No. 16-581

In the Supreme Court of the United States

LEIDOS, INC., FKA SAIC, INC.,
Petitioner,

v.

INDIANA PUBLIC RETIREMENT SYSTEM, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

Edward J. Fuhr*
Counsel of Record
Scott H. Kimpel
Matthew P. Bosher
Johnathon E. Schronce
HUNTON & WILLIAMS LLP
951 East Byrd Street
Riverfront Plaza, East Tower
Richmond, VA 23219
(804) 788-8200
efuhr@hunton.com

Counsel for Amicus Curiae

Linda E. Kelly
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW
Suite 700
Washington, D.C. 20001
(202) 637-3000

Counsel for Amicus Curiae

*Gibson*Moore Appellate Services, LLC
206 East Cary Street♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM regularly participates as *amicus curiae* in cases of particular importance to the manufacturing industry. This litigation raises issues of direct concern to the members of the NAM that are public companies and to American industry as a whole. The private right of action implied by this Court under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5, is among the most potent remedies available to investors and, as both Congress and this Court have

---

[1] All parties, including counsel for Respondents, received timely notice of the NAM's intent to file this brief under Rule 37(a) and have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party. A party or a party's counsel did not contribute money that was intended to fund preparing or submitting this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

recognized, is susceptible to abuse. The ruling of the Second Circuit below confirmed a conflict between the Second Circuit and the Third and Ninth Circuits on the relationship between the private right of action under Rule 10b–5 and the Management Discussion and Analysis ("MD&A") disclosures required by the SEC in every publicly traded company's quarterly and annual reports. Should the Second Circuit's rulings be left intact, its expansion of the private right of action would have far-reaching implications for publicly traded companies, including the many public manufacturing companies that are members of the NAM.

SUMMARY OF ARGUMENT

As one commentator on the federal securities laws has observed, "[t]he most significant and challenging public disclosures are those required by item 303 of Regulation S–K . . . ." 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 9:50 (7th ed. 2016). Item 303, 17 C.F.R. § 229.303, establishes the necessary disclosures in the MD&A section of many reports required of publicly traded companies under the federal securities laws, including quarterly and annual reports. Foremost among these disclosures are any known "trends" or "uncertainties" impacting a company's liquidity, capital resources, and results of operations. 17 C.F.R. § 229.303(a)(1). These disclosures therefore place "particular emphasis on the registrant's prospects for the future." Management's Discussion & Analysis of Fin. Condition & Results of Operations, Exchange Act Release No. 6835, 54 Fed. Reg. 22,427, 22,428 (May 24, 1989) (hereinafter the "Interpretive Release").

Until recently, the Courts of Appeals to have considered the question had held consistently that an omission of material information required under Item 303 could not provide the basis for a private right of action for securities fraud under Section 10(b) and Rule 10b–5 unless Rule 10b–5 was itself violated. In other words, absent an omission of material fact that rendered an affirmative statement misleading, no claim under Rule 10b–5 could lie. The Second Circuit's ruling in this case confirms that this unanimity of authority no longer exists. Instead, contrary to holdings from the Third and Ninth Circuits, the Second Circuit held that a violation of Item 303 could support a claim for securities fraud, even if the omitted material facts did not render an affirmative statement misleading.

The Second Circuit's ruling departs from both the plain language of Rule 10b–5 and this Court's precedents. In this context, to state a claim under Rule 10b–5, a plaintiff must plead either a specific misstatement of material fact or an omission of material fact that renders a specific affirmative statement misleading. 15 U.S.C. § 78u–4(b)(1); *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011). The "duty to disclose" to which this Court has referred is the duty to disclose information sufficient "to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b). The Second Circuit's rule would give rise to liability for securities fraud based only on a material omission, even though this Court has made clear that an omission alone does not suffice.

