

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MACQUARIE INFRASTRUCTURE )  
CORPORATION, ET AL., )  
                                ) Petitioners, )  
                                ) v. ) No. 22-1165  
MOAB PARTNERS, L.P., ET AL., )  
                                ) Respondents. )  
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Pages: 1 through 71  
Place: Washington, D.C.  
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3   MACQUARIE INFRASTRUCTURE                    )  
4   CORPORATION, ET AL.,                        )  
5                                    Petitioners,                    )  
6                                    v.                                 ) No. 22-1165  
7   MOAB PARTNERS, L.P., ET AL.,                )  
8                                    Respondents.                    )  
9   - - - - -

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11                                   Washington, D.C.  
12                                   Tuesday, January 16, 2024

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14                                   The above-entitled matter came on for  
15   oral argument before the Supreme Court of the  
16   United States at 10:03 a.m.

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9 Respondent.  
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-1165, Macquarie Infrastructure Corporation versus Moab.

Ms. Coberly.

ORAL ARGUMENT OF LINDA T. COBERLY  
ON BEHALF OF THE PETITIONERS

MS. COBERLY: Thank you, Mr. Chief Justice, and may it please the Court:

Like many cases, this case should be resolved by the text, and, here, the text is in Rule 10b-5 as adopted by the Congress in the PSLRA. That text makes clear that an omission is actionable in just one circumstance, when the omitted fact is material and necessary to make a statement not misleading.

Today, you're going to hear arguments for omission liability in a different circumstance, when the omitted fact is material and required to be stated by Item 303. None of those arguments is rooted in the text.

The text doesn't permit eliding the statement requirement by treating the entire

1 management narrative as misleading if one thing  
2 is left out. The PSLRA shows that Congress had  
3 something far more specific in mind by the word  
4 "statement."

5 The text also doesn't permit recasting  
6 a claim about what a 10-K does or doesn't say as  
7 a claim involving a fraudulent scheme or act.  
8 Whenever this Court has recognized liability  
9 under Rule 10b-5(a) or (c), the case has  
10 involved something more or different than speech  
11 alone.

12 And this is all in the context of the  
13 judicially implied private right of action,  
14 which this Court is loath to expand. No  
15 circuit, either before or after the PSLRA, has  
16 approached 10b-5 liability in the ways that Moab  
17 and the government are seeking here.

18 Now, to be clear, no one is seeking  
19 immunity. The SEC has extensive powers to  
20 penalize an omission that violates Item 303.  
21 But, without the element of a misleading  
22 statement, an omission can't be the subject of a  
23 private class action.

24 I'm happy to take the Court's  
25 questions.

1 JUSTICE THOMAS: Can a -- a compliance  
2 certification statement be made misleading by an  
3 omission?

4 MS. COBERLY: I would say no, Your  
5 Honor, for a couple of reasons.

6 So, first of all, the government isn't  
7 arguing that a compliance statement itself is a  
8 misleading statement. The government's argument  
9 is that a compliance statement makes the  
10 narrative as a whole the misleading statement.

11 As for the compliance certification  
12 itself, though, Your Honor, that statement  
13 wouldn't be actionable under the federal  
14 securities laws because, first of all, it would  
15 be a statement of opinion, and, secondly, to the  
16 extent that it is relating to an item of future  
17 import, it would be protected by the  
18 forward-looking -- the bar on claims against  
19 forward-looking statements by the safe harbor.

20 JUSTICE SOTOMAYOR: Are there any  
21 specific arguments with respect to 906? I think  
22 that question was related to 906 and the  
23 certification there.

24 MS. COBERLY: They're -- the -- Moab  
25 is making an argument based on 906, Your Honor.

1 I'll note that the Second Circuit did not rely  
2 on 906, a 906 certification. The 906  
3 certification wasn't mentioned in the complaint,  
4 in the briefs below, or -- or in the brief in  
5 opposition. So we don't think it's really --

6 JUSTICE SOTOMAYOR: And that sort of  
7 certification is not a part of the 303 filing,  
8 is it?

9 MS. COBERLY: It is not. It is a  
10 separate document from the securities filings  
11 themselves. And, of course, the requirement for  
12 a 906 certification does not appear in the  
13 securities laws. It appears in the criminal  
14 code. And this Court is loath to interpret a  
15 civil remedy from something in the criminal code  
16 unless Congress specifically stated so.

17 JUSTICE SOTOMAYOR: So, in this case,  
18 we don't need to reach that issue?

19 MS. COBERLY: I think that's correct,  
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: Counsel, I --  
22 the distinction you draw between sort of  
23 half-truths and omissions strikes me as one that  
24 might be hard to apply in practice.

25 Let's say you have a statement that,



1 you know, our -- our sales are going to rise  
2 because of the new processors we're going to  
3 bring online, but what you don't say is that our  
4 sales are going to fall because EPA is going to  
5 issue new regulations. You know what --  
6 something like along those lines that you know.  
7 And they're going to limit further the use of  
8 No. 6 oil.

9 Now is -- is that an omission case  
10 because, you -- you know, there's a difference  
11 between new processors increasing sales and EPA  
12 regulation lowering it, or is it a half-truth  
13 situation because the first part says our sales  
14 will rise?

15 MS. COBERLY: Well, Your Honor, that's  
16 a kind of question that district courts answer  
17 every day in securities cases. In every  
18 instance where a plaintiff identifies a  
19 statement and identifies it as a half-truth, the  
20 court is then tasked with answering a lot of  
21 questions about that statement. Does it match  
22 the omitted fact? Is it close enough in topic  
23 given the context of -- of the -- of the  
24 statements?

25 CHIEF JUSTICE ROBERTS: Well, what's

1 the answer in the hypothetical that I --

2 MS. COBERLY: I think the answer to  
3 that question, Your Honor, would be no, and  
4 that's because the statement needs to be  
5 something like in kind in both subject matter  
6 and specificity. And so the classic example  
7 that this Court has discussed in Escobar is  
8 taken from Justice Cardozo in Junius  
9 Construction, and that's two streets intersect  
10 and if a third also exists but is omitted, then  
11 the statement about the two streets might be  
12 misleading by omission.

13 JUSTICE KAGAN: Well, where do you get  
14 that from the text? I mean, I understand how  
15 you get your principal argument from the text.  
16 But, there, I understood you to be saying that  
17 there are limits on the ways in which an  
18 omission can make statements in the MD&A or in  
19 the broader form misleading, and I don't see  
20 anything like that in the text.

