitted material does not exist. Investors reasonably (but mistakenly) assume the issuer has conveyed the required information.

b. Filing an MD&A disclosure that omits Item 303-required information also can violate Rule 10b-5's other clauses. Those clauses cover any "device, scheme, or artifice to defraud" and any "act, practice, or course of business" that "operates . . . as a fraud or deceit." 17 C.F.R. § 240.10b-5(a), (c). "These provisions capture a wide range of conduct." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019). And because "[c]onduct itself can be deceptive," liability does not require "a specific oral or written statement." *Stoneridge*, 552 U.S. at 158.

Once again, the rule's words cover deceptive omissions. A "device" "is simply 'that which is devised, or formed by design'; a 'scheme' is a 'project,' 'plan, or program of something to be done'; and an 'artifice' is 'an artful stratagem or trick.'" *Lorenzo*, 139 S. Ct. at 1101 (quoting *Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980)) (cleaned up). The "words 'act' and 'practice' in subsection (c) are similarly expansive" — an "'act'" is "'a doing' or a 'thing done'" and a "'practice'" is "an 'action' or 'deed.'" *Id.* (quoting *Webster's International Dictionary* 25, 1937 (2d ed. 1934)). Deceptive omissions

— especially of required information from an SEC-mandated report — fall well within the "wide range of conduct" these words describe. *Id.*

Filing a periodic report is an "act" or "practice." If that report omits required material information, the act of filing it can operate "as a fraud or deceit" and constitute a "device" or "artifice to defraud." 17 C.F.R. § 240.10b-5(a), (c). Whatever the scope of Rule 10b-5's second clause, the first and third clauses do not require "the making of an untrue statement." *Lorenzo*, 139 S. Ct. at 1102. Indeed, both provisions bar "[d]eception through nondisclosure," *United States v. O'Hagan*, 521 U.S. 642, 654 (1997), just as subsection (b) bars deception through misrepresentation, *see Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972).

3. MIC's periodic reports were fraudulent under all those provisions. The annual report's cover page stated it was filed "pursuant to Section 13 . . . of the [Exchange] Act." 2016 10-K at 1. MIC's CEO and CFO certified "the Report fully complies with the requirements of [Exchange Act] Section 13(a)" and "fairly presents, in all material respects, the financial condition and results of operations of the Company." *Id.*, Exs. 32.1-32.2. And MIC's CEO and CFO also certified that the report did not "omit to state a material fact necessary to make the statements made" "not misleading" under "the circumstances." *Id.*, Exs. 31.1-31.2; *see also* 15 U.S.C. § 7241(a)(2) (requiring certification). Those statements, in the "circumstances under which they were made," 17 C.F.R. § 240.10b-5(b), misled investors into thinking MIC had made compliant Item 303 disclosures.

Petitioners' 6-Oil omissions had an even closer nexus to petitioners' other misstatements. In the

MD&A, petitioners acknowledged petroleum price volatility but asserted that "the essential services nature" of IMTT's business and "continued strong demand for the products stored" offset this "re-contracting risk." JA133-34 (¶ 271) (emphases omitted). Petitioners also represented that IMTT's "capacity utilization was higher than historically normal levels" — "[c]onsistent with strong demand patterns across petroleum product storage markets" — while omitting that IMO 2020 likely would demolish that demand. JA134-35 (¶¶ 273, 275). Petitioners even forecasted that utilization rates would "revert to historical levels of 94% to 96% in the medium term," *id.*, when in fact they knew IMO 2020 would cause those utilization rates to plummet, JA135 (¶ 274). Indeed, petitioners elsewhere told investors that IMTT relied "very little" on "crude" or "heavy product" and that "commodity-driven factors" would not decrease utilization. JA76, 117-19, 147 (¶¶ 150, 248, 301) (emphasis omitted).

Those "statements" were "misleading" because petitioners "omit[ted] to state" the disclosures Item 303 required. 17 C.F.R. § 240.10b-5(b). By including an MD&A and certifying its compliance with § 13, petitioners led investors to believe that no other material trends or uncertainties would affect MIC's business. At a minimum, investors reasonably interpreted petitioners' omissions as conveying that no other such trends likely would affect "demand for the products stored" or MIC's "utilization rates." JA132-35, 137 (¶¶ 269-270, 273-274, 278) (emphasis omitted). If other such trends existed — like the impending IMO 2020-driven collapse in the 6-Oil business — investors expected petitioners to disclose them in the MD&A. Petitioners' deliberate refusal to do so violated Rule 10b-5(b).

Petitioners' deceptive omissions similarly violated Rule 10b-5(a) and (c). They deceived investors by failing to disclose IMTT's 6-Oil exposure in MIC's annual and quarterly reports. Those omissions not only rendered MIC's other statements misleading — thus violating Rule 10b-5's second clause — but also represented their own fraudulent scheme and contrivance under the rule's other clauses. Had petitioners disclosed the likely impact of IMO 2020, as Item 303 required, investors appropriately could have considered those risks in valuing MIC's stock. But by secretly excluding that information from its reports, MIC artificially inflated its stock price and defrauded investors. JA137-38 (¶¶ 280-281). With or without any other misleading statements, such fraudulent conduct violates Rule 10b-5(a) and (c). *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *cf. Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1961 (2021).

B. Common-Law Fraud Principles Support Liability For Omitting Information The SEC Requires Issuers To Disclose

Common law long has recognized that nondisclosure of material facts can be fraudulent in two circumstances relevant here: when an omission renders a statement misleading; and when the speaker has a legal duty to disclose the omitted information. Both common-law principles underpin § 10 and Rule 10b-5. *Cf. Chiarella*, 445 U.S. at 227-29 & n.9; *see also Omnicare*, 575 U.S. at 191-92 & n.11 (citing "common law respecting the tort of misrepresentation" in construing § 11).

1. The omission of a material fact or failure to disclose under a required duty was recognized as fraud at common law

For decades, this Court has applied the common-law principle that concealment of a material fact can give rise to fraud. *See Neder v. United States*, 527 U.S. 1, 22 (1999) (common-law fraud included both "misrepresentation or concealment of material fact") (emphasis omitted); *accord Durland v. United States*, 161 U.S. 306, 312-13 (1896) (distinguishing "false pretenses," which requires misrepresentation of an existing fact, and a "scheme or artifice to defraud," which encompasses "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future").