The consequences of the Second Circuit's ruling are far-reaching. This Court long ago ceased implying private rights of action where Congress did not intend to create them. For similar reasons, in the years since Congress enacted the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), the Court has also cabined the implied private right of action under Rule 10b–5 to its present boundaries. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, *Inc.,* 552 U.S. 148, 165 (2008). Nevertheless, the Second Circuit's ruling expands the private right of action under Rule 10b–5 to encompass omissions of forward-looking information required by an SEC rule that does not itself contemplate such a private right of action. Making matters worse, there is nothing in the Second Circuit's reasoning that limits its holding to Item 303. On the contrary, under the Second Circuit's approach, any number of statutes and regulations requiring disclosure are now ripe to be grafted onto Rule 10b–5. Such an expansion of the private right of action undermines congressional intent rather than advancing it, and is wholly unnecessary in light of the SEC's enforcement authority and existing private rights of action. Indeed, private plaintiffs may still pursue claims under Rule 10b–5, so long as they satisfy its elements—that is, they plead an omission of material fact that renders an affirmative statement misleading.

Amicus curiae respectfully submits that the Court should grant the writ of certiorari, resolve this conflict of authority, and restore the proper limitations on the private right of action under Rule 10b–5.

REASONS FOR GRANTING CERTIORARI

I. The Second Circuit's Ruling Confirms a Circuit Split on the Scope of the Private Right of Action Under Rule 10b–5

In its ruling below, the Second Circuit held that a violation of Item 303 could give rise to a claim for securities fraud under Section 10(b) and Rule 10b–5. *Indiana Pub. Ret. Sys.* v. *SAIC, Inc.*, 818 F.3d 85, 94–96 (2d Cir. 2016). That ruling rested on an earlier opinion issued by the Second Circuit, *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), for which no party petitioned for certiorari.[2] *Indiana Pub. Ret. Sys.*, 818 F.3d at 94 n.7. According to these rulings by the Second Circuit, a material omission in violation of "Item 303's affirmative duty to disclose . . . can serve as the basis for a securities fraud claim under Section 10(b)," even if that omission does not render an affirmative statement misleading. *Stratte-McClure*, 776 F.3d at 101.

As the Second Circuit noted, its "conclusion is at odds with" the conclusion that the Ninth Circuit reached on this same question. *Stratte-McClure,* 776 F.3d at 103 (citing *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2349 (2015)). In *NVIDIA*, the Ninth Circuit rejected the proposition that "Item 303's disclosure duty is actionable under Section 10(b) and Rule 10b–5." *NVIDIA*, 768 F.3d at 1054. Instead, the Ninth

---

[2] In *Stratte-McClure*, the Second Circuit ultimately affirmed the District Court's dismissal of the plaintiff's claims under Section 10(b) and Rule 10b–5 because the plaintiff failed to plead scienter. *Stratte-McClure*, 776 F.3d at 107–08.

Circuit held that "[d]isclosure is required" under Section 10(b) and Rule 10b–5 "only when necessary to make statements made, in light of the circumstances under which they were made, not misleading." *Id.* (quoting *Matrixx*, 563 U.S. at 44).

Both the Second Circuit and the Ninth Circuit purported to draw support from an earlier decision of the Third Circuit, *Oran* v. *Stafford*, 226 F.3d 275 (3d Cir. 2000). *See Stratte-McClure*, 776 F.3d at 103; *NVIDIA*, 768 F.3d at 1054–55. But in *Oran*, an opinion authored by then-Circuit-Judge Alito, the Third Circuit "h[e]ld that a violation of SK–303's reporting requirements does not automatically give rise to a material omission under Rule 10b–5." *Id.* at 288. The Second Circuit seized on the Third Circuit's use of the word "automatically," concluding that "*Oran* actually suggested, without deciding, that in certain instances a violation of Item 303 could give rise to a material 10b–5 omission." *Stratte-McClure*, 776 F.3d at 103. That conclusion, however, misreads *Oran*. In fact, the Third Circuit recognized that a violation of Item 303 could give rise to a claim under Rule 10b–5, but only if "a duty to disclose" was "separately shown." *Oran*, 226 F.3d at 288 (internal citation omitted).

Left unresolved, this conflict of authority threatens the interests of the NAM's publicly traded members and other public companies. Given the ubiquity and complexity of the MD&A disclosures required under Item 303, it is imperative for those companies that the Court review the Second Circuit's ruling in this case and provide clarity as to the circumstances in which a company can be held liable for securities fraud under Rule 10b–5.

