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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The Second Circuit held that "Item 303 imposes an '*affirmative duty to disclose*'" that is actionable in a private § 10(b) lawsuit. Pet. App. 16a n.7 (emphasis added). To resolve a circuit conflict, this Court granted certiorari to decide whether "Item 303 … creates *a duty to disclose* that is actionable under Section 10(b)." Pet. i. (emphasis added); *see also* Pet. Br. i. Respondents devote but a *single page* to that question (at 32) because it can only be answered in the negative.

Indeed, Respondents' brief confirms that, prior to the PSLRA, *no court* had *ever* imposed private § 10(b) liability against an issuer for allegedly omitting information required to be disclosed by Item 303; and other than the Second Circuit, *no* court of appeals has *ever* allowed an action like this one to proceed past the pleading stage. Respondents are asking this Court to adopt a novel and unprecedented theory of securities-fraud liability. That, however, is the role of Congress, not the Judiciary.

Respondents devote most of their brief to arguing, instead, that omitting information required to be disclosed by a Commission regulation would mislead a reasonable investor and is thus "deceptive"—a word that appears 50 times in their merits brief but not once in their brief in opposition. This argument, which was not the basis of the decision below, ignores the plain text of Rule 10b–5(b) and the PSLRA, which specify that omissions are actionable only if they render affirmative "statements made" misleading. 15 U.S.C. § 78u–4(b)(1); 17 C.F.R. § 240.10b–5(b). Recognizing as much, Respondents dedicate the balance of their brief to arguing that this case does not involve the pure-omission theory of liability that this Court agreed to review, but rather is an ordinary "half-truth" case. But they waived that argument by not pleading it in their complaint, presenting it to the courts below, or raising it in their brief in opposition.

The decision below should be reversed.

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

The Question Presented is whether Item 303 creates a disclosure duty that is enforceable in a private § 10(b) action. The answer to *that* question is clearly no.

A. THIS COURT HAS RECOGNIZED ONLY TWO PRIVATELY ENFORCEABLE DUTIES—AND NEITHER APPLIES HERE.

Respondents (at 35-37) and the government (at 8) acknowledge that "[s]ilence, absent a duty to disclose" is not actionable under Rule 10b–5. *Basic Inc. v. Levinson*, 485 U.S. 224, 239, n.17 (1988). This Court has recognized *only* two privately enforceable duties to disclose.

1. The first actionable duty this Court has recognized is the "duty not to mislead" by speaking a half-truth. *Basic*, 485 U.S. at 240 n.18; *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). That duty reflects the common-law rule—as implemented by the Commission in Rule 10b–5(b)—that, when an issuer speaks, it must speak truthfully and include all "material fact[s] necessary in order to make the statements made … not misleading." 17 C.F.R. § 240.10b–5(b); *see* Pet. Br. 21-22. This duty thus applies "only when" an issuer makes an affirmative statement. *Matrixx*, 563 U.S. at 44; *see also* Pet. Br. 22. In other words, pure omissions—the absence

of information *not* necessary to make any affirmative statement not misleading—are not actionable under Rule 10b–5(b).

Petitioner made no statement about the CityTime investigation in its March 2011 10-K. The Second Circuit unequivocally held that the relevant disclosure duty arose from a "'failure to comply with Item 303,'" Pet. App. 16a n.7 (quoting *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015))—*not* because the 10-K contained a "statement that would otherwise be 'inaccurate, incomplete, or misleading,'" *Stratte-McClure*, 776 F.3d at 101 (citation omitted). And this Court agreed to decide whether Item 303 provides an actionable duty *even if* "disclosure[] [is] not necessary to make affirmative statements not misleading." Pet. i. This is not, and never has been, a half-truth case.

2. The only other actionable duty this Court has recognized under the securities laws involves a fiduciary-type duty to disclose material information in connection with a transaction. *See Chiarella v. United States*, 445 U.S. 222, 230 (1980). This second duty can be invoked in a pure-omission case, but it arises 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 the general antifraud proscriptions in the federal securities laws,'" *Dirks v. SEC*, 463 U.S. 646, 657 (1983) (emphasis added) (citation omitted).

