No. 22-1165

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

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INTRODUCTION

Moab and its amici do not and cannot defend the Second Circuit's analysis. Instead, they devote most of their attention to quarreling with the question presented. They insist that this case does not, after all, involve a *pure omission*—that is, silence in the face of an SEC disclosure requirement, "in the absence of an otherwise-misleading statement." Pet. i.

For Moab, at least, this is a significant change in position. Neither its complaint nor its briefs below tried to identify a specific "statement" rendered misleading by MIC's alleged failure to comply with Item 303.

Neither did the Second Circuit. Instead, it held that a private plaintiff can assert an omission claim under Rule 10b-5(b) merely by pointing to a material fact that SEC regulations required to be stated. Pet. 7a–8a. The court expressly distinguished this kind of omission from a half-truth—a situation where "a company speaks on an issue or topic" and yet does not "tell the whole truth." Pet. 6a.

Unable to defend the Second Circuit's reasoning on its terms, Moab and its amici instead advance arguments that would expand the private right of action, essentially giving private parties the right to enforce SEC regulations. But none of these arguments—applying Rule 10b-5(a) and (c) to a claim based solely on periodic filings, imposing private liability based on Sarbanes-Oxley certifications, or grafting an implied certification theory onto the securities laws—has ever been adopted by this Court or any court of appeals. This is fatal, particularly given this Court's admonition to "give narrow dimensions * * * to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the

law." *Janus Cap. Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011) (quotation omitted).

Rejecting the Second Circuit's outlier position will not create the problems Moab and its amici fear. It will not grant "blanket immunity" for violating Item 303, which the Commission retains broad authority to enforce. *Contra* Resp. Br. 1. And if an issuer tells a half-truth in an Item 303 disclosure, the plaintiff can simply point to the omitted material fact that makes the disclosure misleading. An Item 303 disclosure obligation adds nothing to an omission claim under Rule 10b-5, and it also takes nothing away.

Nor is there any danger of "negat[ing]" an important enforcement tool. *Ibid.* Neither Moab nor the Government has identified *any* Item 303 enforcement action that depended entirely on Rule 10b-5. And private enforcement has not played a significant role for Item 303 to date.

A contrary ruling, on the other hand, would open a new, potentially lucrative front for private class actions. Lawyers armed with 20/20 hindsight would scour periodic filings for missing Item 303 predictions. The existence of the circuit split—and the grant of certiorari in *Leidos*—would no longer cast doubt on and thus discourage such claims. And while many such claims might be dismissed for failure to plead other elements, many would not—as the Second Circuit's ruling here demonstrates. A new era of class action litigation would be born, producing a corresponding incentive for issuers to overdisclose.

And it is, indeed, *over*disclosure that is at stake here. As certain former SEC officials have pointed out, the business community does not oppose Item 303 itself and has "largely hailed" the Commission's efforts to make it clearer. Br. of Former SEC Officials 5, 20–23.

But while the Commission is well-suited to strike an appropriate balance, private litigators are not. It is no surprise, then, that SIFMA and the Chamber of Commerce oppose placing Item 303 enforcement in private plaintiffs' hands.

Policy concerns aside, though, neither Rule 10b-5's text, the PSLRA, nor this Court's precedents permit the rule applied below. This Court should vacate the Second Circuit's decision.

ARGUMENT

I. To the extent they address "pure omission" liability, Moab and its amici either ignore or distort the language of Rule 10b-5.

Moab and its amici devote most of their attention to disputing the idea that this is a "pure omission" case. There is a simple reason for this: as former SEC Commissioner Joseph Grundfest has explained, there is "no support in the text of the statute or rule, or in the relevant legislative or regulatory history, for the proposition that Congress or the Commission ever intended to extend Rule 10b-5 private liability to cover pure omissions." Grundfest, *Ask Me No Questions*, at 19 (cited in full at Br. 30). To the extent they do address the point, however, they have provided no basis to affirm the Second Circuit's decision.

