No. 22-1165

IN THE

Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORP., ET AL.,
Petitioners,

v.

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

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

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and financial asset managers across the United States. SIFMA's mission is to support a strong financial sector while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of *amici*'s members are subject to the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78a *et seq.*, and accordingly, Rule 10b-5, 17 C.F.R. § 240.10b–5. They are also subject to Regulation S-K and, specifically, to Item 303, which calls for manage-

[1] *Amici curiae* timely provided notice of intent to file this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

ment to discuss and analyze certain "trends" and "uncertainties." 17 C.F.R. § 229.303. For decades, *amici*'s members and other issuers of publicly traded securities understood that responses to Item 303 are not actionable under Rule 10b-5, and approached their discussion and analysis with that understanding.

That settled approach was upended by the Second Circuit's decision in *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), and its progeny. Breaking from the longstanding precedents of other circuits, the Second Circuit held that "Item 303 imposes the type of duty to speak that can, in appropriate cases, give rise to liability under Section 10(b)" and Rule 10b-5. *Id.* at 102 & n.5. This Court granted certiorari to resolve the conflict. *Leidos Inc. v. Ind. Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017). But *Leidos* settled before oral argument. 138 S. Ct. 2670 (2018). The circuit conflict thus continues to plague *amici*'s members. And companies ignore the Second Circuit at their peril, because so much securities litigation occurs in that circuit's courts and plaintiffs can almost always bring suit there.

The Second Circuit's erroneous rule means that public companies run a risk by omitting a disclosure in any remotely doubtful case—they must *overdisclose*. Such overdisclosure is hardly benign. This Court, the SEC, and scholars have all warned against bloated disclosures that bury actually useful information in a pile of verbal junk. The Second Circuit's interpretation aggravates this problem, and *amici* have an interest in restoring the proper boundaries of Rule 10b-5.

SUMMARY OF ARGUMENT

The Second Circuit erred in holding that Item 303 creates a "duty" to disclose that is actionable under Rule 10b-5. Although Item 303's provisions on forward-looking statements may be couched in seemingly mandatory terms, the breadth and amorphousness of Item 303's reporting standards make it difficult in many instances to determine when management is obligated to make a disclosure. As a result, the other circuits that have considered the issue have uniformly and correctly held that Item 303 cannot be enforced through a Rule 10b-5 action. That split calls for this Court's review.

The Second Circuit's approach perniciously incentivizes companies to overdisclose. No one is well-served by prophylactic, heavily lawyered disclosures—page after page, footnote after footnote—that are more likely to confuse an investor than inform. In *Basic Inc. v. Levinson*, this Court cautioned that Rule 10b-5 should not be interpreted in a way that would merely flood the market with "essentially useless information." 485 U.S. 224, 234 (1988). That principle weighs heavily here: because Item 303's standard is so loose and so vague, corporate officers often will be unable to conclude with the necessary certainty that a particular contingency can safely be omitted. If any arguable misapplication of the standard will result in a class action lawsuit (or many), then the inevitable choice is to put out more and more management's discussion and analysis ("MD&A") under the heading of Item 303.

Aside from confusing investors with low-quality information, the Second Circuit's rule also tends to deprive investors of the principal benefit of MD&A: the opportunity to see the company through "the eyes of management." The inevitable effect of creating a private cause of action for alleged violations of Item 303 is that MD&A disclosures stray from management's candid narrative of their business into a pre-litigation document shaped largely by lawyers. That is not what the SEC intended with Item 303.

This Court should resolve the split now. Because Item 303 is actionable in one circuit—the circuit that sees the most securities class actions filed in its district courts—there is a significant incentive for plaintiffs simply to file there. That fact explains why only one other circuit (the Eleventh) has chosen a side in the split since *Leidos* and why there is unlikely to be much further percolation. And so long as the Second Circuit's precedent remains uncorrected, any publicly traded company that transacts any portion of its business in the Second Circuit will face an increased threat of private civil liability. *Amici* urge this Court, therefore, to take this opportunity to resolve the split.

