No. 22-1165

IN THE

Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORP., ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF INSTITUTIONAL INVESTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief is filed by institutional investors and their representatives that collectively invest more than $340 billion of assets on behalf of more than two million retirees, employees, and investors. Amici include:

1. Thomas P. DiNapoli, Comptroller of the State of New York, as Trustee of the New York State Common Retirement Fund ($248 billion under management)
2. Maryland State Retirement and Pension System ($64 billion under management)
3. Michigan Association of Public Employee Retirement Systems (members collectively manage $30 billion)
4. Fire and Police Pension Association of Colorado ($7.4 billion under management)
5. Louisiana Sheriffs' Pension & Relief Fund ($4.5 billion under management)
6. Oklahoma Firefighters Pension & Retirement System ($3.5 billion under management)
7. Louisiana Municipal Police Employees' Retirement System ($2.6 billion under management)
8. Discovery Capital Management ($2.5 billion under management)

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[1] No counsel for petitioners or respondents authored any part of this brief, and no person other than amicus curiae or its counsel made any monetary contribution to the preparation or submission of this brief.

9. City of Miami Firefighters' and Police Officers' Retirement Trust ($1.5 billion under management)
10. City of Miami General Employees' & Sanitation Employees' Retirement Trust ($780 million under management)
11. Ironsides Asset Advisors ($750 million under management)
12. Sandalwood Securities ($750 million under management)
13. Employee Retirement System of the City of Providence ($400 million under management)
14. The Association of Benefit Administrators

Amici have a vital interest both in ensuring an effective private remedy for deceptive practices that injure investors and in avoiding the devaluation of the companies they invest in through meritless securities litigation. In this case, amici believe that Congress struck the appropriate balance by ratifying a private right of action for investors injured by misleading omissions from Item 303 disclosures, while protecting against unwarranted litigation through a variety of important procedural requirements and limitations in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995).

SUMMARY OF ARGUMENT

Federal securities laws were enacted to provide investors confidence in our capital markets by ensuring them access to accurate information essential to the valuation of a company's shares. Congress thus imposed on issuers a variety of disclosure obligations and instructed the Securities and Exchange Commission ("SEC") to develop additional requirements. Congress and this Court have recognized that providing a private right of action to those injured by material violations of those disclosure obligations is essential to the proper functioning of the legal regime and our financial markets.

Amici institutional investors, their investment advisors, and investment professionals generally, rely heavily not only on the accuracy of the information disclosed under this regime, but also on the *completeness* of those disclosures. Item 303 disclosures are particularly important. Most information provided under federal securities law is backward-looking. That information is important, but stock valuations are principally based on a prediction of *future* performance. Item 303 plays an essential role in that assessment, requiring companies to disclose "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." 17 C.F.R. § 229.303(a).

Incomplete Item 303 disclosures can be exceedingly misleading, indeed even more misleading than many outright misstatements. When an annual report purports to comply with Item 303, investors will

understand the absence of any discussion of an event or trend to indicate that management believes it is unlikely to occur or have a material effect on the firm. When that is not true, investors often would be better off if the company had made no Item 303 disclosure at all. At least then they would be on notice that they would need to conduct an independent, comprehensive assessment.

Such incomplete disclosures are actionable under Section 10(b). Contrary to petitioners' framing, this is not a case about pure omissions. Petitioners were not simply silent about Item 303 or future trends and events—they included in their annual report an extensive discussion that would lead reasonable investors to believe the disclosure was comprehensive and included all that Item 303 requires. Moreover, as required by 18 U.S.C. § 1350, the Company's CEO signed a certification attesting that the report "fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934," referring to the provisions under which Item 303 was promulgated. The omissions charged in this case rendered that certification and the seemingly complete Item 303 discussion misleading.

Petitioners' policy objections are both beside the point (they should be directed to the SEC or to Congress) and unconvincing. Their complaints about the alleged ambiguity in Item 303 are doubly irrelevant. First, denying respondents a cause of action in this case will do nothing to affect petitioners' Item 303 obligations, which exist independent of any private right of action. Second, the Item's more relaxed materiality requirement is entirely irrelevant to the question before the Court because private

litigants must satisfy the ordinary materiality standard applied in all Section 10(b) cases.

Petitioners' rendition of issuers' traditional floodgates argument has no merit either. It ignores that Congress responded to concerns about meritless litigation with a variety of procedural protections, such as heightened pleading standards, not by carving out certain kinds of violations from the 10(b) private right of action. Nor can petitioners show any concerning flood of litigation in the Second Circuit, which has applied the rule petitioners oppose for nearly a decade without ill effect.

There is also no basis to petitioners' equally worn prediction that allowing private remedies for non-disclosure will prompt harmful over-disclosure. Petitioners ignore that the audience for these documents is not ordinary retail investors but highly sophisticated analysts and other investment professionals who routinely review significant amounts of information and are perfectly capable of ignoring irrelevant material. Moreover, balancing the benefits of disclosure against the costs of over-disclosure is best left in the expert hands of the SEC, which can tailor Item 303's requirements to reach the optimal balance. Indeed, the SEC has been attentive to this need, even modifying Item 303 after this suit was filed to "provide clarity and focus to registrants as they consider what information to discuss and analyze." Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Exchange Act Release No. 10890 ("2021 Guidance"), 86 Fed. Reg. 2080, 2089 (Jan. 11, 2021).

