No. 16-581

IN THE
Supreme Court of the United States

LEIDOS, INC.
Petitioner,

v.

INDIANA PUBLIC RETIREMENT SYSTEM, INDIANA STATE TEACHERS' RETIREMENT FUND, AND INDIANA PUBLIC EMPLOYEES' RETIREMENT FUND,
Respondents.

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

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The RLC has an interest in the question presented in this case because its public company members routinely must determine whether, and when, disclosure of "known trends or uncertainties" is required in their periodic filings by Item 303. As encouraged by the Securities & Exchange Commission, RLC members use these required disclosures to share forward-looking information and management's perspective of their businesses with shareholders. In so doing, management must exercise its best judgment in making highly subjective determinations as to when information known to management may or may not come to fruition and may or may not have a material effect on operations. Retailers such as the RLC's members face unique challenges in making these determinations because of a

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person aside from *amicus curiae* and their counsel made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus curiae* states that petitioner and respondent have filed a joint letter with the Clerk of the Court granting blanket consent to the filing of *amicus* briefs.

confluence of factors specific to the retail industry, including the variety and volume of information obtained by from large employee bases, global supply chains, large numbers of business partners, extensive point of sale and electronic/social media interaction with customers and other consumers, and pervasive regulation by authorities at all levels of government covering a vast range of legal duties. The challenge is even greater for those retailers who do business internationally via brick and mortar stores and/or e-commerce sites.

If allowed to stand, the Second Circuit's decision equating required disclosures under Item 303 with statements and omissions actionable under Section 10(b) and Rule 10b-5 would have a profound impact on RLC members' operations, including fundamentally altering their reporting and disclosure obligations, and exposing them to potentially sweeping securities class action litigation.

SUMMARY OF ARGUMENT

The Second Circuit's determination that Item 303 creates a duty to disclose that is *per se* actionable under Section 10(b) expands the private cause of action, contravenes this Court's precedents, and disrupts the statutory and regulatory disclosure framework.

First, this Court has repeatedly emphasized that "[s]ilence, absent a duty to disclose, is not misleading." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988); *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 45 (2011). As a result, an omission is actionable only when the omission causes an affirmative statement to be materially misleading, see 17 C.F.R. § 240.10b-5(b), or where an omission violates a fiduciary style duty to disclose, see *Chiarella* v. *United States*, 445 U.S. 222, 230 (1980). Absent these predicates, securities fraud

liability under Section 10(b) does not attach to mere omissions.

Second, the Second Circuit's *per se* rule that an omission of an Item 303 disclosure is a material omission actionable under Section 10(b)/Rule 10b-5 ignores and contravenes the test for materiality established in *Basic*. The SEC purposefully drew materiality for Item 303 more broadly than the materiality standard applicable to Section 10(b) liability. Whereas the latter asks only whether the omitted information would have "significantly altered the 'total mix' of information made available" to investors, Item 303 requires disclosure of known trends or uncertainties that management cannot prove are either not reasonably likely to occur or not likely to have a material effect on earnings or operations. Item 303 is, therefore, designed to compel disclosure of information that would not be considered material under *Basic*. The Second Circuit erred in conflating these divergent materiality tests.

Third, the implied private right of action in Section 10(b) is a "judicial construct" that should not be expanded absent Congressional directive. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). Because Congress did not extend Section 10(b) liability to Item 303 omissions when it enacted the Private Securities Litigation Reform Act of 1995, enforcement of such omissions should be left to the SEC.

Fourth, the Second Circuit's rule threatens to disrupt Congress and the SEC's flexible regulatory disclosure regimes. The SEC sought to encourage management to disclose forward looking information that will "provide investors with information they need to make informed investment and voting decisions." Exchange Act Release No. 33-10064, 81 Fed. Reg. 23916, 23919 (Apr. 22, 2016). In developing this framework, the

SEC granted management discretion to discuss that material information that management believes "is necessary to an understanding of the company's financial condition and operating performance." Exchange Act Release No. 33-8350, 68 Fed. Reg. 75056, 75059 (Dec. 29, 2003). By imposing *per se* liability for an omission under Item 303, the Second Circuit's rule will compel companies to forego reasoned judgment and instead over-disclose non-material information in order to avoid the risk of liability. As a result, the market will become flooded with "useless information" and dilute the impact of truly material information under *Basic*.