In *Universal Health*, the Court incorporated that principle to omissions of fact concerning compliance with federal regulations when construing the False Claims Act. *See* 579 U.S. at 186-87. The Court explained that "common-law fraud has long encompassed certain misrepresentations by omission." *Id.* at 187. And the Court invoked "the rule that half-truths — representations that state the truth only so far as it goes, while omitting critical qualifying information — can be actionable misrepresentations." *Id.* at 188; *see also id.* at 188 n.3 (citing *Matrixx*, 563 U.S. at 44). To illustrate the half-truths rule, the Court referred to the "classic example" of "the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property." *Id.* at 188-89 (citing *Junius Constr. Corp. v. Cohen*, 178 N.E. 672, 674 (N.Y. 1931) (Cardozo, J.)). "The enumeration of two streets" is "a tacit representation that the land to be conveyed was subject to no others." *Id.* at 189.

The Court applied this rule to explain the defendant's misrepresentation in that case: "by submitting claims for payment using payment codes that corresponded to specific counseling services, [the defendant] represented that it had provided" those services. *Id.* "[T]hese representations were clearly misleading in context" because they implied that the defendant's staff had the appropriate training and licensing to provide those counseling services. *Id.* at 189-90. This case is similar: a periodic report is "misleading in context" when it purports to comply with SEC disclosure rules while omitting the very material those rules require. *Id.* at 189; *see also* 18 U.S.C. § 1350 (express certification). The incomplete trends petitioners disclosed in the MD&A — future "recontracting" risks and projected utilization rates, JA133-35 (¶¶ 271, 273, 275) — were like the incomplete "two roads" disclosure in the classic example. They were a "tacit representation" that no other trends existed. *Universal Health*, 579 U.S. at 189.

This Court also has recognized that omissions of required information can be fraudulent. "At common law," a person commits fraud by failing to disclose material information "when he is under a duty to do so." *Chiarella*, 445 U.S. at 227-28. This duty to disclose can arise "when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" *Id.* at 228 & n.9 (quoting Restatement (Second) of Torts § 551(2)(a) (1977)) (brackets in *Chiarella*). A duty to disclose can arise by statute, too. *See* 3 Dan B. Dobbs et al., *The Law of Torts* § 682 (2d ed. 2011); *see also* U.S. Amicus Br. Supporting Respondents 19 n.3*, Leidos, Inc. v. Indiana Pub. Ret. Sys.*, No. 16-581 (U.S. Sept. 7, 2017) ("U.S. *Leidos* Br.") (collecting cases).

2. The Court has applied those common-law principles in securities cases

In *O'Hagan*, the Court held that a stranger to the issuer — "a corporate 'outsider'" — committed securities fraud under Rule 10b-5(a) and (c) by trading on nonpublic information in breach of a duty owed to the source of the information. *See* 521 U.S. at 650-66. The Court explained that a fiduciary's nondisclosure constitutes a "deceptive device" because the breach "defrauds the principal." *Id.* at 653-55.

In *Zandford*, the Court held that a broker violated § 10(b) and Rule 10b-5 by selling customers' securities and misappropriating the proceeds. *See* 535 U.S. at 819 (citing Rule 10b-5(a) and (c)); *id.* at 820-25 (citing *Chiarella*, 445 U.S. at 230). Each sale was "made to further [the broker's] fraudulent scheme," and each was "deceptive because it was neither authorized by, nor disclosed to, the [customers]." *Id.* at 820-21. The court of appeals in *Zandford* had emphasized that the broker was not accused of making "an affirmative misrepresentation," but instead of "simply fail[ing] to inform the [customers] of his intent to misappropriate their securities." *Id.* at 822. This Court was "not persuaded by this distinction" because the broker "was only able to carry out his fraudulent scheme without making an affirmative misrepresentation because the [customers] had trusted him to make transactions in their best interest." *Id.*

These cases confirm that the core inquiry under Rule 10b-5(a) and (c) is whether the defendant's actions are fraudulent or deceptive. *See* 17 C.F.R. § 240.10b-5(a) ("To employ any device, scheme, or artifice *to defraud*") (emphasis added); *id.* § 240.10b-5(c) ("operates or would operate *as a fraud or deceit* upon any person") (emphasis added). Accordingly, the source of a "duty to disclose" is not dispositive. *See Wharf*, 532 U.S. at 596 (breach of a duty of "good faith" can be actionable). The pertinent question is whether violating that duty is fraudulent. *See Basic*, 485 U.S. at 230 ("The [Exchange] Act was designed to protect investors against manipulation of stock prices.").

As this Court's cases explain, when a fiduciary secretly acts contrary to its duties, the resulting conduct can constitute fraud. *See*, *e.g.*, *Zanford*, 535 U.S. at 822; *see also Basic*, 485 U.S. at 239 n.17 (duty to disclose can render silence misleading). Thus, the same is true for a knowing failure to comply with a statutory or regulatory duty to disclose. *See* 3 Dobbs § 682 ("Affirmative duties of disclosure are imposed when . . . statutes so provide[.]"). In such a case — like this one — investors reasonably presume that the defendant will comply with its disclosure obligations. Thus, when a defendant files a periodic report purporting to disclose (but secretly omitting) required information, that violation of a regulatory disclosure duty can be fraudulent.

C. This Court's Cases Support Liability For Omitting SEC-Mandated Disclosures

The omission of required information from a periodic report can be misleading. While the Court's cases acknowledge the general principle that silence alone is not misleading, they also recognize that omissions can deceive investors when they violate a disclosure duty.