Finally, as the SEC has frequently explained to Congress and this Court, the Commission lacks the resources to adequately detect and address Item 303 violations on its own. Indeed, although the SEC endeavors to "undertake[] *some* level of review for each reporting company at least *once every three years*,"[2] even when it scrutinizes a report, the Commission's staff has no way of knowing what the Item 303 discussion has *failed* to disclose.

ARGUMENT

I. Federal Securities Law Assures Investors That They Can Rely On The Truth And Completeness Of Mandatory Disclosures.

Federal securities law arose as a response to the worst economic crisis in the Nation's history. In the run up to the stock market crash of 1929, "some 50 billions of new securities were floated in the United States." H.R. Rep. No. 73-85, at 2 (1933). "Fully half or $25,000,000,000 worth of securities floated during this period have been proved to be worthless," *ibid.*, amounting to more than *half a trillion* dollars today adjusted for inflation.[3] Those losses were bad enough, but the loss of investor confidence in our capital markets was catastrophic.

Recognizing that restoration of that confidence was essential to ending the economic crisis and to the health of our free-market economy moving forward, Congress enacted the Securities Act of 1933 and the

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[2] SEC, Filing Review Process, https://www.sec.gov/divisions/corpfin/cffilingreview (emphasis added)

[3] *See* U.S. Inflation Calculator, https://www.usinflationcalculator.com (last visited December 8, 2023).

Securities Exchange Act of 1934. At the heart of both laws are mandatory disclosure obligations, the private enforceability of which is essential to their ability to provide investors confidence in the accuracy and completeness of those disclosures and, thereby, in our capital markets.

A. Federal Securities Laws Were Enacted In Response To The Lack Of Reliable Investment Information.

Although Congress determined to root out fraud from securities trading, it realized that prohibitions against fraud would not be sufficient to restore and maintain investor confidence. Equally important was ensuring that investors had access to reliable information regarding the securities sold on national exchanges. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 (1976).

A central flaw Congress identified in securities markets leading up to the Great Depression was that investors lacked "facts essential to estimating the worth of any security." H.R. Rep. No. 73-85, at 2. To address that problem, Congress crafted new laws designed "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1103 (2019) (citation omitted). Thus, in drafting the Securities Exchange Act of 1934, "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." *Basic Inc. v. Levinson*, 485 U.S. 224, 245-46 (1988). It did so by imposing a variety of disclosure obligations on companies participating on national security exchanges and creating the SEC with a mandate to

elaborate on those obligations by regulation. *See, e.g.*, 15 U.S.C. §§ 77e, 77g, 78m.

B. Private Remedies For Violations Of Federal Disclosure Obligations Are Critical To Market Confidence In The Disclosure Regime.

1. Congress recognized that investor confidence was unlikely to be restored if federal disclosure obligations were merely precatory. Left to their own devices, many companies would disclose only positive information and neglect the negative. Moreover, disclosures are only as helpful as they are accurate. After all, there was no shortage of disclosures in the lead-up to the Great Depression; the problem was that many were false or incomplete.

Congress also recognized that leaving enforcement solely to the SEC would be grossly insufficient. *See infra* § IV.D. It enacted a series of private enforcement provisions that allowed those injured by violations of the Act's disclosure rules to recover, subject to a variety of requirements and limitations to protect defendants from meritless litigation. *See, e.g.*, 15 U.S.C. §§ 77k, 77*l*, 78r.

Whether Section 10(b) was one of those provisions was once a subject of debate, but no more. Congress has "ratified the implied right of action" under that provision, recognizing it as a "prominent feature of federal securities regulation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). In enacting the PSLRA, Congress rejected calls to eliminate the Section 10(b) private right of action, recognizing that the "success of the U.S. securities markets is largely the result of a high level of investor confidence in the integrity and efficiency of

our markets"[4] and that retaining private Section 10(b) litigation was necessary to "protect investors and to maintain confidence in the securities markets."[5] "[P]rivate rights of action are not only fundamental to the success of our securities markets," the Senate Report explained, "they are an essential complement to the SEC's own enforcement program." S. Rep. No. 104-98, at 8 (quoting SEC Chairman Arthur Levitt).

This Court, too, has long recognized that "'private securities litigation [is] an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (citation omitted)). It is the "SEC enforcement program *and* the availability of private rights of action *together* [that] provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." *Stoneridge*, 552 U.S. at 174 n.10 (quoting S. Rep. No. 104-98, at 8 (June 19, 1995)). Accordingly, this Court has taken care not to construe the securities laws in a way that could "seriously impair the deterrent value of private rights of action" by diminishing "the incentives for [securities market actors] to comply with the federal securities laws." *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986).

2. The availability of a private remedy is particularly important to institutional investors, who

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[4] S. Rep. No. 104-98, at 8 (1995).