Imposition of Section 10(b) liability for failure to identify and timely disclose events, trends, or uncertainties will fall particularly heavily on retail companies. Retailers are broadly regulated by foreign, federal, state, and local government agencies, often at the store level. It would be extremely challenging and burdensome to divine reportable trends and uncertainties from this pervasive regulation. So too, large retailers in particular may be said to "know" a wide range of information from retail sales staff, customer feedback, electronic interactions, social media, and the accumulation of sales, marketing, supply chain, inventory, employee, and other data. The burden of collecting, aggregating and sifting such data to identify reportable events and trends would be substantial, and largely purposeless. Nonetheless, in order to avoid already burgeoning creative claims for failure to disclose picayune, off-beat, or simply absurd events and occurrences as potentially material events under Item 303, retailers will be forced to overdisclose in the very manner the Court attempted to avoid in *Basic*.

ARGUMENT

I. OMISSION OF A REQUIRED ITEM 303 DISCLOSURE IS NOT *PER SE* ACTIONABLE UNDER SECTION 10(b) AND RULE 10b-5.

The Second Circuit's determination that Item 303 of SEC Regulation S-K creates a duty to disclose that is *per se* actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5—without requiring that the plaintiff independently satisfy the test for securities fraud materiality established by this Court in *Basic Inc.* v. *Levinson*, 485 U.S. at 237—represents a dramatic expansion in Section 10(b) liability, contravenes this Court's precedents, and upsets the SEC's carefully crafted regulatory scheme, and for these reasons should be rejected.

Section 10(b) of the Securities Exchange Act of 1934 prohibits any person from using, "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 SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j. The SEC, in turn, implemented Section 10(b) through Rule 10b-5, which, in relevant part, makes it unlawful "[t]o 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 light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

Rule 10b-5, of course, "encompasses only conduct already prohibited by § 10(b)." *Stoneridge Inv. Partners*, 552 U.S. at 157; *accord Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Thus, in order to maintain a Section 10(b) action, a plaintiff must allege (and then 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." *Stoneridge Inv. Partners*, 522 U.S. at 157. This case concerns the first prong.

A. The Private Right Of Action Does Not Include Liability For All Omissions From Regulatory Disclosures.

As Petitioner's brief explains in detail, Respondents' claim here fails for want of an actionable omission. Whereas the antifraud provisions call for a "misstatement" or an "omission" as a basis for liability, not just any old omission will do. To the contrary, as this Court has made clear repeatedly, the federal securities laws do not impose a general duty to disclose material information that is actionable under Section 10(b) and Rule 10b-5. See *Matrixx*, 563 U.S. at 44 ("[I]t bears emphasis that § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information."). This Court, therefore, has repeatedly noted that "[s]ilence, absent a duty to disclose, is not misleading." *Basic*, 485 U.S. at 239 n.17; *Matrixx*, 563 U.S. at 45 (noting that "companies can control what they have to disclose under these provisions by controlling what they say to the market.").

Instead, an "omission" supports a Section 10(b) claim only under sharply constrained circumstances. Rule 10b-5(b) itself requires disclosures of "material fact … 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). This does not create a freestanding and generalized affirmative duty of disclosure; instead, it imposes only a condition of completeness. Essentially, "a

party who discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully on those subjects." *Findwhat Inv'r Grp.* v. *FindWhat.com*, 658 F.3d 1282, 1305 (11th Cir. 2011) (quoting *In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 898 (8th Cir. 2002)).

Separately, the Court has recognized omission liability where the defendant had an affirmative duty to disclose material information and possessed material information required to be disclosed pursuant to that duty. *See Chiarella*, 445 U.S. at 230. Outside of these discrete contours, however, the Court has never recognized securities fraud liability under Section 10(b) for omissions from regulatory disclosure requirements generally. To the contrary, nothing in the text of Section 10(b) or Rule 10b-5, and nothing in this Court's precedents, supports endorsing such a *per se* view.

B. Item 303 Imposes A Significantly Broader Standard For Disclosure Than Required For Section 10(b)/Rule 10b-5 Liability.

The Second Circuit's assumption that an omission of a required Item 303 disclosure is a *per se* material omission under Section 10(b)/Rule 10b-5 fails for a completely separate reason—lack of materiality under *Basic*.

To satisfy the first prong for Section 10(b)/Rule 10b-5 liability, a plaintiff must plead a "misrepresentation or omission" that is "material." 17 C.F.R. § 240.10b-5. The Second Circuit assumed without discussion that any omission of a known trend or uncertainty that is reasonably expected to have a material impact on continuing operations under Item 303 as interpreted by the SEC, necessarily qualifies as a

material omission for purposes of an implied private action to enforce Section 10(b)/Rule 10b-5. *Ind. Pub. Ret. Sys.* v. *SAIC, Inc.*, 818 F.3d 85, 94 n.7 (2d Cir. 2016) (citing *Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015)), *cert. granted*, 85 U.S.L.W. 3451 (U.S. Mar. 27, 2017) (No. 16-581). But this is not the case. To the contrary, Item 303 imposes a significantly broader requirement for disclosure, sweeping in types and amounts of information that would not be considered material under Rule 10b-5, and would therefore not support liability thereunder.