21 MS. COBERLY: Well, what the text  
22 tells us, Your Honor, is -- is the -- the text  
23 makes it unlawful to omit to state a material  
24 fact necessary in order to -- to make the  
25 statements made, in the light of the

1 circumstances under which they were made, not  
2 misleading. And courts have interpreted that  
3 text to require a similarity in like -- in both  
4 subject matter and specificity between the  
5 statement rendered misleading and the omitted  
6 fact, and that's how courts have typically --

7 JUSTICE KAGAN: Well, I mean, I -- I  
8 -- I guess this is along the same lines as the  
9 Chief Justice's question. If you have a set of  
10 paragraphs or a set of sentences, what have you,  
11 which paints a very rosy picture of the  
12 prospects of a company, and then it turns out  
13 that you've omitted the thing that is actually  
14 going to crater the company next month, that  
15 rosy picture seems to be rendered misleading.

16 But I understood your answer to the  
17 Chief Justice to say that you did not agree with  
18 that. Am I -- is that right?

19 MS. COBERLY: So I think the first  
20 question is if there is a statement that the  
21 complaint identifies --

22 JUSTICE KAGAN: And when -- when you  
23 say "if there is a statement," I mean, it's --  
24 it's actually framed in the plural in the text,  
25 so it's "statements." Is -- are -- are you

1 saying that there has to be one discrete  
2 statement? And where -- where does that come  
3 from?

4 MS. COBERLY: The -- it comes from the  
5 PSLRA, Your Honor. So the PSLRA requires that  
6 each statement must be specifically identified  
7 in the complaint. So the PSLRA took that plural  
8 language, the plural language in Rule 10b-5, and  
9 it described what -- what is the pleading  
10 requirement for that statement in the context of  
11 a claim based on an omission that makes  
12 statements made misleading, and what it said is  
13 the complaint shall specify each statement  
14 alleged to have been misleading.

15 JUSTICE KAGAN: So --

16 MS. COBERLY: So --

17 JUSTICE KAGAN: -- again, go back to  
18 my hypothetical, and it's like -- it's a big  
19 paragraph that just says this company has a  
20 bright future ahead of it for the following 19  
21 reasons, and then it doesn't tell you the thing  
22 that's going to crater the company next week.

23 How does your analysis apply to that?

24 MS. COBERLY: I think the analysis  
25 would change. The result would be the same, and

1 let me explain why. I think, in that instance,  
2 there might very well be a statement that is the  
3 -- that satisfies the statement element of the  
4 omission claim, it -- provided that it was  
5 identified in the complaint.

6 But this is why the specificity is so  
7 important. Once that specific statement, that  
8 -- that paragraph with the rosy future and so  
9 on, is identified in the complaint, then the  
10 defendant has the opportunity to move to dismiss  
11 the case.

12 It might, for example, in that  
13 instance invoke a -- invoke the safe harbor for  
14 forward-looking statements. It might also  
15 invoke this Court's ruling in *Omnicare*, which  
16 identifies statements of opinion as being  
17 different from statements of fact.

18 Now, of course, a statement of opinion  
19 can be misleading, but that requires a very  
20 special kind of omitted fact that the Court was  
21 very clear about in the *Omnicare* decision.

22 So the importance of the specific  
23 statement is tied in part to the PSLRA's  
24 requirements, which are very important here,  
25 especially because that's the moment when

1 Congress finally weighed in on the judicially  
2 implied private right of action.

3 But the statement requirement is also  
4 important because of all the things that flow  
5 from it, all of the other elements and  
6 safeguards that use the statement as their  
7 predicate. And to have, as -- as the government  
8 argues, the statement be the entire narrative,  
9 which, here, was pages and pages and pages on  
10 many different topics with respect to multiple  
11 different subsidiaries of a holding company,  
12 that kind of statement isn't what the -- the  
13 Congress had in mind when it used the word  
14 "statement" in the PSLRA.

15 JUSTICE BARRETT: Ms. Coberly, can I  
16 ask you what I think is a -- a variation on this  
17 theme? Is the rule that you're asking for  
18 pretty narrow?

19 Because the Chief and Justice Kagan  
20 are pointing out that it can sometimes be  
21 difficult to tell when an omission causes a  
22 statement or statements in the disclosure to be  
23 misleading. So Professor Grundfest suggests  
24 that most omission cases can pretty easily be  
25 repleaded as misleading statement cases.

1           Do you agree that that's going to be  
2 true of some significant portion of these,  
3 meaning that the rule that you're asking for is  
4 fairly narrow?

5           MS. COBERLY: It -- yes, I do agree  
6 with that, Your Honor. And so, first of all, I  
7 think it's important to remember how we got  
8 here. The Second Circuit held that a violation  
9 of Item 303 is actionable independent of whether  
10 there's a misleading statement. And -- and we  
11 think that rule is incorrect and needs to be  
12 vacated.

13           Now, as far as what the -- the status  
14 quo will be going forward, and it is what the  
15 law is in every other circuit right now, a  
16 plaintiff must identify a specific statement.  
17 If that happens, then, of course, the statement  
18 requirement is satisfied and we move on to the  
19 other elements.

20           So all we're seeking here is respect  
21 for the text of 10(b) that -- which says that an  
22 omission is actionable only when necessary to --  
23 when the omitted fact is necessary to make the  
24 other statements made not misleading. And so  
25 we're -- we're simply asking for what Congress

1 asked for, which is that the complaint identify  
2 a misleading statement.

3 JUSTICE JACKSON: Is there anything --

4 JUSTICE SOTOMAYOR: Are you hoping --  
5 I -- I'm sorry. I thought the Second Circuit in  
6 the alternative had held that there were  
7 half-truths here, and so why are we here if  
8 you're going to lose anyway when you go down --  
9 back down?

10 MS. COBERLY: Well, respectfully, we  
11 don't think we're going to lose when we go back  
12 down, but --

13 JUSTICE SOTOMAYOR: I know you won --  
14 I know you won on this issue on the district  
15 court.

16 MS. COBERLY: Indeed. So the specific  
17 half-truths that the Second Circuit identified  
18 don't have to do with the Item 303 omission. So  
19 the -- the paragraphs in the complaint that  
20 described the Item 303 omission simply referred  
21 to Item 303 and did not tie that failure to  
22 comply with any specific statement.

23 The two statements --

24 JUSTICE SOTOMAYOR: Was -- was this  
25 fought about below on the Second -- in the



1 Second Circuit? So did you make these -- this  
2 argument in the Second Circuit?

3 I mean, obviously, we can just, if we  
4 were to rule in your favor, not to suggest we  
5 are, but just to say that, we would vacate and  
6 remand and let the Second Circuit apply the  
7 correct rule, correct?

