No. 22-1165

IN THE

Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORP., 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 OF FORMER SEC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former commissioners and senior officials of the U.S. Securities and Exchange Commission (SEC) who served under both Republican and Democratic Presidents and went on to serve as leaders in industry and academia. Collectively, they have decades of experience in administering and enforcing the securities laws. Signatories include:

- Arthur Levitt, Jr., who served as Chairman of the SEC from 1993 to 2001, was appointed by President William J. Clinton. He has also served as Chairman of the American Stock Exchange and Chairman of the New York City Economic Development Corporation.
- Luis A. Aguilar, who served as a Commissioner of the SEC from 2008 to 2015, was originally appointed by President George W. Bush, and then reappointed by President Barack Obama. He has been a partner at McKenna Long & Aldridge, LLP (subsequently merged with Dentons US LLP); Alston & Bird LLP; Kilpatrick Townsend & Stockton LLP; and Powell Goldstein Frazer & Murphy LLP (subsequently merged with Bryan Cave LLP). During his time at the SEC, Commissioner Aguilar represented the Commission as its liaison to both the North American Securities Administrators Association and to the Council of Securities Regulators of the Americas. He also served as the primary sponsor of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution.

the SEC's first Investor Advisory Committee. He began his legal career as an attorney at the SEC.

- Bevis Longstreth, who served as a Commissioner of the SEC from 1981 to 1984, was appointed twice by President Ronald Reagan. He has also served as an Adjunct Professor at Columbia University School of Law and on various boards, including the Board of Governors of the American Stock Exchange and the Pension Finance Committee of The World Bank.
- Jane B. Adams, who served as Acting Chief Accountant of the SEC in 1998, and Deputy Chief Accountant from 1997-2000. She advised and represented the Chairman and Commission on accounting, disclosures, financial reporting, and corporate governance matters.
- Andy Bailey, who served as Deputy Chief Accountant of the SEC from 2004-2005. He was also the President of the American Accounting Association and the Head of the Department of Accountancy at the University of Arizona, as well as at the University of Illinois.
- Matthew Cain, Ph.D., who served as Advisor to Commissioner Robert J. Jackson in 2018, and previously as a financial economist at the SEC. He currently is a Senior Fellow at the Berkeley Center for Law and Business.
- Parveen P. Gupta, who served as the Academic Accounting Fellow in the Division of Corporation Finance of the SEC from 2006-2007. He is currently the Clayton Distinguished Professor of Accounting at Lehigh University and a member of the Investor Advisory Group of the PCAOB. From 2007-2016, he served as Chair of Lehigh's Department of Accounting in the School of Business.

- Micah Hauptman, who served as Counsel to Commissioner Caroline A. Crenshaw from 2020-2022. He currently is the Director of Investor Protection at the Consumer Federation of America.
- Renee Jones, who served as the Director of the Division of Corporation Finance at the SEC from 2021 to 2023, leading a team of more than 400 lawyers, accountants, and analysts. She currently is a Professor of Law and Dr. Thomas F. Carney Distinguished Scholar at Boston College Law School.
- Lynn E. Turner, who served as Chief Accountant of the SEC from 1998-2001, and principally advised the Chairman and Commission on accounting, disclosures, financial reporting, and corporate governance matters. He was appointed to the U.S. Treasury's Committee on the Auditing Profession and has also chaired the audit committees of various public companies and mutual funds.
- Thomas R. Weirich, who served as the Academic Accounting Fellow in the Office of Chief Accountant of the SEC from 1990-1991. He was also Chair of the Michigan Board of Accountancy and head of the School of Accounting at Central Michigan University, where he is currently Professor of Accounting.[2]

Together, *amici* have a longstanding interest in the integrity of public markets and the deterrence of, and legal remedies for, materially misleading statements and omissions.

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[2] The views expressed by *amici* do not necessarily reflect the views of the institutions with which they are or were associated, whose names are included solely for identification purposes.

SUMMARY OF ARGUMENT

Truthful public disclosures are at the core of the Securities Act of 1933 and the Securities Exchange Act of 1934, the statutory mandates of the Securities and Exchange Commission (SEC), and the integrity of U.S. stock markets. These disclosures take a number of forms for public companies, including management's discussion of known trends or uncertainties that are reasonably likely to materially impact the company's finances, known as Item 303 of Regulation S-K. When disclosures turn out to be untruthful, various causes of action – most pertinently here, under Rule 10b-5 – create civil liability in order to protect investors and deter fraud. Over the years, these requirements and incentives have collectively fostered integrity in U.S. markets and helped make them the envy of the world.