The Court established the standard for materiality for a private securities fraud claim in *Basic Inc.* v. *Levinson*, 485 U.S. 224. Adopting the test for materiality for statements made in the proxy-solicitation context previously articulated in *TSC Industries, Inc.* v. *Northway*, 426 U.S. 438 (1976), the Court held that "there must be 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. More precisely, a fact is material if a "*reasonable* investor would have viewed the nondisclosed information 'as having *significantly* altered the 'total mix' of information made available.'" *Matrixx*, 563 U.S., at 44 (quoting *Basic*, 485 U.S. at 232).

The Court further refined this standard to apply to forward looking statements of a contingent or speculative nature. Under such circumstances, the Court held, "materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'"

Basic, 485 U.S. at 238 (quoting *SEC* v. *Tex. Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

In determining whether any particular forward-looking statement is material for purposes of Section 10(b), then, a company must weigh and balance together how likely an event is to occur and whether under such future circumstances the fact might be of sufficient weight and magnitude that it could be viewed objectively as changing the "total mix" of available information.

Item 303 of Regulation S-K, at issue in this case, imposes a very different and significantly broader disclosure obligation. It requires management to disclose "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).

As the Third Circuit noted in *Oran* v. *Stafford*, 226 F.3d 275, 287-88 (3d Cir. 2000) (Alito, J.), the test for materiality articulated in *Basic* differs significantly from the test for materiality required by the SEC for disclosures under Item 303. *Accord In re NVIDIA Corp. Sec. 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.").

In fact, in its interpretive guidance, the SEC expressly rejected application of the *Basic* materiality standard to Item 303. "The probability/magnitude test for materiality approved by the Supreme Court in *Basic, Inc.,* v. *Levinson*, 108 S. Ct. 978 (1988), *is inapposite* to Item 303 disclosure." Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 33-

6835, 54 Fed. Reg. 22427, 22430 n.27 (May 24, 1989) (emphasis added).

The SEC promulgated its Item 303 materiality test in interpretive guidance issued the year after *Basic*. There, the SEC construed "trends or uncertainties" to encompass "trend[s], demand[s], commitment[s], event[s] or uncertaint[ies]." Where any of these 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 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.

54 Fed. Reg. at 22430. "This test varies considerably from the general test for securities fraud materiality set out by the Supreme Court in *Basic*." *Oran*, 226 F.3d at 288.

Whereas the *Basic* test allows management to weigh and balance the likelihood of occurrence and magnitude of impact simultaneously, the Item 303 test requires management to consider them independently and seriatim. For Item 303, on the first prong, management must not only determine the relative likelihood of a particular event coming to pass but must prove that the event is "not reasonably

likely to occur." If management cannot make that determination, whether because an event is in fact likely to occur, or because management simply cannot prove the negative, then management must assume that the event will occur.

Carrying that assumption to the second prong, management must then consider the consequences of the "trend or uncertainty" coming to fruition. Again, management bears the burden of proving the negative. Unless management can conclude affirmatively that the occurrence is not reasonably likely to have a material effect on the registrant's financial condition or operations, Item 303 disclosure is required.

This bifurcated rather than blended analysis, twice requiring management to prove a negative, necessarily casts a significantly broader disclosure net than *Basic*. Indeed, the SEC's approach divides all trends or uncertainties into two buckets: "reasonably likely to occur" and "not reasonably likely to occur." This approach ignores the possibility of a third category—trends or uncertainties that are neither reasonably likely to occur nor reasonably likely not to occur—and instead forces this category into the "reasonably likely to occur bucket."

By its structure, as interpreted by the SEC, Item 303 will on occasion require companies to disclose information that is in fact neither reasonably likely to occur nor reasonably likely to result in a material effect on liquidity, capital resources, or results of operations. Accordingly, Item 303 will require disclosure of more information than would be deemed material for purposes of Section 10(b)/Rule 10b-5 under *Basic*. Omissions under Item 303 therefore cannot provide a *per se* duty to disclose that is actionable under Sec-

tion 10(b) as the Second Circuit held without independently satisfying the materiality requirement articulated in *Basic*.[2]

C. Basing Section 10(b)/Rule 10b-5 Claims On Item 303 Materiality Would Be Inconsistent with The PSLRA.

The Court has cautioned repeatedly in recent years that implied causes of action are disfavored, as is their expansion. Indeed, as the Court explained in *Stoneridge Investment Partners*, an implied cause of action arises today "only if the underlying statute can be interpreted to disclose the intent to create one." 552 U.S. at 164; *accord Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011). While previously recognized implied private causes of action persist, "[t]he decision to extend the cause of action is for Congress, not for [the Courts.]" *Stoneridge Inv. Partners*, 552 U.S. at 165. "The 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statues." *Id.* at 164. Therefore, it "should not be extended beyond its present boundaries" absent Congressional directive. *Id.* at 165.