[5] H.R. Rep. No. 104-369, at 31 (1995) ("Conf. Rep.").

are entrusted with managing trillions of dollars in assets by some of the nation's most important institutions. In enacting the PSLRA, Congress noted that "[i]nstitutional investors are America's largest shareholders, with about $9.5 trillion in assets, accounting for 51% of the equity market." S. Rep. 104-98, at 11. By 2017, institutional investors held more than $21 trillion in equity, and nearly 80% of the shares, in the nation's largest companies.[6] Much of that is held on behalf of pension funds covering tens of millions of retired Americans, often on behalf of public employers like States, local governments, and public universities. Each year, institutional investors invest billions of additional dollars in the U.S. capital markets on behalf of their clients and beneficiaries.[7]

The integrity and success of these funds is thus a matter imbued with the public interest. When violations of securities laws lead to investment losses for institutional investors, much of the cost is borne by their beneficiaries (*i.e.*, individual workers saving for retirement or existing retirees). Moreover, some state and local governments are constitutionally obligated to guarantee defined-benefit retirement plans. Thus, institutional investors are vitally concerned that their investment returns not be diminished by illegal

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[6] *See* Pensions & Investments, *80% of equity market cap held by institutions* (Apr. 25, 2017), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions.

[7] Institutional investors are injured by securities fraud not only when their own analysts or advisors are deceived, but when other market participants are misled and the market price (on whose integrity institutional and other investors rely) is artificially altered.

conduct in the securities markets. At the same time, institutional investors have a long-term investment outlook and an interest in deterring meritless securities litigation because such lawsuits also diminish the value of their investments.

Congress balanced the need to ensure a private remedy for such important institutions against concerns about meritless private securities litigation through provisions of the PSLRA intended to "increase the likelihood that institutional investors . . . would serve as lead plaintiffs." *Tellabs*, 551 U.S. at 321 (2007).[8] Congress understood that because institutional investors are injured both by securities violations *and* by meritless litigation (their income depending on the vitality of the companies they invest in), they are "parties more likely to balance the interests of the class with the long-term interests of the company." *Ibid*. Thus, Congress believed that "increasing the role of institutional investors" in securities litigation would "ultimately benefit shareholders and assist courts." Conf. Rep. at 34.

II. Complete and Accurate Item 303 Disclosures Are Vital to Institutional Investors.

Institutional investors and their investment advisors rely heavily on the insights provided by Item 303 disclosures, and on the integrity of the market price established in reliance on those disclosures. Indeed, Item 303 disclosures are among the most important required by federal securities law because

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[8] Specifically, the PSLRA created a rebuttable presumption that the plaintiff with "the largest financial interest in the relief sought by the class" should be appointed as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

they provide insights into what management views as the principal risks and challenges a company faces. By the same token, intentionally incomplete Item 303 disclosures can be among the most damaging forms of securities fraud.

A. Item 303 Provides Unique Insight About A Company's *Future* Performance.

Investors are predominantly concerned about what the *future* holds for a company. *See, e.g.*, Michael J. Mauboussin and Dan Callahan, *Market-Expected Return on Investment: Bridging Accounting and Valuation* (April 14, 2021) ("A company's stock price reflects the expectation for future cash flows based on past, present, and prospective investments.").[9] Institutional investors (or their investment advisors) therefore undertake extensive research and analysis before investing in a particular company to try and determine the company's future performance. The scope of this undertaking necessarily varies by particular institutional investor or advisor, but invariably includes reviewing *all* of a company's SEC and other public disclosures.

As petitioner acknowledges, most other mandatory disclosures relate to "historical financial information." Petr. Br. 9. That historical information can provide insight into a company's future performance. But past performance can be misleading when there is reason to think that the conditions giving rise to it are likely to change. For example, an annual report's extensive discussion of a company's

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[9] Https://www.morganstanley.com/im/publication/insights/articles/article_marketexpectedreturnoninvestment_en.pdf.

presently robust liquidity may mislead investors about the company's future prospects when management expects that "customer demand is reasonably likely to fluctuate in response to rapid technological changes" or if the firm anticipates "a debt rating downgrade." Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 8056, 67 Fed. Reg. 3746, 3748 (Jan. 25, 2002).

That is where Item 303 comes in. It requires annual reports to include a "management discussion and analysis" ("MD&A") that, in narrative form, apprises investors of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." 17 C.F.R. § 229.303(a). This includes "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." *Id.* § 229.303(b)(2)(ii).

Thus, unlike most backward-looking disclosure requirements, Item 303 "call[s] for companies to provide investors" with information about their "prospects for the future." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operation ("2003 Guidance"), Exchange Act Release No. 48960, 68 Fed. Reg. 75,056, 75,059 (Dec. 19, 2003). As the Second Circuit observed, "Item 303 disclosures 'give investors an opportunity to look at the registrant through the eyes of management by providing a historical and

prospective analysis of the registrant's financial condition and results of operations.'" *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 102 (2d Cir. 2015) (quoting Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures ("1989 Guidance"), Exchange Act Release No. 6835, 54 Fed. Reg. 22,427, 22,428 (May 24, 1989)).

Item 303 thus provides "[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." 2003 Guidance, at 75,061. While information about past performance often may be reliably obtained elsewhere and likely is already reflected in the price of the stock, management is uniquely situated to identify firm-specific obstacles to future performance or to understand how generally known trends will affect a particular firm.