1. *Basic* recognized that a duty-violating omission can defraud investors. The Court there noted that, "[t]o be actionable, of course, a statement" must be "misleading." 485 U.S. at 239 n.17. It added that "[s]ilence, *absent a duty to disclose*, is not misleading under Rule 10b-5." *Id.* (emphasis added). In carving out duty-violating omissions from that general principle, the Court cited an SEC decision recognizing that issuers generally were not required to disclose preliminary merger negotiations. *See id.* (citing *In re Carnation Co.*, SEC Release No. 22214, 33 S.E.C. Docket 1025 (1985)). The SEC confirmed that "a company generally has no affirmative duty under the federal securities laws to disclose ongoing merger activity." SEC Amicus Br. 7, No. 86-279 (U.S. Apr. 30, 1987) ("SEC *Basic* Br."). It explained, however, that "[d]isclosure is required" in certain circumstances, including "where regulations promulgated by the Commission require disclosure." *Id.*; *see id.* at 7 n.3 (discussing regulations requiring disclosure of merger negotiations under certain conditions).

Here, unlike in *Basic*, "regulations promulgated by the Commission require disclosure." *Id.* at 7. In implementing Exchange Act § 13, the SEC mandated that issuers disclose known trends or uncertainties that are reasonably likely to have a material impact on its business. An issuer that files a periodic report purporting to comply with the SEC's regulations but failing to disclose such known trends or uncertainties has gone well beyond mere "[s]ilence." *Basic*, 485 U.S. at 239 n.17. It has deceived investors.

2. *Matrixx* confirmed that omissions can give rise to securities fraud. *See* 563 U.S. at 44-45 (citing *Basic*, 485 U.S. at 239 n.17). That case involved a drug manufacturer's failure to disclose adverse events regarding a key product. *Matrixx* reassured issuers that "§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *Id.* at 44. Rule 10b-5(b) — the only portion of the rule at issue there — requires disclosure, the Court explained, only when necessary to make statements made not misleading, "'in the light of the circumstances under which they were made.'" *Id.* (quoting 17 C.F.R. § 240.10b-5(b)). But those circumstances in *Matrixx* were telling. There, even though no statistical study had yet confirmed the harmful effects of Matrixx's nasal spray, the company had received enough adverse event reports that its failure to disclose information about them was misleading. *Id.* at 45. The test was whether "a *reasonable* investor would have viewed the nondisclosed information 'as having *significantly* altered the "total mix" of information made available.' " *Id.* at 44 (quoting *Basic*, 485 U.S. at 232) (emphases in *Matrixx*).[3]

3. In *Omnicare*, the Court construed Securities Act § 11, which prohibits the failure "to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a); *see* 575 U.S. at 186.[4] The Court explained that omissions in statements of opinion can be misleading because "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion." *Id.* at 188; *see also id.* at 191 (explaining that these

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[3] The SEC's brief in *Matrixx* confirmed that the drug manufacturer was not required to make the overly optimistic statements "about the safety and prospects of its product" that triggered liability. U.S. Amicus Br. Supporting Respondents 27, No. 09-1156 (U.S. Nov. 12, 2010). The manufacturer's statements there principally were made in press releases and conference calls. *See id.* at 4-6. The one statement in a Form 10-Q was a half-truth related to product-liability litigation, not "the safety and prospects of its product." *Id.* at 27; *see id.* at 5.

[4] Although "Section 11's omissions clause also applies when an issuer fails to make mandated disclosures — those 'required to be stated' — in a registration statement," that provision was not at issue in *Omnicare*. 575 U.S. at 186 n.3.

principles "inhere . . . in much common law respecting the tort of misrepresentation"). "[I]f the real facts are otherwise, but not provided, the opinion statement will mislead its audience." *Id.* at 188. "Thus," the Court concluded, "if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability." *Id.* at 189. The same is true here. The omission of Item 303-mandated disclosures likewise affect "what a reasonable investor would take" from the issuer's other statements and thus can defraud them. *Id.*

II. PETITIONERS' STATUTORY ARGUMENTS LACK MERIT

A. This Case Does Not Present Whether § 10(b) Covers "Pure Omissions"

Petitioners acknowledge it is "unlawful '. . . to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" Pet. Br. 21 (quoting 17 C.F.R. § 240.10b-5(b)). Petitioners seek to avoid that rule by mischaracterizing this case as involving only a "pure omission." But petitioners were not silent, so their omissions were not "pure." They spoke in several ways: by filing required periodic reports with an incomplete MD&A, and by discussing their use of 6-Oil specifically. *Supra* pp. 19-20; JA132-35 (¶¶ 269-275). Those statements, viewed in light of MIC's omissions, were fraudulent even under petitioners' crabbed view of Rule 10b-5.

Such affirmative statements included assertions that (emphases omitted):

- the "essential" nature and "strong demand" for the products IMTT stored would offset "re-contracting risk[s]," JA133-34 (¶ 271);
- IMTT's utilization rates would "revert to historical levels," JA134-35 (¶¶ 273, 275);
- IMTT relied "very little" on "crude" or "heavy products" and "commodity-driven factors" would not impact utilization, JA76, 117-19, 147 (¶¶ 150, 248, 301);
- IMTT's petroleum storage was not "macroeconomically sensitive," JA107-08 (¶ 232);
- IMTT was "not the place" that speculative commodities traders would store "liquid products," JA117-19 (¶ 248).

Petitioners also filed an incomplete MD&A, despite certifying that the report complied with § 13(a) and made no misleading omissions. JA136-37 (¶¶ 277-278); MIC 2016 10-K, Exs. 31.1-31.2, 32.1-32.2.

The disclosure of just *some* required information is deception, not a "pure omission." Petitioners' failure to disclose the likely impact of a looming regulatory change — disclosures that MIC's competitors were making, *see* JA71 (¶ 133) — is no more a "pure omission" than a seller's failure to disclose a third planned road through her property. *See Universal Health*, 579 U.S. at 189.[5]

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[5] Petitioners' assertion (at 26, 36) that an omission *must* be "on the same subject" as other statements is mistaken. A court can consider whether the statements and omissions concern the same subject as a relevant "circumstance." But neither Rule 10b-5(b) nor the PSLRA mandates that the subject matter be the same. Rather, the rule requires a court to consider all "circumstances" under which the omission occurred. In any event, petitioners' proposed limitation is inapplicable here where they made statements on the same subject. *Supra* pp. 28-29.