Congress did speak to the Section 10(b) private right of action in the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-5(c). There, Congress imposed heightened pleading requirements and a loss causation requirement on any

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[2] Indeed, in *Basic* the Court specifically rejected the notion of adopting different materiality standards for different types of disclosures. *See* 485 U.S. at 240 n.18 ("We find no authority in the statute, the legislative history, or our previous decisions for varying the standard of materiality depending on who brings the action or whether insiders are alleged to have profited.").

such action. See *id.* § 78u-4(b). In view of this legislation, the Court held that it was "appropriate for us to assume that when § 78u-4 was enacted, Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge Investment Partners*, 552 U.S. at 166.

On this basis, the Court in *Stoneridge Investment Partners* declined to extend the Section 10(b) action to encompass aiding and abetting liability, which Congress had left to the enforcement discretion of the SEC. Here too, the PSLRA is properly understood as having confirmed and codified the *Basic* materiality test, leaving enforcement of omissions under Item 303's much broader disclosure threshold solely to the SEC under Section 13(a) of the Securities Exchange Act. See 15 U.S.C. §§ 78u-2(a)(2), 78u-3(a) (setting forth SEC enforcement authority over violations of the disclosure requirements, including Item 303).

D. Basing Section 10(b)/Rule 10b-5 Claims On Item 303 Materiality Would Confuse The Statutory And Regulatory Disclosure Frameworks.

Lastly, conflating failures to disclose information required under Item 303 with actionable omissions under Section 10(b) would confuse Congress's and the SEC's disclosure regimes.

As explained in *TSC Industries*, 426 U.S. 438, and again in *Basic*, 485 U.S. 224, the Section 10(b) materiality test protects against excessive disclosure or securities fraud claims based on information that was likely objectively irrelevant to investors' investment and voting decisions. As the Court recognized, "certain information concerning corporate developments could well be of 'dubious significance.'" *Id.* at 231 (quoting *TSC Indus.*, 485 U.S., at 448). Indeed, too

loose a materiality standard "might bring an overabundance of information within its reach, and lead management 'simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking.'" *Id.*

In contrast to this rigorous materiality standard governing actionable misstatements and omissions, regulatory disclosure requirements under Regulation S-K are drawn broadly "to provide investors with information they need to make informed investment and voting decisions." Release No. 33-10064, 81 Fed. Reg. at 23919. Among the required disclosures is Management's Discussion and Analysis ("MD&A"), which is "of paramount importance in increasing the transparency of a company's financial performance and providing investors with the disclosure necessary to evaluate a company and to make informed investment decisions." Exchange Act Release No. 33-8182, 68 Fed. Reg. 5982, 5982 (Feb. 5, 2003).

The MD&A requires a company 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). The SEC directs a company to "focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." *Id.* § 229.303(a), Instruction 3.

In 1989, the SEC issued additional guidance explaining that a company *must* disclose information under Item 303 when "a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or

results of operation." 54 Fed. Reg. at 22429. Above all else, these disclosures are meant to be "flexible" in order to "elicit[] more meaningful disclosure and [to] avoid[] boilerplate discussions." *Id.* at 22427.

The SEC crafted the MD&A framework to encourage disclosure of forward-looking information. In broadening the disclosure requirement, the SEC sought to ensure that investors would not be surprised by changes to the company's risks or financial condition. See Exchange Act Release No. 33-9144, 75 Fed. Reg. 59894, 59895 (Sept. 28, 2010) ("Surprises to investors can be reduced or avoided when a company provides clear and understandable information about known trends, events, demands, commitments and uncertainties, particularly where they are reasonably likely to have a current or future material impact on that company."). The MD&A, instead, encourages disclosure of any information that could be important to investors but is not otherwise required elsewhere.

The SEC's test for disclosure is inherently complicated and necessarily requires company management to exercise significant judgment and discretion as to whether an event rises to a known trend or uncertainty that must be disclosed. A company need not make specific disclosures pursuant to MD&A, see Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation*, ch. 2.D.2 (Regulation S-K (Nonfinancial Data)) (5th ed. 2016), but rather, the MD&A is meant to be a narrative discussion and analysis of a company's business as seen "through the eyes of management." Exchange Act Release No. 33-8350, 68 Fed. Reg. at 75056. This discretion allows a company to discuss "material information that is necessary to an understanding of the company's financial condition

and operating performance, as well as its prospects for the future." *Id.* at 75059.

