No. 22-1165

IN THE
Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORPORATION, ET AL.,
Petitioners,

v.

MOAB PARTNERS, L.P., ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT MOAB PARTNERS, L.P.

SALVATORE J. GRAZIANO
LAUREN AMY ORMSBEE
JESSE L. JENSEN
WILLIAM E. FREELAND
BERNSTEIN LITOWITZ
BERGER & GROSSMANN
LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 554-1400

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
DUSTIN G. GRABER
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

August 11, 2023

QUESTION PRESENTED

Whether this Court should grant interlocutory review of the Second Circuit's holding that Item 303 of SEC Regulation S-K creates a duty to disclose that can be actionable under Rule 10b-5 if the plaintiff adequately and independently pleads all other elements of the Rule 10b-5 cause of action.

PARTIES TO THE PROCEEDINGS

Respondent Moab Partners, L.P. was the district court-appointed lead plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

The City of Riviera Beach General Employees Retirement System, on behalf of itself and all others similarly situated, was a plaintiff in the district court proceedings but did not participate in the court of appeals proceedings and so is not a respondent in the proceedings before this Court.

RULE 29.6 STATEMENT

Respondent Moab Partners, L.P., established in 2006, is an institutional investor located in New York, New York. Moab has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT... 2

REASONS FOR DENYING THE PETITION 13

I. THE COURT'S GRANT IN *LEIDOS* DOES NOT SUPPORT GRANTING THIS PETITION 13

A. The Question Presented No Longer Warrants Review....................................... 13

B. This Petition Materially Differs From *Leidos* 20

C. Interlocutory Review Is Unwarranted...... 23

II. THE DECISION BELOW IS CORRECT 26

A. The Second Circuit's Conclusion That Item 303 Creates A Duty To Disclose Comports With The Text Of § 10(b) And This Court's Decisions 26

B. The Second Circuit Did Not Expand § 10(b)'s Private Right Of Action............. 30

CONCLUSION... 31

TABLE OF AUTHORITIES

Page

CASES

Allison v. Oak St. Health, Inc., 2023 WL 1928119 (N.D. Ill. Feb. 10, 2023) 20

American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372 (1893) 23, 25

Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455 (2013) 3, 4

Asay v. Pinduoduo Inc., 2021 WL 3871269 (2d Cir. Aug. 31, 2021) 16

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 3, 4, 27, 28, 29, 30, 31

Brady v. Top Ships Inc., 2019 WL 3553999 (E.D.N.Y. Aug. 5, 2019), *aff'd sub nom. Onel v. Top Ships, Inc.*, 806 F. App'x 64 (2d Cir. 2020) 17

Bristol Cnty. Ret. Sys. v. Adient PLC, 2022 WL 2824260 (2d Cir. July 20, 2022) 30

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967) 23

Carvelli v. Ocwen Fin. Corp., 934 F.3d 1307 (11th Cir. 2019) 17, 18, 30

Chiarella v. United States, 445 U.S. 222 (1980) 28

City of Warwick Mun. Emps. Pension Fund v. Rackspace Hosting, Inc., 2019 WL 452051 (S.D.N.Y. Feb. 5, 2019) 17

Construction Laborers Pension Tr. for S. California v. CBS Corp., 433 F. Supp. 3d 515 (S.D.N.Y. 2020) 17

DCD Programs, Ltd. v. Leighton, 90 F.3d 1442 (9th Cir. 1996).. 15

Dynagas LNG Partners LP Sec. Litig., *In re*, 504 F. Supp. 3d 289 (S.D.N.Y. 2020) 17

General Elec. Sec. Litig., *In re*, 844 F. App'x 385 (2d Cir. 2021) 16

Gordon v. Tencent Music Ent. Grp., 2021 WL 9183821 (E.D.N.Y. Mar. 31, 2021)...................... 17

Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) 29, 30

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 23

Indiana Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85 (2d Cir. 2016), *cert. dismissed sub nom. Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 138 S. Ct. 2670 (2018)...21, 23, 30

J & R Mktg., SEP v. General Motors Corp., 549 F.3d 384 (6th Cir. 2008) 10

Kokesh v. SEC, 581 U.S. 455 (2017).................2, 3, 29

Leidos, Inc. v. Indiana Pub. Ret. Sys., 137 S. Ct. 1395 (2017) 1

Lewis v. YRC Worldwide Inc., 2020 WL 1493915 (N.D.N.Y. Mar. 27, 2020) 17

Liberty Tax, Inc. Sec. Litig., *In re*, 435 F. Supp. 3d 457 (E.D.N.Y.), *aff'd*, 828 F. App'x 747 (2d Cir. 2020) 16-17

Life & Fire Ins. Co. of New York v. Adams, 34 U.S. (9 Pet.) 573 (1835) 23

Lopez v. CTPartners Exec. Search Inc., 173 F. Supp. 3d 12 (S.D.N.Y. 2016)................................ 17

Lorenzo v. SEC, 139 S. Ct. 1094 (2019) 22

Macovski v. Groupon, Inc., 553 F. Supp. 3d 460 (N.D. Ill. 2021) 20

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011) 4, 27, 28

Mount Soledad Mem'l Ass'n v. Trunk, 567 U.S. 944 (2012) 26

Municipal Emps.' Ret. Sys. of Michigan v. Pier 1 Imports, Inc., 935 F.3d 424 (5th Cir. 2019) 18

NVIDIA Corp. Sec. Litig., In re, 768 F.3d 1046 (9th Cir. 2014) 10, 13, 14, 15, 17

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175 (2015) 27

Ong v. Chipotle Mexican Grill, Inc., 294 F. Supp. 3d 199 (S.D.N.Y. 2018), *aff'd sub nom. Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133 (2d Cir. 2020) 17

Oran v. Stafford, 226 F.3d 275 (3d Cir. 2000) 14, 15, 17, 28, 30

Panther Partners Inc. v. Ikanos Commc'ns, Inc., 681 F.3d 114 (2d Cir. 2012) 10

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 24, 25

Roper v. Sito Mobile Ltd., No. 2:17-cv-1106-ES-MAH, ECF No. 64 (D.N.J. Jan. 30, 2019) 16

SCANA Corp. Sec. Litig., In re, 2019 WL 1427443 (D.S.C. Mar. 29, 2019) 18

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 24

SEC v. Capital Gains Rsch. Bureau, Inc., 375 U.S. 180 (1963) 3

SEC v. Zandford, 535 U.S. 813 (2002)....................... 3

Silverstrand Invs. v. AMAG Pharms., Inc., 707 F.3d 95 (1st Cir. 2013)................................. 10

Skechers USA, Inc. Sec. Litig., *In re*, 444 F. Supp. 3d 498 (S.D.N.Y. 2020)....................................... 16

Slack Techs., LLC v. Pirani, 143 S. Ct. 1433 (2023) 2

Slater v. A.G. Edwards & Sons, Inc., 719 F.3d 1190 (10th Cir. 2013).. 10

Socal Recovery, LLC v. City of Costa Mesa, 56 F.4th 802 (9th Cir. 2023), *cert. petition pending*, No. 23-71 (U.S. July 21, 2023)............ 15