B. Petitioners' Textual Comparison To § 11 Is Unpersuasive

In urging the Court to adopt an "omissions" exception to Rule 10b-5 liability, petitioners rely heavily (at 25-29) on textual differences between Rule 10b-5 and § 11. That comparison fails.

1. Section 11 does not limit § 10(b) and Rule 10b-5

a. Petitioners emphasize (at 25-29) that § 11, unlike Rule 10b-5(b), refers to omissions of facts "required to be stated." *Compare* 15 U.S.C. § 77k(a) *with* 17 C.F.R. § 240.10b-5(b). Petitioners believe the SEC's failure to include the phrase "required to be stated" in Rule 10b-5's second clause exempted from liability issuers that omit required disclosures.

Section 10(b)'s text forecloses that argument. Rule 10b-5 "is coextensive with the coverage of § 10(b)." *Zandford*, 535 U.S. at 816 n.1. And the latter's text is broader than § 11's: it reaches "*any* manipulative or deceptive device or contrivance," 15 U.S.C. § 78j(b) (emphasis added). Unlike § 11, § 10(b)'s language is not limited to any particular types of statements and omissions — whether required or not. Indeed, Congress evinced no intent to treat the fraudulent omission of material information required in a periodic report as any less of a "deceptive device or contrivance" than a straight misrepresentation.

Additional differences between § 11 and § 10(b) undercut petitioners' comparison. Section 11's right of action is potent: it contains no scienter requirement, so liability "is virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (footnote omitted). But that right of action is "limited in scope." *Id.* Among other restrictions, "a § 11 action must be brought by a purchaser of a registered security, must be based on misstatements or omissions in a registration statement, and can only be brought against certain parties." *Id.*

Section 10(b), by contrast, "is a 'catchall' antifraud provision." *Id.* An action under § 10(b) "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security." *Id.* (quoting 15 U.S.C. § 78j) (emphases in *Huddleston*). Although § 10(b) prohibits an even broader swath of deceptive conduct than does § 11, "a § 10(b) plaintiff carries a heavier burden than a § 11 plaintiff" by having to "prove that the defendant acted with scienter," among other elements. *Id.*; *see Hochfelder*, 425 U.S. at 200, 210 (rejecting § 10(b) liability based on negligence). Given those additional guardrails, nothing in § 11 supports narrowing § 10(b)'s language to exclude the deception here.[6]

b. Nor did the SEC irrationally fail to mirror § 11's language in Rule 10b-5(b). The SEC had no need to port § 11's "required to be stated" phrase into Rule 10b-5(b) because it opted for something even broader:

[6] Comparing § 10(b) and Rule 10b-5 to Exchange Act § 18 is even less persuasive. *Cf.* Pet. Br. 30-31. Section 18 does not cover omissions of facts necessary to make statements not misleading — omissions that petitioners concede are within the scope of § 10(b). *See id.* at 21. Petitioners cite no authority for narrowly construing § 10(b) to match the scope of § 18. While petitioners quote from *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), that case involved whether to imply a private right of action under Exchange Act § 17(a), not the scope of § 10(b). *Cf. Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 269-70 (2014) (rejecting argument that § 18 should limit the reliance element of a § 10(b) private action).

a bar on all omissions — whether in offering documents or elsewhere — that make the speaker's other statements misleading "in the light of the circumstances under which they were made." 17 C.F.R. § 240.10b-5(b). Section 11 contains no similar "circumstances" language. And the failure to make Item 303-mandated disclosures in an MD&A is a "circumstance" that can make the issuer's other statements misleading. Because Rule 10b-5(b)'s language already captures such omissions, § 11's other phrase is unnecessary.

History and structure confirm that distinction. Rule 10b-5's language mirrors Securities Act § 17(a), which prohibits a range of fraudulent actions and omissions in connection with the interstate sale of securities. *See* 15 U.S.C. § 77q(a)(2); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 n.6 (1975) (noting that § 17(a) is "virtually identical" to Rule 10b-5). And § 17(a)(2) uses the same "circumstances" phrase "to make the omission relate to the statements made in order that these statements shall not be misleading, rather than making mere omission (*unless the act expressly requires such a fact to be stated*) a ground for liability." H.R. Conf. Rep. No. 73-152, at 26 (1933) (emphasis added). Congress thus intended a "mere omission" to support liability when "circumstances exist to make the omission in itself misleading," including when "the act expressly requires such a fact to be stated." *Id.* Contrary to petitioners' theory, the SEC chose to mirror § 17(a)(2)'s language — and not § 11's "required to be stated" concept — because that broader language better fit the range of fraudulent statements and omissions a company and its officers might make.

Section 11, by contrast, contains no analogous reference to "circumstances" because it would render the phrase "required to be stated therein" redundant. 15 U.S.C. § 77k(a). Congress recognized as much in amending § 12 of the Securities Act in the PSLRA. Section 12(a)(2) also prohibits the omission of a material fact that makes statements misleading under the "circumstances." *Id.* § 77*l*(a)(2). And the amendment — subsection (b) — acknowledges that a § 12(a)(2) action can include the omission of "a material fact required to be stated therein." *Id.* § 77*l*(b). Rule 10b-5(b) thus enables a court to consider whether an omitted fact was subject to a disclosure duty because the violation of a duty implicates the circumstances in which a statement can be misleading.[7]

2. Section 11 is irrelevant to Rule 10b-5(a) and (c)

Even if § 11 were relevant, it would matter at most to Rule 10b-5(b), which is similar to but broader than § 11. No such similarities exist between § 11 and Rule 10b-5's other two clauses. Because § 11 does not reach any "device" "to defraud" or an "act" that "would operate as a fraud," 17 C.F.R. § 240.10b-5(a), (c), it does not exhaustively catalog the types of fraud covered by Rule 10b-5.

In *Lorenzo*, this Court rejected petitioners' premise that a claim involving speech "must meet the express limitations of subsection (b)." Pet. Br. 23-24. The Court recognized that "fraud" may consist of different components that violate different prongs of Rule 10b-5.

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[7] Unlike § 11, Rule 10b-5 focuses on deception and does not impose strict liability. Thus, an express disclaimer that an issuer was omitting material information might render an omission not misleading and negate liability under Rule 10b-5. But such a disclaimer would not prevent liability under § 11.

