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 CONSUMER ADVOCATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief is filed by groups that advocate on behalf of consumers whose financial wellbeing depends on a fair and stable market not skewed by securities fraud. Amici include groups that work to ensure that the civil justice system is an effective tool for accountability and redress as well as groups that represent consumers and consumer groups directly.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions including securities actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has long maintained an Access to Justice Project, which seeks to ensure that civil courts are an effective tool that people with less

[1] Pursuant to Rule 37.6, amici affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amici, their members, or their counsel has made a monetary contribution to its preparation or submission.

power can use to win just and equitable outcomes and hold to account those with more power. Towards that end, Public Justice has an interest in ensuring that investors, including everyday retail investors and institutional investors that administer retirement funds for public employees, are able to access court and seek redress for the harm caused by securities fraud.

The Consumer Federation of America ("CFA") is an association of more than 250 nonprofit consumer organizations. CFA was established in 1968 to advance consumers' interest through research, advocacy, and education. CFA works to ensure that the millions of Americans who rely on investments to fund their retirement or other life goals are entitled to a fair financial marketplace that provides strong protections against fraud, manipulation, and abuse, investor disclosures that are accurate and reliable, and effective recourse when they are victims of wrongdoing.

Better Markets, Inc. ("Better Markets") is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through participation in the rulemaking process at the financial regulatory agencies, Congressional testimony, amicus curiae briefs, independent research, and public advocacy. It fights for reforms that stabilize our financial system, prevent financial crises, and protect investors from fraud and abuse, ultimately so that our financial system serves all Americans more equitably. Better Markets has focused not only on the need for strong rules and laws governing the financial markets but also on the need for strong *enforcement* of those rules and laws through

both government actions and private lawsuits by investors seeking recovery for fraud and other violations of the law.

SUMMARY OF ARGUMENT

This case is about whether injured investors can hold a publicly traded company accountable for securities fraud when it deliberately and deceptively violates its duty to disclose material information in securities filings. They can. In arguing to the contrary, Petitioners seek to capitalize on unfounded fears about private enforcement in describing the decision below as radically expanding the ability of investors to enforce the Securities and Exchange Commission's ("SEC") disclosure requirements. But Petitioners mischaracterize both the theory of liability here and the actual risk of increased litigation or disclosure. Allowing claims like the one here to go forward is consistent with this Court's prior decisions as well as the purpose of the securities laws to promote honest and stable capital markets. American investors, big and small, deserve their day in court and the judgment below should be affirmed.

1. This Court has long recognized that private enforcement of the securities laws, including the Securities Exchange Act of 1934, is essential to investor confidence and thus the proper functioning of capital markets. Accordingly, for decades, the Court has allowed investors to bring securities-fraud actions under § 10(b), which broadly prohibits any "deceptive" devices, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, which implements § 10(b). These private actions provide redress to investors, provide a critical supplement to the necessarily limited ability of the government to

police securities fraud, and serve as an additional deterrent against securities fraud.

2. The theory of liability here—an omission of mandated material information from periodic annual and quarterly securities filings—fits comfortably within the existing scope of § 10(b) and Rule 10b-5. Even while Congress and this Court have expressed concern over frivolous securities-fraud class actions, both have continued to recognize the vital importance of meritorious private actions. In response, Congress and the Court have ensured there are adequate safeguards in place to dissuade the former and promote the latter.

Petitioners overstate the novelty of the claim here, accusing Respondents of advancing a fraud claim based on "pure omission." Whatever that phrase means, it has no bearing on the law or facts here. While silence alone is generally not misleading, it can be when there is a duty to disclose. Petitioners had such a duty here. SEC Regulation S-K prescribes the content of the narrative portions of periodic reports filed by securities issuers. Under Item 303 of that regulation, these reports must include management's discussion and analysis ("MD&A") of the issuer's financial condition and results of operations, including "known trends or uncertainties" reasonably likely to have a material impact on the company. It takes no stretch of the imagination, or the private right of action, to understand that if an MD&A omits material facts required under Item 303, reasonable investors can be misled into concluding that those facts do not exist or that the stated facts provide a complete picture of the company's financial prospects. This is quintessentially "deceptive" under § 10(b).