This case provides an excellent example of Item 303's unique value. All else equal, investors would reasonably assume that recent robust demand for Macquarie's storage services foretold similar demand for its services in the near- to mid-term. It would be highly material to investors, however, if management was aware that the regulations of an obscure international maritime regulator could dramatically affect demand for a particular kind of fuel oil that was responsible for a significant share of the company's present revenues. *See* Resp. Br. 7-8. Item 303 ensures that investors have access to that important insight so they can assess the company's value accurately.

B. Incomplete Item 303 Disclosures Are Particularly Misleading.

When a company files an incomplete Item 303 disclosure, the risk of misleading investors is no less than filing a disclosure that contains material falsehoods. Indeed, incomplete disclosures are particularly prone to misleading investors and can be more harmful than affirmative misstatements.

A hypothetical illustrates the point. If, for example, a regulation required a company to disclose all material debt obligations, investors would reasonably assume that any debt not listed does not exist or is not material. The incompleteness of the disclosure would be highly misleading. Indeed, a company's failure to disclose a $100 million debt would be far more misleading than disclosing the debt while misstating its amount by $10 million.

Indeed, when companies violate their obligation to make the complete disclosures required by law, investors may be worse off than if there had been no disclosure requirement at all. If they had no expectation that the company would make a full disclosure of its material debts, for example, investors would be on notice that they had to make their own judgments about this critical financial question. They might ask the company about its debts or conduct their own independent investigation. But they are unlikely to do any of those things when they believe they already have that information because the company was required to provide a complete list of its material debts by law and has said nothing to indicate that it is not complying with that obligation.

So, too, with Item 303. Institutional investors reasonably rely not only on the accuracy of required

disclosures, but also on their *completeness*. Generally, before investing in a company, institutional investors or their advisors conduct their own independent diligence, such as by questioning management, engaging industry consultants, or speaking with competitors. But if a company does not disclose a material known trend or uncertainty in its Item 303 disclosure, an institutional investor will reasonably assume that the trend or uncertainty does not exist (or is not material). They likely will not question management about that topic. And even if the investor could conduct an investigation to determine whether other material trends or uncertainties exist, they are unlikely to do so—analysts and investors have limited resources and understandably direct their research to other relevant matters.

Thus, non-disclosure under Item 303 is akin to Sir Arthur Conan Doyle's dog that did not bark in the night[10]—the absence of disclosure conveys a crucial message to institutional investors, *i.e.*, that the company is not aware of any other material trends or uncertainties with which investors should be concerned. *Cf. Leopold*, 987 F.3d at 167 ("The absence of particular evidence may sometimes provide clues as important as the presence of such evidence."); *Johnson v. Wells Fargo Bank, N.A.*, 744 F.3d 539, 543 & n.6 (8th Cir. 2014) ("[A] list of what is missing is also evidence of what is not missing"). As this Court has observed

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[10] *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark.") (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)); *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987); *Leopold v. CIA*, 987 F.3d 163, 167 & n.3 (D.C. Cir. 2021).

in the national security context, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Sims*, 471 U.S. 159, 178 (1985). Analysts and investors rely on a company's silence about trends and uncertainties—the dog not barking—in constructing the mosaic of information that they gather in deciding whether to invest in a company.

III. Incomplete Item 303 Disclosures Give Rise To Section 10(b) Liability.

Petitioners nonetheless claim that Congress has provided no remedy for such deceit. For the reasons given by respondents, they are wrong. Amici emphasize two important points below.

1. This is not a case about pure omissions. *Contra* Petr. Br. 20-25; Washington Legal Foundation Br. 11-13, 15, 23; Atlantic Legal Foundation Br. 21; Society for Corporate Governance Br. 2. Petitioners did not simply omit, for example, the entire Item 303 discussion from their annual reports. Had they done so, investors would have been on notice that they would be left to their own devices to figure out whether there were regulatory or other events on the horizon that could substantially disrupt demand for the Company's services. *See, e.g.*, Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1681 (2004) ("[I]f an issuer's response to a[n SEC] line-item were something along the lines of 'we cannot provide the information requested' or a simple failure to file completely, this would operate as a breach of the line-item requirement but not be a fraud. The investor is

on notice of the noncompliance and would not be misled.”). Instead, as in every Item 303 case, petitioners included a lengthy section in their report labeled “Item 7. Management’s Discussion and Analysis of Financial Condition and Results of Operations.” *See, e.g.*, Macquarie Management Corp., Annual Report (Form 10-K) 56 (Feb. 21, 2017) (“Macquarie 10-K).[11]

In that context, institutional investors—who keenly focus on issuer’s Item 303 disclosures—would understand petitioners to be conveying that the report includes all the information required for an MD&A discussion under federal law, not simply part of it. As the Second Circuit reasoned, “[d]ue to the obligatory nature of these regulations, a reasonable investor would interpret the absence of an Item 303 disclosure to imply the nonexistence of ‘known trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations.’” *Stratte-McClure*, 776 F.3d at 102 (quoting 17 C.F.R. § 229.303(a)(3)(ii)); *see also* Langevoort & Gulati, *supra*, at 1680 (“[T]he reader of the disclosure sees that the issuer is responding to the disclosure obligation and is entitled to assume that the response is not only accurate but complete as well.”).