As a result, a company must make many difficult choices when making its MD&A disclosures—management must assess the effect of the amount and timing of uncertain events; must determine when an event is indicative of a market trend requiring disclosure; must discuss external market forces that could impact a company's business; and must value certain assumptions in its financial predictions. This sort of analysis is inherently subjective, which is why the SEC developed a "flexible approach" to encourage disclosure of meaningful information. 54 Fed. Reg. at 22427.

At bottom, the SEC intended the MD&A to provide "material historical and prospective textual disclosure enabling investors and other users to assess the financial condition and results of operations" of the company. *Id.* at 22428. The MD&A is not meant to force a company to disclose all information; rather, management is meant to discern the material information and communicate both the "short and long-term analysis of the business" as seen "through the eyes of management." *Id.*

Lawmakers and regulators thus crafted securities disclosure requirements with a goal of providing investors with neither too much nor too little information about a company's financial condition. Turning management's judgment calls about disclosure into an independent cause of action for securities fraud will disrupt this delicate balance and poorly serve investors—the only party that the standards were designed to protect.

1. The Second Circuit's approach will lead to exactly the type of immaterial disclosures that the

Commission hoped to avoid when it drafted its Item 303 guidance. With the fear of exposure to securities fraud class actions under Rule 10b-5 for Item 303 omissions, some companies might turn their MD&A into massive data dumps to head off "vexatious litigation" initiated by "a widely expanded class of plaintiffs" bringing "strike suits" under Rule 10b-5. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975). Investors could then be forced to hack through the brambles of dense reports to find useful information—a result the Court has recognized as "hardly conducive to informed decisionmaking." *TSC Indus.*, 426 U.S. at 448-49 ("[M]anagement's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making.").

The surge of disclosures would occur just when the SEC is looking for ways to *reduce* the volume of information thrown at investors, for fear of "information overload." Mary Jo White, SEC, *The Path Forward on Disclosure* (Oct. 15, 2013) ("I am raising the question here and internally at the SEC as to whether investors need and are optimally served by the detailed and lengthy disclosures about all of the topics the companies currently provide in the reports they prepare and file with us.").

The lower court's approach is a judicially-constructed, dead-weight rule that will compel disclosure of information for no productive or beneficial reason. This is not the result the SEC intended when it created Item 303 disclosures to "provide such other information … necessary to an understanding of its financial condition." 17 C.F.R. § 229.303(a). Under the Second Circuit rule, the MD&A would no longer

be a conversation between management and shareholders; instead, management will be compelled to use the disclosures as a protective wall of data, shielding management from shareholder litigation. And individual investors, and those with fewer resources to sift the useful information from the chaff, will suffer the most.

2. Some companies, on the other hand, may instead focus their Item 303 disclosures only on trends or uncertainties that can provoke liability if unreported. By exposing companies to private enforcement for allegedly material omissions under Item 303, without a corresponding showing that the company had an affirmative duty to disclose the material information, the lower court's approach may incentivize management to report primarily on topics that would help defend against antifraud claims to the detriment of disclosure of other non-material information under *Basic* that Item 303 was intended to elicit from management in the first place.

Item 303 was never designed as a personal liability provision, but the lower court's rule has the potential to swallow the type of disclosure the regulation was originally intended to create. If forced to choose between the risk of paying a major judgment for omitting material information under Rule 10b-5 and the risk of omitting items that are non-material under *Basic* but still required by Item 303, management will be encouraged to focus their resources on the former to the detriment of the latter.

In summation, because Section 10(b) and Rule 10b-5 do not create a generalized and actionable duty of disclosure, because disclosures under Item 303 are compelled by a significantly looser and more subjective materiality requirement, because expanding Section 10(b)'s private right of action to encompass

Item 303 liability would be inconsistent with the PSLRA, and because doing so would upset the disclosure regimes, the Court should reject the Second Circuit's approach below.

II. TREATING ITEM 303 OMISSIONS AS MATERIAL OMISSIONS ACTIONABLE UNDER SECTION 10(b) WOULD IMPOSE SEVERE, UNWARRANTED, AND WASTEFUL OBLIGATIONS ON INDUSTRIES SUCH AS THE RETAIL INDUSTRY WITH NO APPRECIABLE BENEFIT TO INVESTORS.

Adopting the Second Circuit's conflation of Section 10(b) and Item 303 would have unintended consequences for the economy and undermine the purpose of Item 303. Creating an independent cause of action premised solely on Item 303's affirmative disclosure requirements would blur the distinction between fraud and mistake, inject uncertainty into the market, create enormous compliance costs, and incentivize bad-faith litigation. Furthermore, the approach embraced by the lower court could harm the interests of the very investors it aims to protect.

