No. 22-1165

In the Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORP., JAMES HOOKE, JAY DAVIS, LIAM STEWART, RICHARD D. COURTNEY, ROBERT CHOI, MARTIN STANLEY, NORMAN H. BROWN, JR., GEORGE W. CARMANY, III, HENRY E. LENTZ, OUMA SANANIKONE, WILLIAM H. WEBB, AND MACQUARIE INFRASTRUCTURE MANAGEMENT (USA) INC.,

Petitioners,

v.

MOAB PARTNERS, L.P., CITY OF RIVIERA BEACH GENERAL EMPLOYEES RETIREMENT SYSTEM, on behalf of itself and all other similarly situated,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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The parties agree that the issue in this case comes out differently depending on where plaintiffs choose to raise it. Moab concedes that the question "has split the Second and Ninth Circuits" and thus that the "leading securities-law circuit disagree[s]" with the second-busiest. Opp. 15, 22.

While Moab theorizes that the Ninth Circuit could change its mind, there is no reason to think it will, even if plaintiffs choose to give it the opportunity. Not surprisingly, securities plaintiffs choose to assert Item 303-based 10b-5 claims in the Ninth Circuit at a far lesser rate than in the Second. Moreover, the Eleventh Circuit has now weighed in and agrees with the Ninth (and Third), and the Fifth likely would as well. *See* Pet. 17. The split is thus at least as well-established and important as it was when this Court granted certiorari in *Leidos*.

Nor is there any barrier to resolving the issue here. Doing so will make an important difference in this case—and will protect the utility of corporate disclosures more broadly. The Court should grant review.

I. Respondent does not and cannot deny that the most significant courts for securities cases are divided on the question presented.

1. Unable to deny the existence of the circuit split, Moab tries in vain to diminish the split's importance going forward. It argues that "[t]he Second, Third, and Ninth Circuits all agree that a violation of Item 303 *does not automatically support a claim* under § 10(b)," while conceding—critically—that "the Ninth Circuit has gone further and held that a violation of Item 303 *never can support* a § 10(b) claim." Opp. 14 (emphasis added). This argument fails to capture the essence of the split. The alleged omission of information required

by Item 303—in the absence of any affirmative statement rendered misleading—cannot support a private 10b-5 claim in the Ninth Circuit (or the Eleventh or Third, *infra* at 6). But in the Second Circuit, it can.

This split is anything but "superficial" (Opp. 13); it exposes a fundamental disagreement about the concept of duty and its relationship to the statutory language of Section 10(b). On its face, Section 10(b) is about *fraud*. 15 U.S.C. § 78j(b) (prohibiting "manipulative or deceptive" conduct). Thus, before an issuer can be held liable under Section 10(b), there must have been a "false or misleading statement." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007). If an issuer decides to speak, it is under a duty to speak truthfully. Rule 10b-5(b), 17 C.F.R. §240.10b-5(b) (unlawful "to omit to state a material fact necessary in order to make the statements made * * * not misleading"); *see also Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011). But if the issuer decides *not* to speak, the statute and rule impose no duty to disclose that can subject it to a private suit for fraud by omission. In private securities litigation, then, there is a critical distinction between half-truths and pure omissions. *See*, *e.g.*, Opp. 8 (accusing MIC of "omit[ting] any mention of 6-Oil or IMO 2020" from its required filings).

This is where the circuits part ways. In both the Ninth and Second Circuits (and everywhere else), issuers have a duty to remediate half-truths by disclosing any material facts necessary to make their affirmative statements not misleading—including any affirmative statements made under Item 303. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1054 (9th Cir. 2014); *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015). If they do not do so, they can face private investor suits under Section 10(b) and

Rule 10b-5 (assuming that other elements of a claim are also established). But in the Second Circuit, an issuer may be sued for an omission simply for failing to speak under Item 303. *Stratte-McClure*, 776 F.3d at 103. As Moab recognizes, this cannot happen in the Ninth Circuit. There, "Item 303's disclosure duty" is not "actionable [in a private suit] under Section 10(b) and Rule 10b-5" in the case of a pure omission. Opp. 14 n.4 (quoting *NVIDIA*, 768 F.3d at 1054).