A. The Second Circuit's reasoning remains indefensible.

Neither Moab nor the Government defends the Second Circuit's reasoning. Nor could they. The Second Circuit held that 10b-5 omission liability can rest on *either* a misleading statement (a half-truth) *or* silence in the face of an SEC rule requiring disclosure (a pure omission). Pet. 6a (distinguishing between these "two circumstances"). For the latter circumstance, the

court did not invoke subsections (a) and (c). Nor did it identify an express or implied certification of completeness, or a specific, allegedly misleading factual statement under subsection (b). It simply held that the claim could proceed under subsection (b) without one.

This reasoning reflects an obvious logical mistake. As the opening brief explained, the Second Circuit started down this path in two Securities Act decisions. *See* Br. 27. Those decisions relied on the text of §11, which creates omission liability not only for half-truths but also for material facts "required to be stated" in offering documents. *Panther Partners Inc.* v. *Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012) (quoting 15 U.S.C. §77k(a)); *accord Litwin* v. *Blackstone Grp., L.P.*, 634 F.3d 706, 715–16 (2d Cir. 2011). Although these cases also involved claims under §12(a)(2), the court missed the fact that "required to be stated" does not appear in that section. *See* Br. 27–28 & n.4. Later, the court compounded the error by extending its Securities Act analysis to Exchange Act claims, relying on the textual similarity between §12(a)(2) and Rule 10b-5(b). *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 102–03 (2d Cir. 2015). This false syllogism—from §11 to §12(a) to Rule 10b-5(b)—produced a rule that effectively allows Exchange Act liability for the omission of any material fact "required to be stated."

Moab and its amici do not acknowledge the court's move from §11, which includes "required to be stated," to §12(a)(2) and Rule 10b-5(b), which do not.[1] Nor do

[1] In passing, Moab notes that "required to be stated" does appear in §12*(b)*, which the PSLRA added in 1995 as a loss causation defense. Resp. Br. 33 (citing 15 U.S.C. §77*l*(b));

they address the analysis in the Ninth Circuit's *NVIDIA* decision, which disagreed with *Stratte-McClure* on this basis. *See* Br. 28 (discussing *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014)).

While Moab at least starts with language in Rule 10b-5(b), it takes the mistake of logic in the opposite direction. Resp. Br. 31–33. According to Moab, Rule 10b-5(b)'s "in the light of the circumstances under which they were made" is broader than—and includes—§11's "required to be stated." *See ibid.*

There are several problems with this argument. *First*, the "circumstances" language modifies "statements." Pet. 51a–52a ("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"). Thus, it cannot be read to create omission liability *independent* of specific misleading "statements." Resp. Br. 32.

Second, the argument lacks any authority. Moab does not cite a single case that relies on the "circumstances" language to broaden or eliminate the requirement of a specific misleading statement.

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see also Br. of Professors 11 n.10. This appears to be a drafting anomaly, reflecting the fact that the PSLRA imported the defense from §11. *See* Pub. L. No. 104-67, tit. 1, sec. 105, 109 Stat. 737 (1995); Sen. Rep. No. 104-98, at 23 (1995); *compare* 15 U.S.C. §77*l*(b) *with id.* §77k(e). Yet the presence of this language in the defense does not change the fact that it is missing from the liability-creating provision (§12(a)(2)). And even if Congress intended this "required to be stated" language to reflect an expansion of §12(a)(2), the PSLRA's loss causation provision for 10b-5 claims does not use that language. *See id.* §78u-4(b)(4).

Third, if the Commission meant to create securities fraud liability for the omission of any material fact "required to be stated," it could easily have done so using §11 as a model. Instead, the Commission based Rule 10b-5 on §17(a)(2). *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 212 n.32 (1976). As a fraud-focused provision, §17(a)(2) provides omission liability only for misrepresentations and half-truths; it does not refer to facts "required to be stated." *See* 15 U.S.C. §77q(a)(2).