Departing from nearly eight decades of jurisprudence and creating an affirmative duty to disclose information under the antifraud provisions will allow parties to use the securities laws as a form of hindsight insurance and create a headwind against economic growth by adding to companies' administrative burdens. The "practical consequences" of the Second Circuit's broad treatment of Item 303 omissions would lead to serious practical problems for the market and particularly the retail industry. *Stoneridge*, 552 U.S., at 157-64.

1. Litigation Exposure. Treating Item 303 omissions as *per se* actionable under 10b-5 will drastically

expand companies' exposure to class action and securities litigation. Item 303 requires each company to disclose any known trend or uncertainty that is "reasonably likely to have an impact on its financial condition." SEC Interpretive Guidance, Exchange Act Release No. 33-6835, 1989 WL 1092885, at *4 (May 18, 1989). "'To be 'reasonably likely,' a material violation must be more than a mere possibility, but it need not be 'more likely than not.'" Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release Nos. 33-8185; 34-47276, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003). Item 303 disclosures require management to make a series of highly subjective judgment calls. When does something known to the company become a "trend, demand, commitment, event or uncertainty" that might be subject to Item 303 disclosure? When does it become reasonably likely to occur? And, when does it become reasonably likely to have a material impact on the company's bottom line or operations? 54 Fed. Reg. at 22429.

In large respect, Item 303 disclosures present questions of timing. Information that ultimately proves to be material is always known to management for some period of time before it is disclosed in a 10Q, 10K, or otherwise. The Second Circuit's approach to Item 303 leaves companies vulnerable to "allegations of fraud by hindsight." *Tellabs, Inc.* v. *Makor Issues & Rights*, 551 U.S. 308, 320 (2007). It is a simple thing to argue after the fact that a known event that did, in fact, become a trend, and did, in fact, prove to have a material impact, should have been disclosed days, weeks, or months earlier.

The Second Circuit's approach will subject companies to fraud claims for failing to disclose an event or uncertainty the moment its occurrence colorably becomes more than a mere possibility. But whether a

trend or uncertainty was known to management and reasonably likely to occur at the time an MD&A was filed are necessarily fact-specific inquiries, and hindsight bias will color any effort to retroactively make such determinations. "In the context of securities regulation, hindsight can mistakenly lead people to conclude that a bad outcome was not only predictable, but was actually predicted by managers." Mitu Gulati, *Fraud by Hindsight*, 98 NW. U. L. Rev. 773, 774 (2004). The effects of hindsight bias only increase with the severity of an incident. See Erin M. Harley, *Hindsight Bias in Legal Decision Making*, 25 Soc. Cognition (Special Issue: The Hindsight Bias) 48, 51 (2007) ("The severity of a negative outcome can have dramatic effects on the size of hindsight bias, with larger bias resulting from more severe negative outcomes.").

The retail industry is particularly vulnerable to outside economic factors and the decisions of retail managers are especially open to second-guessing in litigation. Under the Second Circuit's rule, plaintiffs will be free to "simply seize[ ] upon disclosures made in later annual reports and allege[ ] that they should have been made in earlier ones." *Denny* v. *Barber*, 576 F.2d 465, 470 (2d. Cir. 1978) (Friendly, J.). In fact, such suits have already been filed against retailers. See, *e.g.*, Compl. ¶ 8 *Iron Workers Local Union No. 405 Annuity Fund* v. *Dollar Gen. Corp.*, 3:17-cv-00063 (M.D. Tenn. Jan. 18, 2017) (class action alleging securities fraud based on management's failure to identify and disclose full impact of SNAP benefit reductions on company's sales in its second quarter filing which were ultimately disclosed in third quarter filing). Item 303's reporting requirements are "intentionally general," leaving a substantial gray area in which management may make judgment calls about whether disclosure is appropriate. SEC Guidance, 1989 WL 1092885, at *1.

The Second Circuit's rule, however, imposes massive consequences for incorrectly predicting the development of a known trend or uncertainty.

2. Compliance Costs. Management will have every incentive to minimize liability by over-reporting and disclosing picayune events and anything remotely resembling a trend or uncertainty. With the specter of "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers" hanging above their heads, companies will divert important resources to scrambling to ensure that the MD&A includes any information that might be contorted into a trend or uncertainty in the future. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006).

Retailers are regulated extensively at every level of government, ranging from federal agencies (such as FTC, CPSC, EEOC, NLRB, FCC, OSHA, EPA, trade/customs agencies and financial regulators), to state agencies (such as employment, consumer protection, environmental and health agencies), and even to county and municipal regulators and foreign regulators (in the case of multinational retailers). Collectively, these account for hundreds, if not thousands, of regulatory touchpoints for individual stores spread out across the entire country or internationally—and many more when aggregated across a retailer—with a wide array of government agencies.