Petitioners also mischaracterize the nature of the decision below, contending that in the Second Circuit, investors can enforce Item 303 alone. Not so. Investors alleging a violation of Item 303 must *also* adequately allege the elements of a § 10(b) and Rule 10b-5 claim, including the stringent scienter and materiality elements.

3. Finally, Petitioners and their amici's policy arguments do not justify construing § 10(b)'s prohibition on deception to exempt materially misleading omissions of information required by Item 303. There are sufficient safeguards in place to protect against abusive or frivolous litigation and the over-disclosure of information. Congress chose a philosophy of full disclosure as the primary means of policing the securities industry. Thus, it is the immunity Petitioners seek that would run contrary to Congressional purpose and harm public confidence in the markets, not private litigation.

ARGUMENT

I. Private Actions Are Essential to Furthering the Purposes of the Securities Laws to Protect Investors and Stabilize the Market.

Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934 in "the aftermath of the market crash in 1929." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976). This Court has long recognized the "legislative philosophy" underlying these laws: "There cannot be honest markets without honest publicity." *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1985) (quoting H.R. Rep. No. 73-1383, at 11 (1934)). To that end, the securities laws were designed "to provide investors with full disclosure of material information" in order "to

protect investors against fraud," and to impose "carefully drawn express civil remedies and criminal penalties" in order "to promote ethical standards of honesty and fair dealing." *Ernst & Ernst*, 425 U.S. at 194-95 (citing, *inter alia*, S. Rep. No. 792, at 1-5 (1934)).

From the beginning, then, Congress and this Court have understood that achieving the substantive aims of the securities laws—a stable market worthy of public confidence—depends heavily on a robust system of enforcement. For its part, the SEC "is provided with an arsenal of flexible enforcement powers." *Id.* at 195 (citations omitted). And the Department of Justice polices securities fraud through criminal prosecutions. *See* 15 U.S.C. §§ 78j(b), 78ff. But the federal government is not alone in these efforts. Both Congress and this Court have long recognized that enforcement by private parties plays an essential role in policing securities fraud, too.

Specifically, for more than 50 years, this Court has authorized private parties to enforce § 10(b) and Rule 10b-5 under an implied private right of action. *See Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b).") (citing, *inter alia*, *Tcherepnin v. Knight*, 389 U.S. 332 (1967)); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (citing cases recognizing the private cause of action under § 10(b) and Rule 10b-5); *Ernst & Ernst*, 425 U.S. at 196 ("[T]he existence of a private cause of action for violations of the statute and the Rule is now well established."). By the late 1980s, this Court

explained, "[j]udicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5[.]" *Basic*, 485 U.S. at 230-31. Indeed, Congress "ratified the implied right of action" when it imposed certain statutory requirements on private actions in the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 165 (2008). And since then, this Court has consistently acknowledged the private right of action. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958 (2021) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (*Halliburton II*)).

In its cases affirming the private right of action, the Court has "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[.]" *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) (emphasis added); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013) (same); *see also Basic*, 485 U.S. at 231 (describing private securities-fraud actions as an "essential tool for enforcement"); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (describing private securities-fraud actions as a "necessary supplement" to SEC enforcement actions) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964)); *Blue Chip Stamps*, 421 U.S. at 730 (same).

This makes sense. Resource constraints mean the

federal government simply cannot police all securities fraud alone. In the words of one former commissioner, "The truth of the matter is that the SEC[] does not, and will not, ever have enough resources to investigate all of the fraud cases that exist."[2] This functional limitation has real consequences. During the Great Recession, for example, the SEC warned in a budget proposal, "We may be forced to decline to prosecute certain persons who violate the law; settle cases on terms we might otherwise not prefer; name fewer defendants in a given action; restrict the types of investigative techniques employed; or conclude investigations earlier than we otherwise would."[3] These challenges are not new. In fact, resource constraints have also been important considerations for the Court when permitting private enforcement of other sections of the Securities Exchange Act. *See J. I. Case Co.*, 377 U.S. at 432-33.

Private enforcement fills this gap in two meaningful ways. First, injured investors can go after those market actors who engage in securities fraud but whose conduct may not rise to a level that attracts

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[2] *See* Comm'r Luis A. Aguilar, U.S. Sec. & Exch. Comm'n, *Statement by Commissioner: Defrauded Investors Deserve Their Day in Court* (Apr. 11, 2012), https://www.sec.gov/news/statement/2012-spch041112laahtm; *see also, e.g.*, Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 Brook. J. Corp. Fin. & Com. L. 289, 321 (2009) ("[T]he SEC will never have enough resources to adequately protect investors against fraud, manipulation, and inadequate or inaccurate corporate disclosure.").