8 MS. COBERLY: Yes. But the -- the two  
9 statements, there were two very specific  
10 statements that the court found had been  
11 adequately pleaded as half-truths, and both of  
12 those statements, first of all, were in oral  
13 discussions. They were not in pleadings. They  
14 were not in filings with the SEC. So Item 303  
15 didn't apply to them at all.

16 They were statements made orally by  
17 management in conferences with investors, and  
18 the court held that both of those statements  
19 were rendered misleading by -- and this is how  
20 the -- Moab had argued it -- by the omission of  
21 specific facts relating to the base of  
22 customers.

23 So they're very -- they're statements  
24 about factually who are our customers, and the  
25 allegation was that those statements were

1 misleading because there was information about  
2 those customers, factual information, that had  
3 been omitted. So that's the very narrow  
4 omission claim, half-truth claim, that the  
5 Second Circuit allowed to proceed.

6           And that claim, by the way, is  
7 proceeding today in the district court. The  
8 claim that's before the Court today is about --  
9 is a much broader claim. It's a claim that --  
10 that the holding company should have disclosed  
11 not just the existence of IMO 2020, not the fact  
12 that it -- the alleged fact that it didn't  
13 comply with Item 303, but very specifically the  
14 idea, the prediction, that IMO 2020 would have a  
15 very significant negative impact on the  
16 performance of one of the subsidiaries and that  
17 that impact would cause the holding company to  
18 cut its dividends, which is ultimately the news  
19 that the plaintiffs allege led to the decrease  
20 in the stock price.

21           JUSTICE SOTOMAYOR: Thank you,  
22 counsel.

23           JUSTICE JACKSON: And I suppose that  
24 you can argue, you -- you know, with many  
25 different parts of that argument. You -- you --

1 you're going to claim that they're wrong about  
2 the way in which the omission had an impact, but  
3 I guess they're also arguing that you're seeking  
4 blanket immunity for omissions in the Item 303  
5 context.

6 Are you?

7 MS. COBERLY: We are not, Your Honor.

8 And --

9 JUSTICE JACKSON: So you -- so you  
10 agree that Item 303 omissions could give rise to  
11 the kind of liability that they say exists here?

12 MS. COBERLY: No. No. And I want to  
13 draw a distinction between immunity and 10b-5.  
14 So we think that in -- a failure to comply with  
15 Item 303 is not actionable unless it's tied to a  
16 specific misleading statement that's plead --  
17 pleaded in the complaint, in which case the Item  
18 303 requirement is not doing very much work.

19 JUSTICE JACKSON: But can that -- can  
20 that statement be of the nature that the SG  
21 points out? So you have a list, you know, the  
22 company does comply partially, it -- it talks  
23 about various trends, et cetera, but it leaves  
24 out a few that seem to be pretty consequential  
25 if investors knew about them.

1                   Is that the kind of scenario that you  
2 say could possibly give rise to liability here  
3 but it just wasn't pled in this situation?

4                   MS. COBERLY: Well, in -- first of  
5 all, in that instance, I'm not sure Item 303 is  
6 doing very much work. So we already have the  
7 classic example, again, from Justice Cardozo  
8 in -- in Junius Construction of the two roads  
9 and the one road.

10                   So the analogy here would be, if the  
11 complaint had identified a specific statement of  
12 certain forward-looking trends that were going  
13 to have an impact and it left out this  
14 forward-looking trend that was going to have an  
15 impact, the plaintiff might be able to plead the  
16 statement requirement by identifying that  
17 specific statement.

18                   Now that didn't happen here, but --  
19 but that was a -- that would be a -- a pleading  
20 that might satisfy --

21                   JUSTICE KAVANAUGH: On -- on the --

22                   MS. COBERLY: -- the statement  
23 requirement.

24                   JUSTICE KAVANAUGH: -- immunity word,  
25 I thought your response would be that the SEC --

1 MS. COBERLY: We do.

2 JUSTICE KAVANAUGH: -- has authority  
3 to enforce omissions in 303.

4 MS. COBERLY: That is my response.  
5 With respect to the question about immunity for  
6 10(b) liability, we're -- even there, we're not  
7 seeking immunity exactly. We're simply saying  
8 that you have to identify a misleading statement  
9 and it has to be something that's like in kind.

10 But Your Honor is quite right that the  
11 SEC has ample authority to -- to pursue and  
12 penalize failures to violate or failures to  
13 comply with that --

14 JUSTICE JACKSON: Right. But just  
15 to -- just to be clear, I guess I'm -- I'm just  
16 trying to understand, are you making the  
17 argument that there's something about the nature  
18 of an Item 303 disclosure that it can't give  
19 rise to liability or there are circumstances  
20 that you can envision like the one perhaps you  
21 identified where it might, but they didn't  
22 allege that in this case?

23 MS. COBERLY: We are not asking this  
24 Court to make a ruling based on the nature of  
25 Item 303 representations. What we're asking the

1 Court to do is respect the text of Rule  
2 10b-5(b).

3 If a -- if a plaintiff identifies a  
4 specific misleading statement in a -- an Item  
5 303 disclosure, that happens to be in an Item  
6 302 -- 3 disclosure, which means, by the way, it  
7 happens to be anywhere in the MD&A of the public  
8 filing, then the plaintiff could plead that  
9 specific statement as a misleading statement for  
10 purposes of the --

11 JUSTICE KAGAN: But just to --

12 CHIEF JUSTICE ROBERTS: I was --

13 JUSTICE KAGAN: -- make sure I --

14 CHIEF JUSTICE ROBERTS: I was just  
15 going to say, I thought you argued that the  
16 private actions could not be brought under  
17 Section 303 alone even though the Commission  
18 might be able to take actions?

19 MS. COBERLY: We do argue that, Your  
20 Honor, but -- but the -- the problem here is to  
21 -- to identify -- what the Second Circuit held  
22 was that a violation of Item 303, standing  
23 alone, is actionable under Rule 10b-5(b) whether  
24 or not there was a misleading statement. And so  
25 -- what -- what we're asking for is for the

1 Court to require the misleading statement.

2 The statement has to be identified and  
3 it has to be something specific to comply with  
4 the PSLRA pleading requirements, and then the  
5 defendant will go through the process, and the  
6 court, of evaluating whether that kind of  
7 statement is the sort of thing on which  
8 securities liability can rest.

9 JUSTICE KAGAN: And just to make sure  
10 I understand your answer to Justice Jackson's  
11 hypothetical, if, in the MD&A, the -- the  
12 company says there are three trends that you  
13 should know about, you, the investor, should  
14 know about, when you think about our future  
15 sales, and it lists three trends, but it doesn't  
16 list a fourth that's actually much more  
17 consequential than those three and cuts in the  
18 opposite direction, has the -- has -- has -- has  
19 that satisfied the requirement?

