No. 16-581

IN THE

Supreme Court of the United States

LEIDOS, INC.,

Petitioner,

v.

INDIANA PUBLIC RETIREMENT SYSTEM, INDIANA STATE TEACHERS' RETIREMENT FUND, AND INDIANA PUBLIC EMPLOYEES' RETIREMENT FUND,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under § 10(b) of the Securities Exchange Act of 1934 and its accompanying Rule 10b–5, an omission may be actionable only if the omitted information is necessary to make an affirmative statement "not misleading." Thus, "companies can control what they have to disclose under these provisions by controlling what they say to the market." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 (2011). In the decision below, however, the Second Circuit held that private plaintiffs can sue a company for omitting from a public filing information allegedly required by Item 303 of Regulation S-K—one of thousands of disclosure requirements in regulations promulgated by the Securities and Exchange Commission—even if the alleged omission did not make any affirmative statement in the filing misleading.

The question presented is:

Whether Item 303 of SEC Regulation S-K creates a duty to disclose that is privately enforceable under § 10(b) of the Securities Exchange Act and SEC Rule 10b–5.

PARTIES TO THE PROCEEDING

In addition to Leidos, Inc. (formerly known as SAIC, Inc.), Kenneth C. Dahlberg, Walter P. Havenstein, Mark W. Sopp, Deborah H. Alderson, and Gerard Denault were initially named defendants in the district court, but all claims against them were dismissed, and dismissal of those claims has been affirmed on appeal.

Respondents, lead plaintiffs in the district and circuit courts, are the Indiana Public Retirement System, Indiana State Teachers' Retirement Fund, and Indiana Public Employees' Retirement Fund.

RULE 29.6 STATEMENT

Petitioner Leidos, Inc. was named SAIC, Inc. when this litigation was filed. Petitioner continued to do business as SAIC until September 2013, when it changed its name to Leidos and spun off a separate, publicly traded company under its former name. Leidos is a publicly held corporation, and no publicly held company holds 10% or more of Leidos' stock.

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BRIEF FOR PETITIONER

Petitioner Leidos, Inc. (formerly known as SAIC, Inc.) respectfully submits that the judgment below should be reversed.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–26a) is reported at 818 F.3d 85. The opinions of the district court (Pet. App. 27a–87a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2016. A timely petition for rehearing was denied on August 2, 2016. Pet. App. 88a–89a. The petition for a writ of certiorari was filed on October 31, 2016 and granted on March 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent portions of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b–5, 17 C.F.R. § 240.10b–5; Item 303 of Regulation S-K, 17 C.F.R. § 229.303; and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), are reproduced in the Appendix, *infra*, at 1a–8a. These provisions, and others, are reproduced in full in the Joint Appendix at JA332–815.

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[1] At the time of the events in question, the company was known as SAIC, and will be referred to as SAIC in this brief (as it was in the opinions below). SAIC has since changed its name to Leidos and spun off a separate, publicly traded company under its former name.

STATEMENT

In June 2011, SAIC publicly disclosed a government investigation regarding allegations of overbilling by certain former employees. In this putative class action, SAIC investors complain that this information should have been disclosed nine weeks earlier. Their theory is that risks related to the then-nascent investigation constituted a "known trend or uncertainty" that SAIC was required to disclose under Item 303 of Regulation S-K, and that the omission of this information from the Management's Discussion and Analysis ("MD&A") section of SAIC's annual report on Form 10-K, filed on March 25, 2011, constituted securities fraud—even though the alleged omission did not render any statement actually made in the 10-K misleading.

The district court dismissed the complaint. Pet. App. 48a–49a. The Second Circuit reversed, holding (as relevant here) that Regulation S-K creates a duty to disclose enforceable by private plaintiffs, such that the omission of material information allegedly required to be disclosed under Item 303 may be actionable even if no other statement is thereby rendered misleading. Pet. App. 16a–17a (citing *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015)). Other circuits, in contrast, have held that such omissions are not actionable because Regulation S-K creates no duty enforceable by private plaintiffs. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014); *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000) (Alito, J.). The Court granted certiorari to resolve this conflict.

1. In 1971, this Court "acquiesced" to the longstanding practice of various lower courts that had

discerned an "implied" private right of action to enforce § 10(b) of the Securities Exchange Act of 1934. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577–78 n.1 (1979) (discussing *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)). Over time, that "legislative acorn" grew into a "judicial oak," and private securities-fraud litigation under § 10(b) quickly surpassed even the express remedies for fraud that Congress provided in the securities laws. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975). This expansionary period came to an end with the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. 104-67, 109 Stat. 737, which codified key elements of the private right as it then existed. This Court has since "caution[ed] against" further expansion, making clear that "[t]he decision to extend the cause of action" beyond the scope established in 1995 is "for Congress, not [this Court]." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

In 1942, the Securities & Exchange Commission adopted Rule 10b–5, which implements § 10(b) by prohibiting certain practices "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b–5. Omissions are actionable under Rule 10b–5 only when the omitted information is necessary to make an affirmative statement "not misleading." *Id.* § 240.10b–5(b). "Pure omissions"—*i.e.*, the absence from public filings of information *not* necessary to make any affirmative statement not misleading—have never been actionable under Rule 10b–5, with one exception. That narrow exception arises where there is a fiduciary-type "relationship of trust and confidence" such that one party has a direct duty to the other to disclose material information in connection with a transaction. *Chiarella v. United States*, 445 U.S. 222, 230

(1980); *see also Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972).

As this Court has explained, "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b–5." *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988). Pure omissions are not actionable under § 10(b) and Rule 10b–5 because the securities laws "do not create an affirmative duty to disclose any and all material information . . . [e]ven with respect to information that a reasonable investor might consider material." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44–45 (2011). Rather, public companies can "control what they have to disclose under these provisions by controlling what they say to the market" in the first place. *Id.* at 45. If the absence of information does not render any affirmative statement misleading, and no fiduciary-type duty founded in a relationship of trust and confidence requires the disclosure of the information, then nondisclosure of the information cannot trigger private liability under § 10(b) or Rule 10b–5.

2. In the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress acted "to protect investors against fraud" and "to impose regular reporting requirements" on companies with publicly traded stock. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). The Securities Act requires issuers to register their securities with the Commission and comply with the Commission's disclosure requirements. *See* 15 U.S.C. §§ 77f, 77j. The Exchange Act authorizes the Commission to impose regular reporting requirements on registrants. *See id.* § 78m(a). As this Court has explained, "[t]he 1933 Act regulates initial distributions of securities, and the 1934 Act for the most part regulates post-distribution trading." *Cent. Bank*

of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 171 (1994).

a. Section 13 of the Exchange Act requires registrants to comply with the Commission's reporting requirements, *see* 15 U.S.C. § 78m(a), and the Commission has promulgated an extensive array of financial and non-financial reporting requirements. The Commission's approach to disclosure has evolved over time (and continues to evolve).

For the first four decades after the Exchange Act was enacted, the Commission's "long-standing policy" was generally to limit disclosure to historical financials. SEC, Disclosure to Investors: A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts, at 96 (1969). This so-called "hard" financial information is now principally subject to the accounting and disclosure requirements of Regulation S-X, 17 C.F.R. § 210, and is not at issue in this case.

In 1977, the Commission adopted Regulation S-K and began to require disclosure in quarterly and annual reports of certain types of non-financial (or "soft") information, including projections. *See* SEC, Report on Review of Disclosure Requirements in Regulation S-K, at 10 (Dec. 2013). Regulation S-K currently comprises more than 600 separate disclosure requirements, divided among eleven subparts. *See* JA429–815 (reproducing Regulation S-K in its entirety).

From the outset, Regulation S-K has required registrants to include a "narrative description" or analysis of their business operations. *See* Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, Securities Act Release No. 33-5893, 42 Fed. Reg. 65,554, 65,554 (Dec. 23, 1977). The Commission has explained that this MD&A is "intended to

give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company." Management's Discussion & Analysis of Financial Condition and Results of Operations ("SEC Guidance"), 1989 WL 1092885, at *3 (May 18, 1989). Given that this sort of analysis is inherently subjective, the "MD&A requirements . . . are intentionally general, reflecting the Commission's view that a flexible approach elicits more meaningful disclosure and avoids boilerplate discussions." *Id*. at *1.

Item 303 comprises fourteen individual disclosure requirements for the MD&A including, as relevant here, that registrants disclose "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii). This provision requires disclosure when a known trend or uncertainty is "reasonably likely to have a material effect" on the results of continuing operations. SEC Guidance, 1989 WL 1092885, at *6 n.27. This standard requires management to identify a "trend" or "uncertainty" and predict the likelihood that it will come to fruition, then disclose the "trend" or "uncertainty" *unless* management can conclude that a material effect on continuing operations "is not reasonably likely to occur," *id.* at *6—a "threshold" that "is *lower* than 'more likely than not'" (*i.e.*, *less* than fifty percent). Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, 67 Fed. Reg. 3,746, 3,748 (Jan. 25, 2002). As the Commission has acknowledged, the "test for materiality approved by [this] Court in *Basic, Inc. v. Levinson*,

[485 U.S. 224] (1988), is inapposite to Item 303 disclosure." SEC Guidance, 1989 WL 1092885, at *6 n.27; *see also Oran*, 226 F.3d at 288 ("This [Item 303] test varies considerably from the general test for securities fraud materiality set out by the Supreme Court in [*Basic*]").