See Lorenzo, 139 S. Ct. at 1102 (rejecting argument that "each of these provisions should be read as governing different, mutually exclusive, spheres of conduct"). The fraud there involved both false statements and the "dissemination" of those statements. *Id.* at 1101. While only the speaker could be liable under Rule 10b-5(b) for "making" the statements, any individual who disseminated the statements could be liable under Rule 10b-5(a) and (c). *See id.* at 1102 ("[T]his Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws."). Thus, even with fraud involving speech, a person may be liable under Rule 10b-5(a)'s and (c)'s "general proscription against fraudulent and deceptive practices" despite falling outside Rule 10b-5(b)'s "specific proscription against nondisclosure." *Id.* The Court rejected the argument that Rule 10b-5(b) "*exclusively* regulates conduct involving false or misleading statements." *Id.* at 1102-03.

Even if petitioners were correct that the omission of a material fact "required to be stated" falls outside Rule 10b-5(b), the deliberate violation of an SEC disclosure duty still can violate the Rule's other prongs. *See United States v. Naftalin*, 441 U.S. 768, 774 (1979) (in Securities Act § 17 context, "[e]ach succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections"). Because annual or quarterly reports result from a deliberate process, *see* Soc'y Corp. Governance Br. 7-14, the contents are "formed by design," *Lorenzo*, 139 S. Ct. at 1101. A report filed with the SEC is publicly available to investors. And this "act" or "device" can defraud investors when an issuer secretly violates a disclosure duty. *Supra* Part I.

C. The PSLRA Does Not Limit The Scope Of Deception Prohibited By § 10(b)

1. The PSLRA did not freeze § 10(b) liability in place

Petitioners err in asserting (at 31-32, 38-39) that the PSLRA inoculates their fraud. They misstate (at 38) *Stoneridge* as "foreclos[ing]" any theory of liability that had not been expressly recognized in judicial decisions before the PSLRA's enactment. Rather, *Stoneridge* rejected § 10(b) liability for an issuer's customers and suppliers — "secondary actor[s]" — because the investor plaintiffs did not "rely upon" the defendants' "own deceptive conduct." 552 U.S. at 158, 160. A contrary result, the Court explained, "would put an unsupportable interpretation on Congress' specific response" to this Court's rejection of secondary liability in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). 552 U.S. at 162. Congress responded to *Central Bank* in the PSLRA by authorizing aiding-and-abetting liability "in actions brought by the SEC but not by private parties." *Id.* The *Stoneridge* plaintiffs' claim conflicted with that determination, the Court concluded, because their "view of primary liability makes any aider and abettor liable." *Id.*

This Court also rejected petitioners' thesis in *Halliburton*: "In *Central Bank* and *Stoneridge*," this Court "declined to extend Rule 10b-5 liability to entirely new categories of defendants" because doing so "would have eviscerated the requirement" that a plaintiff prove reliance on deception "*by the defendant*." 573 U.S. at 275. The *Halliburton* Court explained that adhering to the presumption of reliance established in *Basic* did not transgress the PSLRA or *Stoneridge* because "it does not alter the elements of the Rule

10b-5 cause of action and thus maintains the action's original legal scope." *Id.* Here, too, the Second Circuit's decision does not "alter the elements of" the § 10(b) action or expand its "original legal scope."[8] MIC is not a "secondary actor[]," *id.*, and the Second Circuit assessed the complaint under the settled elements of a § 10(b) claim. The court's ruling thus is consistent with the PSLRA as interpreted in *Stoneridge*.

This Court's post-PSLRA decision in *Wharf* also forecloses petitioners' theory. In that private § 10(b) action, the Court confronted a question of first impression regarding whether selling an option while secretly intending not to honor it violates § 10(b) and Rule 10b-5. *See* 532 U.S. at 589-90, 592. The Court affirmatively answered that question without any suggestion the PSLRA precluded the Court from recognizing that theory of liability. *See id.* at 592-97.

Moreover, prior to the PSLRA, courts had adjudicated § 10(b) claims predicated on the omission of information required under Item 303.[9] Those decisions reflect that Congress and the SEC have adopted

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[8] In *Janus Capital Group, Inc. v. First Derivative Traders*, this Court stated it would not "read into Rule 10b-5 a theory of liability" for controlling persons broader than what Congress expressly provided elsewhere in the Exchange Act. 564 U.S. 135, 146 (2011). But *Janus* does not stand for the proposition that the PSLRA requires a particular "theory of liability" to have been established before the PSLRA's enactment. *Id.*

[9] *See*, *e.g.*, *Ferber v. Travelers Corp.*, 802 F. Supp. 698, 711 (D. Conn. 1992) (discussing Item 303 claim, but holding that trend of increasing mortgage delinquencies was adequately disclosed).

Shortly after the PSLRA's enactment, the First Circuit held that the omission of information required under Item 303 supported a § 10(b) claim. *See Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1205, 1211, 1221-22 & n.37 (1st Cir. 1996). The court a system of periodic reporting of specific types of information, not continuous disclosure of all material information.[10] But, as the SEC recognized in 1987 in a private § 10(b) suit, "[d]isclosure is required . . . where regulations promulgated by the Commission require disclosure." SEC *Basic* Br. 7. When an issuer files a periodic report that purports to comply with those regulations but in fact omits required facts, investors can be deceived, and the issuer is subject to liability under § 10(b). The PSLRA is not to the contrary.

2. The PSLRA's pleading requirements do not exempt petitioners' fraudulent omissions from liability

Petitioners' reliance (at 32-33, 35-36) on the PSLRA's heightened pleading standard for Rule 10b-5(b) claims fails. Where "the plaintiff alleges that the defendant . . . made an untrue statement of a material fact; or . . . omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading," 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).

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cited pre-PSLRA authority that SEC regulations may create a duty to disclose for § 10(b) purposes. *Id.* at 1222 n.37. Although *Shaw* involved a "public offering," its reasoning applies here.