20 MS. COBERLY: I think that would  
21 satisfy the requirement of the misleading  
22 statement.

23 JUSTICE KAGAN: Yeah.

24 MS. COBERLY: It remains -- that then  
25 there are other pleading requirements as well --

1 JUSTICE KAGAN: Sure.

2 MS. COBERLY: -- including potentially  
3 the application of the safe harbor, because I  
4 actually think that statement that Your Honor is  
5 positing probably is a forward-looking statement  
6 that would be protected from liability under the  
7 statutory safe harbor.

8 JUSTICE KAGAN: But, in terms of the  
9 issue that we're deciding today --

10 MS. COBERLY: Right.

11 JUSTICE KAGAN: -- it would pass that?

12 MS. COBERLY: I think it likely would  
13 pass that, Your Honor. And that's why it's so  
14 important that the statement be specific and  
15 identified.

16 There's actually -- the -- the -- the  
17 safe harbor provision itself contains an  
18 important textual clue as well. It discusses  
19 statements as being something contained in the  
20 filings, contained in, in fact, specifically  
21 contained in the Management's Discussion and  
22 Analysis, which, of course, is a lengthy  
23 narrative. Based on that understanding of what  
24 a statement is, it's not appropriate to suggest,  
25 as the government does, that the statements made



1 could be in general the entire MD&A.

2           And one of the reasons it's important  
3 for the PSLRA, I think, to identify something  
4 more specific is because the MD&A is long and  
5 complex and covers many different subjects. I  
6 mean, our client, for example, was a holding  
7 company that had four different major  
8 subsidiaries engaged in different businesses.  
9 It was affected by many regulations. It, in  
10 fact, disclosed in its MD&A the possibility that  
11 regulations that impact the commodities stored  
12 by this subsidiary could impact the outcome, the  
13 financial results, of the holding company. That  
14 was actually disclosed at a higher level of  
15 generality. That did not become misleading  
16 simply because it did not provide a specific  
17 example that included this alleged regulation.

18           And we -- we want companies to  
19 disclose what's required under Item 303. We  
20 want them to provide that information. But, if  
21 we have a rule that says anytime you say  
22 anything you can be held liable for what you  
23 don't say, that would have exactly the opposite  
24 result of the requirement.

25           JUSTICE BARRETT: Ms. Coberly, what

1 about 10b-5(a) and(c)? Would a 303 omission be  
2 actionable under either of those subsections,  
3 and are you asking us to say anything about  
4 that?

5 MS. COBERLY: We are not asking the  
6 Court to say anything about that necessarily  
7 because the Second Circuit didn't. So we did  
8 not brief that issue as if it was before the  
9 Court. The Second Circuit did not rely on that.

10 But what I can say, Your Honor, is  
11 that every time this Court has recognized  
12 liability under (a) and (c), it has found  
13 something in addition to speech alone. And if  
14 it were the case that you could -- this in our  
15 case is a quintessential (b) case, right? It's  
16 about what a 10-K or a 10-Q does or doesn't say.

17 And if that case could be recast as a  
18 scheme case or an act case and avoid the  
19 specific requirements of (b), no one would ever  
20 bring a claim under (b). And, presumably, there  
21 would be some decision by some court of appeals  
22 somewhere that held that a misrepresentation or  
23 omission in a 10-K or a 10-Q can be asserted  
24 under (a) and (c). And no court, including the  
25 Second Circuit, has ever reached that result as

1 far as we are aware.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas?

5 Justice Gorsuch, anything further?

6 All right. Justice Barrett?

7 Okay. Thank you, counsel.

8 MS. COBERLY: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Frederick.

10 ORAL ARGUMENT OF DAVID C. FREDERICK

11 ON BEHALF OF RESPONDENT MOAB PARTNERS, L.P.

12 MR. FREDERICK: Thank you, Mr. Chief  
13 Justice, and may it please the Court:

14 This case involves a classic 10b-5(b)  
15 misleading half-truth. Petitioners disclosed a  
16 few known trends that would affect their bottom  
17 line but omitted the IMO 2020 uncertainty that  
18 would decimate 40 percent of their revenue.  
19 Just as disclosing two roads near a property  
20 when a third one actually bisects it is a  
21 classic fraudulent half-truth, so is a partial  
22 Item 303 disclosure that omits required material  
23 information. A reasonable investor would expect  
24 the description of known trends to be complete  
25 and would be misled by such a material omission.

1           If accepted, Petitioners' argument  
2 would create a roadmap for fraud. Petitioners  
3 knew they were about to lose a substantial part  
4 of their business but kept their stock price  
5 artificially inflated by deliberately  
6 withholding information about their readiness to  
7 comply with an important rule change. When the  
8 truth emerged, their stock price fell by more  
9 than 40 percent in one day.

10           Congress enshrined a private right of  
11 action to redress this kind of half-truth. Now  
12 Petitioners concede that an omission can be a  
13 half-truth when there is a statement on the same  
14 subject. But Item 303 defines the relevant  
15 subject, any known trends or uncertainties that  
16 are reasonably likely to significantly affect  
17 revenues or income.

18           So, if a company, as, Mr. Chief  
19 Justice, your hypothetical pointed out,  
20 discloses that sales are going to go up by some  
21 customers, but suppose that the supplier of  
22 parts is about to go into bankruptcy, both of  
23 those statements go to the same subject under  
24 Item 303. But an omission of one, the  
25 bankruptcy of the supplier, would materially

1 affect the bottom line. For the reason that  
2 they don't give you a standard for determining  
3 the same subject, it has to be tied to Item 303.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: But, even if you  
6 lose, doesn't the SEC have authority over the  
7 omission?

8 MR. FREDERICK: Not under 10b-5(b)  
9 under their theory. The SEC would only have  
10 administrative authority through their Corporate  
11 Finance Department, but they wouldn't have the  
12 authority to bring a fraud claim that would seek  
13 other potential remedies. And the SEC has made  
14 quite clear that its enforcement staff is meager  
15 compared to the resources and opportunities for  
16 institutional investors like the ones that I  
17 represent to be able to bring private actions.

18 JUSTICE THOMAS: And so which  
19 omissions would not be misleading?

20 MR. FREDERICK: Well, omission --

21 JUSTICE THOMAS: If pure omissions are  
22 misleading -- it seems as though you're saying  
23 the mere fact that it is an omission makes it  
24 misleading. Can you -- is there a limit to  
25 that?