"The most significant and challenging public disclosures are those required by [I]tem 303 of Regulation S-K." 2 Thomas Lee Hazen, Law Sec. Reg. § 9:50 (7th ed. 2016); *see also* Mark S. Croft, *MD&A: The Tightrope of Disclosure*, 45 S.C. L. Rev. 477, 478 (1994) (noting that judgments about what to include in Item 303 are "open-ended and exceedingly complex"). Over the years, the Commission has issued at least six separate guidance documents on Item 303—for example, encouraging management to focus on reporting by business segment; to assess economic, industry, and specific company factors and uncertainties; and to avoid boilerplate discussions. The Commission has never addressed disclosure of the risks attendant to legal proceedings (including government investigations) in the context of Item 303.

b. The Commission has broad enforcement authority, including civil and criminal penalties, to police transgressions of § 13 and its implementing regulations. *SEC v. McNulty*, 137 F.3d 732, 740–41 (2d Cir. 1998); *see also*, *e.g.*, 15 U.S.C. §§ 78u–2(a)(2) (civil penalties), 78u–3(a) (cease and desist orders). These tools enable the Commission to calibrate its enforcement approach to promote meaningful disclosure and ensure compliance with the wide variety of requirements imposed by and pursuant to the securities laws. *See Basic*, 485 U.S. at 234.

The private rights of action afforded under the Exchange Act are considerably narrower than the Commission's enforcement authority. Private plaintiffs may bring claims only when a company has made untrue or misleading statements or engaged in other types of fraudulent conduct.

Section 18 of the Exchange Act is "the principal express civil remedy for misstatements in reports." *Touche Ross*, 442 U.S. at 574. That provision is limited to statements in required filings that are "false or misleading with respect to any material fact." 15 U.S.C. § 78r(a). Section 9 of the Exchange Act prohibits similarly fraudulent devices, including the manipulation of security prices by "mak[ing] . . . any statement which was . . . false or misleading with respect to any material fact." *Id.* § 78i(a)(4).

Section 10(b) of the Exchange Act—which Congress included as a "'catch-all' clause," *Hochfelder*, 425 U.S. at 203—makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). The Commission, in turn, has promulgated Rule 10b–5, which makes it unlawful "in connection with the purchase or sale of any security":

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

17 C.F.R. § 240.10b–5.

In the Securities Act, which regulates the initial registration and offering of securities from an issuer, Congress provided different private rights. In addition to imposing private liability for false and materially misleading statements, § 11 of the Securities Act creates private liability for "omitt[ing] to state a material fact required to be stated" in a registration statement. 15 U.S.C. § 77k(a). That provision is limited to the context of public offerings and "is subject to significant procedural restrictions not applicable under [the Exchange Act]." *Hochfelder*, 425 U.S. at 208–09. No provision of the Exchange Act creates a similar private right of action for aftermarket investors, *i.e.*, investors who purchase stock on the open market, rather than in an offering.

"As a check against abusive litigation," Congress enacted the PSLRA to govern private securities-fraud class actions. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). As relevant here, the PSLRA prescribes "[e]xacting pleading requirements" that require private "plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter." *Ibid.* (discussing 15 U.S.C. §§ 78u–4(b)(1), (2)). The PSLRA also codifies certain "[r]equirements for securities fraud actions," including to "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading." 15 U.S.C. § 78u–4(b)(1).

In *Stoneridge*, this Court recognized that, in enacting the PSLRA, Congress "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." 552 U.S. at 166. Thus, plaintiffs who could not sue, and defendants who could not be sued, in a private § 10(b) action before the PSLRA became effective in 1995 remain outside the scope of the private claim. *See id.* at 162–63. Similarly, if a particular "theory of liability" was not established before the PSLRA, it too cannot be enforced privately. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 146 (2011).

3. SAIC is a leading applied technology company that provides scientific, engineering, systems integration, and technical services in the defense, national security, energy, environmental, and health care sectors. JA54.

This lawsuit arises out of SAIC's contract with the City of New York, entered into in 2001 and completed in 2011, to develop and implement an automated time, attendance, and workforce management solution for City agencies. JA54. The project, known as "CityTime," is a cloud-based timekeeping system customized to the specific needs of 65 City agencies and 150 collective bargaining units. Pet. C.A. Br. 5. As of October 2011, CityTime supported more than 163,000 City employees and nearly 70 City departments. *Ibid.* It has been hailed by City officials, including former Mayor Bloomberg, as "a great success." *Ibid.*

During the course of the contract's performance, two (now former) SAIC employees, in conjunction with a subcontractor and several consultants working for the City, formulated an elaborate kickback scheme that resulted in overbilling and substantial ballooning

of the project's costs. JA55–59. The scheme's participants went to great lengths to conceal all aspects of their conduct from both the City and SAIC, as evidenced by their use of "shell companies and bank accounts located . . . abroad." Pet. C.A. Br. 6. Two employees were convicted or pleaded guilty to federal honest services charges for defrauding SAIC. JA65, 71.

Federal and local investigators uncovered the scheme and, in December 2010, prosecutors filed a criminal complaint against four (non-SAIC) consultants hired by and working for the City. JA56–57. Around the same time, SAIC received a grand jury subpoena to produce project-related documents for the investigation of the non-SAIC consultants, JA186, but investigators did not indicate or suggest that the company was a subject or target of the investigation, JA57. A *Daily News* blog post reported that, while Mayor Bloomberg announced a review of the project that would encompass SAIC's "future role," the City had not yet determined whether it had any possible claims. JA57–58.

In March 2011, SAIC filed its annual report on Form 10-K and did not say anything about the investigation. JA263–65, 816–1122. Although Plaintiffs assert that at the time of this filing SAIC knew it faced legal exposure based on its employees' involvement in the fraud, JA58, 209, no SAIC employee had been charged, JA58–59, and investigators had not informed SAIC that it might be liable for CityTime-related misconduct, JA190–91, 227.

On May 27, 2011, the government unsealed an indictment of SAIC's project manager. JA213. SAIC promptly disclosed this fact, and that the project manager had been terminated, in a current report on Form

8-K filed on June 2, 2011. JA1123, 1131, 1155–57. SAIC also disclosed the total amounts billed to date and outstanding, its offer to refund the City $2.5 million for time billed by the project manager, and that government investigations into CityTime were proceeding. JA1155–57. The same disclosures were made again on June 3, 2011, in SAIC's quarterly report on Form 10-Q. JA1158, 1198–1201. The courts below concluded that these June 2011 disclosures completely and accurately described the existence and extent of SAIC's potential exposure from the CityTime project. Pet. App. 23a; *see also id.* at 83a.[2]

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[2] In both June filings, after explaining that the company "ha[d] billed approximately $635 million under the contract through May 31, 2011," and noting that the company still "ha[d] outstanding[,] [CityTime-related] receivables of approximately $40 million," SAIC further disclosed:

> Statements have been issued from the City's Office of the Mayor and Office of the Comptroller indicating that the City's Department of Investigation would conduct a more extensive investigation regarding the CityTime contract, and that the City would withhold payment of amounts owing to the Company until the investigation was complete. In addition, these statements have also indicated that the City intends to pursue the recovery of costs associated with the CityTime program that the City's investigation reveals were improperly charged to the City. The City has not filed any claim against the Company or otherwise requested reimbursement or return of payments previously made to the Company and the Company has not recorded any liabilities relating to this contract other than the approximately $2.5 million it offered to refund. However, there is a reasonable possibility of additional exposure to loss that is not currently estimable if there is an adverse outcome. An adverse outcome of any of these investigations may result in non-payment of amounts owed to the Company, a demand for reimbursement of other amounts previously received by the

Eventually, two former SAIC employees and numerous City consultants and subcontractors pleaded or were found guilty of federal charges in connection with CityTime, including federal honest services charges for defrauding SAIC. JA69–72. SAIC ultimately agreed, as part of a deferred prosecution agreement with federal prosecutors, to pay approximately $500 million in restitution and penalties. JA60–61, 219–20.

4. Plaintiffs filed a putative securities-fraud class action, asserting two § 10(b) claims, among others, based on the absence of information regarding the CityTime investigation in the company's March 2011 10–K. JA263–65. The first claim—not at issue here—asserted that SAIC's statement of compliance with Generally Accepted Accounting Principles ("GAAP") was false because SAIC did not properly record or disclose a "loss contingency." JA231–34, 263–64. The second claim—which is at issue here—alleged that SAIC failed to disclose CityTime-related "trends or uncertainties," allegedly in violation of Item 303. JA228–30, 244, 265. Plaintiffs asserted that this omission was actionable under § 10(b) and Rule 10b–5 even though Plaintiffs did not "specify . . . statement[s]" in the annual report that were made misleading by this omission, as required by the PSLRA, 15 U.S.C. § 78u–4(b)(1). *See* JA229, 239–43, 263–66. The district court ultimately dismissed all claims for failure to state a claim. Pet. App. 49a, 86a; JA34, 37.

> Company under the contract, claims for additional damages, and/or fines and penalties, which could have a material adverse effect on the Company's consolidated financial position, results of operations and cash flows.

JA1155–57, 1198–1201.

The Second Circuit reversed in relevant part, reinstating both § 10(b) claims. Pet. App. 26a. That court had previously held in *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), that Item 303 creates an "affirmative duty to disclose" that "can serve as the basis for a securities fraud claim under Section 10(b)." *Id.* at 101. That "conclusion [wa]s at odds with the Ninth Circuit's recent opinion in [*NVIDIA*, 768 F.3d at 1056, which] held that Item 303's disclosure duty is not actionable under Section 10(b) and Rule 10b–5, relying on a Third Circuit opinion by then-Judge Alito, *Oran v. Stafford*, 226 F.3d at 275." *Id.* at 103. Following *Stratte-McClure*, and breaking ranks with *NVIDIA* and *Oran*, the court below held that a company's "failure to comply with Item 303 . . . can give rise to liability under Rule 10b–5." Pet. App. at 16a n.7 (quoting 776 F.3d at 101). The court then vacated the district court's judgment and remanded. *Id.* at 2a.

SUMMARY OF ARGUMENT

By codifying key elements of the private right of action to enforce § 10(b) and Rule 10b–5 in the PSLRA, Congress precluded judicial expansion of that right. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165–66 (2008). The decision below, which dramatically expands the private right of action by recognizing a new disclosure duty, transgresses this limitation.

I. Item 303 of Regulation S-K creates no duty to disclose that is actionable by aftermarket investors in a private class action under § 10(b) and Rule 10b–5.