ARGUMENT

A. Item 303 provides a standard for disclosure that is too malleable and too deferential to impose an actionable duty under Rule 10b-5.

By design, Item 303 is a provision requiring judgment calls about uncertain future events. Because the SEC wrote the provision to be "intentionally flexible," *Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, SEC Release No. 6835, 1989 WL 1092885, at *17 (May 18, 1989) ("SEC Release"), it contains few bright lines. Generally, what must be included under Item 303 depends on management's subjective predictions about what is "reasonably likely" to happen.

That subjective, uncertain standard calling for predictions makes Item 303 an inappropriate foundation for Rule 10b-5 liability. Allowing plaintiffs' lawyers to litigate such judgment calls under Rule 10b-5 creates a severe penalty for making a wrong guess about the future. This reality compels corporate officers to include more and more speculation about more and more contingent events, because of the risk that a decision *not* to include a particular uncertainty may be subject to second-guessing by a private plaintiff and, ultimately, a jury.

1. Item 303 of Regulation S-K requires disclosure of a wide range of information concerning a company's "financial condition and result of operations," 17 C.F.R. § 229.303. Unlike Rule 10b-5, which uses a rule of materiality to winnow liability, Item 303 is designed to be capacious—to encourage management to disclose enough information so that an investor has "an opportunity to look at the company through the eyes of management." SEC Release, 1989 WL 1092885, at *3; *see* 17 C.F.R. § 229.303(a) (2022) (Item 303 disclosures are designed "to better allow investors to view the registrant from management's perspective"). Those differing standards powerfully underscore why the substance of Item 303 and the procedural mechanism of the Rule 10b-5 private civil action are fundamentally a mismatch for one another. They cannot be judicially fused together into a new and uniquely plaintiff-friendly cause of action.

Indeed, both the SEC and the courts have repeatedly recognized the tension between the scope of what management is supposed to disclose under Item 303 and the scope of the materiality standard this Court applied in *Basic*. Because the scope of the former is generally much broader, the SEC itself called the *Basic* test "inapposite" in the Item 303 context: "The probability/magnitude test for materiality approved by the Supreme Court in [*Basic*] is inapposite." SEC Release, 1989 WL 1092885, at *6 n.27. And several circuits have agreed. *See, e.g.*, *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 (11th Cir. 2019) ("On its face, Item 303 imposes a more sweeping disclosure obligation than Rule 10b-5, such that a violation of the former does not *ipso facto* indicate a violation of the latter."); *In re NVIDIA Corp. Secs. Litig.*, 768 F.3d 1046, 1055 (9th Cir. 2014) ("Management's duty to disclose under Item 303 is much broader than what is required under the standard pronounced in *Basic*."); *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Alito, J.) (noting that "the materiality standards for Rule 10b-5 and SK-303 differ significantly").

In essence, Item 303 considers whether a disclosure or omission *could be* material, not whether it *is* material. *See* SEC Release, 1989 WL 1092885, at *6 n.27 ("MD&A . . . specifies its own standard for disclosure—*i.e.*, reasonably likely to have a material effect."). Because "Item 303, at least in some cases, has a lower threshold for disclosure than does normal materiality, . . . disclosures required under Item 303 do not always implicate normal materiality standards." Brian Neach, Note, *Item 303's Role in Private Causes of Action Under* *the Federal Securities Laws*, 76 Notre Dame L. Rev. 741, 756 (2001).[2]

2. The provision of Item 303 at issue here requires disclosure of "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(b)(2)(ii).[3] The regulation makes clear that "whether a matter is 'reasonably likely' to have a material impact on future operations is based on 'management's assessment.'" 2021 Final Rule, 86 Fed. Reg. at 2093 (quoting 17 C.F.R. § 229.303(a)). This standard is consistent with Item 303's objective "to better allow investors to view the registrant *from management's perspective*." 17 C.F.R. § 229.303(a) (emphasis added).