1           MR. FREDERICK: Yes, there is, Justice  
2 Thomas. And what the Second Circuit did below  
3 was it went through, essentially, a decision  
4 tree whether there was a violation of Item 303.  
5 It asked first, is there a known trend? Would  
6 it have -- reasonably affect the bottom line?  
7 If the answer to that is no, then any omission  
8 that would not concern a known trend wouldn't be  
9 required for disclosure. And if there was an  
10 uncertainty about that, then the managers are  
11 asked whether or not disclosing that event would  
12 be reasonably likely to occur, which is a lower  
13 standard still.

14           The Second Circuit provided those kind  
15 of prophylactic protections through the decision  
16 tree that it undertook to determine whether or  
17 not an omission in these particular contexts  
18 would be important, and it determined -- and  
19 this isn't challenged on appeal -- that it was  
20 objectively unreasonable for the company not to  
21 put in their Item 303 disclosure the facts that  
22 would be necessary to determine the company's  
23 readiness to deal with the IMO 2020 rule change,  
24 which is going to decimate the 6 oil market.

25           And so, for that reason, it seems very

1 clear to us that when the managers are assessing  
2 what needs to be in the Item 303 disclosure,  
3 omitting something that would be so material, as  
4 was the case here, would be independently  
5 actionable.

6 And I would point out that the  
7 underlying Second Circuit case that's really on  
8 appeal here is called Stratte-McClure. That was  
9 the precedent on which the per curiam panel  
10 below relied.

11 Stratte-McClure said that omissions  
12 that were of such materiality would lead the  
13 financial statements to be misleading. We think  
14 what it meant by that was the MD&A part. And  
15 the comment is made, well, the MD&A is many  
16 pages. Well, the statement in a Supreme Court  
17 brief can be many, many pages. And so the fact  
18 that we're not talking about one sentence, but  
19 we're talking about a statement, is relevant for  
20 determining what material information reasonable  
21 investors would want to have.

22 JUSTICE JACKSON: Can I just --

23 CHIEF JUSTICE ROBERTS: Counsel --

24 JUSTICE JACKSON: Go ahead.

25 CHIEF JUSTICE ROBERTS: -- you -- you

1 began by saying this was a classic half-truth.

2 MR. FREDERICK: Yes.

3 CHIEF JUSTICE ROBERTS: Are -- are you  
4 -- is one -- the way that the dispute was  
5 presented at least in some parts is a  
6 distinction between half-truths and -- and pure  
7 omissions.

8 Are you giving up on that distinction,  
9 or you don't buy it? I mean, you -- you do not  
10 buy that distinction at all?

11 MR. FREDERICK: I think their -- what  
12 they define "pure omission" to be is a violation  
13 of a disclosure rule. And if you look at a  
14 disclosure violation, you have to look at what  
15 was disclosed compared to what wasn't disclosed.

16 And that's the classic half-truth that  
17 your very first hypothetical, Mr. Chief Justice,  
18 brought to light. And we think, here, where the  
19 company is talking about some of the material  
20 trends that would affect their bottom line but  
21 not the trend that's going to affect nearly half  
22 of their business, is clearly a material trend  
23 and a material omission that renders the  
24 statements that they've made elsewhere in the  
25 Item 303 disclosure to be misleading.



1 JUSTICE BARRETT: And you would --

2 JUSTICE KAVANAUGH: But isn't --

3 JUSTICE BARRETT: -- have to identify  
4 those specific statements?

5 MR. FREDERICK: Well, there are two  
6 answers, Justice Barrett, and I want to be clear  
7 for the record what our position is.

8 We agree with the SG that the  
9 categorical matter, the statement, is the MD&A.  
10 So that is an adequate statement if referenced  
11 in the complaint, which we have on paragraphs  
12 277 and 278 of our complaint.

13 If, however, the Court were to  
14 conclude that more particularized statements  
15 within the MD&A needed to be identified, we've  
16 also done that in the complaint in the preceding  
17 six or seven paragraphs.

18 And so whichever way the Court rules,  
19 if it accepts the Solicitor General's more  
20 categorical approach or if it takes the more  
21 nuanced approach that we have also offered as an  
22 alternative, we think that you get to the same  
23 place.

24 JUSTICE KAGAN: But, if I understand  
25 you correctly, Mr. Frederick -- and this is

1 really just repeating the Chief Justice's  
2 question -- you have put off the table, you're  
3 not defending the Second Circuit's position,  
4 which is that there's no statement, however  
5 capaciously or narrowly defined, there's no  
6 statement that needs to be alleged becomes  
7 misleading because of the omission?

8 MR. FREDERICK: That's not correct,  
9 Justice Kagan. What the Stratte-McClure Court  
10 said and held was that the omissions rendered  
11 the financial statement misleading. And so the  
12 Second Circuit has viewed the categorical  
13 position that the government does as the correct  
14 ruling on the statement.

15 JUSTICE KAGAN: Well, let -- let's  
16 just imagine that the Second Circuit said  
17 something else, which is that any omission  
18 counts without having to show that it rendered  
19 any other statement -- misleading.

20 You would reject that?

21 MR. FREDERICK: I -- I -- I don't  
22 think that anybody -- that any court has ever  
23 held that. We're not arguing that. The Second  
24 Circuit didn't hold that. It would be purely  
25 hypothetical.

1 JUSTICE KAGAN: So what everybody is  
2 arguing about is just sort of how narrow or how  
3 capacious we should understand the requirement  
4 that there needs to be another statement that's  
5 rendered misleading?

6 MR. FREDERICK: I think that's  
7 basically right in terms of framing the  
8 battlefield here, Justice Kagan, and that's why  
9 the subject is what is so important.

10 They're willing to concede that there  
11 can be half-truths when there are omissions on  
12 the same subject, but they never really make  
13 clear what is the subject in the context of a  
14 public filing by a public company to a public  
15 agency charged with administering particular  
16 rules designed to protect investors.

17 JUSTICE KAVANAUGH: Can -- can we just  
18 say that a -- an omission alone is not good  
19 enough, you have to identify a statement as  
20 well, and send it back?

21 MR. FREDERICK: I don't think that's  
22 going to help anyone, Justice Kavanaugh,  
23 frankly, for this reason.

24 JUSTICE KAVANAUGH: It'll help us, but  
25 --

1 (Laughter.)

2 MR. FREDERICK: I -- and I appreciate  
3 my role is to help you, Justice Kavanaugh. But,  
4 in furtherance of helping the bar, let me urge  
5 you to say that the omission has to be tied to  
6 the particular statements at issue, which are,  
7 here, the MD&A, the management discussion. That  
8 has to be the subject in which you evaluate  
9 omissions and statements.