A. "Silence, absent a duty to disclose," is not actionable under § 10(b). *Basic, Inc. v. Levinson*,

485 U.S. 224, 239 n.17 (1988). This Court has identified an actionable duty in only two circumstances.

1. The first circumstance involves the "duty not to mislead." *Basic*, 485 U.S. at 240 n.18. This duty confirms what the text of § 10(b) and Rule 10b–5 make clear: An omission is actionable under § 10(b) "only when" it renders an affirmative statement misleading. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). A pure omission—where no statement is made at all—is not actionable.

2. The second circumstance involves a fiduciary-type "duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Chiarella v. United States*, 445 U.S. 222, 230 (1980). This is the only duty this Court has recognized where the defendant makes no statement at all. But this Court has never applied this duty to an issuer, and liability under this type of duty has been premised not on a pure omission, standing alone, but on the defendant's fraudulent *use* of material information.

B. Neither established duty applies here because no affirmative statement in the March 2011 10-K is alleged to have been made misleading by the alleged omission, and SAIC did not owe a fiduciary-type duty to Plaintiffs to disclose the information. The Second Circuit instead created a third "duty"—where a reporting regulation (here, Item 303) requires disclosure. That was error.

1. Section 10(b) does not impliedly impose private liability for pure omissions because, when Congress wanted to impose such liability, "it had little trouble in doing so expressly." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733–34 (1975). In § 11 of

the Securities Act, Congress expressly created liability for false or misleading statements (as under Rule 10b–5) *and* for "omitt[ing] to state a material fact required to be stated" in a registration statement. 15 U.S.C. § 77k(a). Moreover, because the only other two anti-fraud provisions in the Exchange Act do not impose liability for pure omissions, it would be "anomalous" for the judicially created private § 10(b) action to do so. *Blue Chip Stamps*, 421 U.S. at 736.

No court of appeals had held before the PSLRA's enactment that regulatory requirements create a duty that is actionable under § 10(b), and a number of courts had rejected the contention. Because the purported "duty" recognized here was not actionable before Congress enacted the PSLRA, courts cannot make it actionable after. *Stoneridge*, 552 U.S. at 165–66.

2. The private right implied under § 10(b) does not authorize private enforcement of disclosure regulations promulgated under § 13(a) and other statutory provisions that do not afford a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 285–86 (2001). Rather, Congress's decision to charge the Commission—and the Commission alone—with the authority to enforce those provisions and their implementing regulations "suggests that Congress intended to preclude" private enforcement. *Id.* at 290. Indeed, if Plaintiffs' liability theory were accepted, then private plaintiffs could enforce thousands of technical reporting requirements.

II. Policy considerations "cannot override" the text and structure of the securities laws. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver,*

N.A., 511 U.S. 164, 188 (1994). But if the Court considers them, those factors weigh overwhelmingly against affirming the decision below.

A. Private enforcement of Regulation S-K would undermine the flexibility inherent in the Commission's disclosure regime. The Commission regulates the disclosure process informally, and generally prospectively, in order to encourage meaningful disclosure; its infrequent enforcement efforts typically proceed under § 13(a), not § 10(b). Private enforcement, in contrast, would threaten massive liability and incentivize registrants to make defensive and over-inclusive disclosures for any conceivable trend or uncertainty that might be second-guessed by the plaintiffs' bar. The results would be "an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking" by investors, *Basic*, 485 U.S. at 231 (citation omitted)—as well as premature disclosures that could engender competitive losses and market confusion.

B. Private enforcement of Item 303 would encourage hindsight-driven litigation. Allowing pure-omissions claims based on Item 303 would eviscerate the PSLRA's heightened pleading requirements by allowing a complaint to proceed without "specify[ing] each statement alleged to have been misleading" or "the reason why the statement is misleading," 15 U.S.C. § 78u–4(b)(1). Affirmance also would significantly increase uncertainty regarding corporate disclosure obligations. This case is a perfect example: The Second Circuit held that Item 303 required disclosure of the government's CityTime fraud investigation even though disclosure was not required under Item 103, which specifically pertains to "Legal Proceedings," 17 C.F.R. § 229.103.

ARGUMENT

"Silence, absent a duty to disclose" is not actionable under § 10(b) and Rule 10b–5. *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988). And "§ 10(b) and Rule 10b–5 do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). Rather, "companies can control what they have to disclose under these provisions by controlling what they say to the market." *Id*. at 45. This is true even if "a reasonable investor might consider" the information worth knowing. *Ibid.* The Second Circuit's decision threatens to unravel these fundamental tenets of securities litigation.

Plaintiffs complain that SAIC's March 2011 10-K was silent regarding the allegations of misconduct involving the CityTime project, which were disclosed just nine weeks later. To prevail on this claim, Plaintiffs must show that SAIC owed a privately enforceable duty to disclose the CityTime fraud in March rather than June. The Second Circuit erred as a matter of law in concluding that SAIC had such a duty.

This Court has previously recognized only two circumstances in which a defendant's silence (an omission) is actionable under § 10(b) and Rule 10b–5. First, silence is actionable where disclosure is "necessary 'to make . . . statements made . . . not misleading.'" *Matrixx*, 563 U.S. at 44 (first alteration in original) (quoting 17 C.F.R. § 240.10b–5(b)). This duty existed at common law and was codified in the PSLRA. *See* 15 U.S.C. § 78u–4(b)(1)(B). Second, silence may be actionable where a "relationship of trust and confidence between parties to a transaction" requires disclosure of the information. *Chiarella v. United States*, 445 U.S. 222, 230 (1980). As the Court has recognized

in a series of cases (none involving issuers), this fiduciary-type duty arises only from a pre-existing legal relationship. *See Salman v. United States*, 137 S. Ct. 420, 423 (2016); *United States v. O'Hagan*, 521 U.S. 642, 652 (1997); *Dirks v. SEC*, 463 U.S. 646, 657 (1983); *Chiarella*, 445 U.S. at 230; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972).

Plaintiffs do not (and cannot) allege that SAIC violated either of these two duties. The alleged omission did not render any statement in the March 2011 10-K misleading; nor did SAIC owe any fiduciary-type duty to investors to disclose this information.

Rather, Plaintiffs invoked—and the Second Circuit endorsed—a third category of duty that has never been recognized by this Court. The court of appeals held that the "known trends or uncertainties" disclosure requirement of Item 303 of Regulation S-K creates a duty that is privately enforceable by aftermarket investors in a private class action. Pet. App. 16a–17a; *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101–04 (2d Cir. 2015). That proposition has been rejected by every other court of appeals to have considered it. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014); *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Alito, J.). While the Commission's regulatory reporting requirements may be (and are) enforced by the Commission, they do not create a "duty" that can be enforced by private plaintiffs in an action under § 10(b) and Rule 10b–5. *See Oran*, 226 F.3d at 288 ("Such a duty to disclose must be separately shown") (internal quotation marks and citation omitted).

As this Court has explained, Congress put an end to judicial expansion of the § 10(b) private right of action when it codified the scope of that private right in the PSLRA. *Stoneridge Inv. Partners, LLC v. Sci-Atlanta, Inc.*, 552 U.S. 148, 165–66 (2008). Before the PSLRA was enacted in 1995, this Court had never held (or even hinted) that private plaintiffs could use § 10(b) or Rule 10b–5 to enforce SEC reporting requirements. The Second Circuit's conclusion that these requirements create a privately enforceable duty constitutes an impermissible expansion of the private right.

I. ITEM 303 DOES NOT CREATE A PRIVATELY ENFORCEABLE DUTY TO DISCLOSE.

This Court has "emphasi[zed]" that "companies can control what they have to disclose under [§ 10(b) and Rule 10b–5] by controlling what they say to the market" in the first place. *Matrixx*, 563 U.S. at 44–45. As the United States explained at oral argument in *Matrixx*, "under the securities laws there is no baseline duty to disclose for a company or manufacturer. A company creates a duty to disclose once they have spoken." Tr. of Oral Arg. at 49–50. That is because § 10(b) and Rule 10b–5 impose liability only for false and misleading *statements*, not for *omissions*. As even the Second Circuit has elsewhere recognized, "a 'pure omission' theory is . . . not strictly within the letter of Rule 10b–5." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 240 n.9 (2d Cir. 2016).

A. THIS COURT HAS RECOGNIZED ONLY TWO ENFORCEABLE DUTIES TO DISCLOSE.

"Silence, absent a duty to disclose" is not actionable. *Basic*, 485 U.S. at 239 n.17. This Court has found an actionable disclosure duty in only two scenarios,

and both involved something *more* than an omission itself. The first duty—"the ever-present duty not to mislead"—arises from the text of § 10(b) and Rule 10b–5, *Basic*, 485 U.S. at 240 n.18, and reflects the common-law rule that one who chooses to speak to the market must do so truthfully. *See Vivendi*, 838 F.3d at 240. The focus remains on the statement, not on the omission. *Basic*, 485 U.S. at 239 n.17 ("To be actionable, of course, a statement must also be misleading"). The only other situation in which this Court has found an omission actionable is where a fiduciary-type duty, arising out of a pre-existing "relationship of trust and confidence," requires disclosure of the information. *Chiarella*, 445 U.S. at 230. The focus in such cases is not on the omission, but on a fraudulent scheme or course of conduct: Liability arises where the defendant profits either by trading in violation of such a duty, *see ibid.*; *Affiliated Ute*, 406 U.S. at 153, or by misappropriating insider information in breach of such a duty, *see O'Hagan*, 521 U.S. at 652.

1. THE DUTY NOT TO MISLEAD BY AFFIRMATIVE STATEMENT.

The first duty this Court has recognized as actionable under § 10(b) is the "duty not to mislead." *Basic*, 485 U.S. at 240 n.18. As explained in the authorities cited by the *Basic* Court (*id.* at 239–40 nn.17–18), "[i]ssuers that make public statements are required . . . to speak truthfully and to include all material facts necessary to make the statements made . . . not misleading." *In re Carnation Co.*, Exchange Act Release No. 34-22,214, 1985 WL 547371, at *6 (July 8, 1985); *see also Flamm v. Eberstadt*, 814 F.2d 1169, 1178 (7th Cir. 1987) ("[H]e who speaks must tell the truth about important matters. The firm may be silent, . . . but may not lie . . . .").