2. Moab ignores the statutory distinction between a pure omission and a half-truth—that is, a situation where a duty to disclose arises because the speaker's affirmative statements would otherwise be misleading. The cases Moab cites all involve the latter. Opp. 22, 27 (citing *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176 (2016), *Lorenzo* v. *SEC*, 139 S. Ct. 1094 (2019), and *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015)).

Moab thus overlooks the actual issue on which the circuits are split—whether Item 303 supplies a duty to disclose that, if breached *by silence*, can provide an independent basis for a private right of action under Section 10(b) in the absence of any affirmative statement rendered misleading by omission. *Compare, e.g.*, *Stratte-McClure*, 776 F.3d at 101–02 ("Item 303's affirmative duty to disclose * * * can serve as the basis for a securities fraud claim under Section 10(b)," as long as the omitted information is "material"), *with NVIDIA*, 768 F.3d at 1054 (even a material breach of Item 303's disclosure duty is not actionable unless there has been an affirmative and misleading statement). The focus must be on whether a statutory duty to speak exists—the very first step in the analysis of

an omission claim. On its face, Section 10(b) contemplates no such duty, absent an affirmatively misleading statement.

3. Moab's failure to distinguish between half-truths and pure omissions also leads its policy analysis astray. Moab argues that the Second Circuit did not expand the private right of action because Section 10(b) empowered the SEC to create rules—here, Rule 10b-5—to allow for enforcement via private lawsuits. Opp. 30. But Rule 10b-5 itself allows a private omission claim only if the issuer "omit[ted] to state a material fact necessary in order to make the statements made * * * not misleading." 17 CFR § 240.10b-5(b). Here, too, then, omissions based on half-truths are actionable; pure omissions are not.

Moreover, nothing in Congress's authorization permitted the SEC to expand the private right of action beyond the bounds of Section 10(b) itself. *See, e.g.*, *Virginia Bankshares* v. *Sandberg*, 501 U.S. 1083, 1103 (1991). And yet the Second Circuit has allowed just that: after *Stratte-McClure*, Item 303 supplies an *additional* affirmative duty to speak—beyond the one contemplated either by Congress in Section 10(b) *or* by the SEC in Rule 10b-5—a duty that can provide the basis for a private right of action when an issuer fails to make a required (as opposed to optional) disclosure regarding a future risk or contingency. *Cf. Stoneridge Inv. Partners, LLC* v. *Sci.-Atl., Inc.*, 552 U.S. 148, 165 (2008) ("The decision to extend the [private] cause of action is for Congress, not for us."). This is where the Second Circuit continues to part ways with its sister circuits.

II. This issue is as worthy of this Court's review now as it was when the Court granted certiorari in *Leidos*.

Moab argues that the split "no longer warrants review" or will "disappear" on its own. Opp. 2, 13. But it points to nothing that has changed, or will change, to make that so.

1. If anything, the petitioner's warnings of forum shopping in *Leidos* have been borne out. MIC's statistical analysis of securities cases (which Moab does not dispute, *see* Opp. 19) shows that since the Second Circuit decided *Stratte-McClure* in January 2015, plaintiffs have included Item 303 claims in securities cases at a much greater rate in the Second Circuit than in the Ninth:

Year	2d Cir.	9th Cir.
2014	25.0%	16.7%
2015	18.2%	4.0%
2016	10.5%	3.6%
2017	21.4%	4.9%
2018	25.8%	5.4%
2019	16.3%	4.9%
2020	20.3%	7.4%
2021	19.2%	12.0%
2022	20.7%	6.3%

Pet. 62a. This is no surprise, as it is easier to bring a Section 10(b) claim based on Item 303 in the Second Circuit than in the Ninth, where the failure to disclose information in violation of Item 303 is not actionable in a private suit absent an affirmative statement rendered misleading by its omission. *Compare Stratte-McClure*, 776 F.3d at 100, *with NVIDIA*, 768 F.3d at 1054.

2. Contrary to Moab's assumption, the Ninth Circuit has offered no indication that it will reassess that position. Opp. 16. It has had two opportunities to conform its precedent to the Second Circuit's after the latter rejected its approach in *NVIDIA*. But in neither case—decided, respectively, six months and sixteen months after *Stratte-McClure*—did the Ninth Circuit even cite *Stratte-McClure*, let alone reconcile it. *See Mosco* v. *Motricity Inc.*, 649 F. App'x 526, 529 (9th Cir. 2016); *Fresno Cnty. Emps. Ret. Ass'n* v. *Alphatec Holdings, Inc.*, 607 F. App'x 694, 695 (9th Cir. 2015).