[10] *See* VII Loss, *Securities Regulation* 622-23 (6th ed. 2022) ("As a general matter in federal securities law, there is no affirmative duty to disclose unless (1) a Commission statute or rule requires disclosure, (2) an *insider* (or the issuer itself) is trading, or (3) a previous disclosure is or becomes inaccurate, incomplete, or misleading.").

Thus, a private plaintiff alleging a Rule 10b-5(b) claim must specify the statements rendered misleading by the omission of required facts (such as the statements in the MD&A) and why the omission made those statements misleading. Moab did that here. Moab specifically identified multiple statements in the MD&A section of MIC's periodic reports that were misleading, such as IMTT's expected utilization rates and re-contracting risks, because petitioners failed to disclose the likely impact of IMO 2020 on MIC's business. JA133-36 (¶¶ 271-276). Moab further alleged that Item 303 required petitioners to disclose that "the implementation of IMO 2020" could "lead to lost contracts and poor utilization rates." JA137 (¶ 278). These allegations satisfy the PSLRA's pleading requirements.

The PSLRA also makes clear that plaintiffs may bring actions under Rule 10b-5(a) and (c) that are not subject to these pleading requirements. For example, the PSLRA provides two different definitions for when "a covered person 'knowingly commits a violation of the securities laws.'" 15 U.S.C. § 78u-4(f)(10)(A). The first definition applies in actions "based on an untrue statement of material fact *or omission* of a material fact necessary to make the statement not misleading," *id.* § 78u-4(f)(10)(A)(i) (emphasis added), while the second definition applies in actions "based on any conduct that is not described in clause (i)," *id.* § 78u-4(f)(10)(A)(ii). The first definition applies to Rule 10b-5(b) claims and the second to Rule 10b-5(a) and (c) claims. *See* 17 C.F.R. § 240.10b-5; 15 U.S.C. § 78u-4(f)(10)(A).

D. Characterizing A Misleading Omission As An "Implied Certification Of Completeness" Does Not Negate Liability

Petitioners assert (at 33-41) that holding an issuer liable for omitting required, material information would be akin to adopting the "implied certification of completeness" theory, which they assert is inconsistent with the statutory scheme. Neither premise is correct.

1. Under the False Claims Act, this theory posits that a defendant "*impliedly* certifies compliance with all conditions of payment" when it submits a claim. *Universal Health*, 579 U.S. at 180 (emphasis added). But an issuer makes an *express* certification in a periodic report: § 906 of the Sarbanes-Oxley Act of 2002 requires the issuer's CEO and CFO to certify that the report "fully complies with the requirements of section 13(a) . . . and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer." 18 U.S.C. § 1350(b). Section 13(a) in turn requires issuers to file periodic reports containing the information prescribed by the SEC. *See* 15 U.S.C. § 78m(a)(2); 17 C.F.R. § 240.13a-1; *id.* § 249.310(a) (Form 10-K "shall be used" for annual reports under § 13). Section 906 thus requires issuers to certify they have disclosed all required information.

Moreover, § 906 requires issuers to certify that its "results of operations" are "fairly present[ed]" in an annual report. Item 303 relates specifically to "results of operations," and the discussion of those results must include any known trends or uncertainties. 17 C.F.R. § 229.303(b)(2). The annual report's express certification warrants that it "presents" "all material" trends. 18 U.S.C. § 1350(b).

2. In any event, an "implied certification of completeness" theory tracks the statutory scheme. An implied certification of completeness is not an actionable "statement" itself. *Cf.* Pet. Br. 34-35. Rather, the omission of required information from a periodic report purporting to comply with the SEC's disclosure rules can create "circumstances" where the statements contained in the report are misleading because investors erroneously believe the omitted information does not exist. Put differently, the theory implicates context. *See Universal Health*, 579 U.S. at 189-90 (explaining "implied certification theory" can render representations "misleading in context").

Additionally, the theory is consistent with *Janus* because a plaintiff cannot use it to hold a speaker liable for an "implied" statement. *Cf.* Pet. Br. 34. Instead, liability derives from a speaker's affirmative statements rendered misleading by the omission of material facts. An implied certification is only relevant to determining whether the statements were misleading. Thus, petitioners' concern (at 35-38) about how to define and apply an "implied" statement is misplaced. For a Rule 10b-5(b) claim, a plaintiff must plead and prove that material omissions rendered affirmative statements misleading just as in any "half-truth" case. And a plaintiff must "specify each statement" and explain "why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). Moab's complaint does that.

III. ENFORCING LIABILITY FOR DECEPTIVE OMISSIONS OF REQUIRED INFORMATION ADVANCES CONGRESS'S POLICY OF DISCLOSURE

A. Accepting Petitioners' Theory Would Undermine The SEC's Ability To Deter And Punish Fraud

Petitioners acknowledge (at 30) the Court's ruling would apply to SEC actions. Accepting petitioners' theory would deny the SEC an important enforcement tool. The SEC's long-settled position is that "Item 303 can be the basis for a Section 10(b) claim."[11] It has pursued numerous enforcement actions against issuers that fraudulently failed to disclose information required under Item 303,[12] typically combining the § 10(b) claim with claims under § 13 or other provisions. Ruling for petitioners would eliminate the SEC's ability to pursue fraud claims in similar cases. The SEC also regularly pursues § 10(b) claims based on the fraudulent omission of information required under other disclosure provisions.[13]

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[11] Pl. SEC's Bench Mem. in Opp. to Def. Conaway's Mot. for J. as a Matter of Law at 5, *SEC v. Conaway*, No. 05-CV-40263-SDP, Dkt. #127 (E.D. Mich. May 26, 2009); *see id.* at 5-11; Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,726 n.86 (Aug. 24, 2000) ("reporting requirements under Section 13(a) . . . create a duty to disclose for purposes of Rule 10b-5").

[12] *See* U.S. *Leidos* Br. 47 n.17 (collecting cases).