This duty does not encompass the type of "pure omission" alleged by Plaintiffs here. Under § 10(b) and Rule 10b–5, an omission is actionable "only when" it renders an affirmative statement misleading. *Matrixx*, 563 U.S. at 44. Congress confirmed this limitation in the PSLRA. These statutory provisions "control[]" the analysis. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994).

a. Section 10(b) does not mention omissions at all, but simply makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Where the Commission has not proscribed a particular "manipulative or deceptive device or contrivance," *ibid.*, there can be no private § 10(b) liability.

The only omission prohibited by the express terms of Rule 10b–5 is an omission of "a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b–5(b). It is well-established that a § 10(b) action premised on a misstatement or omission thus requires "an affirmative statement of some sort"—whether a false statement or a statement that is misleading by omission. *Smith v. Ayres*, 845 F.2d 1360, 1363 (5th Cir. 1988); *see also Fried v. Stiefel Labs., Inc.*, 814 F.3d 1288, 1294 (11th Cir. 2016) ("Rule 10b–5(b) describes an omission that makes other 'statements made' misleading . . . . That is, it proscribes fraud only in connection with an affirmative representation."), *cert. denied*, 137 S. Ct. 102 (2016). In short, it is the false or misleading statement that is actionable; "a 'pure omission' theory

is . . . not strictly within the letter of Rule 10b–5." *Vivendi*, 838 F.3d at 240 n.9.

This textual interpretation is confirmed by the statutory provision from which the Commission "derived" Rule 10b–5 "in significant part." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 n.32 (1976). The Commission modeled Rule 10b–5 on § 17 of the Securities Act in order to "close[] a loophole in the protections against fraud" found in § 17. *Ibid.* (quoting SEC Release No. 3230, 1942 WL 34443, at *1 (May 21, 1942)). Whereas § 17(a) "applied only to brokers and dealers," Rule 10b–5 was designed to extend § 17 liability to "any person in connection with the purchase [or sale] of securities." SEC Release No. 3230, 1942 WL 34443, at *1.

Section 17(a)(2) imposes liability based only on an "untrue statement of a material fact" or an "omission to state a material fact necessary in order to make the statements made . . . not misleading." 15 U.S.C. § 77q(a)(2); *see also* 17 C.F.R. § 240.10b–5(b). Section 17, therefore, requires an affirmative "misstatement[]." *In the Matter of John P. Flannery & James D. Hopkins*, SEC Release No. 3981, 2014 WL 7145625, at *14 (Dec. 15, 2014) (emphasis added), *vacated on other grounds*, 810 F.3d 1 (1st Cir. 2015). Because the Commission modeled Rule 10b–5 on a provision that imposes no liability for pure omissions, no such liability attaches under § 10(b) either. *See Hochfelder*, 425 U.S. at 212 & n.32.

The Commission has long interpreted § 10(b) and Rule 10b–5 in this manner. In *Matrixx*, for example, the Commission told this Court that the defendant drug company could "choose simply to remain silent about the safety and prospects of its products," even though some of the disclosures at issue were required

to be made in the defendant's 10-Q by SEC reporting requirements. U.S. Br. 5–6, 27. The Commission explained that by choosing to remain silent, a company can "avoid any obligation to disclose potentially conflicting information." *Id.* at 27 (citing *Basic*, 485 U.S. at 239 n.17). Section 10(b) and Rule 10b–5 thus do not impose liability based on a registrant's failure to speak.

b. In enacting the PSLRA, Congress ratified Rule 10b–5(b)'s command that omissions are actionable only if an affirmative statement is rendered misleading. Designed "[a]s a check against abusive litigation by private parties," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), the PSLRA codified the "[r]equirements for securities fraud actions," 15 U.S.C. § 78u–4(b). As relevant here, the PSLRA circumscribed the "[m]isleading statements or omissions" that suffice to establish liability, if properly pleaded and proved. *Id.* § 78u–4(b)(1). That codification is limited to false statements and so-called half-truths, where a defendant omits "a material fact necessary in order to make the statements made . . . not misleading." *Id.* § 78u–4(b)(1)(B). The PSLRA nowhere prescribes liability for a pure omission.

A pure omission claim cannot satisfy the PSLRA's "[e]xacting pleading requirements" for omissions liability. *Tellabs*, 551 U.S. at 313. As the complaint in this case illustrates, Plaintiffs could not meet the requirements to "specify each *statement* alleged to have been misleading" and "the reason or reasons why the *statement* is misleading." 15 U.S.C. § 78u–4(b)(1) (emphases added). The PSLRA *requires* a court to dismiss a complaint that does not so specify. *See id.* § 78u–4(b)(3)(A). The Second Circuit erred in departing from this statutory mandate.

2. The Fiduciary-Type Duty To Disclose Or Refrain.

"[D]espite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure," this Court has recognized one—but only one—actionable duty where a defendant makes no statement at all. *Chiarella*, 445 U.S. at 230. That duty "aris[es] from a relationship of trust and confidence," *ibid.*, and "attaches only when a party has legal obligations *other than* a mere duty to comply with general antifraud proscriptions in the federal securities laws," *Dirks*, 463 U.S. at 657 (emphasis added). This duty has been recognized in five of this Court's cases—none involving issuers. *See Salman*, 137 S. Ct. at 423; *O'Hagan*, 521 U.S. at 652; *Dirks*, 463 U.S. at 657; *Chiarella*, 445 U.S. at 230; *Affiliated Ute*, 406 U.S. at 153.

This duty originally developed out of common-law rules governing face-to-face bargaining. *See Basic*, 485 U.S. at 243–44 & n.21; *see also Dirks*, 463 U.S. at 653 (noting that "breach of this common-law duty also establish[es] the elements of a Rule 10b–5 violation"). At common law, failure to comply with a reporting rule did *not* constitute fraud. *See*, *e.g.*, Frank Coulom, Jr., *Rule 10b–5 and the Duty to Disclose Market Information: It Takes a Thief*, 55 St. John's L. Rev. 93, 96–97 (2012). A party's failure to disclose material information to another transacting party, in fact, generally was not actionable at all. *Ibid.*; *see also* Restatement (Second) of Torts § 551(1) (Am. Law Inst. 1977).

There was an exception at common law, however, "when one party ha[d] information 'that the other [party] [wa]s entitled to know because of a fiduciary or other similar relation of trust and confidence be-

tween them.'" *Chiarella*, 445 U.S. at 228 (second alteration in original) (quoting Restatement (Second) of Torts § 551(2)(a) (1977)). In those circumstances, the fiduciary-type relationship *itself* "g[ave] rise to a duty to disclose because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the uninformed minority shareholders.'" *Id.* at 228–29 (second alteration in original) (citation omitted). This duty did not "require equal information among all traders"; it barred instead "only some persons, under some circumstances" from capitalizing on inside information. *Dirks*, 463 U.S. at 657.

In every case applying this "extraordinary" exception, *Dirks*, 463 U.S. at 657, the failure to disclose material information was actionable under Rule 10b–5(a) and (c)—*not* Rule 10b–5(b). In other words, the fraudulent conduct was not the statement or omission *per se*—as under Rule 10b–5(b)—but a "device, scheme, or artifice to defraud," 17 C.F.R. § 240.10b–5(a), or "act, practice or course of business which operates . . . as a fraud or deceit," *id.* § 240.10b–5(c). *See*, *e.g.*, *Chiarella*, 445 U.S. at 225 n.5 ("The portion of the indictment based on Rule 10b–5(b) was dismissed because the petitioner made no statements at all in connection with the purchase of stock"); *Affiliated Ute*, 406 U.S. at 153. Accordingly, liability under Rule 10b–5(a) and (c) requires more than a pure omission. *See*, *e.g.*, *Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 177 (2d Cir. 2005).

Where this narrow duty has been recognized, the Court has repeatedly characterized the fraud as engaging in or facilitating a transaction when one has a

fiduciary-type duty to disclose material information. *See Salman*, 137 S. Ct. at 423 ("undisclosed trading on inside corporate information"); *O'Hagan*, 521 U.S. at 652 ("undisclosed, self-serving use of a principal's information to purchase or sell securities" in breach of a fiduciary duty); *Affiliated Ute*, 406 U.S. at 152–53 (bankers "obligated to act on behalf of the [Native American] sellers" "devised a plan and induced [the sellers] to dispose of their shares without disclosing to them material facts").

Where there was no fiduciary-type "relationship of trust and confidence," *Chiarella*, 445 U.S. at 230, the Court has held there was no duty enforceable under § 10(b) and Rule 10b–5. *See Chiarella*, 445 U.S. at 232 (a "duty to disclose" was "absent in this case" because "petitioner had no prior dealings" with the sellers of the target company's securities); *Dirks*, 463 U.S. at 665 (no violation because "[t]here was no expectation by Dirks' sources that he would keep their information in confidence"). In short, a specific relationship is essential: A duty "attaches only when a party has legal obligations other than a mere duty to comply with general antifraud proscriptions in the federal securities laws." *Dirks*, 463 U.S. at 657; *see also Oran*, 226 F.3d at 288 ("Such a duty to disclose must be separately shown").

B. THE SECOND CIRCUIT ERRED IN INVENTING A THIRD "DUTY."

This Court has recognized two—*and only two*—duties sufficient to make an omission privately enforceable under § 10(b): The duty to correct an affirmatively misleading statement, and the fiduciary-type duty arising out of relationships of trust and confidence. This case involves neither duty. The operative complaint specifies no statement in the March 2011

10-K that was rendered misleading by the omission of the CityTime fraud; and SAIC had no fiduciary-type duty to disclose this information to aftermarket investors. That should have been the end of the § 10(b) analysis. *See*, *e.g.*, *Fried*, 814 F.3d at 1294 (taxonomy of available liability theories).