Finally, when Congress described a Rule 10b-5(b) claim in the PSLRA, it left out the "circumstances" language altogether. *See* 15 U.S.C. §78u-4(f)(10)(A)(i)(I) (referring to "an action that is based on an untrue statement of material fact or omission of a material fact necessary to make the statement not misleading"). Congress apparently does not think this language has the same significance that Moab does.

Again, while the Second Circuit is the only circuit to recognize a 10b-5 omission claim based solely on a violation of Item 303,[2] no one defends its reasoning. That should be enough by itself to require vacatur.

B. The broader language in §10(b) does not provide a path around the narrower Rule 10b-5(b), which contrasts with §11.

Stymied by the text of Rule 10b-5(b), Moab turns to §10(b) itself, invoking §10(b)'s broad reference to "*any*

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[2] In a footnote, Moab cites a First Circuit decision that made a similar mistake in reasoning for a different disclosure requirement. Resp. Br. 36 n.9 (citing *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194 (1st Cir. 1996)). The *Shaw* court limited its decision to offering documents, which it found to be a special case. 82 F.3d at 1222 n.37. In nearly three decades, *Stratte-McClure* is the only appellate decision to cite *Shaw* for the relevant proposition.

manipulative or deceptive device or contrivance." Resp. Br. 30–31 (quoting and adding emphasis to 15 U.S.C. §78j(b)); *see also id.* at 15–16.

But it is the language of the *rule*, not the statute, that sets the outer bounds of the private right of action. Unlike the provisions of the Securities Act, which created and defined causes of action, §10(b) charged the Commission with adopting "rules and regulations" to flesh out what would constitute a "manipulative or deceptive device or contrivance." *Compare*, *e.g.*, 15 U.S.C. §77k, *with* 15 U.S.C. §78j(b). The Commission's definition includes omissions only in the context of half-truths—that is, when the omitted fact is "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Pet. 51a–52a.

That definition operates as a limit on the private right of action. *Stoneridge Inv. Partners, LLC* v. *Sci.-Atl., Inc.*, 552 U.S. 148, 157 (2008) (this Court "has found a right of action implied in the words of [§10(b)] and its implementing regulation"). Thus "[t]he scope of the private right of action is more limited than the scope of the statutes upon which it is based." *Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377, 382 (2014).

Accordingly, it makes no difference whether a failure to comply with SEC regulations could meet the dictionary definition of "deceptive" or "manipulative." *Contra* Resp. Br. 15–16, 30. *Of course* omissions are actionable—when the omitted fact is necessary to make the statements made not misleading. *Id.* at 26–28 (discussing *Basic*, *Matrixx*, and *Omnicare*). But without a misleading "statement," an omission is *not* actionable under Rule 10b-5(b). *See Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011).

The various arguments about §11 fail for the same reason.[3] The opening brief focused on the "required to be stated" language in §11, not to argue for some kind of overlap exception (Gov't Br. 30), but to emphasize that those words are missing from Rule 10b-5(b). Br. 25–29. Both Moab and the Government largely ignore this point, comparing §11 to §10(b) instead. Resp. Br. 30–31; Gov't Br. 30–32.

Again, it is the language of the rule that matters. The Commission could have used §11 as a model for Rule 10b-5—including "required to be stated." But it didn't. *See supra* at 6. As a matter of construction, "where Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (alteration omitted). This principle is no less important for a rule that the Commission promulgated under Congress's express authority and that acquired statute-like status when Congress left it untouched in the PSLRA.

In short, both Moab and the Government are making the wrong comparison. Yes, §10(b) has broader language than §11. But Rule 10b-5(b) does not. Its terms are unambiguous: they cover omissions only when the omitted fact is material and necessary to make other statements not misleading. The current Commission might prefer a different formulation, and it might

[3] The Government's argument about §18(a) is similarly flawed, as it compares that section too with §10(b), not Rule 10b-5(b). Gov't Br. 32. Like Rule 10b-5(b), §18(a) specifically requires a misleading statement. It would be anomalous to imply a private right of action that does not.

sometimes push the limits of the text.[4] But it remains bound to the rule it promulgated in 1942, particularly now that Congress has adopted it.