10 It's the only administrable rule where  
11 you look at what is required under the Item 303  
12 rule and you determine whether the company  
13 complied with the form --

14 JUSTICE KAVANAUGH: Well, to say the  
15 MD&A as a whole is misleading really kind of  
16 waters down the -- the statement requirement.  
17 At least that's the argument on the other side.

18 MR. FREDERICK: It is. And that's why  
19 we made the backup argument that if charged with  
20 looking at particular statements in the MD&A, we  
21 pleaded that, we can do that, we can establish  
22 that.

23 But I think, Justice Kavanaugh, what's  
24 important is that when there are material  
25 omissions of the type and sky -- size and scope

1 here, it's really important to have a tool to be  
2 able to say, we're not going to flyspeck every  
3 sentence and the placement of every comma. This  
4 company didn't disclose what was going to happen  
5 to 40 percent of their business.

6 JUSTICE GORSUCH: Well, Mr. Frederick,  
7 if -- if there's such agreement that a  
8 statement's required and, in fact, you -- you  
9 seem to be okay with your -- your friend, Ms.  
10 Coberly's, suggestion that it has to be a  
11 specific statement in a specific context, why  
12 not send it back for analysis under that  
13 standard?

14 MR. FREDERICK: Certainly, a -- a  
15 remand is going to happen anyway because of the  
16 existence of the other claims.

17 JUSTICE GORSUCH: But would -- would  
18 that -- would that help the bar?

19 MR. FREDERICK: I don't know that --

20 JUSTICE GORSUCH: Would that be  
21 useful?

22 MR. FREDERICK: Well, what I would  
23 like to urge the Court is that when a -- an  
24 omission is evaluated in the context of a  
25 misleading statement, the test for determining

1 it in an Item 303 context is, is it the subject  
2 covered by the Item 303 requirement?

3 JUSTICE GORSUCH: I understand that's  
4 your first argument, but you seem to be --

5 MR. FREDERICK: No.

6 JUSTICE GORSUCH: -- content with a  
7 more specific level of analysis too, and your  
8 friend on the other side suggests that that  
9 might even be required by the PSLRA.

10 MR. FREDERICK: Well --

11 JUSTICE GORSUCH: And if you're  
12 content with it and she's content with it and  
13 you say it would be helpful for us to go beyond  
14 talking about omissions, why shouldn't we go  
15 ahead and do that?

16 MR. FREDERICK: Because I think the  
17 government's position is the more categorical  
18 one, which we defend as well, and we believe  
19 that is correct for multiple reasons. The PSLRA  
20 doesn't require individual sentences. It  
21 requires statements, statements --

22 JUSTICE GORSUCH: But -- but, if lower  
23 courts have uniformly, Ms. Coberly suggests,  
24 understood it at -- at a lower level of  
25 specificity than -- than -- than that, why --

1 why shouldn't -- if you're asking for help for  
2 the bar, why wouldn't it be helpful for the bar  
3 to affirm what lower courts have done in that  
4 respect?

5 MR. FREDERICK: Well, I think she's  
6 misstated the law of the Second Circuit, is the  
7 financial statement, and the MD&A is the  
8 important narrative discussion in the financial  
9 statement. So, to the extent that she's talking  
10 about other courts, the only other court that's  
11 addressed the question presented directly is the  
12 Ninth Circuit, which has held categorically that  
13 no Item 303 violation can give rise to a 10b-5  
14 claim.

15 JUSTICE GORSUCH: No, but we're  
16 talking about 10b-5 generally. We're now moving  
17 past the 303 issue as I understand it and  
18 talking about what it takes to plead a 10b-5(b)  
19 case generally.

20 MR. FREDERICK: Well --

21 JUSTICE GORSUCH: And as -- as Ms.  
22 Coberly suggests at least -- and what I've read  
23 seems to comport with it -- that the level of  
24 specificity is lower than -- than -- than just  
25 saying go look at a long document like a legal

1 brief.

2 MR. FREDERICK: Well, Justice Gorsuch,  
3 I don't -- I -- I don't want to fight your  
4 instinct to ratify --

5 JUSTICE GORSUCH: Oh, go ahead and  
6 fight it.

7 (Laughter.)

8 JUSTICE GORSUCH: But, if you're  
9 looking for guidance and that's correct and  
10 useful guidance and --

11 MR. FREDERICK: The -- the problem --

12 JUSTICE GORSUCH: -- I mean, or do you  
13 want us just to go ahead and answer the --  
14 the -- the narrow question presented about  
15 omissions? I -- I'm -- I'm just --

16 MR. FREDERICK: I would say that --

17 JUSTICE GORSUCH: -- wondering where  
18 you're at.

19 MR. FREDERICK: -- the problem with  
20 getting too high a level of specificity is that  
21 it misses the very hypothetical that the Chief  
22 started the argument with, where the company  
23 oversells the fact that 30 percent of its  
24 revenue come from a customer that, say, doubles  
25 its order, but it doesn't talk about the parts



1 supplier that's about to go into bankruptcy that  
2 would affect 30 percent.

3 When --

4 JUSTICE GORSUCH: That -- that might  
5 be a -- a specific. I mean, we're going to have  
6 to argue about that, but that's, I -- I think,  
7 what lower courts do all the time and say is  
8 that specific enough. Is that more like the  
9 crossroads example that you both have used, or  
10 is it too far flung to qualify as a statement on  
11 that subject matter?

12 MR. FREDERICK: And that's why the  
13 Item 303 framework is a better one than a  
14 free-floating same-subject test, which is the  
15 other side's offer.

16 JUSTICE GORSUCH: But do you concede  
17 that elsewhere in securities law it is more  
18 specific than that under 10b-5(b) and that --  
19 that courts do require a more specific level of  
20 granularity than just say it's somewhere in a --  
21 required somewhere in a regulation?

22 MR. FREDERICK: Yes, but that is  
23 usually in the context of earnings calls, press  
24 releases, voluntary statements in which the  
25 company is not required to make disclosures.

1 JUSTICE JACKSON: But I guess --

2 MR. FREDERICK: And --

3 JUSTICE JACKSON: Sorry. I guess  
4 that's my problem, Mr. Frederick, because I'm --  
5 to the extent that the government's general  
6 categorical view reduces to whenever the company  
7 is required to make statements, not doing so  
8 renders the report misleading, I -- I guess I  
9 don't understand how that's any different than  
10 just saying pure omissions in a context in which  
11 there's a regulation that requires you to  
12 disclose count.