The NAM is also concerned that the Second Circuit's ruling will lead to forum shopping. The conflict between the Second and Ninth Circuits, which hear more cases involving the federal securities laws than the other circuits, means that economically rational plaintiffs can be expected to exploit that conflict and seek the most favorable forum available. Given their regular interaction with customers and sources of financing in New York City, as well as their listings on one of the two major stock exchanges headquartered there, many of the NAM's members may face securities litigation there in addition to other circuits where they may be incorporated or headquartered. In future cases, it stands to reason that plaintiff's counsel will prefer to pursue litigation in the Second Circuit over those others, leading to judicial inefficiency and further divergence in the application of the law among the several circuits. That is an outcome that this Court can and should prevent.

II. The Second Circuit's Ruling Contravenes the Text of Rule 10b–5 and this Court's Precedents

In departing from the decisions of the Third and Ninth Circuits, the Second Circuit's holding contravenes the plain language of Rule 10b–5 and this Court's precedents establishing when omissions are actionable.

Respondent asserts claims under Section 10(b) and, more specifically, Rule 10b–5. In relevant part, Rule 10b–5 makes it "unlawful for any person, directly or indirectly . . . 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." 17 C.F.R. § 240.10b–5(b). As this Court has explained, "it bears emphasis that § 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary 'to make statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx*, 563 U.S. at 44 (quoting 17 C.F.R. § 240.10b–5(b)); *see also Basic Inc.* v. *Levinson*, 485 U.S. 224, 238 (1988) ("to prevail on a Rule 10b–5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact") (emphasis in original).

The text of Rule 10b–5 stands in stark contrast with another prominent provision of the federal securities laws, Section 11 of the Securities Act of 1933. *See* 15 U.S.C. § 77k. In Section 11, Congress created an express right of action against issuers and others when a registration statement "contained an untrue statement of a material fact or *omitted to state a material fact required to be stated therein* or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a) (emphasis added). Accordingly, "[i]f a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983). The text of Section 11 makes clear that it is not necessary that the alleged omission render an affirmative statement misleading.

Despite the critical differences in these statutes, the Second Circuit drew upon its precedents applying Section 11 to conclude that a material omission under Item 303 is actionable under Rule 10b–5. *Stratte-McClure*, 776 F.3d at 100–02 (citing, *inter alia*, *Panther Partners Inc.* v. *Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012) and *Litwin* v. *Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir. 2011)). In doing so, it quoted a footnote in *Basic* stating that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b–5." *Id.* at 100-01 (quoting *Basic*, 485 U.S. at 239 n.17). The Second Circuit's conclusion, however, ignores the sentence immediately preceding the sentence on which it relied: "To be actionable, of course, a statement must also be misleading." *See Basic*, 485 U.S. at 239 n.17. That context is critical, and is rooted in the text of Rule 10b–5. That requirement is also now established in the PSLRA which, among other requirements, mandates that a plaintiff "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading . . . ." 15 U.S.C. § 78u–4(b)(1)(B).

To the extent the Second Circuit acknowledged this fundamental requirement, it suggested a bright-line rule that every material omission in violation of Item 303 renders the remaining disclosures made under Item 303 misleading: "Due to the obligatory nature of these regulations, a reasonable investor would interpret the absence of an Item 303 disclosure to imply the nonexistence of 'known trends or uncertainties that the registrant reasonably expects will have a material unfavorable impact on revenues or income from continuing operations.'" *Stratte-McClure*, 776 F.3d at 102

(quoting 17 C.F.R. § 229.303(a)(3)(ii)). That end-run around the text of Rule 10b–5 violates another teaching of *Matrixx* and *Basic*. This Court has repeatedly refused to "reduce[]" the test for identifying a material misstatement or omission "to a bright-line rule." *Matrixx*, 563 U.S. at 30. As the Court explained in *Basic*, "[a] bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But . . . . [a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Basic*, 485 U.S. at 236. As the Court predicted, the Second Circuit's suggestion is indeed overinclusive because it embraces omissions beyond those that Rule 10b–5 proscribes.

III. The Second Circuit's Ruling Dramatically Expands the Implied Private Right of Action Under Rule 10b–5

The consequences of the Second Circuit's ruling are more extensive than the legal question of whether an omission of information required to be disclosed under Item 303 can provide the basis for a claim under Rule 10b–5. In fact, the Second Circuit's rulings expand the private right of action under Rule 10b–5 far beyond what Congress intended.