C. This Court's cases do not permit pure omission liability under subsections (a) and (c) for claims based solely on what is or is not in public filings.

Unable to defend the Second Circuit's reliance on subsection (b), Moab shifts its attention to subsections (a) and (c)—provisions it never invoked in the court below. Scattered throughout its brief is the argument that this Court's cases under (a) and (c) reflect a common-law view that a plaintiff can sue for an omission of required information without satisfying (b)'s requirement of a misleading statement. Resp. Br. 18–19, 21, 24–25, 33–34; *accord* Gov't Br. 18–23.

But as the opening brief explained (addressing the same cases), subsections (a) and (c) do *not* provide a path to bypass (b). Br. 23–24. Every time this Court has allowed liability under (a) and (c), the claim has been based on something *more* than misrepresentations and omissions. For example:

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[4] The Government cites four examples of administrative proceedings in which it imposed sanctions under Rule 10b-5 based on the omission of Item-303-required information. Gov't Br. 24. None of these matters resulted in an adjudication; all four settled. At least two appear to have been about affirmative misstatements, not pure omissions. *See In re Russell*, Exchange Act Release No. 36,280, 1995 WL 568739, at *3 (Sept. 26, 1995); *In re Valley Sys. Inc.*, Exchange Act Release No. 36,227, 1995 WL 547801, at *2–3 (Sept. 14, 1995). And in all four—as in all other Item-303-related proceedings of which we are aware—the Commission sought relief under §13(a) as well.

- In *Lorenzo*, the defendant targeted investors by email, "disseminating" false statements made by others and inviting investors to call with questions. 139 S. Ct. 1094, 1101 (2019).
- In *Affiliated Ute*, the defendants induced tribe members to sell shares to white buyers (including the defendants themselves) without disclosing that the prices were discriminatory, earning commissions as a result. 406 U.S. 128, 153 (1972).
- In *Chiarella* and *O'Hagan*, the defendants traded securities based on misappropriated nonpublic information. 445 U.S. 222, 231–35 (1980); 521 U.S. 642, 648 (1997).[5]

All these cases included conduct beyond speech alone. The opening brief made this point expressly (at 23–24), and Moab and the Government have no response. And the PSLRA subsection Moab cites on this point undercuts Moab's position. 15 U.S.C. §78u-4(f)(10)(A)(ii) (describing (a) and (c) claims as "based on any conduct that is not described in [(b)]").

The distinction between speech and speech-plus-conduct is essential; without it, subsection (b) would be superfluous. Br. 24 (discussing the relevant rules of construction). The majority in *Lorenzo* was careful to avoid that result. It made clear that even though the subsections "overlap" and are not "mutually exclusive"

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[5] *Accord Sec. & Exch. Comm'n* v. *Zandford*, 535 U.S. 813, 815–16 (2002) (defendant secretly sold his customers' securities and misappropriated the proceeds); *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 592 (2001) (defendant sold an option it never intended to honor). *Cf. Goldman Sachs Grp., Inc.* v. *Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1961 (2021) (cited in Resp. Br. 21) (addressing claims based on contents of public filings solely under (b)).

(139 S. Ct. at 1102), they still have distinct roles to play. The majority pointed to non-speech conduct—the knowing "dissemination" of false statements made by others—to show that its decision under (a) and (c) avoided the superfluity problems highlighted by the dissent. *Id.* at 1101–03.

Thus, *Lorenzo* did *not* "reject[] petitioners' premise that a claim involving speech 'must meet the express limitations of subsection (b),'" as Moab contends. Resp. Br. 33 (quoting Br. 23–24); *cf*. Gov't Br. 22–23. Both *Lorenzo* itself and subsequent case law in the Second Circuit—whose rulings are at issue here—show otherwise. *See Sec. & Exch. Comm'n* v. *Rio Tinto plc*, 41 F.4th 47, 49 (2d Cir. 2022) (claim under (a) and (c) "requires something beyond misstatements and omissions, such as dissemination").