Steamfitters' Indus. Pension Fund v. Endo Int'l PLC, 771 F. App'x 494 (2d Cir. 2019)................. 17

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)......................... 3

Stratte-McClure v. Morgan Stanley, 776 F.3d 94 (2d Cir. 2015).......................................5, 11, 12, 13, 14, 17, 18, 30

Sun v. Han, 2:15-cv-00703-JMV-MF, ECF No. 44 (D.N.J. No. Dec. 21, 2015).............................. 16

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) 6, 29

Tempur Sealy Int'l, Inc. Sec. Litig., *In re*, 2019 WL 1368787 (S.D.N.Y. Mar. 26, 2019) 17

Triangle Cap. Corp. Sec. Litig., *In re*, 988 F.3d 743 (4th Cir. 2021)... 18

Universal Health Servs., Inc. v. United States ex rel. Escobar, 579 U.S. 176 (2016).................... 27

Utah Ret. Sys. v. Healthcare Servs. Grp., Inc., No. 2:19-cv-01227-ER, ECF No. 42 (E.D. Pa. Apr. 24, 2020) 16

Victor Techs. Sec. Litig., In re, 792 F.2d 862 (9th Cir. 1986).......... 15

Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588 (2001) 29

Williams v. Globus Med., Inc., 869 F.3d 235 (3d Cir. 2017) 15

Yoshikawa v. Seguirant, --- F.4th ---, 2023 WL 4722982 (9th Cir. July 25, 2023).......... 16

STATUTES, REGULATIONS, AND RULES

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* 2, 3, 9, 10, 11, 12, 23, 24, 29

§ 11, 15 U.S.C. § 77k............3, 9, 10, 12, 23, 27, 29

§ 12, 15 U.S.C. § 77*l*.......... 3

§ 12(a)(2), 15 U.S.C. § 77*l*(a)(2)...........9, 10, 12, 23

§ 15, 15 U.S.C. § 77*o*..........10, 12

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* 1, 2, 3, 4, 10, 11, 12, 22, 23, 27, 28

§ 10(b), 15 U.S.C. § 78j(b)......... 1, 2, 3, 5, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31

§ 13, 15 U.S.C. § 78m.......... 28

§ 13(a)(2), 15 U.S.C. § 78m(a)(2) 5

§ 20(a), 15 U.S.C. § 78t(a)..........10, 12

§ 20A, 15 U.S.C. § 78t-1..........10, 12

17 C.F.R.:

§ 229.10(a)(2) 5

§ 229.303 (SEC Item 303)......1, 2, 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 30, 31

§ 229.303(a)(3)(ii) (2018) 5

§ 229.303(b)(2)(ii) 5-6

§ 240.10b-5 (SEC Rule 10b-5) 1, 3, 4, 10, 13, 22, 26, 30

§ 240.10b-5(b) (SEC Rule 10b-5(b)).................... 22

§ 240.10b-5(c) (SEC Rule 10b-5(c)) 22

2d Cir. R. 32.1.1 19

Sup. Ct. R. 10 19

ADMINISTRATIVE MATERIALS

Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22,427 (May 24, 1989) 5

Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080 (Nov. 19, 2020) 6, 20

OTHER MATERIALS

Lead Pls.' Mem. of Law in Support of Unopposed Mot. for Prelim. Approval of Settlement, *In re SAIC, Inc. Sec. Litig.*, No. 1:12-cv-01353-DAB, ECF No. 178 (S.D.N.Y. Dec. 13, 2017)... 21

Leidos, Inc. v. Indiana Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (No. 16-581):

Brief for the United States as Amicus Curiae Supporting Respondents (Sept. 7, 2017)... 15

Petition for a Writ of Certiorari (Oct. 31, 2016)..14, 21

Reply Brief for Petitioner (Feb. 21, 2017)......21, 22

INTRODUCTION

This case involves a straightforward, unpublished ruling on a motion to dismiss by a well-regarded Second Circuit panel in a securities case. In one of several independent bases for remanding, the court of appeals correctly ruled that respondent Moab Partners, L.P. ("Moab") had stated a claim under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 by alleging material omissions in petitioners' SEC-mandated disclosures. Those omissions concerned the effect of an international rule change on a commodity at the core of petitioners' business. The Second Circuit upheld that omission claim — plus many other claims the petition does not challenge — and remanded for further proceedings. Those proceedings remain ongoing.

Petitioners urge review because this Court granted certiorari six years ago in a case raising a similar issue. *See Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (No. 16-581). Petitioners there convinced the Court of a circuit conflict between the Second Circuit and the Ninth Circuit over whether Item 303 — an SEC regulation requiring businesses to disclose management's analysis of the issuer's financial condition — can support an omission claim under § 10(b). Whether such an omission claim is viable is highly fact-specific, as it is in this case. The Solicitor General, representing the United States (and the SEC) as *amicus* in *Leidos*, agreed with the Second Circuit that, if the factual allegations meet all the elements of a § 10(b) claim, the case can proceed past the pleadings stage. The Ninth Circuit — which appears to have been the first to opine that an Item 303 violation never can support a § 10(b) claim — has not had occasion to revisit the question since the Second Circuit held that the inquiry is contextual and

the federal government has agreed. Nor has any other circuit adopted the Ninth Circuit's reasoning. Indeed, Moab was unable to find another certiorari petition since *Leidos* even to raise the question.

The petition, therefore, presents an issue of diminishing importance. The asserted circuit split has proven superficial and could well disappear with further percolation. Moreover, this issue arises rarely and usually makes no difference to the outcome. Indeed, the last six years have revealed that the *Leidos* petition's premise — that Item 303-based omission claims would reshape securities law and upend the financial markets — was mistaken. Courts assess Item 303-based claims carefully and sustain them only when investors can meet § 10(b)'s other elements, including materiality and scienter. Most investors cannot satisfy that test; in this case, the court of appeals correctly held that Moab had done so. And because this case will proceed on remand on other claims not challenged in the petition, its interlocutory posture furnishes an additional reason to deny the petition.

STATEMENT

1. Congress enacted the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") to counter "rampant abuses in the securities industry [that] led to the 1929 stock market crash and the Great Depression." *Kokesh v. SEC*, 581 U.S. 455, 457-58 (2017). The Securities Act regulates initial offerings; the Exchange Act regulates secondary trading. *See Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1437 (2023). The Exchange Act also created the SEC and gave it broad authority to regulate the securities industry. *See Kokesh*, 581 U.S. at 458.

To "promote investor confidence" in the securities markets, *SEC v. Zandford*, 535 U.S. 813, 819 (2002), Congress "'substitut[ed] a philosophy of full disclosure for the philosophy of *caveat emptor*,'" *Kokesh*, 581 U.S. at 457-58 & n.1 (quoting *SEC v. Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186 (1963)) (brackets omitted). Congress recognized that "the hiding and secreting of important information obstructs the operation of the markets as indices of real value." *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988). Both the Securities Act and the Exchange Act thus empower private litigants to bring suit for securities violations. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); 15 U.S.C. §§ 77k, 77*l*. Private enforcement of the federal securities laws is "an essential supplement to criminal prosecutions and civil enforcement actions." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013).