Nor is there any need for the Ninth Circuit to "reconsider" *NVIDIA*. Opp. 14. Its decision correctly construes both the relevant statute and the case law, including the Third Circuit's seminal decision in *Oran*, which it read as stating without qualification that Item 303 does not "impose[] an affirmative duty of disclosure * * * that could give rise to a claim under Rule 10b-5." *Oran* v. *Stafford*, 226 F.3d 275, 286 n.6 (3d Cir. 2000); *see NVIDIA*, 768 F.3d at 1055.

No "later developments" have undermined this straightforward reading. Opp. 15. To the contrary, the Eleventh Circuit has expressly adopted the Ninth Circuit's view. *Carvelli* v. *Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 & n.16 (11th Cir. 2019) (adopting the Ninth Circuit's approach, while acknowledging that the Second Circuit's approach is different and "more generous"). And as for the Third Circuit, it has never second-guessed *Oran*'s view of Item 303. Nor have the district courts Moab cites. *See Sun* v. *Han*, No. 15-703 (D.N.J. Dec. 21, 2015), ECF 44 (no discussion of *Oran*, Item 303, or duty to disclose), and *Utah Ret. Sys.* v. *Healthcare Servs. Grp., Inc.*, No. 19-1227 (E.D. Pa. Apr. 24, 2020), ECF 42 (ignoring argument that Item 303 violation cannot give rise to 10b-5 claim), *cited in*

Opp. 15–16. The only cited decision to address the issue agreed with MIC that *Oran* found "no independent private right of action for violation of Item 303 alone." Oral Opinion at 29, *Roper* v. *Sito Mobile Ltd.*, No. 17-1106 (D.N.J. Jan. 30, 2019), ECF 64.

In short, there is no reason to believe the Third Circuit has shifted from one side of the split to the other. And even if it had, the two busiest circuits for securities litigation—the Second and the Ninth—remain at odds when it comes to Item 303 claims based on pure omissions.

3. What little marginal benefit "further percolat[ion]" could offer does not justify waiting to resolve the split. Opp. 20.

The case Moab describes as "in the Seventh Circuit" actually remains pending in the district court, where the parties are in the midst of discovery. *Id.* It could be years before the Seventh Circuit decides the issue, if ever.

Nor should the Court wait and see whether the SEC's 2021 revisions to Item 303 will resolve the split. They won't. Opp. 19–20. As Moab admits, "the SEC's amendment incorporates its prior guidance" (Opp. 20 n.8); it does not materially alter the text of the regulation at issue. Pet. 5 n.1. Nor does the new guidance answer the question presented here; it says nothing about whether an alleged Item 303 omission can, by itself, be the basis for a private Section 10(b) claim. All it does is underscore the difficulty of distinguishing between required and optional disclosures for the issuers who have to navigate that blurry and shifting "dividing line." Opp. 20 n.8. That the SEC attempted to clarify its guidance on Item 303 does not weigh against review; it shows why issuers are often left in a quandary when considering whether disclosure of a future

contingency is required or merely optional. It says nothing about whether mere silence by issuers who conclude that Item 303 disclosure is not required, as here, can support a private right of action.

4. Moab claims review is unnecessary because Item 303 cases are "rare." Opp. 19. But "rare" or not (and the statistics above suggest that Item 303 remains fertile ground for litigation), these suits are anything but "unimportant" to the companies that find themselves on the receiving end of a summons. *Id.* Even if the suits are ultimately unsuccessful (Opp. 16, 19), they must be aggressively defended. A single 10b-5 suit can cost millions in legal fees and settlement costs. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975); *see also*, *e.g.*, *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 475–76 (2013) (discovery costs can force settlements). In fact, two of the most expensive settlements in history were 10b-5 class actions. Institutional Shareholder Services, *The Top 100 U.S. Class Action Settlements of All-Time* 3 (Dec. 31, 2021), https://perma.cc/TS8E-59CN.