[3] *See* James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. Times (July 16, 2011), https://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html.

government attention. *See Berner v. Lazzaro*, 730 F.2d 1319, 1322 (9th Cir. 1984) ("The resources of the [SEC] are adequate to prosecute only the most flagrant abuses."), *aff'd sub nom. Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985). Thus, private actors can seek accountability and "recover their losses" while also ensuring that securities fraud that hasn't necessarily attracted government attention does not fall through the cracks. *See Tellabs, Inc.*, 551 U.S. at 320 n.4 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006)).

Second, as this Court has recognized for decades, the threat of private securities actions serves as a more potent deterrent than government enforcement alone. *See, e.g.*, *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986). Even when the SEC does exercise its discretion, expending the resources to bring a case, investors are rarely made whole. Securities laws limit the monetary sanctions the SEC can seek to civil fines and disgorgement based on the amount of ill-gotten gains. 15 U.S.C. §§ 78u-1, 78u-2. While the SEC can potentially distribute these funds to harmed investors, the benefits of fraud rarely equal the victims' aggregate losses. *See S.E.C. v. Contorinis*, 743 F.3d 296, 296 (2d Cir. 2014). By contrast, the damages paid in private securities actions are tethered to victims' losses. 15 U.S.C. § 78u-4(e). Thus, private actions not only compensate injured investors, but also deter future fraud by increasing the amount of exposure to potential damages.[4]

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[4] *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in

Footnote continued on next page

II. A Claim Based on an Omission Under Item 303 Fits Comfortably Within the Existing Scope of the Private Right of Action Under § 10(b) and Rule 10b-5.

Notwithstanding the long-recognized and well-established role of private investor actions, Petitioners and their supporting amici present the Court with a crabbed view of § 10(b) and Rule 10b-5. They claim that the decision below radically expands the private right of action to encompass omitted disclosures under Item 303, thereby undermining Congress's decision to "accept[] the § 10(b) private cause of action . . . but extend it no further" when it enacted the PSLRA. Pet. Br. 8 (quoting *Stoneridge*, 552 U.S. at 166). They're wrong, both on the significance of the PSLRA and on the novelty of the theory of liability at issue here.

1. Petitioners erroneously argue that the PSLRA froze in place the scope of fraud actionable under § 10(b). Pet. Br. 8. To be sure, Congress passed the PSLRA out of frustration with "perceived abuses of the § 10(b) private action," including "nuisance filings." *See Tellabs, Inc.*, 551 U.S. at 320 (citations omitted). But at the same time, it adopted measures to enhance private actions. For example, a key "innovation" of the law was to adopt new procedures to appoint lead plaintiffs and lead counsel in shareholder actions, "aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead

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the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions.") (citations omitted).

plaintiffs." *Id.* (citing H.R. Rep. No. 104-369, at 33-34 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 730, 732-33; S. Rep. No. 104-98, at 11 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 690). Congress explained that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Rep. No. 104-369, at 34. Thus, Petitioners and their supporters overlook that while Congress sought to discourage meritless securities class actions by imposing, for example, heightened pleading standards, it simultaneously doubled down on the importance of preserving meritorious private actions.

This Court has likewise recognized this balance. Thus, in *Stoneridge*, it "declined to extend Rule 10b-5 liability to an entirely new category of defendants." *See Halliburton II*, 573 U.S. at 275 (describing, *inter alia*, *Stoneridge*, 552 U.S. at 157, 159). But as to the substance of a Rule 10b-5 claim and contrary to Petitioners' implication, this Court has *not* suggested that any defendant can evade liability simply because the precise fact pattern of its fraud was not addressed in the case law before 1995. Instead, actions that do "not alter the elements of the Rule 10b-5 cause of action . . . maintain the [private right of] action's original legal scope." *Id.* This is perfectly consistent with the PSLRA and *Stoneridge*. And as explained below, the Second Circuit similarly has not altered the elements of a Rule 10b-5 action.