Petitioner owed no fiduciary-type duty to disclose the CityTime investigation to its shareholders. The Second Circuit did not even mention the *Chiarella-Dirks* line of cases in ruling that Petitioner could be liable for a pure omission. And barring an express statutory directive, corporations undisputedly do not owe a fiduciary duty to their shareholders. *See* Pet.

Br. 27-28. This is not, and never has been, a fiduciary-type duty case.

B. THE SECOND CIRCUIT ERRED IN CREATING A THIRD DUTY.

The Second Circuit did not rely on either duty previously recognized by this Court; it held, instead, that Item 303 itself imposes an "'affirmative duty to disclose'" that is actionable in a private § 10(b) claim. Pet. App. 16a n.7 (citation omitted). Respondents' vanishingly brief defense of that decision rests on the proposition that there is no reason that this Court should not recognize a *new* "duty" arising from Commission reporting requirements. Resp. Br. 31-32; *see also* U.S. Br. 16-17; Professors Br. 9-10. That argument is wrong on many levels.

1. PETITIONER DID NOT OWE A "DUTY" TO INVESTORS.

Item 303 does not create a privately enforceable duty because the disclosure *requirements* imposed by Item 303 are not *duties* owed to, and enforceable by, investors.

a. Congress has expressly authorized the Commission to create *and enforce* reporting requirements under § 13(a) of the Exchange Act. *See* 15 U.S.C. §§ 78m(a), 78u–2(a)(2), 78u–3(a). Regulation S-K and Item 303 were adopted under § 13(a), and private investors undisputedly cannot enforce them. Pet. Br. 37. Accordingly, although issuers must comply with these reporting requirements, they are not "duties" that run to investors.

The government asserts (at 17) that a regulation mandating disclosure "creates a 'duty' to disclose as that term is commonly understood." But as the government concedes (at 17), a "duty" is a "legal obligation that is *owed or due to another*." *Black's Law Dictionary* 615 (10th ed. 2014) (emphasis added). That a duty is owed to a specific individual is precisely why this Court in *Chiarella* required "a relationship of trust and confidence between parties to a transaction," 445 U.S. at 230, and why this Court in *Dirks* held that such a duty "'attaches only when a party has legal obligations *other than* a mere duty to comply with the general antifraud proscriptions in the federal securities laws,'" 463 U.S. at 657 (emphasis added) (citation omitted). Commission disclosure requirements do not create for issuers any legal obligations running directly to (and enforceable by) investors.

Corporate duties generally are defined by state law, and under the laws of most states, a corporation owes no fiduciary duties to its shareholders. *See* Pet. Br. 39 n.5. Congress presumably has the power to override state law and create such duties—if it does so clearly and expressly. *See*, *e.g.*, *Jones v. Harris Assocs.*, 559 U.S. 335, 340-41 (2010) (discussing 15 U.S.C. § 80a–35(b)). Yet, it undisputedly has not done so in either the Securities Act or the Exchange Act; nor has it authorized the Commission to do so. *See* Pet. Br. 39 n.5.

What Respondents urge, in short, is that this Court cut from whole cloth a new duty owed to "all participants in market transactions." *Chiarella*, 445 U.S. at 233. But such a "broad duty" would "depart[] radically from the established doctrine that duty arises from a specific relationship between two parties" and "should not be undertaken absent some explicit evidence of congressional intent." *Ibid.* Respondents offer no response to this point; in fact, they do not even cite *Chiarella* or *Dirks*.

b. None of Respondents' authorities supports treating regulatory "requirements" as imposing privately actionable "duties." This Court's "duty" precedents did not involve mere failure to comply with reporting regulations. *See SEC v. Zandford*, 535 U.S. 813, 823 (2002) (broker "ha[d] a fiduciary duty to her clients"); *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("'a promise made without [an intention to perform] is fraudulent'" (citation omitted)); *United States v. O'Hagan*, 521 U.S. 642, 652 (1997) ("duty of loyalty and confidentiality" owed to a principal). In fact, the Court has characterized all three cases as involving "a fraudulent scheme in which the securities transactions and *breaches of fiduciary duty* coincide." *Zandford*, 535 U.S. at 825 (emphasis added).