The court below recognized a third category of "duty," premised exclusively on a registrant's silence where Item 303—or presumably any of the Commission's *thousands* of other disclosure requirements—allegedly mandates that information be disclosed. In so doing, the Second Circuit broke sharply from other circuits. *NVIDIA*, 768 F.3d at 1056; *Oran*, 226 F.3d at 288; *see also In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 403 (6th Cir. 1997) (dismissing as unpersuasive "plaintiffs['] suggest[ion] . . . that defendants' disclosure duty under . . . Rule 10b–5 . . . may stem from Item 303"); *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 682 n.78 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part) (same as to Item 303 of Regulation S-B, a regulation "materially identical" to Item 303 of Regulation S-K).

Allowing private parties to enforce these regulatory requirements would extend the private § 10(b) and Rule 10b–5 action well beyond the boundaries established by Congress to include a liability theory that no court of appeals had held was actionable before the PSLRA was enacted. Moreover, the decision below contravenes Congress's clear intent to authorize only *Commission* enforcement of its own reporting requirements. *See Alexander v. Sandoval*, 532 U.S. 275, 285–86 (2001). In both respects, the court below usurped

Congress's role to determine the scope of a private § 10(b) action.[3]

1. THE PSLRA PRECLUDES EXPANSION OF THE § 10(B) PRIVATE RIGHT OF ACTION.

The text and structure of the securities laws, including the PSLRA, establish that Congress precluded private § 10(b) liability for omitting information allegedly required by a disclosure regulation.

a. When Congress wanted to impose private liability for failing to comply with a regulatory requirement, "it had little trouble in doing so expressly." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733–34 (1975). That it did not do so in § 10(b) confirms that private plaintiffs cannot use § 10(b) to enforce compliance with Item 303.

i. In § 11 of the Securities Act, Congress expressly imposed the kind of liability that the Second Circuit erroneously inferred under § 10(b). Like Rule 10b–5(b), § 11 prohibits making an "untrue statement of a material fact" in a registration statement or omitting "a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). But unlike Rule 10b–5(b), § 11 also goes on to prohibit "omitt[ing] to state a material fact required to be stated therein." *Ibid.* The Commission's regulations reflect a similar distinction. *See* 17 C.F.R. § 240.12b–

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[3] The Commission apparently has never directly addressed the question whether (or not) Item 303 or its other disclosure regulations may form the basis of a private action under § 10(b) or Rule 10b–5. Because § 10(b) may give rise to criminal prosecution, the rule of lenity requires resolving any ambiguity against an expansion of liability. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also United States v. Apel*, 134 S. Ct. 1144, 1151 (2014).

20 ("*In addition to the information expressly required to be included in a statement or report*, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading") (emphasis added).

When Congress enacted the Exchange Act just one year later, it did not include similar language in any of the provisions expressly conferring private rights of action, or in § 10(b). The courts must respect Congress's decision not to do so. *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation marks and citation omitted). The Second Circuit, by contrast, expanded § 10(b) to include omitting information required by regulation, thus engrafting onto § 10(b) the statutory text from § 11 that Congress deliberately chose *not* to include.

There are additional distinctions between § 11 and § 10(b) that mean that § 10(b) "cannot be extended, consistently with the intent of Congress," to the extent of liability under § 11. *Hochfelder*, 425 U.S. at 210. Section 11 applies only in the context of registration statements, and only where the plaintiff purchases shares in (or, as most courts allow, "traceable to") the issuer's public offering. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82 (1983). Congress imposed "virtually absolute" liability, "even for innocent misstatements" in a registration statement involving items required to be disclosed by SEC regulations. *Id.* at 382. At the same time, Congress

was so "concern[ed] over the impact of [strict liability] on the new issues market" that it added "significant procedural restrictions" to this provision. *Hochfelder*, 425 U.S. at 208–09 (discussing statutes of limitations and bonds for costs). Because § 10(b) "has no comparable restrictions," *id.* at 210, the liability for failure to follow reporting requirements expressly imposed by § 11 cannot be implied under § 10(b). *See id.* at 200. "Ascertainment of congressional intent with respect to the standard of liability created by a particular section of the Acts must . . . rest primarily on the language of that section." *Ibid.*

ii. There are *only two* anti-fraud provisions in the Exchange Act beyond § 10(b). Because Congress did not impose liability for pure omissions in either of these express remedies for fraud, it would be "anomalous," and contrary to Congressional intent, for a judicially implied cause of action to impose such liability. *Blue Chip Stamps*, 421 U.S. at 736.

Section 9 of the Exchange Act makes it unlawful to manipulate security prices, including by "mak[ing] . . . any statement which was . . . false or misleading with respect to any material fact." 15 U.S.C. § 78i(a)(4). Section 18 of the Exchange Act—"the principal express civil remedy for misstatements in reports," *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574 (1979)—similarly makes it unlawful to "make or cause to be made any statement" in any required filing that is "false or misleading with respect to any material fact." 15 U.S.C. § 78r(a). Both of these provisions expressly require an affirmative "statement" to be "made."

This Court should be "extremely reluctant to imply a cause of action . . . significantly broader than the remed[ies] Congress chose to provide." *Touche-Ross*,

442 U.S. at 574. Because these most analogous express remedies—*adopted concurrently with § 10(b)*—are "by [their] terms limited" to false or misleading statements, the *implied* § 10(b) action is similarly limited and cannot be *more* expansive than the enumerated private remedies. *Ibid.*

b. When Congress subsequently enacted the PSLRA, it "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166. Because § 10(b) had not been construed to allow private claims for pure omissions when Congress enacted the PSLRA, such claims are now foreclosed.

i. Before the PSLRA, this Court had never held that registrants could be liable in a § 10(b) private action for omissions under Item 303 or the Commission's disclosure rules generally. On the contrary, "courts consistently held that mere silence constituted a fraudulent scheme or practice within the prescription of the rule only in the presence of a relationship of trust and confidence." Coulom, *It Takes a Thief*, 55 St. John's L. Rev. at 102. That was precisely the narrow duty that *Chiarella* recognized.[4]

As the Third Circuit observed in rejecting a broader disclosure duty in 1982, "[a]lthough some [academic] commenters have urged the . . . doctrine to require disclosure of all material facts . . . the plaintiffs

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[4] Academic suggestions that courts "should" recognize a duty founded in SEC reporting requirements (*e.g.*, Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b–5*, 57 Vand. L. Rev. 1639, 1680 (2004)) are unmoored from the text and structure of the securities laws and do not take into account this Court's holding in *Stoneridge* that post-PSLRA expansion of the private right of action is for Congress, not the courts.

have not called our attention to any case . . . which imposed any duty of disclosure under the Federal Securities Laws on a corporation which is *not* trading in its own stock and which has *not* made a public statement." *Staffin v. Greenberg,* 672 F.2d 1196, 1204 (3d Cir. 1982) (Higginbotham, J.), *abrogated on other grounds by Basic*, 485 U.S. 224. And just three years before the PSLRA was enacted, the Fourth Circuit explained that such a duty "arises only where there is some basis outside the securities laws, such as state law, for finding a fiduciary or other confidential relationship." *Fortson v. Winstead McGuire, Sechrest & Minick*, 961 F.2d 469, 472 (4th Cir. 1992) (Wilkinson, J.). "Several circuits," the Fourth Circuit observed, "ha[d] concluded that the federal securities laws are not the source of such a duty." *Ibid.* (citing cases from the Fourth, Fifth, Seventh, and Tenth Circuits).

ii. The contrary notion that an actionable duty can arise "when a statute or regulation requires disclosure" is derived from a single sentence in a 1987 First Circuit opinion *rejecting* an expansion of disclosure duties. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 27 (1st Cir. 1987). In *Roeder*, the First Circuit affirmed the dismissal of a § 10(b) complaint, concluding that the plaintiff failed to establish that the defendant had a duty to disclose the company's illegal kickback payments. *Id.* at 28. The plaintiff "claim[ed] that a corporation has an affirmative duty to disclose all material information even if there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosures." *Id.* at 27. The court disagreed, noting "[t]he prevailing view . . . is that there is no such affirmative duty of disclosure." *Ibid*.

Roeder did not hold that statutes and regulations impose an affirmative duty to disclose. Notably, *Roeder*'s reference to "statute[s] or regulation[s] requiring disclosure" stems from its disapproval of *Issen v. GSC Enters., Inc.*, 538 F. Supp. 745 (N.D. Ill. 1982), cited by the plaintiff for the proposition "that all material information had to be disclosed in annual reports 'notwithstanding the absence of an explicit statutory or regulatory duty to do so.'" *Roeder*, 814 F.2d at 27 n.2 (quoting *Issen*, 538 F. Supp. at 750). The First Circuit flatly rejected that proposition. It is illogical to suggest that, in dismissing an attempt to expand the § 10(b) duty to disclose, the First Circuit actually broadened it. This underlying proposition therefore has no support in *Roeder* or any other supporting case law. *See, e.g., Schlanger v. Four-Phase Sys. Inc.*, 582 F. Supp. 128, 133 (S.D.N.Y. 1984) ("[T]he federal securities laws do not impose a general duty upon an issuer to disclose material facts or new developments when it is not trading in its own securities").

Thus, there is no "history of long-standing interpretation" that might justify expanding the scope of the private right in this case. *Touche Ross*, 442 U.S. at 578 n.19. Before the PSLRA was enacted, no appellate court had actually held that regulatory requirements impose an actionable duty, while many courts had squarely held that the securities laws impose no such duty.

iii. Only *after* the PSLRA was enacted did some courts begin to apply *Roeder*'s *dictum* to pure omissions under Item 303 (and other reporting requirements), and even then—at first—only in the limited "context of a public offering." *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1222 n.37 (1st Cir. 1996).

The timing is no coincidence. The PSLRA caused a wave of "novel" litigation, as plaintiffs pressed "rare" theories of liability to avoid the PSLRA's exacting pleading requirements. *Cf. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006) ("Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law"). One such theory involved enforcing Item 303 through the guise of a private § 10(b) action.

