No. 16-581

IN THE

Supreme Court of the United States

LEIDOS, INC., F/K/A SAIC, INC.,
Petitioner,

v.

INDIANA PUBLIC RETIREMENT SYSTEM ET AL.,

Respondents.

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

BRIEF FOR THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING PETITIONER

JAYANT W. TAMBE
HENRY KLEHM III
RAJEEV MUTTREJA
JONES DAY
250 Vesey St.
New York, NY 10281

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Ave. NW
Suite 800
Washington, DC 20001

BETH HEIFETZ
Counsel of Record
MATTHEW J. RUBENSTEIN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bheifetz@jonesday.com

Counsel for Amicus Curiae
(Additional counsel listed on inside cover)

DAVID WOODCOCK
JONES DAY
2727 North Harwood St.
Dallas, TX 75201

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have more than $6 trillion in annual revenues, employ nearly 15 million employees, and pay more than $220 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

Many of the BRT's member companies, as publicly traded companies, are subject to both Rule 10b–5 and Item 303 of Regulation S-K. The BRT believes that reading Item 303 to create a duty to disclose that is actionable under Rule 10b–5 even for a pure omission, as the Second Circuit held in this case, is legally unsupportable and carries severe practical consequences not only for its member companies, but also for a well-functioning securities market.

---

[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized that, when determining the scope of an implied private right of action, courts must pay close attention to the implications of "permit[ting] enforcement without the check imposed by prosecutorial discretion." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004); *accord RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016). This principle should apply with particular force in this case, where Respondents seek to expand the implied right of action under Rule 10b–5 so that they may enforce Item 303 of Regulation S-K, 17 C.F.R. § 229.303.

The provision of Item 303 at issue in this case requires a company's management—in the Management's Discussion and Analysis (MD&A) section of the company's annual report, with interim updates as needed—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." § 229.303(a)(3)(ii); *see also* § 229.303(b). Designed to allow investors to "look at the company through the eyes of management," SEC Release No. 6835, Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22427, 22428 (May 24, 1989)—but written to require disclosures even about "trends or uncertainties" that are neither clear nor obvious—this intentionally broad and flexible standard has been noted by courts and commentators alike for its vagueness. Even the

SEC admits that compliance with Item 303 is difficult.

The SEC has attempted to clarify Item 303 through informal guidance—but in ways that only confirm the regulation's expansive breadth. For example, the SEC has opined that Item 303 requires disclosure about the potential impact of pending legislation or regulations that a company reasonably thinks might be enacted—information that would seem beyond management's expertise. At the same time, the SEC's view is that companies need not disclose confidential merger negotiations that would otherwise seem to be covered by Item 303 (as "known . . . uncertainties" that could impact "sales or revenues or income"). Whatever the merits of these policy judgments, they make clear that Item 303 itself leaves much unanswered.

The SEC can compensate for Item 303's breadth when deciding when and how to enforce the regulation—by, for example, targeting only serious violations, or by using remedies other than an enforcement action. Such flexibility is the essence of prosecutorial discretion, which the SEC can exercise with the benefit of its institutional experience and knowledge. But private plaintiffs have no reason to show such restraint, and no ability to resort to anything short of a lawsuit. As a result, enabling plaintiffs to enforce Item 303 through Rule 10b–5 claims will invite litigation about purported "trends or uncertainties" that may be easy to allege but difficult to prove, and that the SEC would never pursue on its own. This will inevitably encourage the sort of overdisclosure (about potential "trends or uncertainties") that this Court and the SEC have

specifically tried to avoid when crafting or construing disclosure rules.

In other contexts, this Court has been mindful of the importance of prosecutorial discretion when deciding whether (and to what extent) to recognize a private right of action. The Court has similarly expressed concern about private plaintiffs using implied rights to pursue fringe theories of liability without the check of political accountability. These factors have particular resonance with Rule 10b–5 claims, for which practical considerations have long informed the types of claims that may be brought. Here, given the breadth and ambiguity of Item 303, this Court should give significant weight to the benefits of preserving prosecutorial discretion. The Court should decline to expand the implied Rule 10b–5 private right of action to encompass pure omissions from Item 303 disclosures.

ARGUMENT

THE EXERCISE OF PROSECUTORIAL DISCRETION IS CRUCIAL TO THE PROPER ENFORCEMENT OF ITEM 303, PARTICULARLY GIVEN THAT REGULATION'S BREADTH AND AMBIGUITY.