Respondents (at 38-39) misread then-Judge Alito's decision in *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000), for the proposition that Item 303 can provide an actionable disclosure duty so long as the omitted information satisfies *Basic*'s materiality standard. In fact, *Oran* expressly "reject[ed] plaintiffs' claim that … Item 303(a) imposed an affirmative duty of disclosure … that could give rise to a claim under Rule 10b–5." *Id.* at 286 n.6. As *Oran* explained, Item 303 may obligate issuers to speak in certain circumstances, but private investors cannot sue under Rule 10b–5 to enforce that obligation. *See id.* at 287-88; *see also id.* at 288 ("'Such a duty to disclose must be separately shown'" (citation omitted)).

The only "authority" Respondents (at 36) and the government (at 23) cite for the proposition that Commission regulations create an actionable duty is the Commission's *brief*, as *amicus curiae*, in *Basic*. Yet that brief argued only that "regulations promulgated by the Commission require disclosure," and nowhere suggested that Commission regulations create *privately enforceable duties*. SEC Br. as *Amicus Curiae* at 7, *Basic*, 485 U.S. 224 (No. 86-279). Moreover, *Basic* certainly did not hold that regulations can create such duties. Indeed, no court has ever cited *Basic* for the proposition that Commission regulations create privately enforceable duties. If the Commission actually thinks it has the authority to create new duties, it can and should proceed through notice-and-comment rulemaking subject to APA review, rather than misquoting snippets of antiquated *amicus* briefs.

c. Respondents' *amici* also rely on Commission enforcement orders and state common law as purported authorities for creating a new duty. That reliance is misplaced.

The government (at 22-23) and Professors (at 11-12) cite settlement orders in which the Commission invoked § 10(b) in enforcement proceedings involving alleged non-compliance with Item 303. No deference is due the Commission's position, however, because the Commission was not interpreting ambiguous language in § 10(b) or Rule 10b–5, *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 145 n.8 (2011), and those settlement orders have only "limited precedential value" even for the Commission, *In re SIG Specialists, Inc.*, Exchange Act Release No. 34-51867, 2005 WL 1421103, at *7 n.36 (June 17, 2005). Indeed, this Court has "previously expressed skepticism over the degree to which the SEC should receive deference regarding the private right of action" and has repeatedly "disagreed with the SEC's broad view of § 10(b) or Rule 10b–5." *Janus*, 564 U.S. at 145 n.8 (collecting authorities). Such skepticism is particularly warranted where the agency's "precedents" involve settlements in enforcement actions that were never subjected to adversarial challenge or judicial scrutiny.

The reliance of the government (at 19 n.3) and Professors (at 13-14) on state common law is likewise misplaced. As an initial matter, failure to comply with a reporting rule did *not* constitute fraud at common law. Pet. Br. 25; WLF Br. 16-19. Further, the cases Professors cite either held that the regulation at issue did not give rise to an actionable duty or concerned a regulation that defined obligations owed *to specific parties* in a transaction. Neither *amicus* cites any case recognizing a free-floating "duty" owed to every investor in the world.

Finally, unable to find any support in the voluminous regulatory history of Regulation S-K, the government cites (at 24) a fragment from an administrative notice accompanying Regulation FD. That the Commission in 2000 included a provision that expressly foreclosed private claims in "respon[se] to concerns about 'the prospect of private liability for violations,'" *id.* (citation omitted), does not mean that the Commission retroactively *authorized* private claims under the disclosure requirements it had adopted more than 20 years earlier in Regulation S-K (even assuming the Commission had the power to do so). Such requirements are enforceable by the Commission under § 13(a), but not by private investors under Rule 10b–5.

2. *STONERIDGE* PRECLUDES EXTENDING THE PRIVATE RIGHT OF ACTION.

The Second Circuit also erred by "extend[ing]" the scope of the private § 10(b) action "beyond its present boundaries." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). Petitioner challenged Respondents and their *amici* to find a *single* pre-PSLRA case holding that Item 303 is privately enforceable under § 10(b). Respondents and the government found no pre-PSLRA case—not even one—where *any* court held that a reporting requirement provides a privately enforceable duty. Resp. Br. 42-44; U.S. Br. 17; Professors Br. 8-14. That is dispositive under *Stoneridge* because, when the PSLRA was enacted, "Congress accepted the § 10(b) private cause of action *as then defined* but chose to extend it no further." 552 U.S. at 166 (emphasis added).