[13] *See*, *e.g.*, *SEC v. Kovzan*, 807 F. Supp. 2d 1024, 1037 (D. Kan. 2011) (failure to disclose company's payments to CEO for lavish personal expenses, as required by 17 C.F.R. § 229.402 (Item 402)); *SEC v. Das*, 2010 WL 4615336, at *7-8 (D. Neb. Nov. 4, 2010) (failure to disclose valuable perks and related-party transactions as required by Items 402 and 404); *In re Ciro Inc.*, SEC Release No. 612, 1994 WL 548994, at *5 (Sept. 30, 1994) (failure to disclose CEO's bankruptcy as required by 17 C.F.R. § 229.401).

These provisions require disclosure of important information about material off-balance-sheet arrangements, officers' prior convictions and bankruptcies, transactions with related persons, and other information vital to investment decisions. *See*, *e.g.*, 17 C.F.R. §§ 229.101(c)(1)(xii), 229.103, 229.303(a)(2)(ii), 229.401(d), (f), 229.404(a). Petitioners' theory has no inherent restriction on omissions just for Item 303 cases; it logically would extend to enforcement of any of the SEC's disclosure requirements. The prospect of liability under § 10(b) and Rule 10b-5 provides a critical complement to the SEC's other efforts to promote issuer compliance with disclosure obligations. Removing that prospect would undermine the SEC's informal disclosure measures. Those efforts work precisely because the threat of government enforcement actions and private liability backs them up. Curtailing the SEC's enforcement powers would discourage productive issuer engagement with the SEC.

B. Item 303 Does Not Warrant A Policy Exception Under § 10(b) And Rule 10b-5

1. Item 303 does not modify the § 10(b) claim's elements

Petitioners' argument (at 41) that Item 303 is ill-suited for private actions misunderstands the interaction between Item 303 and § 10(b). Petitioners correctly recognize (*id.*) that materiality under Item 303 is less stringent than materiality under *Basic*. But that difference works in companies' favor. No court has held that a mere violation of Item 303 is sufficient for liability under § 10(b) or Rule 10b-5. *See Stratte-McClure*, 776 F.3d at 102; *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Alito, J.); *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1054 (9th Cir. 2014).

Instead, violating Item 303, like violating a fiduciary duty to disclose, can form the requisite factual predicate of a Rule 10b-5 claim if the elements of a claim are satisfied. If information is not material under Item 303, then no disclosure is required, meaning the omission of such information should not mislead investors because a reasonable investor would not have expected the information to be disclosed. If Item 303 requires disclosure, however, nondisclosure can create "circumstances" where the omission is misleading. Even so, the misleading omission may be immaterial for purposes of § 10(b) — and thus not actionable — because Item 303's materiality standard differs from the *Basic* standard. *See Oran*, 226 F.3d at 288.

Under *Basic*, the materiality of an allegedly required forward-looking disclosure is determined by balancing "the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." 485 U.S. at 238. Item 303 contains no balancing component — managers must disclose a known trend unless they determine that the trend is "not reasonably likely" to occur. 54 Fed. Reg. at 22,430. Courts can, and do, dismiss private actions involving disclosure violations when they determine that the undisclosed information was immaterial under *Basic*. *See, e.g.*, *In re Lions Gate Entm't Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 20 (S.D.N.Y. 2016) (§ 10(b)); *In re Ply Gem Holdings, Inc. Sec. Litig.*, 135 F. Supp. 3d 145, 149-54 (S.D.N.Y. 2015) (§ 11).

Even if the omitted facts were material under *Basic*, a plaintiff still must prove the other elements of the § 10(b) cause of action, such as scienter. A negligent or good-faith (but erroneous) violation of Item 303 does not support liability under § 10(b). *See Stratte-McClure*, 776 F.3d at 103. Indeed, pleading a violation of Item 303 is no small matter. Courts regularly dismiss private actions for insufficiently pleaded facts requiring disclosure under Item 303. *See* BIO 16-17 & n.7 (collecting cases).

2. Courts routinely adjudicate disclosure issues under Item 303

Petitioners overstate concerns (at 42-44) about the perceived compliance challenges posed by Item 303. For decades, courts have adjudicated § 11 claims based on violations of Item 303 and other disclosure requirements, in addition to numerous cases over the years under § 10(b).[14] Petitioners, however, cannot demonstrate that "[their] concern[s] ha[ve] proved serious as a practical matter in the past." *Wharf*, 532 U.S. at 597. Nor should those concerns be expected to materialize.

Section 10(b) liability for deceptive omissions of required information will not produce immaterial, prophylactic disclosures. Although Item 303 may require disclosure of more information than is material under *Basic*, *see Oran*, 226 F.3d at 288, the scope of private liability turns on the *Basic* standard, which "filter[s] out essentially useless information that a reasonable investor would not consider significant," *Basic*, 485 U.S. at 234.

Nor will § 10(b) liability for omissions of required information lead to hindsight pleading. Warding off "allegations of fraud by hindsight," *Tellabs*, 551 U.S. at 320, is the function of the scienter element, which

[14] *See* Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1646-47 & nn.20, 22, 1651-53 & n.42 (2004) (collecting cases).

requires "a mental state embracing intent to deceive, manipulate, or defraud," *Matrixx*, 563 U.S. at 48. To survive a motion to dismiss, a private § 10(b) plaintiff must "plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference." *Tellabs*, 551 U.S. at 328 (interpreting the PSLRA, 15 U.S.C. § 78u-4(b)(2)). An issuer that acts with an "intent to deceive, manipulate, or defraud," *Matrixx*, 563 U.S. at 48, in misleadingly omitting required, material information from a disclosure cannot later complain of hindsight pleading when investors seek to recover for damages caused by its misconduct.

Because the materiality and scienter elements of a § 10(b) violation address precisely the concerns petitioners raise, the Court should reject their proposed bright-line rule. "[I]nstead of adopting a circumscribed view of what it means for a [securities filing] to be false or fraudulent," petitioners' concerns "can be effectively addressed through strict enforcement of" the Exchange Act's "materiality and scienter requirements." *Universal Health*, 579 U.S. at 192; *see also Matrixx*, 563 U.S. at 40 (rejecting "categorical rule" that would "'artificially exclude'" information that "'would otherwise be considered significant to the trading decision of a reasonable investor'") (quoting *Basic*, 485 U.S. at 236) (cleaned up).