The Second Circuit held below that private plaintiffs may seek damages through Rule 10b–5 when public companies do not make disclosures allegedly required by the SEC under Item 303. The Rule 10b–5 right of action is, of course, an *implied* private right of action, created by the courts and not by Congress. *See, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975). When

enacting the Private Securities Litigation Reform Act of 1995, "Congress accepted [that] private cause of action as then defined" but "chose to extend it no further." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 166 (2008). More generally, this Court has recently charted a "cautious course before finding implied causes of action." *Ziglar v. Abbasi*, No. 15-1358, 2017 WL 2621317, at *10 (U.S. June 19, 2017). And, as this Court has noted specifically with respect to Rule 10b–5 claims, "[c]oncerns with the judicial creation of a private cause of action caution against its expansion" as well, and counsel in favor of giving the Rule 10b–5 right "narrow dimensions." *Stoneridge*, 552 U.S. at 165, 167; *accord Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (quoting *id.*). Among those concerns is the importance of prosecutorial discretion as a check on overzealous enforcement, which weighs strongly against making Item 303 privately enforceable through Rule 10b–5 claims.

A. The Critical Value of Prosecutorial Discretion Counsels Against Expanding the Rule 10b–5 Implied Private Right of Action.

For laws that only the government may enforce, publicly accountable officials can and must weigh the costs and benefits of enforcement when deciding how to address potential violations. Implying a private right of action, however, has "the practical effect of eliminating prosecutorial discretion." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.). This Court has accordingly emphasized that the scope of an implied right of

action should be informed by the implications of "permit[ting] enforcement without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727; *accord RJR Nabisco*, 136 S. Ct. at 2106.

The importance of "the check imposed by prosecutorial discretion" played a prominent role in *Sosa*. At issue in *Sosa* was whether there is an implied private right to enforce the law of nations under the Alien Tort Statute. Given the risk "of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," the Court explained that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." 542 U.S. at 727. Wary of claims for "new and debatable violations of the law of nations," the Court in *Sosa* permitted private plaintiffs to enforce only those norms of international law that are "*so well defined* as to support the creation of a federal remedy." *Id.* at 728, 738 (emphasis added). Anything beyond this core of improper conduct, even if perhaps a violation of the law of nations, was not a *clear enough* violation to justify private plaintiffs taking the reins.

Similarly, two Terms ago, in *RJR Nabisco*, the Court held that the private right of action under RICO did not reach injuries suffered abroad because of the need for "the check imposed by prosecutorial discretion." 136 S. Ct. at 2106 (quoting *Sosa*, 542 U.S. at 727). The Court had no trouble "applying U.S. substantive law to that foreign conduct," but it emphasized that "providing a private civil remedy" was a different matter. *Id.* Reluctant to "upset th[e] delicate balance" of considerations that inform enforcement decisions, which could risk

"international friction," the Court declined to recognize a private right of action. *Id.* at 2107.

Lower courts similarly have recognized the important role prosecutorial discretion plays in an enforcement scheme when considering whether to imply a private right of action. *See, e.g.*, *Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (quoting *Sosa* in declining to recognize *Bivens* claims for unlawfully detained aliens); *Romero-Barcelo v. Brown*, 643 F.2d 835, 849–50 & n.23 (1st Cir. 1981) ("The government's decision not to enforce [the Rivers and Harbors Act of 1899] against a particular party, perhaps in anticipation of an informal resolution of the matter, could be frustrated by a private party armed with an implied cause of action."), *rev'd in part on other grounds sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

This Court and other courts thus have placed weight on the need for prosecutorial discretion across a variety of contexts—reflecting that the risks of private plaintiffs who are free to "set[] unwise enforcement priorities" are universal. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Envtl. L. & Pol'y F. 39, 49 (2001); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 114, 119 (2005) (explaining that "private rights of action can lead to inefficiently high levels of enforcement . . . [and] raise concerns about the democratic accountability of law enforcers"). The importance of prosecutorial discretion is no different with the Rule 10b–5 right of action, for which commentators have remarked that private claims

have caused "problems of inconsistency, incoherence, high transaction costs, inefficiency, and lack of political accountability for policy decisions." Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 Admin. L. Rev. 1, 14 (1996); *see also* Note, *Investor Empowerment Strategies in the Congressional Reform of Securities Class Actions*, 109 Harv. L. Rev. 2056, 2071 ("[T]he incentive structure facing class representatives does not necessarily encourage litigation decisions that are socially worthwhile, because the benefits that plaintiffs expect to receive from litigation are not tied to the social benefits of such litigation.").