13 It seems to me it -- it -- it -- it  
14 writes out of the statute something about the  
15 statement being rendered misleading to interpret  
16 that to mean anytime you are required to  
17 disclose certain information in a statement and  
18 it isn't there you have a misleading statement.

19 MR. FREDERICK: But, Justice Jackson,  
20 the part of the statute that they don't really  
21 want to talk about is the part that says "in the  
22 light of the circumstances in -- under which  
23 they were made." The circumstances here are the  
24 regulation requiring disclosure on specific  
25 topics.

1 JUSTICE JACKSON: No, I understand  
2 that. But the Chief Justice asked the very  
3 question that I was going to ask, which is what  
4 is the difference between a pure omission in a  
5 world in which you're required to make a  
6 disclosure and an omission that renders a  
7 statement misleading? And if you do it at a  
8 certain level of generality, I see that there is  
9 no difference between those two.

10 MR. FREDERICK: And I think there is  
11 no difference except in the circumstance where  
12 you simply don't file an MD&A at all. That is a  
13 pure omission. It is as pure as you can be that  
14 you have violated the rule by simply not  
15 complying with it.

16 Now I'm told that never happens in the  
17 real world, but that's why this whole pure  
18 omission thing is a canard for really not  
19 capturing what is going on in a securities  
20 action, which are a series of half-truths.

21 Here, the difference is that between  
22 the voluntary scenario where you do have to have  
23 more specificity about the misleading omissions  
24 and statements, where you're under a regulatory  
25 regime that requires certain disclosures and

1 certain managers' analyses, you have to follow  
2 the regulation, and the regulation here calls  
3 for this disclosure.

4 Now, Justice Jackson, to be sure, not  
5 all of those misleading statements or omissions  
6 are going to give rise to 10b-5 claims. You  
7 have to plead -- plead materiality and --

8 JUSTICE JACKSON: But why -- why is  
9 there a difference in 10(b) and -- and -- and  
10 Section 11 then? In other words, how -- how do  
11 you respond -- it seems to me the Section 11  
12 argument is what you're saying. When you're  
13 required to state something and you don't state  
14 it, Section 11 says there's liability.

15 We have different language in 10b-5.  
16 So how do you account for that?

17 MR. FREDERICK: Well, 10b-5 is  
18 intended to be more of a catch-all for a -- a  
19 provision in which the SEC was intending to  
20 capture by rule all conceivable forms of fraud.  
21 Section 11 is a very specific rule capturing  
22 just the disclosures made in offering documents  
23 because, once a stock is put on the market  
24 through an offering document, the offering  
25 document, all four corners, are supposed to help

1 the investor identify the worth of the offering.

2           Once the offering is made, the market  
3 takes over, right? And so the specificity  
4 required is necessary because Section 11 is a  
5 strict liability offense. It does not involve  
6 scienter. Fraud requires scienter.

7           And so having more particularity with  
8 respect to the offering document statements in  
9 that context makes economic sense, and it makes  
10 governmental sense in the -- in the regard that  
11 what you're doing is holding the maker of those  
12 statements strictly liable for messing up by --  
13 either by misleading in some way or omitting  
14 something that was stated.

15           You don't do that in the fraud context  
16 because you're looking for broader concepts and  
17 language in which to enforce, and that's why the  
18 SEC, when it promulgated Rule 10b-5, looked to a  
19 different provision that did speak to the  
20 circumstances in which fraud could be conducted.

21           JUSTICE ALITO: Mr. Frederick, what  
22 about the question that we agreed to review?  
23 Now you told us it was a worthless question in  
24 your brief in opposition. But, wisely or not,  
25 we took the case to decide that question.

1                   And based on the argument this morning  
2                   and your briefs, I don't really see a  
3                   disagreement between you and Ms. Coberly on the  
4                   narrow question that the Court agreed to take.  
5                   I understand you to say that when there is a  
6                   material omission in the 303, then a -- a number  
7                   of statements in the 303 can be regarded as  
8                   misleading. And you need to say that, right, to  
9                   get under 10b-5(b)? Is that correct?

10                   MR. FREDERICK: Well, we need that to  
11                   get under 10b-5(b). We do that multiple ways,  
12                   either categorically because the entire MD&A is  
13                   false and misleading or because the individual  
14                   statements within it are false and misleading.

15                   JUSTICE ALITO: All right. I'll  
16                   follow up when --

17                   CHIEF JUSTICE ROBERTS: Why don't you  
18                   go ahead now.

19                   JUSTICE ALITO: Well, the question is  
20                   whether a failure to make a disclosure required  
21                   under Item 303 can support a private claim under  
22                   Section 10(b) -- you'll understand that to refer  
23                   to 10b-5(b) -- "even in the absence of an  
24                   otherwise misleading statement."

25                   And you're not arguing that as I

1 understand it. You're arguing that there are  
2 misleading statements in the 303 because it --  
3 it fails to state things that should have been  
4 stated.

5 MR. FREDERICK: But the opacity of  
6 that last phrase that you highlighted, Justice  
7 Alito, is part of my argument. What is an  
8 otherwise misleading statement depends on  
9 context. The context here are the omissions.  
10 So you might look at a statement and say:  
11 That's not misleading, except for the fraud and  
12 omissions that were material to render that  
13 particular statement otherwise misleading.

14 So we argue on the Question Presented  
15 the Second Circuit has never decided this on the  
16 basis of pure omissions. They decided it in the  
17 context of misleading financial statements. And  
18 the "otherwise misleading" gets the half-truth  
19 theory into the case.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: Mr. Frederick, am --  
24 am I correct in assuming that the -- you're just  
25 adding, you're saying it has to be a pure

1 material omission?

2 MR. FREDERICK: What I'm saying is  
3 that --

4 JUSTICE THOMAS: It seems to me as the  
5 only adjective you're adding is "material."

6 MR. FREDERICK: "Material" is  
7 necessary to make a 10b-5 claim --

8 JUSTICE THOMAS: Yeah.

9 MR. FREDERICK: -- Justice Thomas.  
10 And so -- there also has to be scienter. So it  
11 has to be a pure material omission with scienter  
12 that also causes the other elements in order to  
13 give rise to a 10b-5 claim. We -- we  
14 acknowledge --

15 JUSTICE THOMAS: Yeah.

16 MR. FREDERICK: -- the -- that.

17 CHIEF JUSTICE ROBERTS: Anything  
18 further?

19 Justice Gorsuch? No?

20 Justice Jackson?

21 Thank you, counsel.

22 Mr. McDowell.

23

24

25



1                   ORAL ARGUMENT OF EPHRAIM McDOWELL  
2                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                   SUPPORTING THE RESPONDENT

4                   MR. McDOWELL: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6                   I want to just pick up on this idea  
7 that the Petitioners are asking for a tight  
8 factual connection between the statement and --  
9 and the omission. But that ignores the context  
10 in which an MD&A is -- is made. The context is  
11 Item 303.