Moab's arguments also overstate both the scope of liability under the common law and its impact on the securities laws. Resp. Br. 22–23, 25. The common law recognizes omission liability largely in the context of half-truths, not based on a failure to comply with reporting requirements. *See* Br. of Wash. L. Found. 13–15. The only exception is where a party to a transaction is in a "fiduciary or other similar relation of trust and confidence" with a counterparty. *Id.* at 14–15 (quoting Rest. (2d) of Torts §551). No such relationship exists between an issuer and its shareholders. *Id.* at 15 (citing authority). And in any event, the common law cannot trump the language of Rule 10b-5, which sets the outer bounds of the private right of action. *Stoneridge*, 552 U.S. at 162 ("Section 10(b) does not incorporate common-law fraud into federal law.").

If "[f]iling a periodic report" can simply be reframed as "an 'act' or 'practice'"—as Moab contends (at 19)—then subsection (b) would be a dead letter. A dispute about what a periodic report does and does not disclose

is the quintessential fact pattern triggering subsection (b). Neither Moab nor the Government cites a case holding that such a claim can avoid subsection (b)'s express limits by masquerading as a claim under (a) and (c). It is no surprise that Moab did not make this argument below.

D. The PSLRA does, indeed, block the expansion Moab seeks.

Moab also ignores the effect of the PSLRA, arguing that this Court may expand the private right of action as long as it does not transgress a specific PSLRA provision. Resp. Br. 35–37 & n.8.

This Court has held otherwise. The PSLRA is more than just a statute that should not be contravened; it reflects a watershed moment in which Congress finally weighed in on the judicially implied private right of action. As this Court explained in *Janus*, courts must "give 'narrow dimensions * * * to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" 564 U.S. at 142 (quoting *Stoneridge*, 552 U.S. at 167); *see also Stoneridge*, 552 U.S. at 165 ("[T]he §10(b) private right should not be extended beyond its present boundaries."). Limiting these landmarks to their facts—as Moab advocates (at 35–36 & n.8)—would reverse a multi-decade interpretive approach.

Halliburton undercuts Moab's view. It held that adhering to *Basic*'s presumption of reliance would not transgress the PSLRA because "it does not alter the elements of the Rule 10b-5 cause of action and thus maintains the action's original legal scope." Resp. Br. 35–36 (quoting *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014)). But allowing an omission claim without a misleading statement *would* alter the elements of the cause of action. Subsection (b)

makes a false or misleading "statement" an element of the offense. And this Court has never interpreted the elements of an unlawful "scheme" or "act" under (a) and (c) to be satisfied when the defendant's only conduct was failing to disclose information. While it may not be necessary to identify a pre-PSLRA case that matches the fact pattern exactly (Gov't Br. 29–30), *Stoneridge* and *Janus* do require pre-PSLRA authority recognizing the same *type* of securities claim.

Here, there is no such authority. While Moab contends that courts before the PSLRA "had adjudicated §10(b) claims predicated on the omission of information required under Item 303," it cites only one such case, acknowledging that the district court there found no violation. Resp. Br. 36 & n.9. And the Government's reference to non-securities-law cases and *Chiarella* does not help either. *See* Gov't Br. 29. As discussed above, *Chiarella* imposed (a) and (c) liability based on trading activity, not on a pure failure to disclose, and it did so specifically in the context of a fiduciary relationship. *See supra* at 10.

To the extent Moab relies on *Basic* for this point, that case simply observed that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." Resp. Br. 25 (emphasis omitted) (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988)). *Basic* did not establish the converse—that a breach of *any* duty to disclose, whatever its source, can give rise to 10b-5 liability even in the absence of a misleading statement.