In real world equity markets, retail and institutional investors, as well as finance professionals, continue to rely on required disclosures (including those required by Item 303) as central sources of truthful information when pricing and buying shares.

The case at bar involves a company asserting that Item 303 disclosures are exempt from Rule 10b-5's general prohibition against materially misleading statements and omissions. That is incorrect as a matter of statutory construction. Moreover, in *amici*'s experience, Petitioners' arguments are inconsistent with the SEC's longstanding position – as reflected in administrative proceedings, sanctions, settlements, and federal cases.

The Commission has long underscored the importance of accurate, material disclosures under Item 303. Failure to comply with Item 303 by omitting material information is prohibited under Rule 10b-5. Petitioners seek to sidestep this logical consequence by

raising the specter of over-disclosure. But the SEC has repeatedly highlighted that *only* material items can go into Management's Discussion and Analysis (MD&A) – and expressly condemned unnecessary or duplicative disclosures precisely because they frustrate investor understanding.

Furthermore, this Court should treat with skepticism the parade of horribles Petitioners warn of today. In a recent SEC rulemaking that clarified aspects of Item 303, Petitioners' leading *amici* (SIFMA and the Chamber of Commerce) largely supported the rule changes. Moreover, their comment letters were noticeably silent about the risk of litigation or an onslaught of 10b-5 claims. Those same *amici* filed a comparable amicus brief in *Leidos* in 2017 (just two years earlier), and surely were aware of factors bearing upon litigation risks related to Item 303. Such inconsistencies should give this Court pause. If Petitioners' *amici* have unearthed new concerns about the scope of Item 303, then the appropriate forum to address them would be a formal rulemaking process – not a cramped reinterpretation of securities law.

Lastly, *amici* respectfully urge this Court to consider the ways in which Section 10(b) and Rule 10b-5 remain significant tools for private litigants and public officials alike. The availability of private enforcement through civil litigation is a critical supplement to SEC enforcement efforts, particularly in light of the SEC's significant resource constraints.

ARGUMENT

Item 303 is an important part of a broader disclosure framework that has long undergirded federal securities laws. The Securities Act of 1933 and the Securities Exchange Act of 1934 "were enacted primarily to prevent the recurrence of those abuses . .

. responsible for the October 1929 stock market crash and [] depression." Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L.J. 311, 315-16 (1974) (citations omitted). The "overriding concern of Congress in passing the legislation was to provide protection for small investors, many of whom had lost their savings by investing in the securities markets in the late twenties and early thirties." *Id.*[3]

To this day, markets and investors rely on company disclosures when pricing and buying shares – including disclosures about known trends and uncertainties that would be reasonably likely to have a material effect on the registrant's future results or financial condition, as required by Item 303. "Directly or indirectly, millions of financial professionals, institutional investors, and small investors depend on the quality, timeliness, and reliability of the disclosure mandated by the Federal securities laws." Remarks of David S. Ruder, Chairman of the U.S. Securities and Exchange Commission, *The Evolution of Disclosure Regulation by the Securities and Exchange*

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[3] "The choice of disclosure as the primary means of policing the securities industry reflected the influence . . . of Louis D. Brandeis," who "had argued persuasively that publicity was the most effective means of . . . curtailing self-dealing and conflicts of interest." *Id.* at 318-319 (citing Louis Brandeis, *Other People's Money and How the Bankers Use It* 99-105 (1914)). "Moreover, disclosure could [deter both illegal and unethical conduct] with a minimum of government intervention . . . ." *Id.* at 319 (citations omitted). *Accord* Anderson, *supra*, at 319 ("Roosevelt and his advisers, believing that the nation's economic recovery depended on a revival of confidence in, and within, the private sector, saw the immediate goal of financial reform as the restoration of the public's confidence in the securities markets."); *id.* at 319-320 ("the financial community generally considered a disclosure statute acceptable.") (citations omitted).

Commission at 2 (March 10, 1988). This Court has recognized that if "investors cannot rely upon the accuracy and completeness of issuer statements, they will be less likely to invest, thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike." *Basic Inc. v. Levinson*, 485 U.S. 224, 235 n.20 (1987) (citation omitted). Likewise, the legislative record from the 1930s reflects that Congress recognized the importance of disclosures for market pricing dynamics.[4]

This overarching logic of disclosure and private enforcement applies squarely to Item 303:

> if [a] company has had three great quarters but knows that the bottom is about to fall out of its business, a reasonable investor would find that information material. Although we do not require issuers to disclose everything, disclosures full of gaps are useless to investors and the public and undermine the issuer-related purposes of disclosure.