2. After underselling the private right of action, Petitioners and their supporting amici overstate the novelty of the theory of liability in this case. They say that § 10(b) and Rule 10b-5 do not authorize liability

based on "pure omission." *See* Pet. Br. 16. In other words, they read § 10(b) and Rule 10b-5 to cover omissions only to the extent "an affirmative statement [] is misleadingly incomplete." Washington Legal Foundation ("WLF") Amicus Br. 11. This reading, however, misses the point on the law and is wrong on the facts.

Starting with the law, the touchstone of § 10(b) is deception. Rule 10b-5 implements § 10(b)'s prohibition on the use of any "deceptive device" by barring, as relevant here, "any untrue statement of a material fact" or the omission of "a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b-5(b). That is, § 10(b) and Rule 10b-5 prohibit omissions when the material facts omitted are "necessary" to avoid misleading investors. One such circumstance when disclosure of a material fact is "necessary" is when there is a predicate "duty to disclose." *See Basic*, 485 U.S. at 239 n.17. Item 303 imposes such a duty. Filing a report that purports to disclose all information required by the SEC but that deliberately or recklessly omits material facts required under Item 303 misleads reasonable investors into believing there are no additional "trends or uncertainties" to be disclosed. That is particularly so here, where issuers certify compliance with reporting requirements, including Item 303. *See* 18 U.S.C. § 1350. Indeed, by definition, the omission of required disclosures renders the certification false and misleading. A materially misleading omission under Item 303 can be "deceptive" under § 10(b), pure and simple.

Petitioners repeatedly violated their duty to disclose. Take the reports at issue here. Respondents

have adequately alleged that, year after year, Petitioners' annual and quarterly reports omitted any mention of the exposure International-Matex Tank Terminals—a bulk liquid-storage and handling service provider—faced as a result of coming regulatory changes designed to reduce reliance on "6-Oil," a blend of heavy and lighter oils that must be stored in a particular way. As it turns out, storing 6-Oil was 40% of IMTT's storage volume and its main source of revenue, a fact also concealed from investors. That's *exactly* the kind of information investors like Respondents want to know and exactly the kind of fact they'd expect to be included in an MD&A pursuant to Item 303. By filing periodic reports that certified they were providing the information required by the SEC, but that omitted any mention of risks related to 6-Oil, Petitioners omitted material facts that were necessary to avoid misleading investors into thinking they had nothing else to disclose under Item 303. So, they engaged in a "deceptive" act under § 10(b).

But even if Rule 10b-5 required more than "pure" omissions, Respondents have in fact identified specific statements rendered misleading by Petitioners' omission of material facts under Item 303. For example, Petitioners' 2015 and 2016 Form 10-K and Form 10-Q filings disclosed various trends and uncertainties but not *all* material facts required by Item 303—such as the regulatory-driven decrease in demand for 6-Oil and that storage of 6-Oil made up 40 percent of IMTT's core business. Instead of disclosing these known facts, Petitioners emphasized the "continued strong demand for the products stored" and "strong demand patterns across petroleum storage markets[.]" JA73 ¶ 140; JA135 ¶ 275; *see also*

JA136-37 ¶¶ 276, 277.

As these filings make clear, it will often be the case that misleading omissions of disclosures required in an MD&A will not only render the entire MD&A misleading but will also render particular statements in that narrative analysis misleading too. For this reason, too, Petitioners' focus on "pure omissions," as though the omission is made in isolation, is misplaced.

3. Finally, Petitioners compound their mischaracterizations of § 10(b) and the theory of liability by contending that the decision below allows § 10(b) claims "based *solely* on a violation of Item 303," which has a lower materiality standard than that set forth in *Basic*. Pet. Br. 41-42 (emphasis added); *see also id.* 43 (contending that the "incompatibility between Item 303 and *Basic* materiality should block *any* private claim based on a violation of Item 303"). Far from it. Rather, the decision below correctly explained that the theory of a misleading omission of a fact required by Item 303 fits comfortably within the legal contours of § 10(b), Rule 10b-5, and this Court's precedent.