The Second Circuit engaged in the sort of expansion of § 10(b) that *Stoneridge* precludes by "read[ing] into Rule 10b–5 a theory of liability" that is "broader in application" than "what Congress has already created expressly elsewhere." *Janus*, 564 U.S. at 146. Whereas § 11 of the Securities Act expressly makes omissions of required information privately actionable, but only in a "registration statement," 15 U.S.C. § 77k(a), the Second Circuit expanded § 10(b) liability to encompass pure omissions in *any* Commission filing. The Second Circuit also dramatically altered the "falsity" element of § 10(b) claims: Whereas the PSLRA and Rule 10b–5 require private plaintiffs to plead and prove that a specific statement was made misleading by an omission, *id.* § 78u–4(b)(1); 17 C.F.R. § 240.10b–5(b), under the Second Circuit's rule, a pure omission would suffice.

Respondents mistakenly suggest (at 42) that *Wharf* authorizes expansion of the § 10(b) private cause of action. *Wharf* pre-dates *Stoneridge* and involved a well-established "breach[] of fiduciary duty." *Zandford*, 535 U.S. at 825. It therefore provides no basis for disregarding *Stoneridge*'s clear command that "the § 10(b) private right should not be extended." 552 U.S. at 165.

Respondents assert (at 40-41) that *Stoneridge* is limited to secondary actors or other categories of defendants, while permitting courts to invent other liability theories not "recognized in judicial decisions before the PSLRA's enactment." Nonsense. *Stoneridge* explained that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion"—period. 552 U.S. at 165. Justice Kennedy could not have been clearer: "The decision to extend the cause of action is for Congress," not the courts. *Ibid.*; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("expanding" private rights of action "is now considered a 'disfavored' judicial activity" (citation omitted)). The decision below cannot be reconciled with this clear and express holding of *Stoneridge*, which is why Respondents simply ignore it.

3. *SANDOVAL* PRECLUDES PRIVATE ENFORCEMENT OF SEC REPORTING REQUIREMENTS.

Regulation S-K was promulgated pursuant to § 13—*not* § 10(b)—and that Exchange Act provision can be enforced only by the Commission. Pet. Br. 37-38. That "express provision" of agency enforcement as a "method of enforcing a substantive rule suggests that Congress intended to preclude others," including private enforcement. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001).

Respondents contend (at 45) that they seek to enforce § 10(b), "not Regulation S-K." But by Respondents' own admission (at 32), they seek to enforce a "duty" purportedly arising under § 13 and Item 303—

not § 10(b). In any case, the same could have been said about the private plaintiffs in *Sandoval*, who sought to use a private right of action under § 601 of Title VI to enforce regulations designed "to effectuate" that provision. 532 U.S. at 278 (quoting 42 U.S.C. § 2000d–1). The Court rejected that approach, however, reasoning that because the "regulations do not simply apply § 601 … the private right of action to enforce § 601 does not include a private right to enforce these regulations." *Id.* at 285. So too here.

C. RESPONDENTS' NEW ARGUMENTS ARE WAIVED AND MERITLESS.

Unable to defend the pure-omission theory that this Court granted review to evaluate, Respondents tacitly concede that they lose on the Question Presented. They argue instead, for the first time, that the alleged omission of the CityTime investigation was a "deception" capable of misleading "reasonable investors," and is somehow actionable under a half-truth theory. *See* Resp. Br. 23-26. The government tries the same gambit, studiously avoiding any "duty" language in its alternative Question Presented (at i) and contending (at 9) that "[t]his case … involves a half-truth rather than a 'pure omission.'" This new position is both waived and meritless.

1. Respondents (at 18) feign ignorance of the meaning of a "pure omission." That is disingenuous at best. Their own brief in opposition *consistently* addressed whether a "pure omission" violates § 10(b). For example, Respondents argued that "'a complete failure to make a statement—in other words, a *pure omission*,—is actionable under the securities laws.'" Br. in Opp. 20 (emphasis added) (citation omitted). They even presented as a counter-question (at i) the precise issue they so assiduously avoid answering

now: Whether "Item 303 … can provide a duty to disclose."