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[2] This is not a circumstance in which one (broader) standard subsumes the other (narrower) standard; here they are qualitatively different. Indeed, in some circumstances, the materiality test under Rule 10b-5 may require more disclosure than Item 303's standard—a fact that the SEC recently cited to further underscore why the *Basic* standard is inapposite for Item 303. *See* Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, 2094 (Jan. 11, 2021) ("2021 Final Rule") ("[T]he probability/magnitude test could result in disclosure of issues that are large in potential magnitude but low in probability.").

[3] This is the current version of the provision, following the 2021 amendments to Item 303. Although this case is governed by the previous version of Item 303, the amendments do not alter the analysis here. *See* Pet. 5 n.1; *see also* 2021 Final Rule, 86 Fed. Reg. at 2093 (SEC explaining its view that the 2021 "amendments reflect a standard that is consistent with longstanding Commission guidance"). This brief cites Item 303's current language unless otherwise noted.

Determining whether disclosure is necessary under this aspect of Item 303 requires multiple steps. SEC Release, 1989 WL 1092885, at *6. First, a company's management "should consider whether a known trend, demand, commitment, event, or uncertainty is *likely* to come to fruition." 2021 Final Rule, 86 Fed. Reg. at 2093; *see also* SEC Release, 1989 WL 1092885, at *6. Next, management must assess whether "such known trend, demand, commitment, event or uncertainty would reasonably be likely to have a material effect on the registrant's future results or financial condition." 2021 Final Rule, 86 Fed. Reg. at 2093. Where management cannot determine whether the "trend, demand, commitment, event, or uncertainty" is likely to come to fruition but it would have a material impact were it to come to fruition, management must assess whether "a reasonable investor would consider omission of the information as significantly altering the mix of information made available in the registrant's disclosures." *Id.* at 2093-2094.

The SEC has introduced a further complication. As the SEC stated in a 1989 release, there is a

> distinction between prospective information that is required to be discussed and voluntary forward-looking disclosure. . . . The distinction between the two rests with the nature of the prediction required. Required disclosure is based on *currently known trends, events, and uncertainties that are reasonably expected to have material effects*, such as: A reduction in the registrant's product prices; erosion in the registrant's market share;

> changes in insurance coverage; or the likely non-renewal of a material contract. In contrast, optional forward-looking disclosure involves *anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty*.

SEC Release, 1989 WL 1092885, at *4.

3. Thus, Item 303 asks management to make a series of difficult judgments: to start with (for example) an "uncertainty"; to assess how likely the uncertain contingency is to come about; and to assess whether, *if* it comes about sometime in the future, it is "reasonably likely" to have a material effect at that future time. If so, the "uncertainty" must be written up under Item 303. But if the impact would instead be "less predictable," *id.*, then assessing it is "forward-looking" and disclosure is optional, not required. *Id.*[4]

It is difficult to discern when forward-looking information is sufficiently certain that it crosses the line from optional to mandatory. *See* Suzanne J. Romajas, Note, *The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A*, 61 Fordham L. Rev. S245, S286 (1993) ("[T]he distinction that the SEC has drawn between required and optional disclosures is so subtle that corporations and courts alike find Item 303 of Regulation S-K difficult to apply."). Despite

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[4] *Cf. Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1297-98 (9th Cir. 1998) (noting that "forward-looking statements" are "not required" under Item 303 and holding that prediction failure based on the known event of a slowdown was not actionable under section 12).

decades of regulatory guidance, what Item 303 requires is still unclear. *See* Mark S. Croft, *MD&A: The Tightrope of Disclosure*, 45 S.C. L. Rev. 477, 478 (1994) ("Under Item 303 . . . the MD & A disclosure requirements are open-ended and exceedingly complex."); Lauren M. Mastronardi, Note, *Shining the Light a Little Brighter: Should Item 303 Serve as a Basis for Liability Under Rule 10b-5?*, 85 Fordham L. Rev. 335, 349 (2016) ("Despite this guidance from the SEC, the requirements under this section are flexible and complicated, leaving the company with a difficult task.").