Neither this Court nor any of the Courts of Appeals has implied a private right of action under Item 303 itself. As the Third Circuit observed, "[n]either the language of the regulation nor the SEC's interpretative releases construing [Item 303]

suggest that it was intended to establish a private cause of action, and courts construing the provision have unanimously held that it does not do so." *Oran*, 226 F.3d at 287; *see also In re Sofamor Danek Group, Inc.,* 123 F.3d 394, 403 (6th Cir. 1997) ("courts have been reluctant to recognize a private right of action under Item 303"). That conclusion stands to reason because "MD&A is intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company." Interpretive Release, 54 Fed. Reg. at 22,428. In furtherance of that purpose, the SEC adopted a separate test for materiality under Item 303 that "specifies its own standard for disclosure—i.e., reasonably likely to have a material effect." *Id.* at 22,430 n.27. As a result, according to the SEC, "[t]he probability/magnitude test for materiality approved by the Supreme Court in [*Basic*] is inapposite to Item 303 disclosure." *Id.*; *see also Oran*, 226 F.3d at 287–88 (noting that the test for materiality under Item 303 "varies considerably from the general test for securities fraud materiality set out by the Supreme Court" in *Basic*) (citing *id.*).[3] These

---

[3] The SEC's test for materiality under Item 303 is as follows:

> Where a trend, demand, commitment, event or uncertainty is known, management must make two assessments:
>
> (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or

characteristics confirm that Item 303 is not and was never intended to be an antifraud provision.

Federal courts' reticence to imply a private right of action under Item 303 is consistent with this Court's precedents. Because "private rights of action to enforce federal law must be created by Congress," courts may not create private rights of action "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander* v. *Sandoval*, 532 U.S. 275, 286–87 (2001). Accordingly, it is not the case that "every provision of the securities Acts gives rise to an implied private cause of action." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 (1979) (declining to imply a private right of action under Section 17(a) of the Securities Exchange Act); *see also Transamerica Mortg. Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19–24 (1979) (declining to imply a private right of action under Section 206 of the Investment Advisers Act of 1940).

These principles are no less applicable to the Second Circuit's holding, which effectively grafts a private right of action under Item 303 onto Rule 10b–5. *See Stoneridge*, 552 U.S. at 165 ("Concerns with the judicial creation of a private cause of action

---

> uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur.

Interpretive Release, 54 Fed. Reg. at 22,430. The SEC subsequently advised that the "reasonably likely" threshold "is lower than 'more likely than not.'" *In Re Comm'n Statement*, Release No. 8056, 67 Fed. Reg. 3746, 3748 (Jan. 25, 2002).

caution against its expansion."). This Court long ago recognized that "litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). Although the Court has implied a private right of action under Section 10(b) and Rule 10b–5, it has also recognized that the "private right should not be extended beyond its present boundaries." *Stoneridge*, 552 U.S. at 165. That recognition is reflected in the careful balance the Court has struck as to who can be sued under Rule 10b–5's private right of action and for what conduct. *See, e.g., Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011) (limiting the private right of action to persons or entities making a statement); *Stoneridge*, 552 U.S. at 152–53 (private right of action does not reach secondary actors absent reliance on those actors' statements); *Central Bank, N.A.* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 191 (1994) (private right of action does not permit an aiding and abetting claim). It further reflects the goals of the PSLRA, which Congress intended to "curb perceived abuses of the § 10(b) private action." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007); *see also Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (noting the concern that abuses of the private right of action "chilled any discussion of issuers' future prospects").

The Second Circuit's ruling has upended this carefully constructed balance. By expanding the private right of action under Rule 10b–5 to include material omissions made in violation of Item 303, the Second Circuit has introduced even greater

uncertainty into an already imprecise area of the federal securities laws. Among other information, Item 303 requires quarterly disclosure of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii). This provision, like many others in Item 303, "require[s] disclosure of forward-looking information" that "may involve some prediction or projection." Interpretive Release, 54 Fed. Reg. at 22,429. The different—and lower—standard for materiality under Item 303 only exacerbates the difficulty for issuers attempting to craft the required disclosures. *See id.* at 22,430 n.27. Not surprisingly, therefore, "[t]he line between those MD&A disclosures which are required and those which may be avoided is far from a clear one." Hazen, *supra*, § 9:50. The logical recourse for the NAM's publicly traded members is to overdisclose potential "trends and uncertainties" so that they might mitigate the increased likelihood of being sued for securities fraud. That outcome is as predictable as it is harmful. The statute's "fundamental purpose" of "full disclosure" is undermined if an expansive private right of action "lead[s] management simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Basic*, 485 U.S. at 230–31 (internal citations and quotations omitted).