Moab below brought claims under both the Securities Act and the Exchange Act. Moab's claims under the Securities Act remain pending in the district court and are not at issue in this petition. Moab's Exchange Act claims also remain pending before the district court, and only a subset of the Exchange Act claims are at issue in this petition. As for those latter claims, the Exchange Act broadly prohibits deceptive conduct in connection with the purchase or sale of securities, making it "unlawful" for any person "[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 as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). The SEC's Rule 10b-5 implements that prohibition by proscribing any of the following:

(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.

17 C.F.R. § 240.10b-5.

To prevail in a private action under these provisions, "a plaintiff must prove '(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Amgen*, 568 U.S. at 460-61 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011)). When a claim alleges an omission, the withheld information must have been material, meaning there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32. But "§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives*, 563 U.S. at 44. Rather, the issuer must first have "'a duty to disclose'" before any omission — even a material one — can be actionable. *Id.* at 45 (quoting *Basic*, 485 U.S. at 239 n.17).

An SEC regulation called "Item 303" is one way such a disclosure duty can arise. The Exchange Act authorizes the SEC to establish requirements for periodic

reporting by public issuers. 15 U.S.C. § 78m(a)(2). Regulation S-K implements one such requirement by prescribing "the content of the non-financial statement portions" of the "annual or other reports" issuers must file. 17 C.F.R. § 229.10(a)(2). Item 303 of Regulation S-K in turn requires that those annual reports include management's analysis of the issuer's financial condition and results of operations — called the "MD&A." *See id.* § 229.303. As the Second Circuit has held, an issuer's failure to make a disclosure mandated by Item 303 can support a § 10(b) claim if the statute's other elements are met. *See Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015).

During the relevant period here, the MD&A required petitioners to "[d]escribe 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) (2018). That provision created a "disclosure duty" mandating that petitioners disclose any "trend, demand, commitment, event or uncertainty" that "is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation." Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22,427, 22,429 (May 24, 1989).

In November 2020, after the time period relevant here, the SEC amended the Item 303 rules at issue. The revised provision now mandates that the registrant disclose any known trends or uncertainties "that are reasonably likely to cause a material change in the relationship between costs and revenues." 17 C.F.R.

§ 229.303(b)(2)(ii). The amendment changed the disclosure trigger from a "reasonably expects" threshold to a "reasonably likely" one. The SEC explained that the purpose of the amendment was to provide "specific guidance" and "a tailored and meaningful framework" for issuers to "objectively analyze whether forward-looking information is required" where the likelihood of "known events or uncertainties" cannot be determined. Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, 2094 (Nov. 19, 2020) ("SEC 2021 Interpretive Release").

2. MIC owned and operated several infrastructure businesses, including International-Matex Tank Terminals ("IMTT"), a large bulk liquid-storage and handling service provider (¶ 37).[1] IMTT was MIC's most profitable business and the "key driver" of its performance, supplying 54% and 80% of its net income in 2016 and 2017. ¶¶ 61-79. During the Class Period (February 22, 2016 to February 21, 2018), IMTT devoted more than 40% of its infrastructure to storing "6-Oil," the industry term for high-sulfur heavy and residual fuels. ¶¶ 1, 5, 81, 83. 6-Oil requires expensive, specialized storage tanks. ¶¶ 116-117. Consumption of 6-Oil has declined over time, and by the start of the Class Period in February 2016, the primary remaining 6-Oil users were large shipping vessels. ¶¶ 86-89.

---

[1] Paragraph cites are to the operative complaint, which is reproduced at pages JA20-138 of the Second Circuit Joint Appendix. The complaint's factual allegations are deemed true at the dismissal stage. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

In October 2008, the International Maritime Organization announced new regulations — effective January 2020 — to largely eliminate usage of 6-Oil in global shipping ("IMO 2020"). ¶¶ 90-92. Other industry participants appeared to recognize that IMO 2020 would be a seismic event for 6-Oil, including for oil-storage companies. *See*, *e.g.*, ¶¶ 92-93.

Years before the start of the Class Period, petitioners had told investors in the wake of IMO 2020's announcement that they intended to reduce IMTT's 6-Oil storage. Specifically, in May 2012, MIC's then-CEO, petitioner Hooke, told investors that MIC executives had "all read the articles" about the "uncertainty" and possible impact on the "demand for storage of heavy oil residual product" (i.e., 6-Oil) and explained that IMTT could shift to storing "clean products" through "a one-off increase in capital expenditures." ¶ 105. By November 2012, Hooke stated that IMTT had begun to reduce 6-Oil storage, converting 1.2 million barrels of 6-Oil storage capacity to a lighter-grade fuel. ¶ 107. For years after that statement, petitioners remained silent about IMTT's exposure to 6-Oil. Meanwhile, IMTT secretly remained reliant on it. On February 21, 2018, petitioners disclosed to the market the material impact of IMO 2020 on IMTT's business, ¶¶ 180-184, and petitioners finally revealed in May 2018, months after the end of the Class Period, that 6-Oil had accounted for nearly 40% of IMTT's storage volume, ¶¶ 212-213.

Petitioners' years-long silence about IMTT's continued 6-Oil storage materially misled investors. The alleged facts — known only to petitioners during the Class Period — made it reasonably likely that the IMO 2020-driven collapse of the 6-Oil market would crush IMTT's revenues and force MIC to spend

millions of dollars repurposing its 6-Oil tanks. Petitioners knew of these risks during the Class Period because they had been "completely joined at the hip with" IMTT in "active day-to-day management" and "knew in great detail" IMTT's fuel inventory and contracts. ¶¶ 64-65, 75 (emphases omitted).

While industry observers and participants (including IMTT's competitors) warned during the Class Period that IMO 2020 would have "global repercussions" and would be "one of the dominant issues facing the global refinery industry in the next ten years," ¶¶ 101, 119-123 (emphasis omitted), petitioners concealed from investors MIC's exposure to IMO 2020's seismic impact. Petitioners' quarterly and year-end filings during the Class Period omitted any mention of 6-Oil and IMO 2020, including the risks they posed to IMTT's business. ¶¶ 111-112, 140.

In fact, petitioners misrepresented MIC's exposure. On November 1, 2016, Hooke claimed publicly that "none of MIC's businesses are exposed directly to the price of . . . petroleum products" — omitting IMTT's particular exposure to the industry-wide disruption of the 6-Oil market as a result of IMO 2020. ¶ 130 (ellipsis in original). With investors unaware of the truth, however, MIC common stock climbed to its Class Period high that same day. *Id.* Likewise, in a secondary public offering of MIC common stock two days later ("Offering"), the Offering Documents made no mention of IMTT's dependence on 6-Oil or the risks threatened by IMO 2020. ¶¶ 131-132, 354-365.

After the Offering, petitioners continued to omit any mention of 6-Oil or IMO 2020 — even while other industry participants acknowledged how the IMO 2020 changes would affect their businesses. ¶¶ 142, 147, 151, 186. Instead, on an August 2017 earnings

call, Hooke told investors that IMTT remained "a case of steady as she goes" and disclaimed any "other commodity noise or other noise or counter-party issues." ¶ 150 (emphases omitted). Those misleading assurances caused an industry analyst to predict growth for IMTT, even as IMTT's performance was falling. ¶¶ 151-152.