Most courts, however, adhered to the pre-PSLRA understanding that regulatory disclosure requirements are not privately enforceable in a § 10(b) action brought by aftermarket investors. *See NVIDIA*, 768 F.3d at 1056; *Oran*, 226 F.3d at 288; *Thompson*, 610 F.3d at 682 n.78; *Sofamor Danek*, 123 F.3d at 40. The Second Circuit is the *only* appellate court to have held that a "statute[] or regulation[] that obligate[s] a party to speak" imposes a disclosure duty in periodic filings that is actionable in a § 10(b) claim. *Stratte-McClure*, 776 F.3d at 102. The Second Circuit applied that outlier view in this case. But just as this Court views with skepticism broad claims of new authority derived from "long extant statute[s]," *UARG v. EPA*, 134 S. Ct. 2427, 2444 (2014), this Court should not endorse a novel theory of § 10(b) liability when the supposed predicate is a regulation that has been in effect for decades.

As Justice Kennedy recently explained for the Court, "expanding" implied private rights of action "is now a disfavored judicial activity." *Ziglar v. Abbasi*, No. 15-1358, slip op. at 17 (U.S. June 19, 2017). Because the Second Circuit's purported "duty" was not actionable in a private § 10(b) claim *before* the PSLRA was enacted, courts cannot make it actionable now.

Stoneridge could not have been clearer: "Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." 552 U.S. at 165. Instead, "restraint is appropriate," and the scope of that private right must be given "narrow dimensions." *Id.* at 165, 167. Recognizing a *new* type of duty neither reflects "restraint" nor gives "narrow dimensions" to that right. The court below thus violated *Stoneridge*'s seminal conclusion that "[t]he decision to extend the cause of action is for Congress," not the courts. *Id.* at 165.

2. Congress Has Not Authorized Private Enforcement Of SEC Reporting Requirements.

There is a second, and independent, defect in the Second Circuit's conclusion that private plaintiffs can premise a § 10(b) action on an alleged violation of Item 303: Regulation S-K was adopted under § 13(a), *not* § 10(b), and as such is enforceable exclusively by the Commission. Allowing private plaintiffs to enforce Regulation S-K—either directly or indirectly—runs counter to this Court's decision in *Sandoval*. 532 U.S. at 286.

In *Sandoval*, this Court held that a private right to enforce the disparate-treatment prohibition of § 601 of Title VI of the Civil Rights Act of 1964 did not extend to enforcing a disparate-*impact* regulation promulgated pursuant to § 602 of Title VI. *See* 532 U.S. at 293. Because it was "clear that the private right of action to enforce § 601 does not include a private right to enforce" disparate-impact regulations, this Court held that the private right to assert disparate-impact claims "must come, if at all, from the independent force of § 602." *Id.* at 285–86. Section 602 did not have such force, this Court held, because

"'rights-creating' language" was "completely absent from § 602," and Congress's "express provision" for agency enforcement "suggest[ed] that Congress intended to preclude" private enforcement. *Id.* at 288–90 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979)).

As in *Sandoval*, Plaintiffs have sought to enforce a regulation for which there is no private right of action. Regulation S-K was enacted "pursuant to sections 12, 13, 14, 15(d), and 23(a) of the Exchange Act," Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, 42 Fed. Reg. 65,554, 65,556 (Dec. 23, 1977), and Item 303 was "adopted pursuant to the authority in sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933," Adoption of Integrated Disclosure System, Securities Act Release No. 33-6383, 1982 WL 126544, at *1 (Mar. 16, 1982). None of these provisions includes an express (or even implied) private right of action. Courts have "unanimously held" that Item 303 (like other reporting requirements) does not provide an "'independent cause of action for private plaintiffs.'" *Oran*, 226 F.3d at 287 (collecting cases) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 n.7 (3d Cir. 1997)). Yet, by recognizing a "duty" to comply with Item 303 enforceable by private plaintiffs in a § 10(b) action, the Second Circuit has effectively ruled that private plaintiffs may enforce Item 303 (and, by extension, at least all of Regulation S-K).

The decision below further contravenes *Sandoval* because Congress charged the Commission alone with responsibility for enforcing regulatory reporting requirements. Rather than authorize private enforcement, Congress enacted § 13 of the Exchange Act to require registrants to file periodic reports "with the

Commission, in accordance with such rules and regulations as the Commission may prescribe," 15 U.S.C. § 78m(a), and armed *the Commission* with a "full panoply of enforcement tools," *Kokesh v. SEC*, No. 16-529, 2017 WL 2407471, at *4 (U.S. June 5, 2017). By expressly committing enforcement of the reporting requirements to the Commission's discretion, Congress foreclosed private plaintiffs from using an implied § 10(b) action to enforce those same requirements. *Sandoval*, 532 U.S. at 290; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (concluding that the express "creat[ion] [of] a remedial scheme for the enforcement of a particular federal right" by Congress counsels against judicial expansion of other remedies).

This conclusion is reinforced by this Court's holding in *Central Bank* that "a private plaintiff may not bring a suit based on a regulation against a defendant for acts not prohibited by the text of the statute." *Sandoval*, 532 U.S. at 286 (quoting *Cent. Bank*, 511 U.S. at 173). Section 10(b) makes it unlawful to "employ a manipulative device or contrivance in contravention of *such rules and regulations as the Commission may prescribe*." 15 U.S.C. § 78j(b) (emphasis added). Though designed "as a 'catchall' clause," this provision did not create a new mechanism for enforcing the Commission's reporting requirements adopted pursuant to *other* statutory provisions; it instead was intended "to enable the Commission 'to deal with new manipulative [or cunning] devices.'" *Hochfelder*, 425 U.S. at 203 (alteration in original). The Commission has never identified a pure omission as a "manipulative device or contrivance." *Cf. Cent. Bank*, 511 U.S. at 170 (warning that "open-ended readings of the duty stated by Rule 10b–5," including new "add-on" theories, "threaten to rearrange the congressional

scheme") (internal quotation marks and citation omitted).[5]

The consequence of non-compliance with SEC disclosure requirements is appropriate regulatory enforcement, not private class-action liability. That is the norm in complex statutory schemes with technical regulations that are designed to protect the public. *See*, *e.g.*, 21 U.S.C. § 337 (Federal Drug Administration rules); 18 C.F.R. § 1c(1) (Federal Energy Regulatory Commission regulations); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001) (Federal Food Drug & Cosmetic Act); *Am. Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992) (Federal Trade Commission Act). Although each of these statutes was enacted to protect the public from deception and unsafe practices, private plaintiffs "are not empowered to enforce independently" these statutory and regulatory provisions. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993). This baseline principle of law is also reflected in consent decrees, which, as this Court noted in *Blue Chip Stamps*, are not enforceable by third parties, even if they are the intended beneficiaries of the decree. 421 U.S. at 750.

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[5] Moreover, the duties of corporations are generally defined by state law, not federal law. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 106 (1991). Under the law of Delaware and most other states, a corporation does not owe a fiduciary duty to its shareholders. *Arnold v. Soc'y for Sav. Bancorp*, 678 A.2d 533, 539 (Del. 1996); *In re Wayport Litig.*, 76 A.3d 296, 323 (Del. Ch. 2013); *see also Radol v. Thomas*, 772 F.2d 244, 258 (6th Cir. 1985); *Hyman v. N.Y. Stock Exch., Inc.*, 46 A.D.3d 335, 337 (N.Y. App. Div. 2007). Congress can, of course, override state law and create novel fiduciary duties—if it does so clearly and expressly. *See*, *e.g.*, *Jones v. Harris Assocs.*, 559 U.S. 335 (2010). But Congress did not do so (or authorize the Commission to do so) in this context.

It is common for Congress to repose in agencies alone the authority to enforce regulatory requirements.

Plaintiffs' theory is based on two clauses in one subsection of Item 303. But if that theory were accepted, it also would include the other two clauses in the same subsection; the other four subsections in the same section; the other three sections in the same item; the other six items in the 300 series; the other ten subparts in Regulation S-K; and the other 52 items in those subparts—all of which give rise to hundreds of disclosure requirements comprising an astounding 387 pages in the Joint Appendix. *See* JA429–815. And Regulation S-K is just one of the SEC's disclosure regulations; the theory espoused by Plaintiffs would presumably extend to thousands of other regulatory reporting requirements. There is, in short, no limiting principle to Plaintiffs' theory: If this Court were to deputize private plaintiffs to enforce Item 303, then they would be able to enforce the SEC's entire disclosure regime, and perhaps those of the trading exchanges and self-regulatory organizations as well. Handed a powerful weapon against issuers, the plaintiffs' bar will find manifold new "duties to disclose" in every nook and cranny of the regulatory apparatus. *Cf.* Laura Numeroff, *If You Give A Mouse A Cookie* (1985).

Private claims come with considerable costs, which elected representatives weigh when deciding the scope of private liability. Although Congress weighed those costs and ratified limited private liability under § 10(b) and Rule 10b–5, it *never* endorsed private liability with respect to the Commission's reporting requirements. Altering the scope of those claims is the exclusive province of Congress. *See*

Sandoval, 532 U.S. at 291 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself."). That is doubly true with respect to the implied right of action here after the PSLRA. *Stoneridge*, 552 U.S. at 165 ("Though it remains the law, the § 10(b) private action should not be extended beyond its present boundaries").

II. RECOGNIZING A NEW DISCLOSURE DUTY WOULD CONTRAVENE STRONG PUBLIC POLICY.

This Court has recognized that "[p]olicy considerations cannot override our interpretation of the text and structure of the [Exchange] Act." *Cent. Bank*, 511 U.S. at 188. The central insight of *Stoneridge* is that, in the post-PSLRA world, the responsibility for adjusting the contours of the private right of action to enforce § 10(b) rests solely in Congress, and not in the courts. 552 U.S. at 165–66. Congress has the power to hold hearings and weigh the relative burdens and benefits of expanding or contracting the extant regime of private securities-fraud liability. Even if the Court could take such considerations into account here, however, they weigh decisively against the novel liability theory advanced by Plaintiffs and accepted by the Second Circuit.