What Respondents did *not* do at the certiorari stage was contest the premise of the Question Presented by arguing that this case involved a half-truth, rather than a separate *duty* arising under Item 303. By failing to raise their "objection to consideration of [the] question presented" in their brief in opposition, Respondents waived their new half-truth theory. Sup. Ct. R. 15.2; *see also*, *e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930-31 (2011) (deeming waived respondent's "belatedly assert[ed] … theory" which was not raised below or in the brief in opposition); Stephen M. Shapiro et al., *Supreme Court Practice* 503 (10th ed. 2013) (collecting similar cases).

2. Even were this Court to entertain Respondents' new theory, it should reject it. While Respondents assert (at 19) that "[t]his case is heartland securities fraud," it is not even in the hinterlands. It is, in fact, the first of its kind—and should be the last.

a. Respondents cite no authority (and there is none) for the proposition that pure omissions can be "deceptive" half-truths. Respondents rely primarily on two recent cases—but neither involved § 10(b), or even "deception," much less pure omissions. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016) (whether "misrepresentations … [are] misleading half-truths" under the False Claims Act); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1325 (2015) (whether "an opinion may be rendered misleading by the omission of discrete factual representations" under § 11).

Omnicare and *Universal Health* confirm that half-truth liability *requires* a specific affirmative statement to be rendered misleading by an omission. In *Omnicare*, the CEO made two "statements of opinion" essentially "sa[ying] in each that 'we believe we are obeying the law.'" 135 S. Ct. at 1327. And in *Universal Health*, the defendant made "specific representations about the goods or services provided" that were rendered misleading by the omission of additional facts about those goods or services. 136 S. Ct. at 2001. As the Court explained, a "classic example" of a half-truth is where a seller "reveals that there may be two new roads near a property he is selling," but omits a third that could bisect the property. *Id.* at 2000. Having made an *affirmative statement* about the two roads, the seller could not omit additional information about the third road because it would render the affirmative statement misleading.

Here, though, Petitioner said nothing about the CityTime investigation in its March 2011 10-K. Thus, even under the Court's "classic example," Petitioner did not *speak* a half-truth about CityTime. The proper analogy is to the property seller who discloses *no* roads: In the absence of a duty to disclose this information to the prospective purchaser, such a pure omission is not actionable. As former Commissioner Grundfest recently explained, "[t]here is no support in the text of the statute or rule, or in the relevant legislative or regulatory history, for the proposition that Congress or the Commission ever intended to extend Rule 10b–5 private liability to cover pure omissions." Joseph A. Grundfest, *Ask Me No Questions and I Will Tell You No Lies* ("Grundfest"), at 19 (Rock Ctr. for Corp. Governance, Working Paper No. 229, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043990 (all Internet sites last visited Sept. 30, 2017).

b. Respondents strain to recast the pure omission here as a half-truth in two ways, but neither satisfies Respondents' obligation under the PSLRA and Rule 10b–5(b) to identify an affirmative statement that was rendered misleading.

Respondents first suggest (at 27, 40) that "the statements in the MD&A" were misleading, but they never answer the critical question: "*Which* statements?" If vague references to multiple, undifferentiated "statements" were sufficient, the PSLRA's requirement to "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading" would be a dead letter. 15 U.S.C. § 78u–4(b)(1); *see also In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 882-83 (8th Cir. 2009) (listing "lengthy excerpts" from SEC filings "does not satisfy the PSLRA's requirement … because it does not identify 'what' statements were allegedly false or misleading"). Congress enacted the PSLRA to demand *more* specificity in pleading securities class actions; Respondents' approach is not specific at all.