The truth finally emerged on February 21, 2018, when MIC cut its quarterly dividend guidance by 31% to reflect IMTT's declining performance. ¶¶ 180-182. MIC's new CEO blamed the bad news on one culprit: 6-Oil. ¶ 184. He explained that "a number of customers terminated contracts for a significant amount of 6 Oil capacity at IMTT's facility in St. Rose. . . . [I]n some cases, they shut down their operations and exited the industry" as a result of "structural decline in the 6 Oil market." ¶¶ 184-186 (emphasis omitted). Further, MIC needed cash to fund repurposing projects for its tanks "into the storage and handling of bulk liquids other than 6 Oil." ¶ 196. MIC's stock price plummeted in response.

3. On February 20, 2019, Moab filed an amended complaint on behalf of a class of persons who bought MIC securities during the Class Period. Moab sued MIC, certain of MIC's senior executives, Macquarie Management, and Barclays as underwriter of the November 2016 Offering. Based on petitioners' misrepresentations and omissions about IMTT's 6-Oil exposure, Moab brought six claims. This petition does not implicate five of them: (1) the Securities Act § 11 claim against MIC, Barclays, and the individual petitioners for their inaccurate and misleading statements and omissions in the Offering Documents; (2) the Securities Act § 12(a)(2) claim against MIC and

Barclays as statutory sellers in the Offering;[2] (3) the control-person claim under Securities Act § 15; (4) the control-person claim under Exchange Act § 20(a); and (5) the Exchange Act § 20A claim for insider sales.

Moab's claim under Exchange Act § 10(b) and Rule 10b-5 against MIC and the Management defendants — the only claim the petition partially implicates — alleges that those defendants "carried out a plan, scheme, and course of conduct" to deceive investors. ¶ 318. Moab bases this claim both on petitioners' false statements and misleading "half-truths" as well as on their failure to disclose material information required by Item 303. The misrepresentations affirmatively deceived investors about IMTT's reliance on 6-Oil. ¶¶ 20, 151-152, 212. The omissions withheld key information — about IMTT's secret reliance on 6-Oil and its exposure to IMO 2020 — that both petitioners' own statements and Item 303 required them to disclose. ¶¶ 111-112, 130, 140.

Petitioners moved to dismiss, challenging the allegations of falsity, scienter, loss causation, and standing. Petitioners characterized the alleged Item 303 violations as just one facet of Moab's general "omission theory." *See*, *e.g.*, ECF No. 101, at 15 ("Nor does plaintiff's reliance on Item 303 of Regulation S-K (Compl. ¶ 277) do anything to salvage its omission theory."). The district court dismissed the complaint in its

---

[2] The petition does not implicate Moab's Securities Act claims because all circuits that have considered the question agree that Item 303 can support a claim under § 11 and § 12(a)(2). *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1055-56 (9th Cir. 2014); *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013); *Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013); *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119-21 (2d Cir. 2012); *J & R Mktg., SEP v. General Motors Corp.*, 549 F.3d 384, 392 (6th Cir. 2008).

entirety for failing to plausibly allege false statements or omissions, and for failing to sufficiently allege scienter as to the Exchange Act claims. In particular, the court held that Moab failed to allege a violation of Item 303 or that the omission was material. App. 39a-40a. The court did not address the remainder of petitioners' motion-to-dismiss arguments.

4. In an unpublished, summary order, the Second Circuit revived Moab's claims under both the Securities Act and the Exchange Act. Most of the claims it revived do not turn on Item 303. The court reinstated Moab's § 10(b) claim because Moab adequately alleged that petitioners made affirmative misstatements, including as to their "base of customers," which were "half-truths" that independently required petitioners to disclose information necessary to assess the risks from IMO 2020. App. 10a-11a. Moab also sufficiently alleged that petitioners made other misrepresentations that were not "puffery or expression of corporate optimism." App. 7a & n.1. Further, the court held that Moab adequately alleged scienter. App. 11a-12a.

The Second Circuit also revived Moab's § 10(b) and Securities Act claims because Moab adequately alleged that petitioners violated Item 303. Relying on prior circuit precedent, the court explained that failure to make a required Item 303 disclosure can support "a claim under Section 10(b) if the other elements have been sufficiently pleaded." App. 8a (citing *Stratte-McClure*, 776 F.3d at 101-04). Here, Moab alleged that petitioners knew that IMO 2020 would have a "reasonably likely" material effect on MIC's business, so Item 303 required petitioners to inform investors of those risks. App. 9a. The court reasoned that, "[a]s pleaded," petitioners' failure to disclose the potential impact of IMO 2020 was not "'objectively

reasonable.'" *Id.* And Moab sufficiently alleged that the omitted information was material. App. 10a. The court then remanded for further proceedings.

Petitioners sought rehearing en banc, asserting that the panel decision conflicted with *Stratte-McClure*. The Second Circuit denied rehearing. It also rejected petitioners' request to stay the mandate pending this petition. Petitioners' stay motion acknowledged that, no matter how this Court resolves their petition, at least some of Moab's revived claims will proceed. *See* Mot. To Stay Mandate at 21, ECF No. 134-2 (2d Cir. Feb. 2, 2023).

5. On remand, the district court stayed discovery to wait for petitioners' then-anticipated renewed motions to dismiss some of the claims.[3] Briefing on those still-pending motions finished on May 26, 2023. Petitioners concede that neither those motions nor this petition are case-dispositive, and there is at least "one aspect of one claim that would be unaffected by either the renewed motions to dismiss or the anticipated Supreme Court cert petition." 4/3/23 Dist. Ct. Hr'g Tr. 6:14-17, ECF No. 141. Further, neither this petition nor the renewed motions meaningfully will affect the length of the Class Period, the damages sought, or the scope of discovery. Rather, the Item 303-based claims merely complement — and are co-extensive with — other claims the Second Circuit sustained and that this petition does not challenge. *See* ECF No. 101, at 15.

---

[3] All defendants moved to dismiss the Securities Act § 11, § 12(a)(2), and § 15 claims, and Macquarie Management moved to dismiss the Exchange Act § 20(a) and § 20A claims. *See* ECF Nos. 135, 138, 140. Those pending motions do not implicate Moab's § 10(b) claims, some of which do not rest on Item 303.

REASONS FOR DENYING THE PETITION

The Court granted review in *Leidos* to decide whether Item 303 can ever support an omission claim under § 10(b). Six years later, that question no longer warrants review. The circuit split *Leidos* implicated has become superficial and unimportant in practice. With further percolation, it may disappear altogether. And, unlike in *Leidos*, the Item 303 question here is ancillary to the overall case. Reviewing that question now would not resolve the case or even materially change its scope; it would merely create delay and waste judicial resources. That is especially true because the decision below is correct. The Court should not accept review in ongoing proceedings just to affirm the Second Circuit's interlocutory ruling.