See Hillary A. Sale, *Disclosure's Purpose,* 107 Geo. L.J. 1045, 1055 (2019). In today's markets, disclosure of trends and uncertainties are critical for high-flying stocks that are trading at large multiples of annual earnings (e.g., due to momentum or assumptions about global developments). *See also* Denise Voigt Crawford

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[4] See H.R. Rep. No. 1383, 73rd Cong. 2d Sess. 11 (1934) (although "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, . . . truth does find relatively quick acceptance on the market."); S. Rep. No. 1455, 73rd Cong. 2d Sess. 68 (1934) ("Insofar as the judgment of either [buyer or seller] is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of the law of supply and demand.").

et al., *A Rule 10b-5 Private Right of Action for MD&A Violations?*, 43 No. 3 Securities Regulation Law Journal ART 1 (2015) ("There is no reason to fear that allowing a[] [Rule 10b-5 action to enforce the disclosure requirements of] Item 303 [] would broaden the pool of Rule 10b-5 plaintiffs in a negative way. With the extensive network of judicial checks and balances on these claims, there would not be an influx of vexatious litigation from investors relying on MD&A.").

Amici's collective experience underscores that the robust application of Section 10(b) and Item 303 remains deeply important. As SEC commissioners and staff have long stressed, effective disclosure requirements are essential to making American securities markets the envy of the world. *See, e.g.*, Chair Mary Jo White, *Testimony on SEC Budget*, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives (May 7, 2013), https://www.sec.gov/news/testimony/2013-ts050713mjwhtm ("The U.S. markets are the envy of the world precisely because of the SEC's work effectively regulating the markets, requiring comprehensive disclosure, and vigorously enforcing the securities laws."); Commissioner Robert J. Jackson Jr., *Statement on Volcker Rule Amendments* (Sept. 19, 2019), https://www.sec.gov/news/public-statement/statement-jackson-091919 ("The benefits of investor trust in our financial markets are hard to quantify, but they're doubtless a reason why our markets are the envy of the world."); Chairman Christopher Cox, *Statement to SEC Staff* (Aug. 4, 2005), https://www.sec.gov/news/speech/spch080405cc.htm ("So why is it that our markets are the gold standard? It boils down to trust. Investor confidence.

The integrity of the system. The world has faith in our markets because it has faith in the integrity of the people minding the store."); Commissioner Allison Herren Lee, *Investing in the Public Option: Promoting Growth in Our Public Markets*, Remarks at The SEC Speaks in 2020 (Oct. 8, 2020), https://www.sec.gov/news/speech/lee-investing-public-option-sec-speaks-100820#_ftn3 ("[T]he federal securities laws provide robust registration and reporting requirements, which have created a comparatively level playing field for investors—even the smallest investors—and allowed them to participate in returns in our public markets, often described as the envy of the world."). This Court too, has confirmed that the "importance of accurate and complete issuer disclosure to the integrity of the securities markets cannot be overemphasized," *Basic*, 485 U.S. at 235 n.12 (citation omitted).

The Court should be mindful to avoid adverse implications for the even-handed application of federal securities laws and for the SEC's enforcement capabilities. While this case directly concerns a private litigant's ability to sue under Section 10(b), if the Court rules that Item 303 does not create a duty enforceable under Rule 10b-5, then the net effect would be to seriously undermine enforcement of Item 303 as a general matter, to the detriment of investor protection overall.

As detailed below, the overriding importance of accurate, material disclosures is specifically embedded in the regulatory history of Item 303 (*infra* § I) and generally served by the ability to bring private claims (*infra* § II).

I. THE HISTORY OF ITEM 303 CONFIRMS IT IS AN ENFORCEABLE DISCLOSURE REQUIREMENT UNDER RULE 10b-5.

Regulation S-K Item 303, 17 C.F.R. § 229.303, sets out certain disclosure requirements governing "Management's Discussion and Analysis of Financial Condition and Results of Operations" ("MD&A"). "[T]he MD&A requirements are intended to provide in one section of a filing, material historical and prospective textual disclosure enabling investors and other users to assess the financial condition and results of operations of the registrant with particular emphasis on the registrant's prospects for the future." Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, 67 Fed. Reg. 3746, at 3747 (Jan. 25, 2002) ("SEC's 2002 Statement") (citing Securities Act Release No. 6835, 54 Fed. Reg. 22427 (May 18, 1989).