4. The relevant history confirms that Item 303 was written to give flexibility to address difficult-to-foresee contingencies—not to create a litigation trip wire. Indeed, before the SEC adopted the regulation, courts had held that failure to disclose speculation—however likely the speculated-about outcome may be—was not actionable under the securities laws. *See, e.g.*, *Rodman v. Grant Found.*, 608 F.2d 64, 72 (2d Cir. 1979) ("Full factual disclosure need not be embellished with speculative financial predictions."); *Arber v. Essex Wire Corp.*, 490 F.2d 414, 421 (6th Cir. 1974) ("[T]he law mandates disclosure of only existing material facts. It does not require an insider to volunteer any economic forecast."). The SEC relaxed its position in 1978, "encouraging, although not requiring, disclosures of management projections both in filings with the SEC and in general." *Isquith ex rel. Isquith v. Middle S. Utilities, Inc.*, 847 F.2d 186, 205 (5th Cir. 1988) (quoting *Guides for Disclosure of Projections for Future Economic Performance*, SEC Release No. 5992 (Nov. 7, 1978)). That position eventually evolved into the current rule, which mandates disclosure of *some* predictions while leaving the disclosure of others optional. But nothing

in that history supports the notion that Item 303 could be weaponized by plaintiffs invoking Rule 10b-5.

B. The Second Circuit's rule contravenes this Court's warnings that Rule 10b-5 should not push companies to disclose a mountain of "essentially useless information."

By transforming Item 303 disclosures and omissions into a basis for Rule 10b-5 liability, the Second Circuit's rule encourages what Rule 10b-5 seeks to avoid: too much disclosure of "essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his investment decision." *Basic*, 485 U.S. at 234. That not only squarely contradicts the decisions of other circuits, but undermines this Court's decision in *Basic*. This Court has made clear that Rule 10b-5 is not intended to be used in that fashion.

1. Rule 10b-5 provides a private cause of action for representations or omissions that are "material" and "misleading." *E.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011); *Basic*, 485 U.S. at 238. For an omission to be actionable, there must be a corresponding duty to disclose the information. And the starting presumption is that there is no such duty. *Basic*, 485 U.S. at 237 n.17. Materiality also serves as a barrier to suit—information is material only when 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 the information made available." *Id.* at 231-32 (citation omitted).

The materiality rule is intended to "filter out essentially useless information that a reasonable investor would not consider significant, even as a part of a larger 'mix' of factors to consider in making his investment decision." *Id.* at 234 (citation omitted). Dumping too much information on investors can create inefficiencies; the excessive information can impede reasoned decisionmaking. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976). Thus, "if the standard of materiality [for disclosure purposes] is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information." *Id.*

This Court's warnings have proved prescient. For decades now, given the low materiality standard, companies' MD&A disclosures have grown "unnecessarily lengthy, difficult to understand and confusing." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75056, 75058-59 (Dec. 29, 2003) ("2003 Guidance"). In one study of 25 large, well-known companies, the number of pages devoted to MD&A disclosures increased 300% between 1972 and 1992—the period during which Item 303 took shape. Ernst & Young, *To the Point: Now Is the Time to Address Disclosure Overload*, at 1 (June 21, 2012), *available at* https://perma.cc/VHM4-FQ5J. MD&A disclosures went from an average of three pages in 1972 (before Item 303 was promulgated), to seven pages in 1982 (during Item 303's infancy), to 12 pages in 1992, and to 48 pages in 2011. *Id.* at 2. The study predicted that MD&A disclosures would reach an average of 214 pages by 2032 (on top of *320 pages of footnotes*). *Id.*

2. Backing up this Court's admonitions, empirical research has shown that investors suffer when they must dig through heaps of trivial information for a valuable nugget here or there. Studies have demonstrated that increasing "regulation-induced disclosures" has "adverse consequences" on the forecasts of professional analysts interpreting these disclosures—specifically, the increased disclosures are "associated with a longer delay, lower accuracy, and higher dispersion" among forecasts. Joost Impink et al., *Regulation-induced Disclosures: Evidence of Information Overload?*, 58 ABACUS 432, 450 (2022), *available at* https://doi.org/10.1111/abac.12246. Moreover, the evidence shows that analysts are subject to "information overload"—*i.e.*, a certain level of disclosure is helpful, "but at some point, the information becomes too much resulting in worse decisions." *Id.*; *see* Mary Jo White, Chair, Secs. & Exch. Comm'n, *The Path Forward on Disclosure* (Oct. 15, 2013), *available at* https://www.sec.gov/news/speech/spch101513mjw (describing "information overload" as "a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out information that is most relevant").