Leaving out required information in this context is no less misleading than when an applicant for a mortgage fills out a form calling for a disclosure of all credit card debt, but leaves some of her cards off the

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[11] *Available at* https://www.sec.gov/Archives/edgar/data/1289790/000114420417010224/0001144204-17-010224-index.html.

list. In both cases, the incomplete disclosures "fall squarely within 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." *Universal Health Svcs., Inc. v. United States*, 579 U.S. 176, 188 (2016). The "classic example of an actionable half-truth" arises when a property seller "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." *Ibid*. This case is even worse than the classic example because the implication that the disclosure is complete is much stronger here—by using language that invokes the Item 303 obligation, petitioners unambiguously convey to the reader that they *knew* they had a *legal obligation* to completely disclose all of the information required by the regulation and were undertaking to fulfill it.

If that were not enough, Macquarie included a certification from its CEO, as required by 18 U.S.C. 1350, stating that the report "fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended." Macquarie 10-K, Exhibit 32.1. Section 13(a) requires issuers to "file with the Commission . . . such information and documents (and such copies thereof) as the Commission shall require," including "such annual reports . . . as the Commission may prescribe." 15 U.S.C. § 78m(a)(1)-(2). And Item 303 describes part of the information the Commission requires be included in annual reports (*i.e.*, the MD&A section of the report). *See* 17 C.F.R. §§ 229.10(a)(2), 229.303. Macquarie's CEO thus expressly certified that the reports complied with all reporting requirements, including Item 303.

As required by 18 U.S.C. § 7241(a)(1), the annual reports further included certifications that, to officials' knowledge, the report did "not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading." *See, e.g.*, Macquarie 10-K, Exhibit 31.1. This language, of course, directly tracks the words of Section 10b-5.

In signing the legislation that imposed both certification requirements, President Bush explained that "[t]his law says to shareholders that the financial information you receive from a company will be true and reliable" and that under the statute, "CEOs and chief financial officers must personally vouch for the truth and fairness of their companies' disclosures." Remarks By the President at Signing of H.R. 3763, 2002 WL 1751366.

Petitioners note that Section 1350 "does not itself carry a private right of action," Br. 35 n.8, but false certifications can be the basis of fraud actions without the need for an express right of action to enforce the certification requirement. In *Universal Health Services*, for example, this Court did not doubt that a federal contractor would commit actionable fraud in seeking payment of an invoice by falsely certifying compliance with applicable contract requirements, even if there were no separate right of action to enforce the various contract rules. *See* 579 U.S. at 188.

2. Petitioners thus are wrong to frame this case as asking whether Section 10(b) provides a private right of action for violations of Item 303. The regulation simply provides a part of the background

against which the company's affirmative statements are reasonably understood by investors.

Indeed, a defendant would actionably mislead investors by falsely implying compliance with a standard even if that standard were not legal and compliance was purely voluntary. For example, an annual report that invoked voluntary accounting standards of a private standard-setting body would be misleading if, in fact, it did not comply with those standards.

For purposes of the law of fraud (and, by implication, for claims under Section 10(b)) it makes no difference *why* a company has conveyed that it is disclosing everything required by a particular standard; it matters only *that* the company has conveyed that it is being comprehensive. So long as that representation is conveyed, investors will be misled by material deviations from the disclosure standard the defendant has invoked.

IV. Petitioners' Policy Objections Are Irrelevant And Unfounded.

Petitioners and their amici raise a number of policy objections, complaining that Item 303's materiality standard is too lax and speculating that allowing a cause of action to investors injured by misleadingly incomplete MD&A disclosures will prompt a flood of meritless litigation and harmful over-disclosure. *See* Petr. Br. 41-45; SIFMA Br. 15-17, 19-21; Atlantic Legal Foundation Br. 14-18; Society for Corporate Governance Br. 11, 18-27; Washington Legal Foundation Br. 24-27. Those arguments are misdirected and unconvincing.

They are misdirected because this Court "does not presume that any result consistent with one party's account of the statute's overarching goal must be the law." *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 769 (2023) (cleaned up). Petitioners' policy arguments simply rehash objections Congress and the SEC have already considered and rejected. Congress responded to complaints that private lawsuits "chill corporate disclosure" in the PSLRA not by paring back coverage of the Section 10(b) private right of action, but by enacting a variety of protections against meritless litigation. S. Rep. 104-98 at 4-5; *see, e.g.*, *ibid.*; *Tellabs,* 551 U.S. at 320; *infra* § IV.B. The SEC has likewise responded to calls to reduce unwarranted disclosure burdens, including with respect to Item 303 in particular.[12] For example, in 2021, the SEC amended Item 303 "to eliminate duplicative disclosures and modernize and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants." 2021 Guidance, at 2080. Those modifications were supported by many issuers and their trade associations, including some of petitioners' amici.[13]

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[12] *See, e.g.*, 2018 Guidance; Disclosure Update and Simplification, Exchange Act Release No. 10532, 83 Fed. Reg. 50,148 (October 4, 2018); Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. SEC Release No. 10064, 81 Fed. Reg. 23,916 (April 22, 2016); 2002 Guidance.