The vast majority of such contacts, even those involving tickets, citations, or small fines, are not immediately visible to corporate management and never reported as Item 303 events. For example, an individual store may be ticketed because its municipally-approved zoning and landscaping plan indicates a green space with tree coverage at a particular place, but the retailer failed to replace a dead tree. A retailer may be

cited by state or local environmental regulators when members of the public (*i.e.*, not the retailer) improperly dispose of batteries or other products defined by a regulatory agency as a "hazardous waste" in trash cans maintained by the retailer on the store's premises. A retailer may be fined by OSHA for improperly stacked empty cardboard boxes. Or a retailer may receive a "weights and measures" citation where a price posted in the store does not match the register price, even where the register price is lower. Retailers, of course, endeavor to comply with all regulations, but visibility into every alleged infraction at all stores is difficult to achieve – but could, theoretically, indicate a broader trend if multiple infractions of a particular type are eventually discerned.

Ordinarily, there is no reason why corporate management, particular managers responsible for making disclosures to the SEC, should be familiar with such one-off, store-level events. At the same time, however, many regulatory matters that ultimately require Item 303 disclosure by a retailer begin as such one-off issues at individual stores. Likewise, a sales trend that ultimately raises to an Item 303 disclosure often will have been noticed previously by a junior buyer or remote store manager; with the benefit of hindsight it can be argued that such low level observations of a germinating trend should have been disclosed before the growing seed even pierced the soil in which it was germinating.

Imposing private securities fraud liability for failure to divine and timely report a known trend based on such events will place enormous pressure on management to scour the corporate records and employee's knowledge for hints of a larger pattern. Is improper box stacking a systemic problem that may generate re-

peat-offender fines? Is a weights and measures allegation at one store indicative of a broader problem across multiple stores that could lead to a class action? Must an individual event be disclosed? At what point do several incidents become a trend or uncertainty? And at what point might the consequences become material? Once such instances are disclosed, it will be an easy thing to argue that they should have been disclosed one period earlier.

Separate and apart from interactions with foreign, federal, state, and local governmental agencies, retailers also have extensive point-of-sale, and electronic/social media contact with customers. Unlike many other industries, retailers employ large sales forces who interact with customers and vendors at the register and on shop floors. Each of these individuals is constantly learning of "events" that may in the aggregate constitute a trend, and possibly even a material trend. For example, cashiers may be aware that a store has run out of certain items covered by the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). See, *e.g.*, Compl. ¶ 1 *United States ex rel. Johnson* v. *Wal-Mart Stores, Inc.*, No. 2:13-cv-02277 (E.D. Cal. Nov. 1, 2013) (qui tam complaint alleging retailer failed *inter alia* to properly seek reimbursement for WIC vouchers).

Similarly, retailers operate numerous customer service complaint lines, as well as employee complaint or ethics hotlines. These again generate knowledge that may in the aggregate constitute data points that may comprise, or at least point in the direction of, a trend. Moreover, in recent years retailers have deployed comprehensive electronic interaction systems with their vendors, customers, employees, prospective employees, and other business partners (for example, mobile apps and social media platforms such as Facebook,

Twitter, Pinterest, LinkedIn, and Instagram) which result in extensive information exchange and data collection points. These may be helpful in improving the business and should not be discouraged by the courts as a potential source of litigation.

Lastly, a "hot topic" of late in corporate America has been "big data" and what, if any, legal duties and obligations a company has arising from large volumes of data regarding customer habits, product performance, and so forth. Such data may itself disclose trends and uncertainties. Those insights, however, are sometimes conjectural and far from concrete. Big data could reveal several trends or uncertainties – including some whose occurrences are mutually exclusive with one another—that are each "reasonably likely" to occur. See, *e.g.*, Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 Wake Forest L. Rev. 393, 425 (2014) ("the power of big data comes from secondary uses of data sets to produce an infinite variety of insights and predictions").

To ward off the risks of omission liability arising from purported knowledge of events, trends, or uncertainties generated by retail staff, customer or employee complaint lines, or through business data, companies will need to establish extensive systems to gather, centralize, and process vast repositories of information, and to comb it for anything that could potentially spark disclosure liability down the road. And, any doubt will be resolved in favor of disclosure, which will necessarily result in flooding the market with "useless information." *Basic*, 485 U.S. at 234.