In short, MIC has presented a consequential question that, left unresolved, will continue to cost issuers significant time, money, and stress—and will continue to produce over-disclosure, as Amici have explained. The three most prolific circuits for securities cases have already weighed in. There is no chance the circuits will reconcile themselves anytime soon. This Court should resolve the split now.

III. This case is a good vehicle for the Court to answer the question presented.

None of Moab's concerns about this case's suitability as a vehicle—all of which were present in *Leidos*—preclude this Court's review.

1. This case's "interlocutory posture" is no impediment. Opp. 2, 23–26. General preference for "final judgments" notwithstanding (Opp. 23), interlocutory review at the motion-to-dismiss stage is common in securities cases. *See, e.g.*, *Omnicare*, 575 U.S. at 181; *Matrixx Initiatives*, 563 at 36–37; *Tellabs*, 551 U.S. at 316–17; *Ind. Pub. Ret. Sys.* v. *SAIC, Inc.*, 818 F.3d 85, 91–92 (2d Cir. 2016) (vacating dismissal of Item 303 claim), *cert. granted sub nom. Leidos*, *Inc.* v. *Ind. Pub. Ret. Sys.*, 137 S. Ct. 1395, 1396 (2017). This Court has jurisdiction to take a case no matter the procedural stage. *See* 28 U.S.C. § 1254.

2. As for Moab's assertions that a decision in MIC's favor will not (1) resolve the case, (2) "change its scope," or (3) affect the Section 10(b) claim, its concerns are wrong on all three counts. Opp. 21–22.

First, an issue need not be case-dispositive to be certworthy. This Court has often granted certiorari where a favorable decision would not have completely disposed of the case. *See, e.g.*, Opp. 21 ("True, the *Leidos* plaintiff had another, non-Item 303 claim, too."); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 340 (2005) (addressing loss causation regarding one claim while others remained pending in district court). As in *Leidos*, ongoing litigation does not preclude Supreme Court review.

Second, also as in *Leidos*, the scope of discovery will be significantly affected if MIC prevails and the Item 303 claim is dismissed. Moab admits that discovery in *Leidos* still needed to be taken on other issues. Opp. 21. Because the other claims involved different disclosure obligations and different evidence, the scope of discovery stood to be different depending on whether the Item 303 claim was in play.

So too here. Moab's Exchange Act claim based on Item 303 covers a period that extends through February 2018 and includes the additional element of scienter. Moab's Securities Act claims based on Item 303, by contrast, have no scienter requirement and are premised on an alleged violation solely in connection with a November 2016 secondary offering. Eliminating the Exchange Act claim would therefore shorten the discovery period by more than a year and narrow its scope.

The only claim that does not depend on an alleged Item 303 violation is an Exchange Act claim based on two alleged misstatements concerning MIC's "base of customers." *See* Opp. 8–9, 11. If this Court's decision were to reduce this case to this limited theory and just two statements, the scope of discovery would be dramatically circumscribed.

Third, Moab is wrong that reversal would not impact the Item 303 claim under 10b-5. This argument—introduced for the first time in this Court—is predicated on two highly unusual theories of scheme liability under "Rule 10b-5's two other prongs," 10b-5(a) and 10b-5(c). Opp. 22. Scheme liability, however, is generally based on conduct that goes well beyond the publication of financial statements. *See, e.g.*, *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972) (employees liable for acting as market makers and fraudulently inducing vulnerable shareholders to sell their shares); *Lorenzo*, 139 S. Ct. at 1107 (Thomas, J., dissenting) (scheme liability includes "short selling," "wash sale[s]," and "price rigging" (cleaned up)). It does not apply to pure omissions and is not at issue here.

3. Finally, judicial economy is not served by deferring review. No resources are conserved waiting for

the Item 303 claim to fail on its merits after full discovery and summary judgment. And the value of this Court's review and decision is not undercut by the possibility that Moab's claims might ultimately fail on other grounds. *See* Opp. 16, 25. This possibility exists any time this Court addresses a particular element of a securities claim, but it has not stopped this Court from granting certiorari. *See, e.g.*, *Matrixx Initiatives*, 563 U.S. at 38 (addressing only materiality and scienter); *Tellabs*, 551 U.S. at 328–29 (addressing only scienter).

No matter who ultimately wins, this Court's guidance is necessary. The scope of the present litigation would change significantly, and the resulting clarity would benefit issuers and litigants nationwide.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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