Indeed, this Court has long emphasized the importance of "policy considerations when we come to flesh out" the dimensions of the Rule 10b–5 private right of action, in part because "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*, 421 U.S. at 737, 739. Thus, "in the field of federal securities laws governing disclosure of information, even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Id.* at 740. That is particularly so when the possibility for liability is uncertain, which can lead companies to "find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,

511 U.S. 164, 188–89 (1994) (internal quotation marks omitted).

The Court has thus expressed particular concern about Rule 10b–5 claims where "plaintiffs can allege the requirements" with "great ease" but would have "greater difficulty . . . proving the allegations." *Blue Chip Stamps*, 421 U.S. at 742 (rejecting Rule 10b–5 standing for individuals who allegedly did not purchase a company's shares due to misrepresentations). Rule 10b–5 claims that turn on "objectively demonstrable fact[s]" are, in contrast, less concerning. *Id.* at 747. The potential scope of Rule 10b–5 liability "demands certainty and predictability," without "a shifting and highly fact-oriented" approach to when a claim may lie. *Cent. Bank of Denver*, 511 U.S. at 188–89 (rejecting "hazy" standard for aiding-and-abetting liability under Rule 10b–5). A contrary approach—under which private plaintiffs have free rein to pursue liability under open-ended and ambiguous standards—would invite lawsuits that may frequently lack merit but could nonetheless trigger a host of undesirable "ripple effects," as companies grapple with and attempt to avoid litigation costs. *Id.*

B. Item 303's Unusual Breadth and Ambiguity Makes Prosecutorial Discretion Especially Important to Its Enforcement.

The need for the exercise of prosecutorial discretion in enforcement decisions strongly weighs against expanding Rule 10b–5 claims via an Item 303 duty of disclosure—particularly in light of this Court's stated preference for private Rule 10b–5

claims that are "objectively demonstrable." *Blue Chip Stamps*, 421 U.S. at 747. As relevant here, Item 303 broadly obligates management 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." § 229.303(a)(3)(ii).

By calling for disclosure about "known trends or uncertainties" that have a reasonable chance of materially impacting a company's sales, revenues, or income, Item 303's requirements are unusually "open-ended and exceedingly complex." Mark S. Croft, *MD&A: The Tightrope of Disclosure*, 45 S.C. L. Rev. 477, 478 (1994). The breadth of the terms "'known trend' and 'known uncertainties'"—which have been called "oxymoronic" and "incongruous"—cannot be doubted. *Id.* at 484–85. Indeed, one court has held that the terms "trends" and "uncertainties" are themselves so "vague and amorphous" that Item 303 "do[es] not provide sufficient notice that a particular disclosure is required to allow criminal liability to attach for alleged non-disclosure." *United States v. Crop Growers Corp.*, 954 F. Supp. 335, 348 (D.D.C. 1997).

The SEC, for its part, similarly admits that Item 303 compliance can "be particularly challenging." SEC Release No. 82, Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295 (Feb. 8, 2010). The rule calls for two layers of guesswork—first, as to whether the "trend" or "uncertainty" is likely to occur, and second, as to the effect of the "trend" or "uncertainty" on the company's business. SEC Release No. 6835, *supra*,

54 Fed. Reg. at 22430. And the list of "trends and uncertainties" that might affect a company's business is potentially enormous. For example, as the SEC has stated in informal guidance, Item 303 calls for public companies to evaluate the potential effect of any "pending legislation or regulation" that management thinks "is reasonably likely to be enacted"—political prognosticating that is a far cry from, say, assessing whether a new factory will open on time, or whether customer preferences are changing. SEC Release No. 82, *supra*, 75 Fed. Reg. at 6296. Moreover, if management cannot determine whether the "trend or uncertainty" will likely occur, the SEC directs that management must assume that the "trend or uncertainty" will in fact "come to fruition"—and must then make a disclosure unless the likely impact would be immaterial. SEC Release No. 6835, *supra*, 54 Fed. Reg. at 22430. In other words, if management is unsure about both the chance of a particular "uncertainty" occurring and the materiality of that "uncertainty," Item 303 requires a disclosure.

Ultimately, what is required under Item 303 will vary by company, and will necessarily require management to make discretionary calls about what "trends or uncertainties" are both "reasonably" likely and "material." § 229.303(a)(3)(ii). As the SEC has made clear, "good MD&A disclosure for one registrant is not necessarily good MD&A disclosure for another," or even for the same registrant in a different year. SEC Release No. 6835, *supra*, 54 Fed. Reg. at 22436. But that is by design: the standard is "intentionally flexible and general." *Id.* The SEC views this as a positive, because the rule's "flexible

nature" can "result[] in disclosures that keep pace with the evolving nature of business trends without the need to continuously amend the text of the rule." SEC Release No. 82, *supra*, 75 Fed. Reg. at 6294. But the capacious text of Item 303—which was promulgated nearly 40 years ago, long before any hint of private enforcement[2]—makes prosecutorial discretion especially important to its application.