It is a well-known "fallacy" to "think[] that if some information is good, more is better." Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669, 696 (1984). "Not surprisingly, investors often voice their disapproval with the current SEC disclosure regime as they encounter needlessly voluminous and complicated SEC filings." U.S. Chamber of Commerce, Center for Capital Markets Competitiveness, *Essential Information: Modernizing Our Corporate Disclosure System* 14 (2017), *available at* bit.ly/46jiu4L; *see* Arthur J. Radin, *Have We Created Financial Statement Disclosure Overload?*, CPA J., Nov. 2007, at 6 (2007) ("[A]s an investor looking at the number of pages that are boilerplate, redundant, immaterial, irrelevant, or overly fact-packed, I immediately suffer from MEGO—my eyes glaze over.").

For precisely this reason, the SEC has repeatedly stressed that Item 303, properly implemented, should not lead to "investors [being] overwhelmed by voluminous disclosure of insignificant and possibly unnecessarily speculative information." 2021 Final Rule, 86 Fed. Reg. at 2094 n.162 (quoting SEC Release No. 33-8182, 2003 WL 175446, at *6 (Jan. 28, 2003)). To combat this trend, the SEC launched its ongoing "Disclosure Effectiveness Initiative"—which includes an attempt at simplifying the disclosures required by Item 303. Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 85 Fed. Reg. 12068, 12069 (Feb. 28, 2020).

3. Opening up Rule 10b-5 liability for failures to disclose under Item 303 encourages just the regime of overdisclosure that this Court disavowed in *Basic*. Materiality is supposed to be a check on the incentive to overdisclose, but Item 303 contains a relatively weak concept of materiality. *See Oran*, 226 F.3d at 288 (explaining that "[b]ecause the materiality standards for Rule 10b-5 and SK-303 differ significantly, the demonstration of a violation of the disclosure requirements of

Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5. *Such a duty to disclose must be separately shown.*" (emphasis added, citation and internal quotation marks omitted)); *accord Carvelli*, 934 F.3d at 1331; *In re NVIDIA Corp. Secs. Litig.*, 768 F.3d at 1055. Allowing alleged violations of Item 303 to be litigated by private plaintiffs, wielding the threat of classwide liability, strongly skews managers' behavior toward the overly cautious, self-preserving end of the spectrum.

It comes as no surprise that the risk of litigation is a significant factor driving ballooning disclosures. As former SEC Chair White observed, one important cause of "lengthy and complex disclosure" is "the risk of litigation" which forces companies "to take a defensive posture and disclose more information rather than less." White, *supra*. In fact, a survey of over two hundred companies revealed that "73 percent say their company's disclosures are influenced by concerns over potential future litigation." KPMG, *Disclosure overload and complexity: hidden in plain sight*, at 16, 22 (2011), *available at* bit.ly/3Ju5q2K. And the Second Circuit's role as the forum-of-choice for plaintiffs asserting violations of Rule 10b-5 predicated on an Item 303 theory, *see* Pet. App. 62a, aggravates this incentive to overdisclose.

4. Nor is there any need for a new *private* cause of action to enforce Item 303. In appropriate cases, the SEC can and does enforce violations of Item 303. *See, e.g.*, *In re Compass Minerals Int'l, Inc.*, Exchange Act Release No. 95889, ¶¶ 38 n.15, 42 n.18 (Sept. 23, 2022), https://www.sec.gov/litigation/admin/2022/33-11107.pdf. But companies know that, in the highly

specific context of Item 303 guidance and enforcement, the SEC is attuned to the problem of overdisclosure and is less likely to pursue doubtful violations of Item 303. Private plaintiffs, though, have much different motivations. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349-351 (2001) (noting that government agencies can take a "measured approach" to avoid overdisclosure, whereas private litigants lack the incentive to do so).