Pursuant to Item 303, "[d]isclosure is mandatory where there is a known trend or uncertainty that is reasonably likely to have a material effect on the registrant's financial condition or results of operation." SEC's 2002 Statement, 67 Fed. Reg. at 3747 & n.8 (citing Securities Act Release No. 6835, 54 Fed. Reg. 22427, 22429 (May 18, 1989)).[5]

Thus, "[a] clear policy undergirds Item 303: giving meaningful information to investors that is also understandable. MD&A helps ensure investors are

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[5] "In contrast, optional forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend, or uncertainty." *Id.* (citing Securities Act Release No. 6835, 54 Fed. Reg. 22427, 22429 (May 18, 1989)).

confident in the companies they choose for investment. It also promotes a more efficient market. And it provides a context within which investors can analyze financial statements. For these reasons, Item 303 is 'paramount' and 'generally the most important portion of a company's disclosure.'" *Crawford*, *supra* (citing Exchange Act Release No. 34-45149, 2001 WL 1583348, *2 (Dec. 12, 2001) ("Investors may lose confidence in a company's management … if sudden changes in its financial condition and results occur, but were not preceded by disclosures . . . . "); Critical Accounting Policies, Exchange Act Release No. 34-45907, 2002 WL 970847, *2 (May 10, 2002)). The SEC states that "[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, is the discussion and analysis of known trends, demands, commitments, events, and uncertainties." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350, 68 Fed. Reg. 75,056 at 75,061 (Dec. 19, 2003) ("SEC's 2003 Guidance").

A. The SEC's Enduring Position is That Violating Item 303 or Other Disclosure Requirements Can Predicate a Rule 10b-5 Claim

The SEC has consistently made clear that a violation of Item 303 can serve as the basis for a Rule 10b-5 action—and that, fundamentally, it would make no sense to permit fraud by omission but not by commission. That view is entitled to an appropriate measure of deference. *See, e.g.*, *SEC v. Zanford*, 535 U.S. 813, 819-20 (2002); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

Since the adoption of the current MD&A framework in the 1980s, *see* Securities Act Release No. 6231, 45 Fed. Reg. 63630 (Sept. 2, 1980), the SEC has instituted administrative proceedings and imposed various sanctions under Rule 10b-5 due to omissions from an MD&A in violation of Item 303. *See, e.g.*, *In re Cypress Bioscience Inc.*, Exchange Act Release No. 37,701, 62 SEC Docket 2286, 2292 (Sept. 19, 1996) (finding Rule 10b-5 violation based on issuer's Form 10-Q that included false financial statements and "failed to disclose" information "in the MD&A section" in violation of Item 303); *In re Valley Sys., Inc.*, Exchange Act Release No. 36,227, 60 SEC Docket 541, 544 (Sept. 14, 1995) (similar); *In re Westwood One, Inc.*, Exchange Act Release No. 33,489, 55 SEC Docket 2350, 2359 (Jan. 19, 1994) (similar); *In re Fitzpatrick*, Exchange Act Release No. 34,865, 57 SEC Docket 2178 (Oct. 20, 1994) (concluding that executives had violated Rule 10b-5 by filing an MD&A that omitted material information in breach of Item 303); *id.* at 2182-2183 ("[T]he information omitted from First Capital Holdings' 1990 Form 10-K was clearly material," and the defendants "knew or were reckless in not knowing of the disclosure failures."). Similarly, the SEC's action against an industrial equipment company for failure to disclose material information about a foreign subsidiary is another example of a 10b-5 claim. *See In re Caterpillar, Inc.*, SEC Accounting and Auditing Enforcement Release No. 363, [1991-1995 Accounting and Auditing Enforcement Releases Transfer Binder] Fed. Sec. L. Rep. (CCH) 73,830, at 63,055-56 (Mar. 31, 1992).

Likewise, the SEC has maintained the same position in administrative actions that feature other disclosure requirements. *See, e.g.*, *In re Ciro, Inc.*, Exchange Act Release No. 34,767, 57 SEC Docket 1896 (Sept. 30,

1994) (finding a company violated Rule 10b-5 by filing Forms 10-K that "failed to disclose that [the company's president and chief executive officer] had filed for personal bankruptcy in October 1987, as required by Item 401(f) of Regulation S-K.").