I. THE COURT'S GRANT IN *LEIDOS* DOES NOT SUPPORT GRANTING THIS PETITION

A. The Question Presented No Longer Warrants Review

1. Petitioners ask the Court to decide whether Item 303's disclosure duty can ever support an omission claim under § 10(b) and Rule 10b-5. Nearly a decade ago, the Ninth Circuit said no. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014). Afterwards, the Second Circuit adopted a more nuanced approach, under which Item 303 can *sometimes* support a § 10(b) claim when the statute's other elements are met. *See Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 103 (2d Cir. 2015). The Court granted review in *Leidos* to resolve that disagreement. Six years later, things have changed. The *Leidos* question no longer merits review.

The *Leidos* petitioners obtained review by warning this Court that the Second Circuit's view of Item 303 — first announced in 2015 — would threaten far-

reaching consequences. *See Leidos* Cert. Pet. 22, No. 16-581 ("[T]he Second Circuit's holdings would upset the securities and financial markets by exposing issuers to potentially massive liability for omitting information that might later be found to be a 'trend' or 'uncertainty' under Item 303."). The intervening years have proved those warnings unfounded. Certiorari is no longer warranted.

a. The circuit split has narrowed since *Leidos* and — if percolation continues — may disappear entirely. The Second, Third, and Ninth Circuits all agree that a violation of Item 303 does not automatically support a claim under § 10(b).[4] Only the Ninth Circuit has gone further and held that a violation of Item 303 never can support a § 10(b) claim. *See NVIDIA*, 768 F.3d at 1056. The Ninth Circuit has addressed this question only once — in a single case nearly 10 years ago before Item 303 was amended — and would not likely adhere to its ruling if the question arose again.

The Ninth Circuit has had no opportunity to reconsider that bright-line rule since adopting it nine years ago. And intervening developments have undermined its rationale. To start, the Ninth Circuit lacked the benefit of the Second Circuit's views — the most influential circuit on the federal securities laws — when it

---

[4] *See Stratte-McClure*, 776 F.3d at 102 ("The failure to make a required disclosure under Item 303 . . . is not by itself sufficient to state a claim for securities fraud under Section 10(b)."); *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Alito, J.) (holding "that a violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5"); *see also NVIDIA*, 768 F.3d at 1054 (holding that a violation of "Item 303's disclosure duty" is not "actionable under Section 10(b) and Rule 10b-5").

decided *NVIDIA*.[5] And since the leading securities-law circuit disagreed with the Ninth Circuit's ruling, no other circuit has adopted the Ninth Circuit's rationale. Further, before *Leidos* was dismissed, the United States filed an *amicus* brief endorsing the Second Circuit's approach. *See generally Leidos* U.S. Merits Amicus Br. Supporting Resps. The United States explained that "[a] statute or regulation that mandates disclosure thus creates a 'duty' to disclose as that term is commonly understood." *Id.* at 17 (collecting cases; citing *Oran*, 226 F.3d at 285). If the Ninth Circuit ever had a chance to reach this question again, the United States' views likely would carry significant weight.[6]

Moreover, the Ninth Circuit's ruling relied heavily on a reading of the Third Circuit's *Oran* decision that later developments have shown to be incorrect. *See NVIDIA*, 768 F.3d at 1054-55. While the Third Circuit held that the alleged Item 303 violation in that case was not actionable, it did so only after finding the omission immaterial. *See Oran*, 226 F.3d at 288. In fact, the Third Circuit recognized — and continues to recognize — that "a statute requiring disclosure" can create "a duty to disclose." *Id.* at 285-86; *see also Williams v. Globus Med., Inc.*, 869 F.3d 235, 241 (3d Cir. 2017) (same). And district courts within the Third Circuit since have held that Item 303 can support a

---

[5] *See DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1448 (9th Cir. 1996) (finding Second Circuit's interpretation of federal securities law persuasive); *In re Victor Techs. Sec. Litig.*, 792 F.2d 862, 866 & n.2 (9th Cir. 1986) (same).

[6] *See Socal Recovery, LLC v. City of Costa Mesa*, 56 F.4th 802, 814 (9th Cir. 2023) (finding the United States' *amicus* brief interpreting a federal statute persuasive), *cert. petition pending*, No. 23-71 (U.S. July 21, 2023).

§ 10(b) claim. *See*, *e.g.*, Oral Op. 28-29, *Roper v. Sito Mobile Ltd.*, No. 2:17-cv-1106-ES-MAH, ECF No. 64 (D.N.J. Jan. 30, 2019); *Sun v. Han*, No. 2:15-cv-00703-JMV-MF, ECF No. 44 (D.N.J. Dec. 21, 2015); *Utah Ret. Sys. v. Healthcare Servs. Grp., Inc.*, No. 2:19-cv-01227-ER, ECF No. 42 (E.D. Pa. Apr. 24, 2020). The Court should allow more percolation so the Ninth Circuit can address these developments. *See*, *e.g.*, *Yoshikawa v. Seguirant*, --- F.4th ---, 2023 WL 4722982, at *1 (9th Cir. July 25, 2023) (en banc) (overruling circuit precedent in light of contrary rulings by other circuits).

b. Post-*Leidos* experience also confirms that the circuit split is superficial. In the Second Circuit — which petitioners frame as opening the floodgates to boundless securities litigation — Item 303-based § 10(b) claims usually fail. Indeed, the Second Circuit routinely rejects Item 303-based claims for failure to plead materiality and scienter. *See*, *e.g.*, *In re General Elec. Sec. Litig.*, 844 F. App'x 385, 387-89 (2d Cir. 2021) (affirming dismissal of § 10(b) claim based on Item 303 for lack of scienter); *Asay v. Pinduoduo Inc.*, 2021 WL 3871269, at *4 (2d Cir. Aug. 31, 2021) (affirming dismissal of § 10(b) claim based on Item 303 for lack of materiality). By petitioners' own account, the Second Circuit has affirmed the dismissal of Item 303-based claims on other grounds in every case but one since *Leidos*. Pet. 21. Likewise, district courts in the Second Circuit routinely dismiss such claims for failure to plead an Item 303 violation. *See*, *e.g.*, *In re Skechers USA, Inc. Sec. Litig.*, 444 F. Supp. 3d 498, 522 (S.D.N.Y. 2020); *In re Liberty Tax, Inc. Sec. Litig.*, 435 F. Supp. 3d 457, 469 (E.D.N.Y.), *aff'd*, 828 F.

App'x 747 (2d Cir. 2020).[7] Petitioners thus concede (at 21) that cases raising this issue are "rare." That is because Item 303 typically makes no difference to the outcome — even in the Second Circuit.

Other circuits are similar. Since *Leidos*, no other circuit has joined the split — because the Question Presented has made no difference to the outcome of the cases before them. The petition itself demonstrates that point. Although petitioners cite (at 3) the Eleventh Circuit's *Carvelli* decision as entrenching the split, that decision held merely that a violation of Item 303 does not *automatically* give rise to § 10(b) liability. *See Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 & n.16 (11th Cir. 2019) (citing *Oran*, *NVIDIA*, and *Stratte-McClure*).