That Respondents cannot, in fact, cite *any* specific statement is clear from the very paragraphs in the complaint that, they contend (at 40), "specify the statements that were rendered misleading by the omission of required facts." Three paragraphs generically refer to false or misleading "SEC filings," ¶ 5 (JA55), or unspecified "false and misleading statements," ¶¶ 527, 564 (JA282, JA310-11). One paragraph references statements in the 2007 10-K, which is not at issue here. *See* ¶ 455 (JA244-45). And the final two paragraphs refer to statements in the 2011 10-K that pertain to "ethics and integrity" and "disclosure and internal controls," ¶¶ 496, 499 (JA263-65)—statements the Second Circuit held (and Respondents do not dispute) were not actionable, *see* Pet. App. 24a-25a. Tellingly, Respondents spend just one sentence (at 40) trying to show they actually complied with the PSLRA's specificity requirement.

Respondents alternatively suggest (at 27) that the MD&A *as a whole* is a "statement." The government's argument (at 12-15) that filing a report with the Commission impliedly conveys compliance with all reporting requirements is nothing more than a dressed-up version of this position. But when Congress enacted the PSLRA, it made clear that a "statement" is something "contained in"—not equivalent to—"a discussion and analysis of financial condition by the management." 15 U.S.C. § 78u–5(i)(1)(C). The entire purpose of "requir[ing] plaintiffs to state with particularity" the specific statements alleged to be fraudulent was to curb "abusive litigation." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Without such a requirement, issuers would be exposed to fraud claims based merely on vague assertions that their "Form 10-K" could have disclosed more. Courts have rejected this theory since the enactment of the PSLRA. *See*, *e.g.*, *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 800 (9th Cir. 2017) (dismissing claim that "Form 10-Q filing was misleading" for failure to "point to any particular statement in the Form 10-Q … that would be misleading"). Neither Respondents nor their *amici* cite any case to the contrary.

As a last-ditch effort, Respondents mention (at 2, 24) for the first time in this litigation the compliance certifications signed by Leidos executives in the March 2011 10-K. Respondents never alleged and do not argue, however, that these certifications were themselves misleading—nor could they pursue such a claim because those certifications are required by

18 U.S.C. § 1350, which merely enhances criminal liability "and does not amend the federal securities laws," including the scope of private § 10(b) liability, Grundfest, *supra*, at 37. This Court "ha[s] been quite reluctant to infer a private right of action from a criminal prohibition alone." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994).

c. Recognizing that Rule 10b–5(b) and the PSLRA foreclose their half-truth theory, Respondents half-heartedly assert (at 40) that this case falls under Rule 10b–5(a) and (c). It does not, as even the government appears to recognize. *See* U.S. Br. 21 (Rule 10(b)–5(a) and (c) require "more than just an omission").

Only Rule 10b–5(b) specifically addresses omissions liability, and every circuit court to address this issue has thus held that Rule 10b–5(a) and (c) require something *more* than a mere omission. *See* Pet. Br. 26-27. "A defendant may *only* be liable … under Rules 10b–5(a) or (c) when the scheme … encompasses conduct beyond … misrepresentations or omissions." *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) (emphasis added).

The fraudulent conduct in each of Respondents' authorities involved engaging in or facilitating a transaction in breach of a fiduciary-type duty—not a pure omission. *See Salman v. United States*, 137 S. Ct. 420, 423 (2016) ("undisclosed trading on inside corporate information"); *Zandford*, 535 U.S. at 825 ("As in *Bankers Life, Wharf,* and *O'Hagan*, … the securities transactions and breaches of fiduciary duty coincide"). It is the deceptive act or scheme that is actionable under 10b–5(a) or (c), not an omission (pure or otherwise). No case imposed liability under 10b–5(a) or (c) for omission *simpliciter*.

3. Respondents mistakenly imply (at 21-22, 26, 34) that private plaintiffs can use § 10(b) to "catch" any and all conceivable "deception." Section 10(b) is a "'catchall' clause" only in the sense that it "enable[s] the Commission 'to deal with *new* manipulative [or cunning] devices.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976) (second alteration in original) (emphasis added); *see* 15 U.S.C. § 78j(b) (prohibiting only those "deceptive" acts that "the Commission may prescribe").

Pure omissions are not a new device: Congress was well aware of them when it first enacted the securities laws, which is why it made them enforceable by private plaintiffs under § 11 of the Securities Act, 15 U.S.C. § 77k(a), and by the Commission under § 13(a) of the Exchange Act, *id.* § 78u–2(a)(1)(C). It is unsurprising that Congress would deliberately authorize broader private liability for omissions under § 11 than under § 10(b). Unlike §10(b) which makes issuers liable to investors trading with third-parties on the open market, § 11 applies only when the issuer *itself* sells securities to investors—and hence could profit from a pure omission.