The SEC has long adopted the same position in federal courts. *See, e.g.*, SEC Amicus Br. at 7, *Basic, supra* (No. 86-279) (1986) (arguing that a duty to disclose exists for these purposes "where regulations promulgated by the Commission require disclosure."). *See also id.* at 7 n.3 (citing 17 C.F.R. § 229.504 (1987)) (providing an example involving Item 504 of Regulation S-K). *See also SEC v. CVS Caremark Corp.*, No. 14-cv-177 (D.R.I. Apr. 8, 2014) (omission of information required to be disclosed in prospectus supplements); *SEC v. Conaway*, 698 F. Supp. 2d 771, 822 (E.D. Mich. 2010) (noting SEC's arguments that a company violated Rule 10b-5 by "fail[ing] to disclose in the MD&A that [it] had experienced a material liquidity event in the third quarter."). *Accord* D. Ct. Doc. 127, at 5, *Conaway, supra* (No. 05-cv-40263), 2009 WL 1719312 (arguing that "Item 303 can be the basis for a Rule 10b-5 action" because it "provide[s] a duty to disclose, such that liability may apply to omitted material information if scienter exists.").

The SEC's position is not only abiding, it is also sensible: "Rule 10b-5 is a good vehicle for Item 303 claims because it is so well-established. A private cause of action under Rule 10b-5 is a 'judicial oak which has grown from little more than a legislative acorn.'" Crawford, *supra* (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975)).

B. The SEC has Stressed the Importance of Accurate, Material Disclosures Under Item 303, and Warned Against Over-Disclosure

Decades of SEC guidance has repeatedly underscored the significance of specific, accurate, and material disclosures made pursuant to Item 303. Even though the SEC designed Item 303 to be "intentionally general, reflecting [the SEC's] view that a flexible approach elicits more meaningful disclosure and avoids boilerplate discussions,"[6] there is no ambiguity in what constitutes a required disclosure under Item 303.

The SEC's most recent amendment of Item 303, which "reflects a standard that is consistent with longstanding Commission guidance and . . . current practice," states that "[w]hen considering whether disclosure of a known event or uncertainty is required, the analysis is based on materiality and what would be considered important by a reasonable investor in making a voting or investment decision." *See* Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, at 2093 & n.159 (Jan. 11, 2021) ("SEC's 2021 Final Rule").[7] An analysis of

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[6] SEC Guidance Regarding Management's Discussion & Analysis of Financial Conditions & Results of Operations, Exchange Act Release No. 26831, 54 Fed. Reg. 22,427, 22,436 (May 24, 1989) ("SEC's 1989 Guidance").

[7] Petitioners express much ado about why Item 303 is supposedly "incompatible with a private right of action because its materiality standard is different from the materiality standard this Court established for claims brought under § 10(b)," Pet. Br. 41. But this cannot carry the day, since the word "material" arises in different sentences, with different prerequisites and distinct direct objects. *Compare* 17 C.F.R.

whether disclosure of a known event or uncertainty is reasonably likely "should be made objectively and with a view to providing investors with a clearer understanding of the potential material consequences of [ ] known forward-looking events or uncertainties. Because the analysis does not call for disclosure of immaterial or remote future events, it should not result in voluminous disclosures or unnecessarily speculative information." *Id.* at 2093-94 (citations omitted).

Petitioners' *amici* argue that enforcement of Item 303 under Rule 10b-5 will cause issuers and/or registrants to over-disclose. *See, e.g.*, Br. of Washington Legal Foundation at 23; Br. of Society of Corporate Governance at 18; Br. of SIFMA, et al. at 16. But throughout numerous revision to MD&A requirements over the years, the SEC has repeatedly underscored that *only* material items can go into MD&A. Moreover, the SEC has clearly warned against

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229.303(a)(1) and (3)(ii) (Item 303 requires disclosure of known trends or uncertainties that are "reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way," or that "the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income."); *with* 17 C.F.R. § 240.10b-5(b) (Rule 10b-5 makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading."). The term "material," which arises thousands of times in the portions of Federal Register dedicated to the SEC, is obviously context-specific. *See, e.g.*, Black's Law Dictionary, *Material* (11th ed. 2019) ("2**.** Having some logical connection with the consequential facts []. 3. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential []"). *Federal Register :: Document Search Results 'material,'* https://www.federalregister.gov/documents/search?conditions%5Bagencies%5D%5B%5D=securities-and-exchange-commission&conditions%5Bterm%5D=material#.

over-disclosure under Item 303 – a regime under which companies have successfully operated, with sensible SEC (and private) enforcement, for decades. Commission guidance expressly provides that issuers "avoid[] unnecessary information overload . . . where disclosure is not required and does not promote understanding," SEC's 2003 Guidance, at 75,060. "Companies must determine, based on their own particular facts and circumstances, whether disclosure of a particular matter is required in MD&A. However, the effectiveness of MD&A decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information. *Id.* at 75,061. Indeed, the SEC has long provided that companies "de-emphasize (or, if appropriate, delete) immaterial information that does not promote understanding." *Id.* at 75,059. "[T]he discussion in MD&A should change over time to maintain an appropriate focus on material factors" *Id.* at 75,059. Practically, MD&A gives managers the opportunity to present the company to the marketplace through their own eyes. The SEC operates on the presumption that managers are (or at least strive to be) competent and rational, and that excessively disclosing non-material information (apart from being contrary to SEC requirements) would also, standing alone, not generally serve managerial interests. For all these reasons, the specter of "over-disclosure" is unwarranted.[8]