Moreover, the market already corrects for failures to disclose material and adverse forward-looking information (either because management decided incorrectly or because it deliberately withheld the information); upon discovering such news, "the market will penalize the company later by devaluing its securities (to account for the risk that the company might be holding out on additional bad news not yet known to the public)." Mitu Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Non-disclosure*, 46 UCLA L. Rev. 675, 690 (1999). Compelling maximum disclosure under Item 303 is not only unnecessary, but harmful to the market's self-regulation. *Id.* ("Because the market itself disciplines firms, through the imposition of nonlegal sanctions such as reputational costs, the creation of legal sanctions is largely unnecessary to force appropriate disclosures and, in fact, is positively detrimental to a well-functioning market . . . .").

C. The Second Circuit's approach undermines Item 303's objective of providing investors access to management's perspective.

The unnecessary overdisclosure produced by the threat of liability does more than just make SEC filings longer. In the case of Item 303 in particular, exacerbating the problem of overdisclosure would run contrary to the provision's purpose: to present management's perspective in candid and clear narrative form.

With Item 303, the SEC "intended to give the investor an opportunity to look at the company *through the eyes of management* by providing both a short and long-term analysis of the business of the company." 1989 Guidance, 1989 WL 1092885, at *3 (emphasis added). The current text of the regulation makes this explicit: the MD&A "is expected to better allow investors to view the registrant from management's perspective." 17 C.F.R. § 229.303(a); *see id.* ("The discussion and analysis must focus specifically on . . . matters that are reasonably likely *based on management's assessment* to have a material impact on future operations." (emphasis added)). This objective is thwarted if the MD&A is molded into a contrived and defensive piece of prelitigation work product.

Part of what makes the MD&A useful is that it provides the company's own take on itself, its competitors, and its industry, in a narrative form that is distinct from the quantitative data found in an audited financial statement. *See, e.g.*, 2021 Final Rule, 86 Fed. Reg. at 2106 (MD&A provides "a narrative explanation of the financial statements that enables investors to see a registrant 'through the eyes of management'"). For instance, the introduction should address the risks posed by uncertainties "with which *management* is concerned primarily," 2003 Guidance, 68 Fed. Reg. 75060 (emphasis added), a task that becomes more difficult if the threat of liability leaves management feeling compelled to clutter its narrative with prophylactic discussions of every conceivable uncertainty in the business universe. The MD&A can be useful because it sheds light not just on (*e.g.*) a business uncertainty, but on management's assessment of it and response to it. The latter will get lost in the stack if the disclosure must address every conceivable risk or uncertainty, for fear of liability if one is omitted. That result benefits neither the market nor individual investors.

D. This question warrants immediate review.

This case presents a prime opportunity to resolve the circuit conflict that escaped review in *Leidos*, and this Court should not pass it up. Over the past several years, while the SEC has been working to reduce the length and complexity of MD&A filings, *see* p. X, *supra*, the Second Circuit's misguided expansion of liability under Rule 10b-5 has applied consistent pressure on public companies to overdisclose. It is past time to put a stop to this outlier interpretation that is distorting the decisions of management in companies based all over the country.

After all, a circuit's decision to create what is in essence a new private cause of action encourages plaintiffs to file suit in that circuit. Venue is essentially no obstacle to the filing of a securities class action: the Exchange Act provides for nationwide service of process and allows plaintiffs to bring suit in any district "wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a). Because of that liberal standard, few publicly traded companies are *not* subject to suit within the Second Circuit under the Exchange Act. The fact that the same suit cannot *also* be filed in Philadelphia, San Francisco, or Miami is little comfort for the CFOs and other corporate officers who must complete and sign disclosures.

As the decision below illustrates, securities class actions filed throughout the Second Circuit predicated on omissions under Item 303 may not be easy to dismiss. "[E]xtensive discovery and the potential for uncertainty and disruption" will "allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). And because of the incentives to sue in the Second Circuit and reach a settlement, fewer cases presenting this issue will reach the appellate level. This Court should resolve the conflict now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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