Respondents attempt to avoid the doctrinal analysis demanded by this Court's cases by arguing that a hypothetical "reasonable investor" would expect public company filings to contain all information required by Commission regulations. But while investor expectations are relevant to the *materiality* element of a private § 10(b) action, *see*, *e.g.*, *Matrixx*, 563 U.S. at 38; *Basic*, 485 U.S. at 240, they do not determine whether *fraud* has been committed. The proverbial reasonable investor may expect compliance with every jot and tittle of a regulatory regime, but that does not give the investor a cause of action to enforce every regulation. If duties and rights could arise merely from investor expectations, *Matrixx*'s "empha[tic]" teaching that issuers do not commit fraud under § 10(b) merely by omitting "information that a reasonable investor might consider material," 563 U.S. at 44-45, would be toothless. In fact, equating "investor expectations" with "private rights" would put the Court right back in the business of implying rights of action, and render *Sandoval* meaningless.

As Respondents admit (at 28), affirmance would turn *thousands* of regulatory reporting requirements—including over 600 in Regulation S-K alone—into new sources of private liability. *Cf.* Laura Numeroff, *If You Give a Cat a Cupcake* (2008). The very fact that their approach "contain[s] no stopping point" confirms that it is inconsistent with the structure and purpose of Item 303 and other disclosure requirements, as a trio of knowledgeable observers has recently explained at length. Linda L. Griggs, John J. Huber & Christian J. Mixter, *When Rules Collide—* Leidos*, the Supreme Court, and the Risk to the MD&A* ("Griggs et al."), 49 Sec. Reg. & L. Rep. (BNA) 1511, 1557 (2017).

II. POLICY REASONS DO NOT SUPPORT EXPANDING THE § 10(B) PRIVATE RIGHT.

Petitioner and its *amici* explained that it would be neither necessary nor wise to expand private § 10(b) liability to include novel, private claims based on pure omissions. *See* Pet. Br. 41-54; SIFMA Br. 16-26; NAM Br. 15-20; Soc'y for Corp. Governance Br. 18-29; Bus. Roundtable Br. 16-18; WLF Br. 26-33; Retail Litig. Ctr. Br. 19-28. Respondents do not dispute the first point, and their responses to the second are unpersuasive.

A. Respondents make no argument that *private* enforcement is needed as an "essential supplement" to Commission enforcement. *Tellabs*, 551 U.S. at 313. Respondents suggest instead (at 46) that failing to recognize private § 10(b) liability would somehow create a "blanket immunity" for issuers and "strip the Commission of power to police" pure omissions. That is misdirection.

Issuers are liable under § 10(b) for making false statements or half-truths in public filings, including in the MD&A section. And the Commission *already* has a "full panoply of enforcement tools" for enforcing pure omissions under § 13, *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017), which includes the same relief as would be available in a § 10(b) action. *See* 15 U.S.C. §§ 78u–2(a)(2) (civil penalties), 78u–3(a) (cease-and-desist orders), 7246(a) (compensation for harmed investors). Because § 13 claims do not require a showing of scienter and are easier to prove, "the Commission's enforcement agenda will therefore not be meaningfully impacted by the outcome" of this case. Grundfest, *supra*, at 5. Tellingly, no party cites any case in which the Commission relied exclusively on § 10(b) to prosecute a pure omission under any regulation.

Moreover, there plainly is no need for an *additional* theory of private § 10(b) liability. "If the Court holds that pure omissions are not actionable under Rule 10b–5, plaintiffs will simply reframe those omissions as creating actionable half-truths." Grundfest, *supra*, at 6. This case proves the point because Respondents have alleged that the identical omission caused affirmative statements made pursuant to FAS 5 to become materially false and misleading. Bottom line: "No one gets a free pass because of a pure omission." *Id.* at 16.

B. Private enforcement of pure omissions also would undermine the Commission's flexible disclosure regime and incentivize hindsight pleading. Pet. Br. 41-47; *see also*, *e.g.*, SIFMA Br. 11-13, 22-26; Soc'y for Corp. Governance Br. 18-27; Bus. Roundtable Br. 5-9.