All told, *amici*'s extensive experience at the helm of the SEC confirms a basic truism: that affirmative

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[8] Moreover, companies are already required to make various disclosures in their Forms 10-K and 8-K filed with the SEC, all of which are subject to Section 10(b) and Rule 10b-5. Yet this has not led to a proliferation of over-disclosure, and there is no reason to believe it would occur here either.

disclosure requirements (Item 303) and prohibition against misleading omissions (under Section 10(b) and Rule 10b-5) are naturally related in some cases. The Commission stressed that "Companies must provide specified material information in their MD&A, and they must also provide other material information that is necessary to make the required statements, in light of the circumstances in which they are made not misleading." *Id.* at 75,060-61 & nn.32 & 33 (specifically citing Exchange Act Rule 10b-5). Indeed, the SEC instructs companies to evaluate even "material information (historical or forward-looking) . . . to determine whether it is required to be included in MD&A, either because it falls within a specific disclosure requirement or because its omission would render misleading the filed document in which the MD&A appears." *Id.* at 75,060 (emphasis added).

C. The Legislative History of Rule 10b-5 Confirms its Breadth

Petitioners seek to effectively shrink the scope of Rule 10b-5 to become narrower than Section 11 of the Securities Act. But that theory cannot be reconciled with the legislative history of the Securities Act. Specifically, Petitioners invoke Section 11 to contend that it creates liability for omitting a material fact that is required to be stated, whereas Rule 10b-5 does not. Pet. Br. 25-26.

But selectively quoting Section 11 cannot obscure the fact that Rule 10b-5 contains significant, added language:

- Rule 10b-5 prohibits "the use of any means or instrumentality of interstate commerce, or of the mails . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made,

in the light of the circumstances under which they were made, not misleading . . . ." 17 C.F.R. § 240.10b-5(b) (emphasis added).

- Section 11 creates a cause of action relating to any registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a) (emphasis added).

On its face, Rule 10b-5 applies to a somewhat broader range of conduct, since it covers any communications and a variety of "circumstances," not only registration statements. *See also Slack Techs., LLC v. Pirani*, 598 U.S. 759, 762 (2023) ("Together, the Securities Act of 1933 [] and the Securities Exchange Act of 1934 [] form the backbone of American securities law. The first is 'narrower' and focused 'primarily' on the regulation of new offerings.") (citations and internal quotations omitted).

The legislative history bears this out too. An earlier, House version of Section 17(a) of the Securities Act is generally mirrored by Rule 10b-5. The House version of Section 17(a) did not include the "circumstances" language and a proposed Senate amendment contained rather different language about omissions. *Compare* H.R. 5480, 73d Cong., 1st Sess. (May 3, 1933) *with* S. 875 [Report No. 47], 73d Cong., 1st Sess. (Apr. 17, 1933). The "circumstances" language appears to have emerged from a May 1933 conference report reconciling the House and Senate bills:

> The Senate amendment imposed liability upon persons making false and deceptive statements in connection with the distribution or sale of a security. The House bill made the liability depend upon the making of untrue statements or

> omissions to state material facts. This phrase has been clarified in the substitute 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 where no circumstances exist to make the omission in itself misleading.

H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess. (May 20, 1933) (emphasis added). This too, indicates that Section 17—and by logical extension, Rule 10b-5—was meant to cover a broader set of facts and "circumstances" than only certain omissions in registration statements.

Congress has repeatedly codified Rule 10b-5(b), first in 1995 with the enactment of the Privacy Securities Litigation Reform Act, 15 U.S.C. § 78u–4(b)(1)(B), and again in 2002 with the Sarbanes Oxley Act, 15 U.S.C. § 7241(a)(2). *See also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (Congress has "ratified the implied right of action" under Rule 10b-5, recognizing it as a "prominent feature of federal securities regulation.").