The SEC has all but admitted as much, by seeing the need to narrow Item 303 informally. The agency noted in an interpretive release, for example, that "Item 303 could be read to impose a duty to disclose otherwise nondisclosed preliminary merger negotiations." SEC Release No. 6835, *supra*, 54 Fed. Reg. at 22435. Such negotiations might seem to constitute "known trends or uncertainties . . . that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." § 229.303(a)(3)(ii). The SEC has recognized, however, that companies may have a strong and valid "interest in preserving the confidentiality of such negotiations." SEC Release No. 6835, *supra*, 54 Fed. Reg. at 22435. The agency accordingly does not view Item 303 as requiring the disclosure of confidential "preliminary

---

[2] The SEC first adopted language closely mirroring the current MD&A requirement in 1980. *See* SEC Release No. 279, Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides, 45 Fed. Reg. 63630, 63643 (Sept. 25, 1980). Two years later, the agency moved the language to Item 303 and made some minor tweaks. *See* SEC Release No. 6383, Adoption of Integrated Disclosure System, 47 Fed. Reg. 11380, 11411 (Mar. 16, 1982).

negotiations for the acquisition or disposition of assets not in the ordinary course of business" where, "in the registrant's view, inclusion of such information would jeopardize completion of the transaction." *Id.* at 22436 Disclosure of such transactions is required, according to 2003 guidance from the SEC, when "an unconditionally binding definitive agreement, subject only to customary closing conditions[,] exists or, if there is no such agreement, when settlement of the transaction occurs." SEC Release No. 67, Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, 68 Fed. Reg. 5982, 5990 (Feb. 5, 2003). The SEC has construed Item 303 in other interpretive releases, too, as well as through no-action letters and other forms of informal guidance[3]—but the relevant text of Item 303 has remained the same.

---

[3] *See, e.g.*, SEC Release No. 82, *supra*, 75 Fed. Reg. 6290 (interpretive guidance on disclosure of climate change issues); SEC Release No. 8056, Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, 67 Fed. Reg. 3746 (Jan. 25, 2002) (general interpretive guidance); SEC Release No. 1149, Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers, 1998 WL 425894 (July 29, 1998) (interpretive guidance on disclosure of Y2K issues); SEC Div. of Corp. Fin., Regulation S-K Compliance and Disclosure Interpretations, Sec. 110 (July 3, 2008), https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm; Glendale Federal Bank, Federal Savings Bank, SEC No-Action Letter, 1990 WL 286350 (Mar. 30,

Private plaintiffs filing Rule 10b–5 suits would be bound by the SEC's informal interpretations of Item 303, at least to the extent a court must defer to an agency's interpretations of its own regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).[4] But Item 303 is, as noted, intentionally and indisputably open-ended. For every item that the SEC informally believes should *not* be disclosed, there are innumerable other "trends or uncertainties" that the SEC has yet to address. And even when the SEC does act, it can leave much unresolved. To take the SEC's guidance that certain preliminary negotiations need not be disclosed if confidential, for example, what is the status of confidential negotiations for labor or services (instead of for "the acquisition or disposition of assets")? SEC Release No. 6835, *supra*, 54 Fed. Reg. at 22436. Or, what

(continued)

1990); Photronics, Inc., SEC Staff Comment Letter (Mar. 13, 2017).

[4] Deferring to an agency's regulatory interpretation is inappropriate at least "when the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). Four Justices have suggested such deference is *never* appropriate. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment); *Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

must the chances be that disclosure would "jeopardize completion of the transaction" in order for management to properly keep the negotiations confidential? *Id.* at 22435.

It is one thing for the SEC to address these issues as it applies Item 303. The agency's expertise, experience, judgment, and political accountability can protect against overreach and allow for enforcement of these deliberately vague standards without causing undue collateral damage to the securities market. Indeed, the SEC polices the regulation with a variety of tools and brings "enforcement proceedings only in extreme or egregious cases under Item 303." Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, 63 Fordham L. Rev. 1953, 1972 (1995); *see, e.g.*, *SEC v. Ronson Corp.*, No. 83-3030, 1983 WL 1357 (D.N.J. Aug. 15, 1983) (company failed to disclose, among other things, that its largest customer, which accounted for 15% of revenue and 33% of earnings in past years, had shut down operations and suspended all purchases); *In re Kirchner*, SEC Release No. 3877, 2017 WL 2591798 (June 15, 2017) (administrative action about non-disclosure of the causes and severity of liquidity challenges that company had extensively analyzed).[5] As the agency