[13] *See, e.g.,* Letter to SEC from U.S Chamber of Commerc's Center for Capital Markets Competitiveness (May 4, 2020, *available at https://www.sec.gov/comments/s7-01-20/s70120-7149390-216380.pdf*; Letter to SEC from Securities Industry and

Petitioners may think the SEC has not done enough. But how much is too much disclosure is ultimately a matter of judgment, as is weighing the potential costs of over-disclosure against the benefits of private enforcement (including deterrence and compensation for injured investors). The SEC is the entity within the federal government charged with tailoring disclosure rules to strike what it deems to be the best balance of those competing interests.

All that said, even if this Court thought it appropriate to consider petitioners' policy argument itself, none has any merit.

A. Petitioners' Complaints About Item 303's Requirements Provide No Basis For Their Proposed Limitation On Private 10(b) Actions.

Petitioners and their amici complain at length that figuring out what must be disclosed under Item 303 is complicated and uncertain. *See, e.g.*, Petr. Br. 41-45; SIFMA Br. 7-10; Atlantic Legal Foundation Br. 9-14; Society for Corporate Governance Br. 7-14, 27-31; Washington Legal Foundation Br. 22-24. They ignore, however, the significant steps the SEC has taken—some after this case was brought—to provide clarity. *See, e.g.*, 2021 Guidance, at 2089; 1989 Guidance (interpretative release providing guidance on Item 303 requirements); *id*. at 22,427 & n.5 (collecting prior guidance).

Financial Markets Association (Apr. 28, 2020), *available at https://www.sec.gov/comments/s7-01-20/s70120-7130286-216134.pdf*.

More importantly, however, nothing in petitioners' legal arguments turns on the alleged ambiguity in Item 303's requirements—their reasoning would preclude private claims relating to even the clearest disclosure obligation (*e.g.*, a rule requiring disclosure of every person owning more than 10% of the company's stock). And their proposed solution is a poor fit for the alleged problem—as petitioners emphasize, compliance with Item 303 is still required, subject to enforcement action and civil penalties by the SEC. Petr. Br. 29, 41-45.

Indeed, petitioners' and amici's principal objection—that Item 303's materiality requirement is less demanding than what is usually required to state a claim for fraud—applies *only* to cases brought by the Commission. In a private suit, plaintiffs must satisfy the same standard that would apply if instead of omitting a known trend that threatened its business, the company had acknowledged the trend but lied about its expected impact on the firm. *See, e.g.*, *Stratte-McClure*, 776 F.3d at 100.[14]

B. Allowing A Private Remedy In This Context Will Not Open The Floodgates To Meritless Litigation.

Nor is there any merit to petitioners' rendition of the classic objection that ruling against the issuer in

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[14] Some amici argue that even the *Basic* standard materiality requirement is insufficient protection for defendants. *See, e.g.,* Washington Legal Foundation Br. 25 n.14. But this Court has repeatedly reaffirmed the standard and Congress has declined to disturb it. *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39-40 & n.4 (2011).

this case will open the floodgates of meritless securities litigation.

1. This Court has heard and rejected such predictions before, noting the multiple protections against meritless suits Congress included in the original legislation and enhanced in the PSLRA. *See, e.g.*, *Tellabs,* 551 U.S. at 320. For example, as just noted, private litigants must satisfy the same materiality element required in every Section 10(b) case, precluding suits over a defendants' failure to include information in the MD&A that does not alter the "'total mix' of information made available" in the market. *Basic*, 485 U.S. at 232 (citation omitted). Among other things, this allows issuers to defend against Item 303 claims by showing that the information it allegedly failed to disclose was already known to the market. *See, e.g.*, *Ganino v. Citizens Utils. Co*., 228 F.3d 154, 167 (2d Cir. 2000).

To the extent issuers complain that the SEC has not provided sufficient guidance regarding what must be included the MD&A discussion, Congress offered substantial protection against good faith mistakes by requiring proof of scienter. *See United States ex rel. Schuette v. SuperValu Inc.*, 598 U.S. 739, 750-53 (2023) (discussing common law scienter requirement's application to good-faith mistakes of law). The PSLRA's heightened pleading requirements for scienter provide additional protection, requiring early dismissal of cases in which plaintiffs cannot plead facts giving rise to a "strong inference of scienter." 15 U.S.C. § 78u-4(b)(2). At the same time, other elements of the claim must be pleaded with particularity under Federal Rule of Civil Procedure 9, and the PSLRA stays discovery until the Complaint has been tested

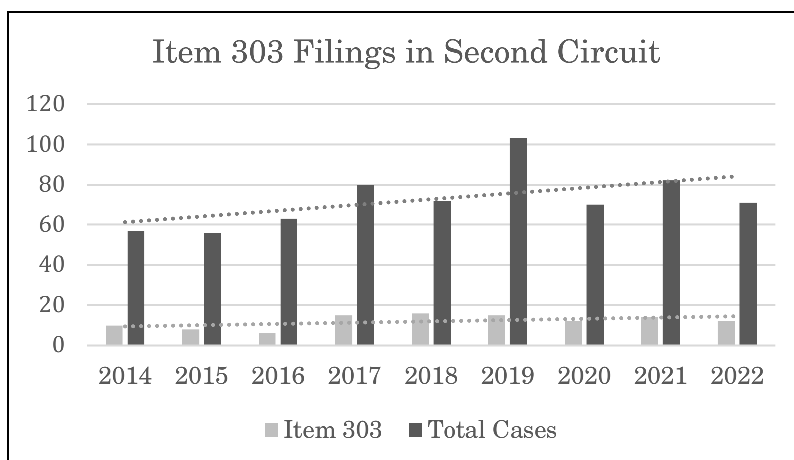
against those pleading standards through a motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B).