Even if Moab were right about how post-PSLRA expansion works, the PSLRA does, in fact, have specific provisions that matter here. The Second Circuit's decision effectively abandons the requirement of a specific statement rendered misleading by omission. Yet the PSLRA underscores that requirement. *See* 15 U.S.C. §78u-4(b)(1) (complaint must "specify each

statement alleged to have been misleading"); *id.* §78u-4(f)(10)(A)(i)(I) (in repeating 10b-5(b)'s omission definition, referring to a misleading "statement," though without the "circumstances" language). Doing away with the statement requirement—or allowing it to be satisfied by reference to the MD&A as a whole (*see infra* Part II.B)—would frustrate those provisions.

The text of Rule 10b-5 is clear enough on its face to resolve this case. But even if it were not, the Court should decline this new post-PSLRA opportunity to expand the private right of action.

II. Moab and its amici cannot avoid the question presented by reframing the nondisclosure as a "half-truth."

Given the lack of support for pure omission liability, it is no surprise that Moab and its amici now say this case involves a "half-truth" instead. But they disagree about what the half-true statement *is*. Moab points to express certifications required under Sarbanes-Oxley, along with specific factual statements pleaded in the complaint, conceding that "[a]n implied certification of completeness is not an actionable 'statement' itself." Resp. Br. 40. The Government, in contrast, relies on an implied certification theory and points to the MD&A as a whole. Gov't Br. 10.

This disagreement illustrates the problem. Again, the PSLRA makes clear that the misleading statement has to be something definite and specific. *See* 15 U.S.C. §78u-4(b)(1), §78u-4(f)(10)(A)(i)(I). This makes sense, as the misleading statement is the predicate for other elements, including scienter, reliance, and loss causation. Br. 35–38. For this reason—among others—the briefs' conflicting efforts to identify a "statement" cannot save the Second Circuit's conclusion.

A. Moab cannot save its Item 303 claim by relying on express §906 certifications.

The Sarbanes-Oxley Act requires an issuer's CEO and CFO to certify that, to the best of their knowledge, an SEC filing "fully complies with the requirements of section 13(a)." 18 U.S.C. §1350 (§906). According to Moab's brief, the certifications by MIC's officers constitute misleading "statements" (Resp. Br. 19)—though its complaint, briefs below, and opposition to certiorari never mentioned them.

Finding §906 certifications actionable would expand the securities laws dramatically—in a way that neither this Court, the Second Circuit, nor any other circuit has done before. Section 906 sits in the Criminal Code, not the securities laws. If Congress wanted to expand *civil* liability for officers, it would have put the requirement in title 15, not title 18. Absent clear congressional intent, this Court will not infer civil liability based on a criminal statute. *See* Grundfest, *supra*, at 38–41 & n.194 (collecting authority).

In any case, §906 certifications are not part of the issuer's public filings themselves. 18 U.S.C. §1350 (certifications are separate and "accompan[y]" the report). And the "issuer" is not the one making the certifications; they are signed by the officers personally.

Finding §906 certifications actionable also would not accomplish what Moab hopes. A certification that a report fully complies with complex disclosure requirements is inherently a statement of opinion, and a plaintiff cannot plead that it was misleading just by asserting that the opinion turned out to be wrong. *Omnicare, Inc.* v. *Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 186 (2015). Instead, the plaintiff "must identify particular (and material) facts going to the *basis* for the [officer's] opinion—facts

about the inquiry [he] did or did not conduct or the knowledge [he] did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id.* at 194 (emphasis added). "This is no small task." *Ibid.* And it would be particularly difficult when compliance is itself dependent on complex judgments about what is "reasonably likely" to occur and cause a problem in the future. *See* Br. 41–45.