But the pernicious effects of the Second Circuit's ruling extend still further. The Second Circuit already has opined that "a duty to disclose under Section 10(b) can derive from *statutes or regulations*

that obligate a party to speak." *Stratte-McClure*, 776 F.3d at 102 (emphasis added). Because there is no limiting principle to the court's logic, the Second Circuit's ruling inevitably will encompass a host of other SEC regulations setting forth specific disclosure requirements for public companies, each of which now has the potential to give rise to a further expansion of the private right of action under Rule 10b–5. Item 303 itself is but one of 13 discrete subparts of Regulation S–K, which collectively list 105 separately captioned disclosure items. *See* 17 C.F.R. § 229.10 *et seq.* In turn, most of these 105 items have numerous subsections. Thus, the Second Circuit's holding threatens to open the floodgates of vexatious Rule 10b–5 litigation against the NAM's publicly traded members and other publicly traded companies. That prospect will not only frustrate the SEC's stated policy of "enabling investors and other users to assess . . . the registrant's prospects for the future," Interpretive Release, 54 Fed. Reg. at 22,428, but also undermine the PSLRA's purpose of reducing abusive private actions for securities fraud. *See Dabit*, 547 U.S. at 81–82.

None of this is to say that violations of Item 303 must go without redress. Far from it. "The SEC vigorously enforces the MD&A disclosure requirements." Hazen, *supra*, § 9:50. Indeed, the SEC brings enforcement actions for violations of Item 303 that involve no claim for fraud under Rule 10b–5 or other anti-fraud provisions. *See, e.g., In the Matter of Bank of Am. Corp.*, Release No. 72888 (Aug. 21, 2014) (settling claims under Section 13(a) of the Securities Exchange Act and Rules 12b–20 and 13a–13); *In the Matter of Caterpillar Inc.*, 50 S.E.C. 903 (Mar. 31, 1992) (settling claims under

Section 13(a) of the Securities Exchange Act and Rules 13a–1 and 13a–13). These actions confirm that "[t]he enforcement power is not toothless." *Stoneridge*, 552 U.S. at 166.

Private plaintiffs have remedies as well. In the context of registration statements, they may pursue claims under Section 11. *See, e.g., Panther Partners*, 681 F.3d at 120; *Litwin*, 634 F.3d at 716. Moreover, as both the Ninth and Third Circuits have observed, a private plaintiff can assert a claim under Rule 10b–5 based on disclosures required by Item 303 *if* the duty to disclose is "separately shown according to the principles set forth by the Supreme Court in *Basic* and *Matrixx*." *NVIDIA*, 768 F.3d at 1056; *Oran*, 226 F.3d at 288 (noting that a cause of action exists under Rule 10b–5 if "a duty to disclose" is "separately shown"). Indeed, as the Second Circuit recognized, this Court has articulated a specific standard by which "the materiality of an allegedly required forward-looking disclosure is determined" under Rule 10b–5. *Stratte-McClure*, 776 F.3d at 102–03 (citing *Basic*, 485 U.S. at 238). Such forward-looking disclosures remain actionable under Rule 10b–5 so long as the elements are present and the PSLRA's statutory safe harbor does not apply. *See* 15 U.S.C. § 78u–5. An expansion of the private right of action by reading this fundamental requirement out of Rule 10b–5 is therefore unnecessary. On the contrary, it is an invitation to precisely the sort of vexatious litigation that Congress and this Court have sought to curtail.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court grant the writ of certiorari.

Dated: November 30, 2016

Respectfully submitted,

Edward J. Fuhr*
Counsel of Record
Scott H. Kimpel
Matthew P. Bosher
Johnathon E. Schronce
HUNTON & WILLIAMS LLP
951 East Byrd Street
Riverfront Plaza, East Tower
Richmond, VA 23219
(804) 788-8200
efuhr@hunton.com

Linda E. Kelly
Leland P. Frost
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, D.C. 20001
(202) 637-3000

Counsel for Amicus Curiae
National Association of Manufacturers