In addition, as the SEC has emphasized, "[a]ny forward-looking information supplied" in an MD&A "is expressly covered by the safe-harbor rule for projections" in the PSLRA. 17 C.F.R. § 229.303(b) (citing 17 CFR 230.175, 240.3b–6); *see also* 15 U.S.C. § 78u-5(c). And recoveries are subject to important PSLRA limitations. 15 U.S.C. § 78u-4(a)(4), (a)(6), (b)(4).

2. The experience of the Second Circuit—which has recognized claims based on misleading Item 303 omissions since 2015—does not bear out petitioners' dire predictions.

To start, only a fraction of securities cases filed in the Second Circuit include Item 303 claims and that number has remained relatively steady, even as the overall number of securities class actions has increased.[15]

[15] This chart is drawn from the list of Item 303 cases in Appendix E to the petition for certiorari and data on total securities filings by circuit. *See* Janeen McIntosh *et al*, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* 5 (Jan. 24, 2023) (data on securities class action filings by circuit for 2018-2022); Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* 1 (Jan. 29, 2019) (same for 2014-2018).



Moreover, precluding claims based on Item 303 omissions would not eliminate any material number of lawsuits, given that such suits invariably include other claims and theories of liability as well. *See* Doug Green, Securities Claims Based on Item 303 of Regulation S-K: It Just Doesn't Matter (Sep. 30, 2015) (opining that "very rarely, if ever, would there be an omitted fact that gives rise to an Item 303 claim without also rendering false or misleading one or more challenged statements").[16] This case is a good example: the Item 303 allegations are but one of many claims in the case, which petitioners acknowledge will continue regardless of how this Court resolves the Question Presented. *See* BIO 9-10; Pet. 12 n.3.

Petitioners' own list of Item 303 cases from the Second Circuit also illustrates the robustness of the multitude of protections defendants enjoy against

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[16] Https://www.dandodiscourse.com/2015/09/30/securities-claims-based-on-item-303-of-regulation-s-k-it-just-doesnt-matter/.

meritless suits. *See* Pet. App. E. For example, of the cases filed in 2020, more than 40% were disposed of by successful motions to dismiss, with the Item 303 claims generally failing for inability to satisfy the Second Circuit's test for such omissions, for lack of materiality, and/or failure to adequately plead scienter. [17] That is consistent with the rate of dismissal for securities complaints across the board.[18]

C. Amici's Over-Disclosure Objections Are Meritless.

Some of petitioners' amici speculate that allowing a private right of action for misleading Item 303 disclosures will lead to burdensome over disclosure. *See, e.g.*, Chamber Br. 11-16; Society for Corporate Governance Br. 19-26. That prediction has no merit either.

To start, the Court should reject the premise that the mere prospect that private enforcement could encourage some degree of unnecessary disclosure is a reason to abandon the substantial countervailing benefits private enforcement brings. As discussed, the information required by Item 303 is of vital importance to investors. If petitioners' amici are right that the level of MD&A disclosures is driven by the availability of a private right of action, then eliminating that action will predictably lead to significantly less of these important insights reaching

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[17] Based on a review of PACER entries for cases listed in Pet. App. E.

[18] *See* Cornerstone Research, Securities Class Action Filings: 2022 Year in Review 22 ("Cornerstone 2022") ("From 1997 to 2022, 46% of core federal filings were settled, 43% were dismissed, 0.5% were remanded, and 10% are continuing.")

markets. And while analysts and investors can easily ignore excess information, they are particularly ill-equipped to discover Item 303 information on their own when it is omitted.

At the same time, while amici agree that over disclosure is harmful to some extent, petitioners' amici overstate its costs. The principal audience for Item 303 disclosures is not the casual citizen investor; it is market analysts and sophisticated investors like amici and their advisors who have the training, time, and resources to process inevitably dense financial reports. Such readers are not easily diverted by the inclusion of perhaps unnecessary information and frequently spend significant time reviewing other kinds of documents from a variety of sources that are far less rich in relevant information.