Moab has not attempted such a showing here. Though Moab insists that MIC's officers "knew" IMO 2020 "would upend their business" (Resp. Br. 1), the complaint alleged nothing of the kind. It asserted only that MIC's management was in a "position" to know facts that (according to Moab) should have made a disclosure obligation apparent. Pet 11a. And the complaint also acknowledged other statements discussing reasons why management did *not* think IMO 2020 would cause a problem for MIC's overall performance. JA82–84. Scienter aside, these allegations would not be enough to plead that MIC omitted a material fact about the basis for an opinion that its filings complied with all aspects of Item 303.

B. An implied certification is not an actionable misleading "statement," and it does not render the entire MD&A a misleading "statement" either.

The Government takes a different approach, shying away from Moab's express certification argument and taking up the mantle of *implied* certification. In the Government's view, every periodic filing carries an implied certification of completeness, such that a failure to comply with a disclosure requirement renders "the statements in the MD&A" misleading. Gov't Br. 9–10. Under the Government's implied certification theory,

then, the misleading statement is the MD&A as a whole. *Id.* at 10.

The Government cites no authority supporting this conclusion. *Omnicare* was not about implied certifications; the issuer there stated *expressly* that it believed its contracts were "in compliance with applicable federal and state laws." 575 U.S. at 179 (cited at Gov't Br. 10). Nor did *Omnicare* hold that a certification of compliance is actionable based merely on allegations of *non*-compliance. To the contrary, *Omnicare* found that such a certification—inherently a statement of opinion—is actionable only if the plaintiff identifies an omitted material fact "about the issuer's inquiry into or knowledge concerning" the opinion. *Id.* at 189. And nothing in *Omnicare* suggests that a statement about compliance makes *other* statements—much less an entire narrative—actionable as "misleading."

This Court's decision in *Escobar* (sometimes called *Universal Health Services*) does not help the Government either. *Escobar* interpreted the False Claims Act, which creates an express cause of action based on "false" or "fraudulent" claims. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 186–87 (2016). Because Congress left those broad terms undefined, *Escobar* interpreted them using the common law. *Ibid.*; *see* Gov't Br. 14–15, 17–18. But Congress did *not* leave §10(b)'s broad terms undefined; it charged the Commission with defining them. The common-law principles recognized in *Escobar* thus cannot override the statement requirement that Rule 10b-5(b) adopts and the PSLRA echoes—particularly given this Court's unwillingness to expand the implied private right beyond its PSLRA-era contours.

Escobar was also far narrower than the Government suggests. It held only that when a claim submitted to Medicaid "makes specific representations about the

goods or services provided," it carries an implied certification that the relevant provider complied with the licensure and training requirements that would make reimbursement appropriate. *Id.* at 189–90. *Escobar* thus draws a through line from the specific affirmative statement to the specific omitted fact.

Escobar's "classic example of an actionable half-truth" makes this clear. *Id.* at 188–89 (discussed in Gov't Br. 15). A seller's disclosure "that there may be two new roads near a property" may be misleading if there is also a third—because the disclosure and the omitted fact cover the same subject (roads that might be built on the property). *See id.* at 189. Similarly, a list of lawsuits that seek "more than $10 million in damages" might be misleading if it omitted an additional lawsuit seeking $20 million (Gov't Br. 12)—given that the statement and the omitted fact address the same subject.[6]

These examples affirmatively defeat the Government's argument. The Government says the "statements made" in the MD&A were misleading by omission. But *which* statements, on which subjects? A company's MD&A is intentionally long and broad; its narrative provides a range of information "relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources." Pet. 52a. For a holding company like MIC, a filing's MD&A may address

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[6] The hypothetical disclosure requirement in the Government's example is redundant; the incomplete list would likely be found misleading by omission without it. *See, e.g.*, *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 797 (9th Cir. 2017); *In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145, 1181 (D. Or. 2015).

historical facts and future uncertainties for several constituent businesses. If the MD&A *does* include a misleading statement on a particular subject, that statement may be actionable under Rule 10b-5(b). But there is no legal support for treating the entire MD&A as misleading based on a single omission.