All courts, including the Second Circuit below, agree with that basic proposition. *See Stratte-McClure*, 776 F.3d at 103 ("[A] violation of Item 303's disclosure

---

[7] Courts in many of the cases cited in the petition and appendix found no violation of Item 303. *See*, *e.g.*, *Steamfitters' Indus. Pension Fund v. Endo Int'l PLC*, 771 F. App'x 494, 498 (2d Cir. 2019); *Ong v. Chipotle Mexican Grill, Inc.*, 294 F. Supp. 3d 199, 236 (S.D.N.Y. 2018), *aff'd sub nom. Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133 (2d Cir. 2020); *In re Tempur Sealy Int'l, Inc. Sec. Litig.*, 2019 WL 1368787, at *11 (S.D.N.Y. Mar. 26, 2019); *City of Warwick Mun. Emps. Pension Fund v. Rackspace Hosting, Inc.*, 2019 WL 452051, at *8 (S.D.N.Y. Feb. 5, 2019); *Brady v. Top Ships Inc.*, 2019 WL 3553999, at *11-12 (E.D.N.Y. Aug. 5, 2019), *aff'd sub nom. Onel v. Top Ships, Inc.*, 806 F. App'x 64 (2d Cir. 2020); *Lopez v. CTPartners Exec. Search Inc.*, 173 F. Supp. 3d 12, 33 (S.D.N.Y. 2016); *Lewis v. YRC Worldwide Inc.*, 2020 WL 1493915, at *10 (N.D.N.Y. Mar. 27, 2020); *In re Dynagas LNG Partners LP Sec. Litig.*, 504 F. Supp. 3d 289, 310 (S.D.N.Y. 2020); *Gordon v. Tencent Music Ent. Grp.*, 2021 WL 9183821, at *7 (E.D.N.Y. Mar. 31, 2021); *Construction Laborers Pension Tr. for S. California v. CBS Corp.*, 433 F. Supp. 3d 515, 542 (S.D.N.Y. 2020).

requirements can only sustain a claim under Section 10(b) and Rule 10b-5 if the allegedly omitted information satisfies *Basic*'s test for materiality."). But the petition raises a different question: whether Item 303 can *ever* support a § 10(b) claim. *Carvelli* declined to reach that question, because all the alleged omissions there were immaterial. *See* 934 F.3d at 1322. Indeed, the Item 303 claim in *Carvelli* — like virtually all Item 303 claims brought after *Leidos* — would have failed under both the Second and Ninth Circuit rules. *See id.* & n.16.

Petitioners' other cases confirm the point. They highlight that the Fifth Circuit acknowledged the split, but that court also declined to take sides because the issue again made no difference to the outcome. *See Municipal Emps.' Ret. Sys. of Michigan v. Pier 1 Imports, Inc.*, 935 F.3d 424, 436 (5th Cir. 2019). Likewise, the Fourth Circuit recognized and declined to address the split because the plaintiff failed to allege scienter. *See In re Triangle Cap. Corp. Sec. Litig.*, 988 F.3d 743, 756 n.7 (4th Cir. 2021). As those cases illustrate, the question this Court granted certiorari to resolve in *Leidos* rarely matters. Indeed, petitioners cite only one post-*Leidos* case where the Ninth Circuit rule would have compelled a different outcome. *See* Pet. 21 n.6 (citing *In re SCANA Corp. Sec. Litig.*, 2019 WL 1427443, at *11 (D.S.C. Mar. 29, 2019)). Most courts can — and do — resolve Item 303 claims on other grounds, without needing to decide whether the Ninth or Second Circuit is correct.

Petitioners' characterization of the decision below further undermines their position. In their view, the decision below "effectively eliminated" *Stratte-McClure*'s mandate that only Item 303 "required" disclosures are actionable, and they are actionable only if

a plaintiff independently alleges each element of a § 10(b) claim. *See* Pet. 25-28. If petitioners are right, then this non-precedential, unpublished decision does not accurately represent the law of the Second Circuit, and the Court should wait to consider the issue after the Second Circuit has had the chance to address their arguments in a precedential opinion. *See* 2d Cir. R. 32.1.1.

c. The past six years have shown that the Question Presented is unimportant. As petitioners concede, Item 303-based claims are rare. *See* App. 62a. Even in the Second Circuit, which has the largest volume of securities cases, only 12 § 10(b) cases a year on average include any Item 303-based claims at all. *See id.* And in the six years since *Leidos*, no other certiorari petition has raised this issue — mainly because so few plaintiffs even try to bring Item 303 claims in the first place. An issue that produces a court of appeals opinion only once every six years does not warrant this Court's review. *See* Sup. Ct. R. 10.

2. The SEC's recent amendment to Item 303 weighs further against review at this juncture. Petitioners assert that the decision below expanded the split because it "effectively eliminated" the difference between "required and optional disclosures" and used the "subjective component" of Item 303 "to leapfrog over the scienter requirement altogether." Pet. 4, 26. While petitioners' arguments misconstrue the decision below, they also illustrate the benefit of further percolation. The SEC explained that its revisions to Item 303 were intended to provide "specific guidance on how registrants should evaluate known events or uncertainties where the likelihood of fruition cannot be ascertained" and "a tailored and meaningful framework from which to objectively analyze whether

forward-looking information is required." SEC 2021 Interpretive Release, 86 Fed. Reg. at 2094. The amendment thus implicates the pleading requirements for an Item 303 violation — the question raised by the panel at oral argument, *see* Pet. 27 — but the lower courts have not had sufficient time to analyze the import of these changes.[8]

* * *

Given these intervening developments since *Leidos*, the Court should allow this issue to further percolate. For example, this issue currently is pending in a case in the Seventh Circuit. *See Allison v. Oak St. Health, Inc.*, 2023 WL 1928119 (N.D. Ill. Feb. 10, 2023); *see also Macovski v. Groupon, Inc.*, 553 F. Supp. 3d 460, 485 (N.D. Ill. 2021) (noting that "[t]he Seventh Circuit has not decided whether Item 303 imposes a duty to disclose that, when violated, can give rise to fraud under the Exchange Act"). Should the Seventh Circuit weigh in on the issue, this Court could consider a more meaningful and active circuit split.

B. This Petition Materially Differs From *Leidos*

In *Leidos*, this Court granted review to resolve the plaintiff's most important claim. The lead claim there, which the Second Circuit sustained, alleged that the defendant violated § 10(b) by omitting infor-

---

[8] Although the SEC's amendment incorporates its prior guidance, *see* Pet. 5 n.1, the 2021 Interpretive Release provides further clarity on the dividing line between required and optional disclosures. For example, the SEC explained that "the analysis should focus on an objective determination of the likelihood of an event occurring, rather than on whether management's expectation of such event occurring would be objectively reasonable." SEC 2021 Interpretive Release, 86 Fed. Reg. at 2093 n.160. That clarification informs the allegations necessary to plead an Item 303 violation.

mation Item 303 required it to disclose. *See Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 95-96 (2d Cir. 2016), *cert. dismissed sub nom. Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 138 S. Ct. 2670 (2018). And the viability of that claim — and thus the likely outcome of the case — hinged on the Second Circuit's interpretation of Item 303. *See Leidos* Cert. Pet. 30. True, the *Leidos* plaintiff had another, non-Item 303 claim, too. But that remaining claim turned on "different disclosure requirements" and thus required "discovery of different evidence." *Leidos* Cert. Reply 6-7. By resolving the Item 303 issue, therefore, this Court could have substantially narrowed discovery. And the submissions seeking approval to settle the dispute acknowledged that "an adverse determination" of the Item 303 issue "before the Supreme Court at the time this Settlement was reached . . . could have impacted the propriety of the other claim that the Second Circuit upheld." Lead Pls.' Mem. of Law in Support of Unopposed Mot. for Prelim. Approval of Settlement at 11, *In re SAIC, Inc. Sec. Litig.*, No. 1:12-cv-01353-DAB, ECF No. 178 (S.D.N.Y. Dec. 13, 2017).