In *Stratte-McClure v. Morgan Stanley*, the Second Circuit made emphatically clear that a "violation of Item 303's disclosure requirements can *only* sustain a claim under Section 10(b) and Rule 10b-5 if the allegedly omitted information satisfies *Basic*'s test for materiality." 776 F.3d 94, 103 (2d Cir. 2015). The court therefore required plaintiffs in a case like this to "*first*" show that the disclosure in question was required under Item 303 and "*then*" to prove all the elements of § 10(b), including "that the omitted information was material under *Basic*[.]" *Id.*

(emphases added); *see also, e.g.*, *id.* at 106 ("For Defendants' breach of their Item 303 duty to be actionable under Section 10(b), Plaintiffs were required adequately to plead each element of a 10b–5 securities fraud claim."). The decision below faithfully adhered to that settled Second Circuit law, concluding first that the complaint sufficiently alleged that disclosure was required under Item 303 and only then concluding that the complaint sufficiently alleged the elements of § 10(b), including the higher materiality under *Basic*. Pet. App. 9a, 10a, 11a-12a.

III. Allowing Item 303 Omissions to Support § 10(b) Claims Has Not, and Will Not, Result in a Flood of Meritless Actions or Over-disclosure.

A. Affirming the Decision Below Will Not Result in a Flood of Abusive or Frivolous Private Litigation.

Petitioners and their supporting amici warn that affirming the decision below will "open the floodgates" of private litigation. *See* Pet. Br. 3; *see also* WLF Amicus Br. 24; Securities Industry and Financial Markets Association et al. ("SIFMA") Amicus Br. 19-20; Atlantic Legal Foundation ("ALF") Amicus Br. 22. But this flood has not come to pass in the eight years since the Second Circuit's decision in *Stratte-McClure*. In fact, new filings of federal securities class actions, including Rule 10b-5 actions, have declined for four consecutive years and are down by approximately 30 percent since the Second Circuit

made clear that a § 10(b) claim can be based on an Item 303 omission.[5]

There won't be a flood now for two principal reasons.

1. Congress already put limits in place to respond to concerns about the abuse of securities class actions. As explained above, in enacting the PSLRA, Congress struck a careful balance between preventing abuse and encouraging meritorious securities class actions that operate to compensate victims, deter fraud, and promote confidence in capital markets. *See* H.R. Rep. No. 104-369, at 31-32. These reforms include heightened pleading requirements, a "safe harbor" for forward-looking statements, limits on recoverable damages and fees, restrictions on the selection of lead plaintiffs and counsel, sanctions for frivolous lawsuits, and stays on discovery pending the resolution of any motion to dismiss. *See Amgen Inc.*, 568 U.S. at 476 (citation omitted). A claim premised on the omission of a disclosure required by Item 303 would, of course, be subject to these reforms.

Such a claim also would still be required to satisfy the elements of § 10(b), further limiting the risk of frivolous lawsuits. For instance, a plaintiff must still show scienter and materiality, which often operate to defeat private actions. In *Stratte-McClure*, for example, even while recognizing that Item 303 imposes the type of duty that can give rise to liability under §10(b), the Second Circuit concluded that the plaintiff in that case had failed to establish a "strong

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[5] *See* Janeen McIntosh, Svetlana Starykh, and Edward Flores, *Recent Trends in Securities Class Action Litigation: 2022 Full Year Review* 2 (NERA Economic Consulting 2023).

inference" that the defendant acted with the requisite mental state. 776 F.3d at 102, 106-07.

Not all omissions in violation of Item 303 will be a "material omission" under § 10(b) either. Item 303 imposes a duty to disclose trends or uncertainties that are "reasonably likely to cause a material change in the relationship between costs and revenues" and the SEC has clarified that this "material change" is *not* the same as this Court's materiality standard for § 10(b) claims. 17 C.F.R. § 229.303(b)(2)(ii); *see* Pet. Br. 41-42; Resp. Br. 42. Under this Court's precedent, to satisfy materiality when the claim is based on omitted information, there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32.

2. The remaining attacks on a purportedly overly litigious securities-fraud bar likewise miss the mark. One group of amici describe corporations as "sitting ducks for strike suits," SIFMA Amicus Br. 21; another claims the "in terrorem" effect of costly discovery and reputational damage coerces corporations to settle even meritless fraud claims, ALF Amicus Br. 20. These attacks ignore the realities of most plaintiff-side litigation. As a practical matter, securities-fraud cases are expensive for harmed investors to litigate and counsel is often compensated on a contingency basis. They also usually bear the costs of litigation upfront, which means this work is sustainable only by pursuing meritorious claims involving substantial harm.