Moreover, in light of the corporate scandals that spurred Sarbanes Oxley, Congress chose to require CEOs and CFOs of publicly traded companies to personally certify in periodic filings that "based on the officer's knowledge, the report does 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." 15 U.S.C. § 7241(a)(2) (emphasis added). SEC's final rules made clear that CEO certification includes the material accuracy of "financial information" which "includes . . . management's discussion and analysis of

financial condition and results of operations and other financial information in a report." 67 FR 57276, https://www.federalregister.gov/d/02-22572/p-93. Industry and SEC leadership understood this requirement to mean that a CEO must certify as to the material accuracy of the MD&A, including trends and other disclosures required by Item 303.

At bottom, if Congress meant to curtail Rule 10b-5 in the way Petitioners envision, then surely it would have indicated as much – either in 1933, 1995, 2002, or sometime in the last century. But the legislative history and text of Rule 10b-5 indicate the opposite: liability for material omissions should be construed fairly broadly to encompass Item 303, which CEOs are already required to personally certify.

D. Petitioners' *Amici* Largely Supported Recent Revisions to Item 303 and Did Not Raise Concerns About its Enforcement or Breadth

Over the years, the SEC has undertaken a deliberative process to modernize and simplify Item 303, *see generally* Practical Law, *Restructured Item 303 (MD&A) of Regulation S-K: Chart* (Jan. 11, 2021), with considerable input from industry leaders and the public – including several of Petitioners' *amici.* These rulemakings have been orderly and extensive.

Notably, *amici* in this very case, SIFMA and the Chamber of Commerce, largely hailed the latest changes to Item 303 as part of the SEC's notice and comment period in 2020. *See, e.g.*, Securities Industry and Financial Markets Association, *Re: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information* (Apr. 20, 2020), https://www.sec.gov/comments/s7-01-20/s70120-7130286-216134.pdf (hereinafter "SIFMA Comment

Letter"); *id.* at 1 ("we support the Commission's overall approach"); *id.* at 2 ("The Proposal reflects consideration of our and others' suggestions, and we are generally supportive of the proposed amendments"). SIFMA's suggestions were technical and marginal.[9] *Accord* U.S. Chamber of Commerce, *Re: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information; 17 CFR Parts 210, 229, 239, 240 and 249; Release Nos. 33-10750, 34-88093, IC-33795; File No. S7-01-20; RIN 3235-AM48* (May 4, 2020), https://www.sec.gov/comments/s7-01-20/s70120-7149390-216380.pdf (hereinafter "Chamber Comment Letter); id. at 2 ("We generally support the proposed amendments reflected in the Proposing Release."); *id.* at 2-3 (listing proposed amendments that the Chamber supported).

Conspicuously, in their lengthy comment letters to the SEC, *amici* did not raise grave concerns about private litigation or claims under Section 10(b) or otherwise suggest that the sky is falling. Indeed, SIFMA did "urge the Commission to consider the increased risk of Section 11 claims when crafting [a] critical accounting estimates requirement," SIFMA Comment Letter, *supra*, at 5, and to "revisit the safe harbor landscape as it applies to MD&A," *id.* at 9, but raised no such risks regarding Section 10(b) or about Item 303 generally. The Chamber, too had no difficulty

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[9] SIFMA Comment Letter at 2 (underscoring that their "letter [] reiterate[d] our support for certain proposals, suggest[ed] that the Commission provide certain clarifications that we believe would aid registrants and other offering participants in complying with the Proposal, suggest[ed] certain modifications to the critical accounting estimates requirement[,] and recommend[ed] that the Commission provide explicit and robust safe harbor protection").

in raising a host of concerns about climate-related disclosure, although it acknowledged "the Commission did not directly solicit comments . . . on the topic," Chamber Comment Letter, *supra* at 3; *id* at 11-12.

Their silence is deafening for an added reason: *amici* were well aware, since at least the *Leidos* case, about the prospect of Rule 10b-5 claims in conjunction with Item 303. In 2017, the Chamber and SIFMA filed a joint *amicus* brief in *Leidos*, raising various concerns about Item 303 as it existed at the time, and exposure to "nuisance lawsuits," Brief of the Securities Industry and Financial Markets Association and the Chamber of Commerce as *Amici Curiae* Supporting Petitioner, *Leidos Inc. v. Indiana Public Retirement System, et al.*, 2017 WL 2859944 at 22 (June 28, 2017). But just over two years later, when given the opportunity to weigh in on the SEC's 2020 rulemaking (and to actually have done so), these litigation concerns were nowhere to be found. Writ large, the Chamber and SIFMA are not known to be timid about voicing their fears about litigation risks to the SEC or other federal agencies.[10]