Here, unlike in *Leidos*, the issue petitioners ask the Court to decide will not resolve the case or even change its scope. *First*, the Second Circuit independently sustained Moab's omission-based § 10(b) claim arising from petitioners' misleading "half-truth[]." App. 10a. The court reasoned that, "[h]aving chosen to speak about their base of customers, [petitioners] had a duty to speak accurately, giving all material facts in addressing those issues to permit investors to evaluate the potential risks." *Id.* Petitioners concede that this claim falls outside the scope of their petition and would be unaffected by this Court's ruling. *See* Reply in Supp. of Mot. To Stay Mandate at 11, ECF No. 144 (2d Cir. Feb. 21, 2023). Moreover, while

the Second Circuit affirmed dismissal of certain affirmative false statements that "constitut[ed] non-actionable puffery or expression of corporate optimism," several other affirmative false statements remain in the case. App. 7a & n.1. Even if the Court reversed, therefore, Moab would continue to have viable Exchange Act claims concerning the same discovery and the same damages. That is the opposite of *Leidos*, where the only unaffected claim involved different disclosures and different evidence. *See Leidos* Cert. Reply 6-7.

Second, reversal by this Court would not even eliminate the § 10(b) claim premised on Item 303. The petition addresses solely the question that has split the Second and Ninth Circuits: whether Item 303 creates a "duty to disclose" that can support an omission claim under Rule 10b-5(b). Pet. 12. But Moab additionally pleaded that MIC "employed devices, schemes, and artifices to defraud" and "engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's stock." ¶ 319. Section 10(b) makes clear that it is "unlawful" to use "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). Here, Moab alleges that MIC intentionally violated an SEC rule — Item 303 — to defraud investors. Those allegations support the inference that MIC acted pursuant to a "plan" or "scheme," *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019), and was engaged in a deceptive "'act'" or "'practice,'" *id*. (quoting Rule 10b-5(c)). Thus, the Item 303 violation implicates Rule 10b-5's two other prongs, neither of which petitioners ask the Court to review. Certiorari thus would have little effect on the contours of this case.

Third, the decision below also sustained Moab's claims under Securities Act § 11 and § 12(a)(2) — neither of which petitioners ask the Court to review. App. 12a-13a. Unlike *Leidos*, where plaintiffs raised only Exchange Act claims, *see Indiana Pub. Ret. Sys.*, 818 F.3d at 88, both Moab's § 11 and § 12(a)(2) claims rest in part on MIC's violation of Item 303 but do not raise the legal issues the petition raises. ¶¶ 363, 365. Thus, no matter what the Court rules, Item 303 — and all of the corresponding discovery — will remain a core component of this case.

C. Interlocutory Review Is Unwarranted

If the Court granted the petition, it would be resolving an issue that is both academic to securities litigation writ large and to this case in particular. Doing so now would disrupt the ongoing proceedings in a way the *Leidos* petition did not.

The Court long has limited its exercise of certiorari jurisdiction to "final judgments," *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 378 (1893), and denied petitions where more "remains to be done" "in the inferior court," *Life & Fire Ins. Co. of New York v. Adams*, 34 U.S. (9 Pet.) 573, 602 (1835). The ongoing district court proceedings render the petition "not yet ripe for review," *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam), and constitutes "sufficient ground" to deny the petition, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

The concerns motivating this longstanding practice are acute here. Interlocutory review in this case would unduly delay resolution of the case and risk wasting this Court's resources. *First*, review of the petition at this juncture would conflict with principles

of "good judicial administration." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). During these certiorari proceedings, the parties are continuing to litigate co-expansive claims before the district court — most notably, Moab's Securities Act claims that are premised on the same omissions.[9] MIC's premature petition risks significant disruption to those ongoing proceedings. Certiorari at this juncture would leave the parties and the district court continuing to litigate the live claims independently of any merits proceedings in this Court before then addressing any necessary proceedings on remand.

That option does not comport with "good judicial administration." *Id.* Review by this Court would create unnecessary cost. Unlike *Leidos*, Moab's Securities Act claims are based on the same omissions and misstatements and thus will require the same discovery as the Item 303 theory for which petitioners seek this Court's review. Should the Court reverse the Second Circuit's decision, petitioners have indicated that they will seek to dismiss Moab's Securities Act claims based on that ruling. *See* ECF No. 131, at 2; ECF No. 156, at 2. That threatens to produce piecemeal appeals and waste the time and resources of the parties and the district court. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956) (noting "the historic federal policy against piecemeal appeals"); *Radio Station WOW*, 326 U.S. at 123 (explaining the foundational "characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance").

---

[9] Although discovery is currently stayed due to petitioners' partial motions to dismiss, even if petitioners prevail on those motions, the case will resume and proceed to discovery once the district court rules on the pending motions.

Such "economic waste" counsels against interlocutory review at this juncture. *Radio Station WOW*, 326 U.S. at 124.

Second, the petition also risks expending this Court's resources on an issue that otherwise might "become quite unimportant by reason of the final result." *American Constr.*, 148 U.S. at 384. Indeed, a future final judgment on Moab's § 10(b) claims may not even present the question on which petitioners now seek review. The Second Circuit concluded that Moab's § 10(b) claim adequately was pleaded for three independent reasons: for the Item 303 violation at issue here, for petitioners' failure to disclose all material facts after choosing to speak about their customer base, and for making other actionable false and misleading statements. App. 10a. If Moab prevails on any theory, the result is the same. For example, in the event petitioners are found liable for failing to disclose material facts about their customer base, which necessarily implicates IMO 2020's impact on the 6-Oil market, this Court will have no occasion to consider the Item 303 issue, regardless of whether petitioners separately are found liable under that theory.

Moreover, petitioners ultimately might prevail on the Item 303 issue — during summary judgment or trial — and thereby obviate any need for this Court's review of the Second Circuit's decision. The Second Circuit's decision, as to both materiality and scienter, necessarily accepted Moab's allegations as true and concluded the claim should survive. Specifically, the Second Circuit held that, "[a]s pleaded, a reasonable investor would consider the omitted information important," App. 10a, and that, if the allegations in the complaint were credited, "there is sufficient

circumstantial evidence" that MIC was reckless in failing to disclose the exposure it faced from IMO 2020, App. 11a-12a. Although Moab is confident that discovery will reveal evidence supporting these allegations, should it not, petitioners will be free to argue that Moab has failed to prove all necessary elements of a § 10(b) claim. If petitioners were to succeed on such arguments, this Court would not need to address the interplay between § 10(b) and Item 303. And, if the issue remains, petitioners will be "free to raise [it] in a later petition following entry of a final judgment." *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945-46 (2012) (Alito, J., respecting denial of certiorari).