A. PRIVATE ENFORCEMENT WOULD IMPEDE EFFECTIVE DISCLOSURE REGULATION.

The Second Circuit's decisions in this case and in *Stratte-McClure* mark the first time since the securities laws were enacted eight decades ago that an appellate court has squarely held that Regulation S-K—or any other regulatory reporting requirement—can

be enforced by a private plaintiff in a § 10(b) class action alleging omissions from a periodic filing. That history alone is sufficient to establish that private enforcement is not needed to supplement the Commission's own supervision and enforcement of its disclosure regulations. In fact, private enforcement would be counterproductive.

1. As part of its compliance function, the SEC's Division of Corporation Finance reviews every registrant's public filings on a periodic basis, identifies problems and deficiencies, and engages in a "dialogue with [the registrant] about its disclosure" through a comment letter process. SEC Div. of Corp. Fin., Filing Review Process (Jan. 19, 2017), https://www.sec.gov/divisions/corpfin/cffilingreview.htm. For example, the Division of Corporation Finance may send a comment letter when it has "identifie[d] instances where it believes a company can improve its disclosure or enhance its compliance with the applicable disclosure requirements." *Ibid*. Upon receipt of a comment letter, a registrant may agree with or dispute each comment in its response letter, and, if needed, amend its filings or consent to prospective changes.

The Division of Corporation Finance routinely uses the comment letter process to assist registrants in resolving perceived deficiencies in their MD&A and to comply with Item 303. *See, e.g.*, Universal Hosp. Servs., Inc., SEC Staff Comment Letter (Aug. 15, 2012); Cummins Inc., SEC Staff Comment Letter (Oct. 9, 2002). Such efforts frequently result in agreed-upon *prospective* changes to enhance the disclosures in the MD&A. *See, e.g.*, Bofi Holding, Inc., SEC Staff Comment Letter (Feb. 13, 2017); Teledyne Tech. Inc., SEC Staff Comment Letter (July 23, 2010).

The Commission's goal has been to make Item 303 a vehicle for *meaningful* disclosure.

This open dialogue between registrants and Commission staff helps to ensure that registrants disclose what they need to disclose, and when they need to do so. The regulatory reporting obligations are many and varied; a large number of the requirements are (intentionally) vague and subjective; and persons of good faith can and do disagree about exactly what must be disclosed and when. The comment letter process provides a nuanced, dynamic, and issuer-specific approach to the difficult and evolving disclosure issues posed by the Commission's labyrinthine set of reporting requirements. Accordingly, MD&A sections are subject to significant variation: "[G]ood MD&A disclosure for one registrant is not necessarily good MD&A disclosure for another." SEC Guidance, 1989 WL 1092885, at *17.

The success of this informal process is illustrated by the relative infrequency with which regulatory reporting disputes are pursued by the Commission's Enforcement Division. The Commission oversees more than 12,000 public-company registrants. Yet in the four decades since Regulation S-K was promulgated, the Enforcement Division has brought fewer than 100 actions alleging noncompliance with Item 303. And it typically proceeds under § 13 of the Exchange Act, *not* § 10(b). Notably, to the best of our knowledge, the Enforcement Division has *never* brought a standalone § 10(b) claim based solely on information allegedly omitted from the MD&A. In those rare instances where the Enforcement Division has expressly relied on § 10(b) in an Item 303 case, the allegations included a fraudulent scheme—not a pure omission.

This Court has observed that private class actions alleging securities fraud serve as an "essential supplement" to Commission enforcement, given the agency's limited budget and resources. *See Tellabs*, 551 U.S. at 313. But that observation extends only to those private actions that Congress authorized in the PSLRA (or in another express cause of action in the securities laws). In the context of this case, there is nothing to "supplement": Item 303, Regulation S-K, and the rest of the regulatory reporting apparatus have since their inception been exclusively the Commission's prerogative, and private actions to enforce those requirements have been literally unknown. The Second Circuit's decision to break new ground at this late date is not only contrary to the statutory structure but entirely unnecessary.

2. Private enforcement of Item 303 pure omissions would not just undermine the flexibility inherent in the Commission's disclosure regime, but would affirmatively incentivize registrants to flood the market with immaterial and premature disclosures.

Section 10(b) private actions "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. If the decision below were affirmed, to avoid potentially massive liability for omitting information from the MD&A section of an entirely truthful periodic filing, issuers would be motivated (if not required) to disclose a litany of known unknowns in every periodic report. *See* Nat'l Ass'n of Mfrs. *Amicus* Br. 14 ("logical recourse" for public companies "is to overdisclose potential 'trends and uncertainties'"). This would adversely affect all market participants.

First, investors would be buried "'in an avalanche of trivial information.'" *Basic*, 485 U.S. at 231 (citation omitted). As the Commission has explained, the *Basic* materiality standard is "inapposite to Item 303 disclosure." SEC Guidance, 1989 WL 1092885, at *6 n.27. Item 303 premises disclosure on whether a trend or uncertainty is "*reasonably likely* to have a material effect," *ibid.* (emphasis added)—a "threshold" that "is *lower* than 'more likely than not,'" Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, 67 Fed. Reg. 3,746, 3,748 (Jan. 25, 2002). Because the disclosure standard under Item 303 "extend[s] considerably beyond [that] required by Rule 10b–5," a violation of Item 303 would "not lead inevitably to the conclusion that such disclosure would be required under Rule 10b–5." *Oran*, 226 F.3d at 288. And because "[t]he line between those MD&A disclosures which are required and those which may be avoided is far from a clear one," 2 Thomas Lee Hazen, Law Sec. Reg. § 9:50 (7th ed. 2016), registrants would err on the side of safety and defensively disclose every imaginable trend or uncertainty.

A flood of immaterial information in the marketplace would be "hardly conducive to informed decisionmaking" by investors. *Basic*, 485 U.S. at 231 (quoting *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 448–49 (1976)). As the Commission has explained, "high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities." Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,919 (Apr. 22, 2016).

Take, for example, the periodic filing at issue in this case. SAIC's March 2011 10-K was 145 pages long, providing a comprehensive and robust discussion of its business and operations. It contained a 48-page discussion of the company's financials and risk factors, including 21 tables, 1 figure, and an additional 36 pages in notes to the consolidated financial statements. *See* JA816–1122. The MD&A was itself a 16-page section of this much larger document detailing the company's continuing operations. Imagine how much longer, and less useful, public filings would be if registrants were required to interpose lengthy and lawyerly disclosures for every conceivable known "trend" and "uncertainty" just to fend off unmeritorious private lawsuits. That result would nullify the Commission's project to ensure that registrants "deemphasize or, if appropriate, delete immaterial information." Business and Financial Disclosure, 81 Fed. Reg. at 23,942.

Second, registrants would be incentivized to disclose information prematurely to avoid potential liability for failing to disclose information *sooner*—as Plaintiffs seek to impose here. Registrants commonly (and properly) withhold information, so as not to lose a competitive advantage or confuse the marketplace while events develop or mature. Examples of appropriate non-disclosure include the development of a new product, internal plans for reorganization, secrets or business strategies, an executive's health, or a confidential government investigation. *See, e.g.*, *Panter v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir. 1981); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 329 n.10 (3d Cir. 2004).

All of that information, however, could easily be recast in hindsight as known "trends" or "uncertainties"

that are reasonably likely to occur, or at least reasonably likely to have a material effect assuming they do occur. *See* SEC Guidance, 1989 WL 1092885, at *6. To avoid liability, registrants would be pressed to disclose sensitive and under-developed information prematurely—and thereby engender the market confusion or competitive losses that justified withholding the information in the first place. *Cf. Hochfelder*, 425 U.S. at 215 n.33 ("The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes those consequences") (quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179–80 (1931) (Cardozo, C.J.)).

B. PRIVATE ENFORCEMENT WOULD ENCOURAGE HINDSIGHT–DRIVEN LITIGATION.

The Commission made the requirements of Item 303 "intentionally general" so that management would have greater discretion to decide what to disclose. SEC Guidance, 1989 WL 1092885, at *1. With the benefit of hindsight, however, virtually any event that does occur and correlates with a change in the company's stock price could be recast as a "trend" or "uncertainty" that was known to be reasonably likely to occur. That is precisely why the Second Circuit has been flooded with nearly two dozen Item 303 cases since *Stratte–McClure*, whereas the Ninth Circuit has seen only a handful. *See* Cert. Reply Br. App. 1a–3a.

1. The PSLRA was specifically designed to put an end to hindsight–driven litigation. Congress was concerned about "the routine filing of lawsuits . . . whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer." H.R. Rep. No. 140–369, at 31 (1995) (Conf. Rep.). Congress responded by requiring private

plaintiffs, among other things, to "specify *each* statement alleged to have been misleading," and "the reason or reasons why *the statement* is misleading." 15 U.S.C. § 78u–4(b)(1) (emphases added).

Allowing Plaintiffs' Item 303 claim to proceed would undercut the PSLRA's reforms by making it significantly easier for hindsight–driven pleadings to survive a motion to dismiss. Many § 10(b) actions that have been dismissed for failure to state a claim might have survived and proceeded to expansive discovery had they simply been recast as omitting known "trends" or "uncertainties" under Item 303. *See*, *e.g.*, *Roeder*, 814 F.2d at 28 (dismissing a claim premised on the omission that the company was under investigation for paying bribes to obtain subcontracts). And as this case illustrates, a pure-omission theory would allow a plaintiff to proceed even without alleging a misleading statement or the reason why the statement is misleading, as expressly required by the PSLRA.