[5] More frequently, as the SEC's Division of Corporate Finance explains, "[w]hen the staff identifies instances where it believes a company can improve its disclosure or enhance its compliance with the applicable disclosure requirements, it provides the company with comments." SEC Div. of Corp. Fin., Filing Review Process (Jan. 19, 2017), https://www.sec.gov/divisions/corpfin/cffilingreview.htm. Unlike in adversarial litigation, agency staff "view[] the comment process as a dialogue with a company about its disclosure." *Id.*

responsible for ensuring the overall health of the market, however, the SEC makes its decisions with the costs of overzealous enforcement in mind.

For private plaintiffs and their enterprising counsel, in contrast, enforcing Item 303 would be open season. *Any* event that ends up affecting a company's performance could invite possible claims: a plaintiff could allege that the company should have alerted the market of the "trend or uncertainty" ahead of time, before it came to fruition. The SEC would presumably never proceed so indiscriminately, but private plaintiffs could and likely would, because their incentives are so different. *See* Tamar Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 571 (1981) ("In general, private plaintiffs engage in litigation to further their own economic interests; they rarely concern themselves with the social costs and social benefits of their lawsuits."). The "new and debatable violations" that concerned this Court in *Sosa* would be omnipresent under Item 303. *See* 542 U.S. at 728.[6]

---

[6] Although this case concerns only the duty element of a Rule 10b–5 claim, the fact that plaintiffs must separately allege Rule 10b–5 materiality—which is not automatically satisfied by an Item 303 violation, *see, e.g.*, *Oran v. Stafford*, 226 F.3d 275, 287–88 (3d Cir. 2000) (Alito, J.)—does not lessen the need for caution. Unlike the duty question at issue here, which presents a pure question of law, materiality is an "inherently fact-specific" inquiry that "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those facts to him." *Basic Inc. v. Levinson*, 485 U.S. 224, 236 (1988); *see also ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) ("[A] complaint may not

This would inevitably lead to overdisclosure. Companies facing the threat of liability or expensive litigation will likely "bury the shareholders in an avalanche of trivial information." *Basic Inc.*, 485 U.S. at 231 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976)). Such overdisclosure will, in turn, harm investors by making it more difficult and expensive to identify and evaluate the information that is truly important. *See generally* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417 (2003).

The SEC understands the problem of overdisclosure and has been working to address it. *See, e.g.*, SEC Release No. 10064, Business And Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23919 (Apr. 22, 2016) ("There is also a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities."). But if the implied private right of action under Rule 10b–5 encompasses pure omissions from Item 303's "vague and amorphous" requirements, *Crop Growers Corp.*, 954 F. Supp. at 348, companies will have strong incentives to defensively disclose great quantities of

---

(continued)

properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." (ellipsis in original)).

information. This would impose significant costs on management, who must ensure that these disclosures—even if made solely out of an abundance of caution—do not compound the risk of liability by being misleading in any way. And, regardless, overdisclosure "is hardly conducive to informed decisionmaking" or to the smooth functioning of the securities market. *Basic Inc.*, 485 U.S. at 231; *cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001) (finding state-law claims based on fraud in the context of a medical device application preempted because allowing such claims would give regulated parties "an incentive to submit a deluge of information that the [FDA] neither wants nor needs").

Congress has every right to take this step. But this Court cannot do so without ignoring "the careful approach" it has previously taken with Rule 10b–5 claims. *Stoneridge*, 552 U.S. at 164.

* * *

In short, prosecutorial discretion allows the government to employ its experience and expertise to make enforcement decisions that further broad societal objectives, which here implicate the smooth functioning of the securities market. By contrast, a private plaintiff's focus is on obtaining a judgment—or a settlement—in a particular case, without regard to the impact on registrants or the market more broadly. Because Item 303 sets forth an intentionally loose standard of disclosure that must be enforced with care, the benefits of prosecutorial discretion weigh heavily against expanding the Rule 10b–5 private right of action as Respondents seek.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

JAYANT W. TAMBE
HENRY KLEHM III
RAJEEV MUTTREJA
JONES DAY
250 Vesey St.
New York, NY 10281

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Ave. NW
Suite 800
Washington, DC 20001

BETH HEIFETZ
Counsel of Record
MATTHEW J. RUBENSTEIN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bheifetz@jonesday.com

DAVID WOODCOCK
JONES DAY
2727 North Harwood St.
Dallas, TX 75201

June 28, 2017

Counsel for Amicus Curiae