Petitioners' professed fears about over-disclosure and compliance difficulties reduce to a quarrel with the policies chosen by Congress (in the Exchange and Sarbanes-Oxley Acts) and the SEC (in Regulation S-K). "Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress." *Basic*, 485 U.S. at 234.

C. Petitioners' Position Has No Limiting Principle

The Exchange Act's "fundamental purpose" "was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *Capital Gains*, 375 U.S. at 186. Congress effectuated this goal by requiring issuers to file periodic reports and by empowering the SEC to mandate, by regulation, the information issuers must include in such reports. *See* 15 U.S.C. § 78m(a). Petitioners' premise — that § 10(b) cannot cover "pure omissions" — runs counter to Congress's objective. Although petitioners frame much of their argument in terms of Item 303, they acknowledge (at 3, 41) that their theory generally implicates the SEC's disclosure regulations.

For example, a company could conceal — with no risk of private liability — that it faces a multi-million-dollar enforcement action for environmental pollution. *See* 17 C.F.R. § 229.103(c)(3)(iii); SEC, Form 10-K at 8 (Item 3); *cf. Goldsmith v. Rawl*, 755 F. Supp. 96, 97 (S.D.N.Y. 1991). Or that its CEO was formerly employed by a company convicted of fraud. *See* 17 C.F.R. § 229.401(e)(1); SEC, Form 10-K at 10 (Item 10); *cf. Snellink v. Gulf Res., Inc.*, 870 F. Supp. 2d 930, 940 (C.D. Cal. 2012). Similarly, a company could omit that it relied exclusively on a single customer. *See* 17 C.F.R. § 229.101(c)(1)(i); SEC, Form 10-K at 8 (Item 1); *cf. Direct Benefits, LLC v. TAC Fin., Inc.*, 2020 WL 2769982, at *14 (D. Md. May 28, 2020). More drastically, a company could omit negative financial data, such as revenue or cash flows, from its annual report. *See* 17 C.F.R. pt. 210; SEC, Form 10-K at 9 (Item 8).

Under petitioners' view, issuers would be able to artificially inflate (or deflate) their stock prices through selective compliance without facing private liability. Such "hiding and secreting of important information" would "obstruct[] the operation of the markets as indices of real value," *Basic*, 485 U.S. at 246, and fundamentally diminish "investor confidence" in the securities markets, *Zandford*, 535 U.S. at 819. Petitioners offer no reason to exempt SEC-mandated disclosure of items like those from a securities-fraud claim. To be sure, the SEC would remain free to enforce compliance (through administrative methods other than § 10(b)) to the extent its finite resources permit. But that denies recourse to investors defrauded in the process. *See Tellabs*, 551 U.S. at 320 n.4 ("'[P]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets.") (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)) (cleaned up).

D. Petitioners' Attempts To Relitigate The Second Circuit's Conclusions As To Item 303 And Scienter Fail

Petitioners passingly suggest that the Second Circuit erred in finding that Moab sufficiently alleged scienter and a violation of Item 303. *Cf.* Pet. Br. 40-41, 44. Both arguments — outside the Question Presented — are unpersuasive.

The Second Circuit did not find that MIC's Item 303 violation automatically created scienter. *Cf. id.* at 40-41. Instead, the court found the complaint sufficiently alleged circumstantial evidence that the management defendants were "in the unique position" of knowing MIC's exposure to IMO 2020. App. 11a. Rather than making "corresponding disclosures," these defendants "minimized the exposure that IMTT faced from IMO

2020." App. 11a-12a. The Second Circuit thus did not rely on nondisclosure alone to find scienter.

That court also properly concluded Moab sufficiently alleged that Item 303 required disclosure in these circumstances. IMO 2020 represented a significant reduction of a key 6-Oil market and IMTT relied extensively on storage of 6-Oil. JA21-23, 52-53, 56-57 (¶¶ 1, 5, 81, 83, 90-93). Crediting Moab's allegations, the court correctly recognized petitioners knew IMO 2020 would restrict the 6-Oil market. And Moab sufficiently pleaded it was untenable for petitioners to decide IMO 2020 was "not reasonably likely" to have "a material effect on [MIC's] financial condition or results of operations." App. 9a. Accordingly, Item 303 required disclosure. One of petitioners' competitors recognized as much and correctly disclosed IMO 2020's impact in its 10-K. JA71 (¶ 133).

IV. RESPONDENT BARCLAYS HAS WAIVED ITS ARGUMENTS

Barclays' request — that the Court remand so the Second Circuit can re-evaluate § 11 and § 12(a)(2) claims against Barclays — is procedurally defective. *Cf.* Barclays Br. 7.

First, Barclays did not file a cross-petition. Barclays cannot now attack the Second Circuit's decision "with a view either to enlarging [its] own rights thereunder or of lessening the rights of [its] adversary." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999). The Court has "repeatedly expressed" its cross-petition rule "in emphatic terms." *Id.* at 480 & n.3 (observing that, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [the Court's] holdings has ever recognized an exception to the rule"); *see, e.g.*, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (declining to consider new argument that "would alter the Court of Appeals' judgment . . . in the absence of a cross-petition from respondent"); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 360 (2002) (same); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) (same); Stephen M. Shapiro et al., *Supreme Court Practice* 6-134 (11th ed. 2019) (citing cases). Because Barclays did not raise any such argument relating to § 11 and § 12(a)(2) before the Second Circuit, Barclays' requested relief (at 7) would negate Barclays' waiver, enlarging Barclays' rights and lessening Moab's rights.

Second, Barclays' arguments are not fairly included in the Question Presented. Rule 14.1(a) specifies that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Under this rule, "[a] question which is merely complementary or related to the question presented in the petition for certiorari is not fairly included therein." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (cleaned up). That rule applies here. Sections 10, 11, and 12 proscribe different conduct by different actors and reside in different statutes. The Court therefore should not address the interplay between Item 303 and § 11 and § 12(a)(2) or remand for the Second Circuit to do so. *See id.*; *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992).[15]

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[15] Because Barclays did not raise any argument addressing the Question Presented in its opening brief, it should not be permitted to raise such an argument in the first instance on reply. *See Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 140 n.2 (2014).

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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