In preserving the private right of action, Congress chose to deter securities fraud by preserving access to the courts for defrauded investors, while putting in place safeguards to mitigate the risk of abuse. Petitioners' concerns about how Congress struck that balance should be addressed to that body. *See Basic*, 485 U.S. at 239 n.17; *see also Amgen Inc.*, 568 U.S. at 476-77.

B. Affirming the Decision Below Will Not Lead to Over-disclosure.

Finally, Petitioners and their amici raise the specter of bloated corporate filings filled with trivial information added only to reduce the risk of § 10(b) liability. *See, e.g.*, SIFMA Amicus Br. 11. They claim this outcome, which they say will burden issuers and investors alike, is directly contrary to this Court's warning against disclosure requirements of "essentially useless information that a reasonable investor would not consider significant." *Id.* (quoting *Basic*, 485 U.S. at 234).

Those dire predictions stem from the misinterpretation that the decision below authorizes private enforcement of Item 303 violations alone. But as the decision below explained, a plaintiff must plead and prove *all* the elements of § 10(b), including the materiality standard under *Basic*, not merely that an MD&A omitted information. Pet. App. 8a (citing *Stratte-McClure*, 776 F.3d at 101-04). This Court specifically calibrated the materiality standard not to be "too low" out of "concern[] that a minimal standard might bring an overabundance of information within its reach," leading management to "bury the shareholders in an avalanche of trivial information." *Basic*, 485 U.S. at 231 (quoting *TSC Indus., Inc. v.*

Northway, Inc., 426 U.S. 438, 448-49 (1976)).

What is more, Congress and the SEC have taken additional measures to ensure that MD&As "avoid unnecessary information overload . . . where disclosure is not required and does not promote understanding." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release Nos. 33-8350, 34-48960, FR-72, 68 Fed. Reg. 75056, 75060 (Dec. 29, 2003). For its part, Congress has directed the Commission to modernize and simplify Regulation S-K, which includes Item 303. *See* Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312, § 720002 (2015). The SEC recently did so, promulgating amendments "intended to modernize, simplify, and enhance the MD&A disclosures for investors while reducing compliance burdens for registrants." Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, 2087 (Jan. 11, 2021). Importantly, and as Petitioners acknowledge, the SEC reviews public filings and engages with registrants to address potential deficiencies, including with respect to Item 303. Pet. Br. 45.

Petitioners and their amici fail to offer any evidence suggesting these controls are not working. Nor do they offer evidence of "over-disclosure" resulting from the decision by the Second Circuit, which has recognized § 10(b) claims based on material Item 303 omissions for the past 8 years.

More fundamentally, as the core "legislative philosophy" underlying the securities laws holds, "honest markets" depend on "honest publicity." *Basic*,

485 U.S. at 230 (citation omitted). Congress therefore "substitute[ed] a philosophy of full disclosure for the philosophy of *caveat emptor*," *Kokesh v. S.E.C.*, 581 U.S. 455, 458 (2017) (internal quote omitted), choosing "disclosure as the primary means of policing the securities industry," Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L.J. 311, 318 (1974); *see also* Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules that Require Firms to Make Periodic Public Disclosures*, 88 Indiana L. J. 151, 178-90 (2013) (summarizing evidence that the SEC's mandatory disclosure regime is value enhancing); *Tcherepnin*, 389 U.S. at 336 ("One of [the] central purposes" of the Securities Exchange Act "is to protect investors through the requirement of full disclosure by issuers of securities[.]"). So even while cautioning against requirements for the disclosure of trivial or useless information, this Court has hewed to the fundamental importance of disclosure to maintaining public confidence in the market.

Item 303 disclosures serve this purpose. An MD&A is the "keystone" to an integrated disclosure system and one of "the most important elements necessary to an understanding of a company's performance." Commission Guidance, 68 Fed. Reg. at 75061. Investors make use of the information required by Item 303 to, for example, evaluate noted contingencies that could impact the company's future outlook.

"Information is the lifeblood of our securities markets." Selective Disclosure & Insider Trading, Exchange Act Release Nos. 33-7787, 34-42259, IC-

24209, 64 Fed. Reg. 72590, 72591 (Dec. 28, 1999). Registrants like Petitioners are duty bound to disclose the information mandated by Item 303 and this Court should not allow them to violate that duty with impunity based on unsupported policy arguments layered on misconceptions about the elements of a § 10(b) and Rule 10b-5 claim.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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