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[10] *See, e.g.,* SIFMA Comment Letter, *Re: File No. S7-10-22 The Enhancement and Standardization of Climate-Related Disclosures for Investors* at 4 (June 17, 2022) (critiquing regulation that it said would "dramatically increase litigation risk for registrants."), https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-Comment-Letter-Climate.pdf; SIFMA Comment Letter, *Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions* at 6 (Aug. 9, 2017) (critiquing rules as "burdensome and fraught with litigation risk"), https://www.sifma.org/wp-content/uploads/2017/08/SIFMA-Submits-Comments-to-the-DOL-on-the-RFI-Regarding-the-Fiduciary-Rule-and-Prohibited-Transaction-Exemptions.pdf; Chamber of Commerce Letter, *Re: Definition of the Term "Fiduciary" (RIN 1210-AB32); Best Interest Contract Exemption (ZRIN 1210-ZA25)* (Sept. 24, 2015) at 2, 8 (discussing "significantly increased risk of class action litigation"),

Having supported the recent changes to Item 303, Petitioners' *amici*'s effort to neuter the enforcement of the same regulation should give this Court pause. If Petitioners' *amici* or other industry leaders have newfound concerns about Item 303's scope or enforcement mechanisms, then a formal rulemaking process (with a fulsome notice and comment period) is the proper way to voice, analyze, and address those issues. Completely eliminating Section 10(b) liability for Item 303 omissions is a bridge too far in the absence of such a process.

II. PRIVATE ENFORCEMENT OF SECURITIES LAWS, INCLUDING SECTION 10(b), IS IMPORTANT, UNIQUE, AND COMPLEMENTARY TO OTHER SEC EFFORTS.

"This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313, (2007) (citing *Dura Pharmaceuticals, Inc. v. Broud*o, 544 U.S. 336, 345 (2005); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Private securities fraud actions provide "a most effective weapon in the enforcement" of securities laws and are "a necessary supplement to Commission action." *Borak*, 377 U.S. at 432. *See also Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) ("repeatedly emphasiz[ing]" that private causes of action are "most effective" and "necessary") (quoting *Borak*) (cleaned up).

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https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00370.pdf.

The availability of private enforcement through civil litigation, under Section 10(b) and Rule 10b-5, is a vital complement to SEC enforcement efforts, particularly due to the real resource constraint facing the SEC. The Commission and its senior leadership have repeatedly informed this Court of its view that private actions serve an essential role, including through its filings in *Erica P. John Fund, Inc. v. Halliburton Co.*, 2014 WL 466853 (2011); *Merck & Co., Inc., v. Reynolds*, 2009 WL 3439204 (2010); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 2007 WL 460606 (2007); and *Dura Pharmaceuticals v. Broudo*, 2004 WL 2069564 (2005). As then-Chairman Richard Breeden explained in congressional testimony, the SEC "does not have adequate resources to detect and prosecute all violations of the federal securities laws," private actions thus "perform a critical role in preserving the integrity of our securities markets," and such actions are "also necessary to compensate defrauded investors." *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing and Urban Affairs*, 102d Cong. 1st Sess. 15-16 (1991).

The complementary relationship between the SEC and private plaintiffs bears out in litigation too. "It is telling that the SEC has consistently supported private class actions as a necessary supplement to public enforcement." James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 1 Cal. L. Rev. 115, 178 (2012) (citing A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 Notre Dame L. Rev. 1073, 1085 (2005) ("With a few minor exceptions . . . the SEC has sided with the plaintiffs")).

Scholars of business and economics confirm that "[s]ince the inception of the federal securities laws, the government's broad enforcement authority has been

complemented by private causes of action." James D. Cox, Randall S. Thomas & Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737, 738 (2003). Particularly so since across the history of the SEC, in "several respects, we might conclude that the total volume of SEC enforcement proceedings is quite modest compared to those possible." *Id.* at 751. "The actual distribution of judicial and administrative enforcement cases among types of violations reflects the overriding priorities the SEC must maintain in light of its limited resources." *Id.* Private class actions are sometimes brought in parallel to SEC actions, which can result in greater information sharing and recovery for shareholders that are "statistically larger and settled more quickly. . . ." *Id.* at 777. *See also* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 36 (1975) ("[T]he budgets of public enforcement agencies tend to be small in relation to the potential gains from enforcement").

In principle and in practice, history has borne out that having multiple enforcers of federal securities laws leads to both constructive complementarity and in some instances, competition. Park, *supra*, at 128 (summarizing the scholarship on decentralized enforcement and noting that this "vigorous system of enforcement . . . deters fraud and therefore contributes to the liquidity and transparency of [American] markets.").

CONCLUSION

For the foregoing reasons, this Court should affirm.

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