On the contrary, the PSLRA requires a plaintiff 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) (emphasis added). And with regard to MD&A in particular, Congress used the term "statement" to refer to something "*contained in* a discussion and analysis of financial condition * * * included pursuant to the rules and regulations of the Commission." 15 U.S.C. §78u-5(i)(1)(C) (emphasis added). Given this language, the "discussion and analysis" itself cannot be the "statement," regardless of any implied certification of completeness.

C. Moab cannot now reframe its Item 303 claim as a "half-truth" theory by invoking specific factual statements.

As for Moab's last-ditch attempt to supplement its Item 303 claim with allegedly misleading factual statements (Resp. Br. 19–20, 28–29, 38), this Court may simply ignore it. The complaint's Item 303 allegations did not point to these (or any other) affirmative statements. JA136–37. And the district court found that none of these statements was misleading. Pet. 31a–39a. The Second Circuit disagreed with respect to only one, having nothing to do with Item 303. Pet. 10a–11a.

Most of the statements Moab's brief identifies were made during earnings calls and conferences, to which Item 303 does not apply. These include the following:

- "Very little" of the portfolio involved "crude" or "heavy product." JA117–19, 147.
- Changes in IMTT utilization in 2017 were not caused by "commodity-driven factors." JA76.
- IMTT was not a "macroeconomically sensitive enterprise." JA107–08.
- IMTT was "not the place" that speculative commodities traders would store products for active trading tactics. JA117–19.

The last of these appears to be one of the statements about IMTT's "base of customers" that the Second Circuit found was an actionable half-truth because of an omitted fact about those customers. Pet. 10a. Moab appears to concede that this claim "do[es] not turn on Item 303." Resp. Br. 12.

The two statements that *do* appear in filings subject to Item 303 are no more helpful to Moab's position. The first discussed an "uncertainty" due to a "reduction in the average duration" of contracts executed in 2015, noting that "strong demand" for the stored products "serves to offset" the increased re-contracting risk. JA133–34. The district court concluded that this was a backward-looking explanation of historical results and dismissed Moab's claim based on it (Pet. 33a) —a decision the Second Circuit left intact.

As for the other statement, it described management's "expect[ations]" in 2016 about IMTT's utilization rates—necessarily an opinion, not a fact. *See* JA135 (management "expect[ed] utilization rates to revert" downward from higher levels "to historical levels of 94% to 96% in the medium term"). The complaint did not allege any omitted fact undermining the basis for that opinion. *See supra* at 15–16 (discussing *Om-*

nicare). Further, this was a forward-looking statement accompanied by cautionary language, including the caution that demand for storage could be affected by "changes in government regulations." 2d Cir. JA364–65, 515, 671. And as the complaint concedes, utilization at the end of the second quarter of 2017 was, in fact, 94%, as MIC had predicted. JA76.

Notably, if specific statements like these were misleading by omission, it is unclear what work Item 303 would do in the analysis. The plaintiff could (and Moab did) attempt to allege an omission by pointing to the omitted fact itself. *See*, *e.g.*, Pet. 6a (pointing to alleged omissions about "the extent of IMTT's exposure to No. 6 fuel" and the composition of IMTT's customer base); *see* Resp. Br. 9–11. Layering Item 303 on top adds nothing. Indeed, as the Third Circuit observed in refusing to recognize a claim like the one asserted here, Item 303's trigger for disclosure "varies considerably from the general test for securities fraud materiality set out by the Supreme Court in *Basic*." *Oran* v. *Stafford*, 226 F.3d 275, 288 (2000) (Alito, J.); *see also* Br. 41–42 (collecting authorities).

In any event, the statements listed in Moab's brief could not have been rendered misleading just because MIC's management failed to appreciate and disclose the allegedly likely impact of a well-known proposed regulation relating to a single commodity and a single use (No. 6 oil in shipping), particularly when that regulation was not set to go into effect for another four years. It is no wonder Moab never pleaded these statements that way.

CONCLUSION

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

Respectfully submitted.

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