Despite the detrimental consequences of private liability, Respondents suggest that expanding private liability could promote "'full disclosure.'" Resp. Br. 45 (citation omitted). That ignores the inherently subjective nature of MD&A disclosure, which is not susceptible to bright-line rules. As the Commission has explained, "because each registrant is unique, no one checklist could be fashioned to cover all registrants comprehensively." Concept Release on Management's Discussion and Analysis of Financial Condition and Operations, 52 Fed. Reg. 13,715, 13,716 (Apr. 24, 1987). Even the government acknowledges that Item 303 thus "requires judgment calls" that make it "*unclear* whether [the regulation] actually required disclosure of particular information." U.S. Br. 13 (emphasis added).

Respondents (at 24) never address the subjective nature of Item 303 disclosures. They point to bright-line disclosure rules—requiring disclosure of all lawsuits seeking $10 million in damages, or a director's criminal convictions or pending personal bankruptcy petitions—where the relevant information is readily and objectively verifiable. But they ignore *actual* Item 303 disclosures—such as the development of a new product, internal plans for reorganization, an executive's health, or trade secrets—which are subjective, mutable, and not reducible to clear facts and figures. *See* Pet. Br. 46. Where, for example, management learns of a cyber-intrusion, but does not yet know its scope or even what has been compromised, companies must tread with extreme caution to avoid acting prematurely and inadvertently giving investors misinformation. *See* Soc'y for Corp. Governance Br. 11; *see also* Griggs et al., *supra*, at 1515 ("disclosure of something as a known trend or uncertainty that turns out not to be one can be just as harmful to investors as not disclosing a known trend or uncertainty at the right time"). The threat of private liability would *undermine* meaningful disclosure because the plaintiffs' bar lacks the Commission's prosecutorial discretion and is financially motivated to file as many claims as it can.

Private § 10(b) enforcement of pure omissions also would incentivize precisely the sort of hindsight-driven litigation that the PSLRA was designed to prevent. Pet. Br. 47-49. Respondents assert (at 50-51) that the materiality and scienter elements are sufficient to prevent such suits—but Congress understood they are not. The PSLRA requires private plaintiffs to state with particularity the facts evidencing scienter *and* the specific statements alleged to be fraudulent. *Tellabs*, 551 US. at 313. Congress recognized that both of these requirements played important functions in curbing abusive securities suits. Moreover, materiality is a "fact-specific inquiry," *Basic*, 485 U.S. at 240; and because plaintiffs are likely to bring suit only after determining *ex post* that the omitted trend or uncertainty was material, courts will rarely dismiss complaints for inadequate pleading of materiality.

Finally, Respondents' extended discussion of the merits of their claim (at 52-57) misses the mark. They concede (at 54 n.24) that under Item 303 "there is no 'generalized duty' to disclose uncharged misconduct or a government investigation." Yet they cannot explain why, in their view, disclosure would be required under Item 303 but *not* Item 103, the specific regulation devoted to disclosure of pending legal proceedings and government investigations. Nor do they have any meaningful response to the point that Petitioner was *not* required to disclose the CityTime investigation in the Item 103 section of the very 10-K at issue in this case. *See* Pet. Br. 51 (citing *In re Lions Gate Entm't Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016)). Indeed, they conceded this point by not even alleging an Item 103 violation below. Regardless, Item 103—like Item 303, and all the other line-items in Regulation S-K—is not enforceable by private investors in a § 10(b) class action.

* * *

By any measure, securities litigation is booming. No public company in the Nation is a stranger to it or the dangers it presents. This year alone, an astounding *one in ten* public companies "will get hit with a securities suit." Kevin LaCroix, *What to Watch Now in the World of D&O*, The D&O Diary (Sept. 4, 2017), http://bit.ly/2xAr0zs. The decision whether private plaintiffs need additional liability theories to bring still more securities-fraud class actions "is for Congress," not the courts. *Stoneridge*, 552 U.S. at 165. The Court should decline Respondents' invitation to introduce a new species of private liability into § 10(b).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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October 2, 2017