It might be suggested that expanding the "falsity" element of the § 10(b) private right of action to include pure omissions would not be problematic in practice because other elements are sufficient to screen out unmeritorious class actions. *Cf.* Langevoort & Gulati, *The Muddled Duty to Disclose*, 57 Vand. L. Rev. at 1681. This Court, however, has consistently—and correctly—focused on each element independently. *See*, *e.g.*, *Janus*, 564 U.S. at 137 ("making any untrue statement of material fact"); *Matrixx*, 563 U.S. at 30 ("materiality"). That is particularly important with respect to falsity because it is an element codified in the PSLRA. *See, e.g.*, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005) ("loss causation"); *Tellabs*, 551 U.S. at 313–14 ("scienter"). The question

whether Item 303 creates a privately enforceable duty to disclose can and should be answered in the context of the false statement element. And for the reasons set forth herein, it should be answered in the negative—making it unnecessary for the Court to consider those other elements.[6]

2. Affirmance also would lead to a regime where interpretation of the disclosure standards for *thousands* of separate and distinct reporting requirements is taken out of the hands of an expert regulator and divided among the ninety-four federal judicial districts. The decision below thereby threatens to fracture the Commission's finely tuned and frequently updated disclosure regime and engender reliance interests that could make it more difficult for the Commission to update those requirements as needed. *See*

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[6] To be sure, even under the Second Circuit's approach there would remain significant hurdles to pleading and proving a private claim based on an alleged omission of Item 303 information. Item 303 is inherently (and deliberately) forward-looking, and thus many such claims would be precluded by the PSLRA's safe harbor. *See* 15 U.S.C. § 78u–5. Moreover, the plaintiff in such a case would be unable to invoke the presumptions of reliance established in *Basic* or *Affiliated Ute*, and thus would have to prove actual reliance. *See Stoneridge*, 552 U.S. at 159. The scienter element would require the plaintiff to plead that an authorized representative of the issuer knew that the information was required to be disclosed and failed to do so with the intent to mislead investors. *Tellabs*, 551 U.S. at 324. Price impact (at the certification stage) and loss causation (on the merits) would be difficult if not impossible to establish in pure omissions cases. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014) (price impact); *Dura*, 544 U.S. at 345–46 (loss causation). These additional difficulties—and the streams of new litigation they would spawn—further counsel against recognition of a new liability theory.

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

Courts would be forced to act as deputized securities regulators, deciding what and when information must be disclosed under Item 303 or the thousands of other reporting requirements. Companies with nationwide operations could be subjected to conflicting commands, and all of this would be done in hindsight and without the benefit of the expertise developed over time by the Commission's Division of Corporation Finance. The result would be more uncertainty.

This case is a perfect example of these problems. Plaintiffs base their Item 303 claim on SAIC's purported failure to disclose that federal and state regulators had begun investigations into potential fraud related to the CityTime project when SAIC filed its March 2011 10-K. Item 303, however, requires "known trends or uncertainties" that management believes will have a material impact on "*ongoing operations*," 17 C.F.R. § 229.303 (emphasis added), which do not include one-off events—such as most lawsuits and government investigations—that are not organic to the business. Although the CityTime contract was part of ongoing operations, SAIC had "substantially completed its performance obligations" by May 2011 and collected over 93 percent of amounts due under the contract. JA1155. Accordingly, there was no reason for management to think that CityTime issues would materially affect future revenues from SAIC's ongoing operations.

Legal proceedings, including private litigation and government enforcement actions, generally do not fall within Item *303* at all; rather, they are governed by Item *103* ("Legal Proceedings"), which requires an issuer to "[d]escribe briefly any material pending legal

proceedings" including "proceedings known to be contemplated by government authorities." 17 C.F.R. § 229.103. Courts have consistently held that "a government investigation, without more, does not trigger a generalized duty to disclose." *In re Lions Gate Entm't Corp. Secs.*, 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016); *see also Richman v. Goldman Sachs Grp.*, 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012) ("An investigation on its own is not a 'pending legal proceeding' until it reaches a stage when the agency or prosecutorial authority makes known that it is contemplating filing suit or bringing charges") (internal quotation omitted). In fact, courts have held that the securities laws do not impose a duty to disclose "uncharged criminal conduct." *United States v. Crop Grower Corp.*, 954 F. Supp. 335, 347 (D.D.C. 1997); *see also In re ITT Educ. Servs., Inc.*, 859 F. Supp. 2d. 572, 579 (S.D.N.Y. 2012) ("the securities laws do not impose a general duty to disclose . . . uncharged criminal conduct") (quoting *In re Marsh & Mclennan Cos.*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006)).

SAIC was not required to disclose the CityTime investigation under Item 103, and Plaintiffs do not allege otherwise. To be sure, they assert that SAIC and its employees received subpoenas requesting documents. *See* JA186. Putting aside the fact that subpoenas do not trigger a disclosure requirement under Item 103, *Lions Gate*, 165 F. Supp. 3d at 18–19, the subpoenas here were issued in connection with pending proceedings against *non–SAIC employees*, and did not identify SAIC as a target of any pending or contemplated investigation, *see* JA174, 186. Innocent third-party witnesses routinely receive grand jury subpoenas in criminal investigations.

Moreover, "pending legal proceedings" must be disclosed under Item 103 only if they involve a "claim for damages" that "exceed[s] 10 percent of the current assets of the registrant." 17 C.F.R. § 229.103 (Instruction 2). SAIC's current assets reported in the March 2011 10-K were $3.849 billion, meaning that a claim for damages had to be known to be greater than $384 million to be covered by Item 103. *See* JA976. Because there were no pending proceedings against SAIC in March 2011, the *actual* claim for damages was zero. "[A] corporation has no affirmative duty to speculate or disclose 'uncharged, unadjudicated wrongdoings or mismanagement[.]'" *In re UBS AG Sec. Litig.*, No. 07-11225, 2012 WL 4471265, at *31 (S.D.N.Y. Sept. 28, 2012) (quoting *Ciresi v. Citicorp.*, 782 F. Supp. 819, 823 (S.D.N.Y. 1991)); *see also Lions Gate*, 165 F. Supp. 3d at 15. But even if SAIC were to "speculate," the complaint contains no allegations that SAIC knew in March 2011 that its potential exposure was anywhere near $384 million. Indeed, when SAIC disclosed the government investigations just nine weeks later in a current report on Form 8-K (a disclosure the Second Circuit found legally sufficient), it reported that "[t]he Company recorded a liability of approximately $2.5 million," which represented *all* of the time billed by SAIC's project manager. JA1155–57. Therefore, even if litigation had been "substantially certain," SAIC still would not have been required to disclose the government investigations in its March 2011 10-K.

It is telling that the complaint in this case does not even attempt to plead a violation of Item 103. Instead, Plaintiffs attempt to convert Item 303 into a one-size-fits-all disclosure obligation covering every conceivable topic that, in hindsight, could be construed as a "trend or uncertainty"—even topics that

are dealt with in other Commission disclosure requirements (here Item 103). This approach has no basis in the regulation, and we are unaware of any case in which the Commission has instituted an enforcement action based on a registrant's failure to disclose in the MD&A information regarding legal proceedings that would not be required by Item 103. That the Second Circuit allowed a private class action to go forward on such allegations shows how novel, and dangerous, the liability theory advanced by Plaintiffs is.

There is no upside to, and certainly no need for, a novel theory of liability that eliminates the requirement that a § 10(b) claim must be based on a specific false or misleading statement. A record 270 securities class actions were filed in 2016. *See* Cornerstone Research, *Securities Class Action Filings: 2016 Year in Review*, https://www.cornerstone.com/Publications/Reports/Securities–Class–Action–Filings–2016–YIR. In addition, 13 of the 100 largest private § 10(b) settlements since enactment of the PSLRA—totaling $5.4 billion—occurred in 2016, the largest number of record settlements in any year. *See* Inst. S'holder Servs., *The Top 100 U.S. Settlements of All–Time*, https://www.issgovernance.com/library/top–100–us–settlements/.

The § 10(b) private right of action has proliferated within its existing parameters. Indeed, even in this case, after reversal Plaintiffs will still be able to proceed under their traditional Rule 10b–5(b) claim challenging SAIC's alleged failure to record "loss contingencies" under GAAP. *See* Pet. App. 26a. Further judicial expansion of the private right is neither necessary nor justified, as this Court made clear in *Stoneridge*. As this Court recently reiterated, Congress is

in a far "better position to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar*, slip op. at 12 (internal quotation marks and citation omitted); *see also ibid.* ("[W]hen a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis").

Since the MD&A requirements were adopted in the 1970s, the Commission has enforced its reporting requirements using a variety of tools, including its power to improve prospectively a company's disclosures through the comment-letter process. Throughout that period, private enforcement of those same requirements was unknown. That this issue has reached this Court only *now*—more than eight decades after the Exchange Act became law, four decades since the MD&A requirements were promulgated, and two decades after the PSLRA codified the contours of a private § 10(b) action—shows that this novel and heretofore unknown species of private liability has not been needed for the past century and is not needed for the next.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

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[1] So in original. Probably should be followed by a comma.

17 C.F.R. § 240.10b–5. Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 229.303 (Item 303). Management's discussion and analysis of financial condition and results of operations.

(a) *Full fiscal years*. Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a)(1) through (5) of this Item and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the registrant's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant, reportable segment or other subdivision of the business and on the registrant as a whole.

* * *

(3) *Results of operations*. (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, should be described in order to understand the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.

(iii) To the extent that the financial statements disclose material increases in net sales or revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services.

(iv) For the three most recent fiscal years of the registrant or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, discuss the impact of inflation and changing prices on the registrant's net sales and revenues and on income from continuing operations.

* * *

Item 303 is reproduced in its entirety in the Joint Appendix at JA499–515.

15 U.S.C. § 78u–4. Private securities litigation

(a) Private class actions

(1) In general

The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

* * *

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

(A) In general

Except as provided in subparagraph (B), in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(B) Exception

In the case of an action for money damages brought against a credit rating agency or a controlling person under this chapter, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed—

(i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

(B) Stay of discovery

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(C) Preservation of evidence

(i) In general During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(ii) Sanction for willful violation A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

(D) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

(4) Loss causation

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

* * *

The PSLRA is reproduced in its entirety in the Joint Appendix at JA403–427.