The costs of compliance are far from trivial. For example, in 2004 the SEC added a few items to its Form 8-K requirements—estimated to cause only five additional hours of preparation time per company—at a market-wide price tag of $22.1 million per year. See

Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Exchange Act Release No. 33-8400, 2004 WL 536851, at *31 (Mar. 16, 2004). If a mere five hours of compliance obligations results in a $22.1 million cost to the market, the Second Circuit's rule has the potential to raise costs on the market exponentially.[3] Nor will the burden fall solely on the private sector. The SEC's workload will increase proportionally to those of the companies it regulates, resulting in either reduced oversight or increased taxpayer funding of enforcement efforts to keep pace with the new information overload.

The Court has previously noted that agencies "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2711 (2015) (interpreting statute to require analysis of compliance costs before agency implemented regulation). In this case, the costs of expanding a long-established regulation far outweigh any supposed benefit derived from doing so.[4] The retail industry is one of the largest employers in the U.S. economy, employing over 15.8 million Americans, most of whom are hourly wage-earners. U.S. Bureau of Labor

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[3] In addition, a judicial expansion of disclosure requirements and the accompanying administrative costs would fly in the face of recent bipartisan legislative efforts to reign in burdensome compliance costs. The JOBS Act, approved by a 390-23 margin in the House and signed by President Obama in 2012, reduced IPO disclosure requirements for emerging growth companies to spur economic growth and remove barriers to entering the securities market. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 1216 Stat. 306 (2012).

[4] As set out in further detail above, *see supra*, part I.D, the practical outcomes of the lower court's approach will actually be detrimental to investors' interests.

Statistics, *Industries at a Glance: Retail Trade* (2017). Adopting a policy that significantly increases administrative compliance expenditures risks negative second and third-order effects throughout the economy at large.

3. Risk of Strategic and Manufactured Litigation. Lowering the threshold for civil fraud to allow class actions based on nothing more than management's failure to report information that, in retrospect, could be characterized as a known trend or uncertainty will unfortunately create a moral hazard for litigious behavior. Indeed, publicly-traded companies are already fending off a surge of Rule 10b-5 claims predicated on Item 303 omissions in the aftermath of *Stratte-McClure*. As Petitioners note, twenty-one cases have been filed in the Second Circuit since October 2014, compared to five cases filed in the Ninth Circuit over a similar period. Pet. Cert. 10.

Many of these new claims are based on legal theories that could generously be described as novel and opportunistic. See, *e.g.*, *Lopez* v. *Ctpartners Exec. Search, Inc.*, 173 F. Supp. 3d 12, 34 (S.D.N.Y. 2016) (alleging 10b-5 fraud based on company's failure to disclose that "executives' boorish behavior would ultimately impact the bottom line" by driving away customers if reported publicly); *Christine Asia Co.* v. *Ali Baba Grp. Hldg. Ltd.*, 192 F. Supp. 3d 456, 461 (S.D.N.Y. 2016) (alleging corporation's failure to disclose non-binding "administrative guidance" meeting with Chinese regulatory agency constituted securities fraud under Item 303 and Rule 10b-5).

The traditional 10b-5 standard requires plaintiffs to prove that the defendants made a materially false, affirmative statement or failed to make a statement regarding a material fact in which it had a legal duty to

disclose. Under the lower bar established by the Second Circuit, plaintiffs' attorneys only need to identify an omitted "trend" or "uncertainty" and a stock downturn to file a claim. A uniform application of this standard will allow investors to "effectively convert Rule 10b-5 into a scheme of investor's insurance" because Item 303 disclosures are forward-looking and subject to managements' judgment about what may happen in the future, and are therefore uniquely susceptible to second-guessing after the fact. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005).

If the Second Circuit rule is permitted to stand, publicly traded retailers will likely be faced with "the routine filing of lawsuits … whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer." H.R. Rep. No. 104-369 (1995) (Conf. Rep.). Many of these strike suits will succeed in their aim of producing settlements because settling with litigious parties, even for meritless claims, is often cheaper than the cost of discovery—the exact result the Private Securities Litigation Reform Act was enacted to prevent. If a known trend or uncertainty and a downturn are all that is required to plead a claim of securities fraud, deviously-minded parties may simply create the trend—by flooding a customer care line with complaints or other conduct—and wait until the market has a bad month.

"[M]eritorious private action[]" has been recognized as a "supplement" to SEC and DOJ enforcement for the first eighty years of the Securities Exchange Act's existence, and even then only in the context of materially false, affirmative statements and omissions. *Tellabs, Inc.*, 551 U.S., at 313. Adopting the Second Circuit's rule would engender a wave of private class actions from the plaintiffs' bar. This outcome would in-

vert the proper order of securities enforcement by relegating SEC enforcement to an ancillary role behind private enforcement.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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