In any event, no one has produced any evidence that Item 303's MD&A requirement—much less private litigation regarding misleading MD&A disclosures—has inundated investors with useless information in the Second Circuit. Instead, petitioners' amici simply reprise the same generic objections defendants raise in every case involving a disclosure obligation. Most of their complaints, and nearly all of their purported evidence, relates not to Item 303 but to issuers' general sense at times that their *overall* disclosure obligations under *all* of federal securities law was too burdensome. *See, e.g.*, Chamber Br. 13-16. Much of that evidence is badly dated, going back a decade or more and predating the Commission's 2016-2021 revisions to streamline the federal disclosure regime and Item 303 in particular. *See, e.g.*, Chamber Br. 13-14, 16 & n.9 (citing reports and speeches from 2007, 2011, 2012, 2013). Little of it

relates to Item 303 in particular, instead taking issue with being burdened by "boilerplate, redundant, immaterial, irrelevant, and overly fact-packed" disclosures. *Id*. at 14 (quoting Arthur J. Radin, *Have We Created Financial Disclosure Overload?*, CPA J., Nov. 2007, at 6 (2007)). But as discussed, Item 303 provides uniquely relevant and important information unavailable from other sources.

Even if the Court were persuaded that issuers presently make excessive disclosures, there is no reason to think that allowing private claims based on misleading MD&A omissions will make matters materially worse. Again, precluding a private action does not change what Item 303 requires to be disclosed. Petitioners suggest issuers will take an excessively liberal view of those requirements to avoid private litigation. But that argument ignores that private litigation will continue to be governed by traditional materiality standards. Accordingly, it is no surprise that petitioners are unable to show, for example, that the MD&A's of companies potentially subject to suit in the Second Circuit are meaningfully different from those of other firms.

D. SEC Enforcement Is Insufficient.

Petitioners assure the Court that the SEC can step in to fill the void if the Court eliminates private suits for deceptive MD&A omissions. Petr. Br. 45-46. But that is clearly wrong.

Given the size of U.S. capital markets, it is simply impossible for any government agency to meaningfully scrutinize regulated disclosures made to investors. The Commission recently reported to Congress that the "SEC is charged with overseeing approximately $100 trillion in annual securities trading on U.S.

equity markets and the activities of more than 28,000 registered entities," in addition to "24 national securities exchanges, nine credit rating agencies, and seven active registered clearing agencies," as well as a variety of other governmental and quasi-governmental entities.[19] Part of that oversight includes "reviewing the disclosures and financial statements of more than 7,400 reporting companies." *Ibid*.

"As our capital markets have grown, though, the SEC has not." *Id*. at 4. Today, the SEC performs its work with about 10% of the staff of Goldman Sachs, just one of the thousands of companies it regulates.[20] Around 400 employees are charged with overseeing tens of thousands of annual and quarterly reports filed with the SEC, along with other duties.[21]

Petitioners argue that the SEC's "informal comment-letter process" provides adequate investor protection. Petr. Br. 45. Not so. Although the Commission screens filings and occasionally comments on MD&A disclosures, it cannot and does not review every report filed with the Commission for compliance with mandatory disclosure rules. *Contra* Petr. Br. 45. Instead, it "undertakes *some* level of review of each reporting company at least *once every*

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[19] SEC, Fiscal Year 2022 Congressional Budget Justification, Annual Performance Plan 2 ("SEC FY 2022 Report"), *available at* https://www.sec.gov/files/fy-2022-congressional-budget-justification-annual-performance-plan_final.pdf.

[20] *Compare id*. at 4 (in 2022, SEC had fewer than 4,400 staff); Goldman Sachs, About US (reporting nearly 40,000 employees), https://www.goldmansachs.com/about-us/.

[21] SEC FY2022 Report at 26-27.

three years."[22] Moreover, the SEC is in no position to detect when a company has *omitted* material trends or uncertainties from its reports. It has no way of knowing, for example, whether new regulations from the International Maritime Organization will reduce the demand for No. 6 oil, or whether that will significantly decrease demand for Macquarie's services.

It is understandable, then, that the SEC brings only a handful of actions each year for violations of disclosure rules.[23] It appears that only one or two include alleged violations of Item 303.[24] The infrequency of enforcement actions reflects the Commission's lack of resources and inherent inability to know when a company has omitted important Item 303 information, not that it believes compliance is adequate. *Contra* Petr. Br. 45-46.

Even setting aside the SEC's inability to adequately prevent and deter Item 303 violations on its own, Petitioners' argument ignores the remedial purpose of the Section 10(b) private right of action. Congress has recognized investor confidence in our markets depends not only on a belief that violations

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[22] SEC, Filing Review Process, https://www.sec.gov/divisions/corpfin/cffilingreview (emphasis added).

[23] Cornerstone Research, SEC Enforcement Activity: Public Companies and Subsidiaries 2-3 ("Cornerstone FY2022 Report") (38% of the 67 enforcement actions brought in FY2022 involved reporting and disclosure violations), https://www.law.nyu.edu/sites/default/files/SEC-Enforcement-Activity-FY2022-Update.pdf.

[24] See Br. Petr. 43, *Leidos, Inc. v. Indiana Pub. Retir. Sys.*, 2017 WL 2729693 (2017).

will be relatively infrequent, but also on the assurance that when violations do occur and inflict substantial losses, investors will have a realistic means for being made whole. SEC enforcement cannot come close to fulfilling that role. In FY2022, for example, the SEC recovered approximately $194 million in disgorgement remedies for injured investors.[25] In comparison, private litigation secured $4 billion in settlements.[26]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[25] *See* Cornerstone FY2022 Report at 9.

[26] NERA, Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review 13, 20 (Jan. 24, 2023).