II. THE DECISION BELOW IS CORRECT

A. The Second Circuit's Conclusion That Item 303 Creates A Duty To Disclose Comports With The Text Of § 10(b) And This Court's Decisions

The Second Circuit's judgment tracks § 10(b)'s text. That provision prohibits "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). Rule 10b-5 implements § 10(b) by forbidding the use of (a) "any device, scheme, or artifice to defraud"; (b) "any untrue statement of a material fact" or the omission of "a material fact necessary in order to make the statements made . . . not misleading"; or (c) any other "act, practice, or course of business" that "operates . . . as a fraud or deceit." 17 C.F.R. § 240.10b-5.

As the text makes clear, § 10(b) broadly prohibits the use of "any . . . deceptive device or contrivance." 15 U.S.C. § 78j(b). This can include SEC-mandated filings that deliberately or recklessly omit required,

material information because investors can be led to believe that the omitted facts do not exist or that the stated facts provide a truthful depiction of the company's prospects, when in fact they do not. That type of deceptive practice fits squarely within the bounds of the text.

This Court's cases have recognized that material omissions can be misleading. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 189 (2015) (explaining that "registration statement [that] omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion" can result in liability under Securities Act § 11 "if those facts conflict with what a reasonable investor would take from the statement itself"); *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188 (2016) (noting the rule that "half-truths — representations that state the truth only so far as it goes, while omitting critical qualifying information — can be actionable misrepresentations"). In this context, a reasonable investor expects formal SEC filings such as annual reports to contain the material information required to be disclosed therein. When a company withholds required, material information, investors can be deceived even if the affirmative statements in the filing are otherwise true so far as they go.

Nothing in the Exchange Act prohibits § 10(b) from reaching a scenario — like this case — where a filing purports to comply with regulatory mandated disclosure but omits material information. Indeed, this Court has recognized that, while silence generally is not misleading, it can become deceptive when there is "a duty to disclose." *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988); *accord Matrixx Initiatives, Inc.*

v. Siracusano, 563 U.S. 27, 45 (2011). The Third Circuit likewise recognized in *Oran* that "a duty to disclose may arise when there is . . . a statute requiring disclosure." 226 F.3d at 285-86. That is the case here; no party disputes that Regulation S-K validly implements Exchange Act § 13. Nothing in *Basic*, *Matrixx Initiatives*, or *Oran* supports MIC's view that § 10(b) does not reach misleading omissions of required, material information in securities filings.

Further, MIC's assertion (at 24) that it is "uniquely problematic" for an Item 303 violation to serve as the basis for a § 10(b) claim is misguided. This Court already has held that a failure to disclose information subject to common-law fiduciary duty can support a § 10(b) claim. *See, e.g.*, *Chiarella v. United States*, 445 U.S. 222, 227-28 (1980). There is no basis artificially to distinguish a duty created by Congress or the SEC from a common-law duty. More fundamentally, MIC's position ignores that plaintiffs still must satisfy all the other elements of a § 10(b) claim. If the non-disclosed information is not material under *Basic*, then no liability exists. Likewise, if management had a good-faith (but mistaken) belief that no disclosure was required under Item 303, then there is no scienter.[10] Indeed, MIC's arguments prove this point — given the "fine" line between required disclosures of "currently known trends" and optional disclosures of anticipated future trends, only plaintiffs able to prove the requisite facts will be able to prove scienter. But that is no reason to shield companies that intentionally deceive investors by refusing to comply with the SEC's disclosure requirements.

---

[10] Similarly, if the disclosure is an *optional* forward-looking statement, then there is no duty to disclose in the first place.

MIC's policy arguments — that the Second Circuit's approach will result in "defensive, overinclusive disclosures" and increase vexatious litigation — provide insufficient grounds to deviate from the text of § 10(b). As this Court has recognized, these policy arguments are directed to the wrong branch of government. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014). Even if such concerns were valid, it is Congress's role to modify the statutory structure to address them. *See Basic*, 485 U.S. at 239 n.17 ("[C]reating an exception to a regulatory scheme founded on a prodisclosure legislative philosophy, because complying with the regulation might be 'bad for business,' is a role for Congress, not this Court."). And Congress has expressed a policy favoring full disclosure. *See Kokesh v. SEC*, 581 U.S. 455, 458 n.1 (2017).

Moreover, these policy arguments are misplaced given that for decades courts have adjudicated private actions based on omissions of required information in registration statements under Securities Act § 11. Petitioners have made no showing that their "concern[s] ha[ve] proved serious as a practical matter in the past." *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 597 (2001). Nor are those concerns likely to materialize. Instead, § 10(b)'s other elements mitigate the need for unnecessary overdisclosure (only material omissions are actionable) and the concern of "allegations of fraud by hindsight" (omissions are actionable only if done with the intent to deceive). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007) (cleaned up).

B. The Second Circuit Did Not Expand § 10(b)'s Private Right Of Action

Contrary to petitioners' assertions, the Second Circuit's decision did not impermissibly expand the private right of action under § 10(b). The court's decision does not have the legal or practical effect of authorizing private suits to enforce Item 303. The mere failure to disclose all the information Item 303 requires does not violate § 10(b) or Rule 10b-5 on its own. *See Carvelli*, 934 F.3d at 1331; *Stratte-McClure*, 776 F.3d at 102; *Oran,* 226 F.3d at 288. To establish liability under those provisions, private plaintiffs also must plead and prove a connection with the purchase or sale of a security, materiality under *Basic*, scienter, reliance, economic loss, and loss causation. *See Indiana Pub. Ret. Sys.*, 818 F.3d at 93.

The Second Circuit's approach "maintains the action's original legal scope" because it "does not alter the elements of the Rule 10b-5 cause of action," making it consistent with this Court's decisions. *Halliburton*, 573 U.S. at 275. To establish liability in a case such as this, plaintiffs must prove both a violation of Item 303 and all the elements of § 10(b). *See Stratte-McClure*, 776 F.3d at 103 (explaining that, in addition to materiality, "a plaintiff must also sufficiently plead scienter, a 'connection between the . . . omission and the purchase or sale of a security,' reliance on the omission, and an economic loss caused by that reliance") (citation omitted; ellipsis in original).

Indeed, the Second Circuit strictly has adhered to this requirement, dismissing Item 303 claims that fail to satisfy necessary elements of § 10(b). *See, e.g.*, *Bristol Cnty. Ret. Sys. v. Adient PLC*, 2022 WL 2824260, at *2 (2d Cir. July 20, 2022). In this case, the panel followed this established two-step analysis.

It first concluded the complaint sufficiently alleged that disclosure was required by Item 303. App. 9a. It then addressed the necessary elements of § 10(b) and determined that Moab adequately — and independently — had alleged materiality under *Basic* and scienter. App. 10a, 11a-12a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
DUSTIN G. GRABER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

SALVATORE J. GRAZIANO
LAUREN AMY ORMSBEE
JESSE L. JENSEN
WILLIAM E. FREELAND
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 554-1400

August 11, 2023