12                   Item 303 requires companies to  
13 disclose all information in a particular  
14 category. And in -- when you have that sort of  
15 regulation, that's the subject matter in which  
16 you evaluate the statement and omission.

17                   So just to take the Cardozo case as an  
18 example, that -- that case was a voluntary  
19 disclosure case. There was no disclosure  
20 regulation at issue. And in that circumstance,  
21 we agree that there will need to be some factual  
22 connection between the statement and the  
23 omission.

24                   But, when you have a regulation like  
25 you have here, that's the way in which you

1 evaluate the statement and omission. So just to  
2 take the facts of that case and -- and vary them  
3 a bit, suppose there were a regulation in that  
4 case requiring sellers to disclose to buyers  
5 everything that could affect the material value  
6 of the property. In that circumstance,  
7 disclosing -- not disclosing a nearby factory  
8 would be misleading, even though, even in a  
9 voluntary disclosure case, it might not be  
10 misleading, and there would need to be a tight  
11 subject matter connection.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: But aren't you too  
14 saying that as long as it's material, the  
15 omission is material, that it satisfied  
16 10b-5(b)?

17 MR. McDOWELL: No, Your Honor. We're  
18 saying that it has -- there has to be an Item 3  
19 -- Item 303 violation, it has to be material  
20 under this Court's decision in Basic, which is a  
21 different materiality standard than Item 303  
22 itself, and then there has to be scienter as  
23 well. So there are multiple different elements  
24 beyond just materiality.

25 JUSTICE THOMAS: What I'm trying to

1 get at is I'm trying to understand what the --  
2 what's the difference between what you're saying  
3 and what Petitioner is saying. Petitioner  
4 seemed to suggest that an additional statement  
5 is required. You're saying at least from what  
6 I'm hearing that it has to be material, and I  
7 take as a grant it's scienter, okay? But I  
8 don't see that that adds anything more other  
9 than it's a -- it's a pure omission that is  
10 material.

11 MR. McDOWELL: No, Your Honor, because  
12 we're saying that the statement here is the  
13 MD&A's narrative discussion and analysis as a  
14 whole, and when you have an omission that  
15 satisfies the Item 303 standard, that renders  
16 that entire narrative misleading because --

17 JUSTICE THOMAS: But I don't see how  
18 you could have an omission if you don't have the  
19 initial 303 statement.

20 MR. McDOWELL: You do have the initial  
21 303 statement. That's the MD&A. The MD&A is  
22 the statement in response to --

23 JUSTICE THOMAS: I -- I understand  
24 that, but I -- anyway, I understand what you're  
25 saying. I don't -- I don't know how you could

1 even have the omission ab initio if you don't  
2 have the 303 statement, and it is from that  
3 statement that we're talking about the omission,  
4 the omission beyond -- nothing beyond that, a  
5 material omission from the 303 statement.

6 MR. McDOWELL: Your Honor, that -- our  
7 position is that if you have a material omission  
8 from the 303 statement, that would be -- that  
9 would give -- that could give rise to liability.

10 JUSTICE THOMAS: Yeah.

11 MR. McDOWELL: And the reason for that  
12 is because reasonable investors will expect the  
13 MD&A to disclose all known trends or  
14 uncertainties. So, when you omit one, then  
15 you're violating those reasonable investor  
16 expectations.

17 Now there's been some discussion about  
18 the specificity of the statement required here.  
19 But, as my colleague suggested, the ordinary  
20 meaning of "statement" includes a narrative  
21 discussion and analysis like --

22 JUSTICE KAVANAUGH: How can -- how can  
23 the MD&A as a whole be misleading but not any  
24 single statement within it?

25 MR. McDOWELL: Your Honor, the MD&A as

1 a whole is misleading because reasonable --  
2 investors will assume that it is complete in  
3 light of Item 303. There may also be individual  
4 statements that are specifically misleading, as  
5 my colleague suggested, but our position is the  
6 categorical one that the entire MD&A is the  
7 statement and that's what's been rendered  
8 misleading by the omission.

9 JUSTICE KAVANAUGH: And won't that  
10 always mean then that a omission -- an Item 303  
11 omission qualifies?

12 MR. McDOWELL: No, Your Honor,  
13 because, first of all, it has to meet the -- the  
14 standards of Item 303 itself, which requires  
15 that the trend or uncertainty be currently  
16 known, reasonably likely to occur, and  
17 reasonably likely to be material.

18 JUSTICE KAVANAUGH: Right. But once  
19 you have that?

20 MR. McDOWELL: Once you have that,  
21 then you would also have to show materiality  
22 under Basic, which is oftentimes a higher  
23 threshold, as well as scienter. So we're just  
24 talking about one element of the Rule 10b-5  
25 claim.

1                   But, yes, as to the misleading  
2                   omission element, our position is that when  
3                   there is an Item 303 violation, that would  
4                   satisfy that one element.

5                   And just to understand why we think  
6                   the right way to think about the statement is  
7                   the MD&A as a whole, I want to give you an  
8                   example of a slightly more straightforward SEC  
9                   disclosure regulation, which is Item 401.

10                  That requires companies to list all  
11                  the directors on the board of directors of the  
12                  company. If a company omits one of those  
13                  directors from the disclosure, that omission  
14                  doesn't render misleading the identification of  
15                  any other individual director, but it does  
16                  render misleading the company's larger statement  
17                  that this is our full board of directors.

18                  The same analysis applies here. Item  
19                  303 requires companies to disclose all material  
20                  known trends or uncertainties. So, if you omit  
21                  one, that doesn't render it -- the  
22                  identification of any other one misleading, but  
23                  it does render misleading the holistic statement  
24                  that these are all the known trends or  
25                  uncertainties affecting the company's financial

1 condition.

2 JUSTICE JACKSON: I can see that. And  
3 I -- I think Ms. Coberly agreed, but I guess I'm  
4 trying to figure out the difference between the  
5 language of 10b-5 with respect to this issue and  
6 Section 11.

7 The government's position it seems to  
8 me renders those two the same in this context  
9 because Section 11 says that you may sue when a  
10 regulated party has "omitted to state a material  
11 fact required to be stated."

12 And in this context, you're saying  
13 that to the extent that Item 303 requires these  
14 trends and uncertainties to be stated, if they  
15 are omitted, we should consider that to count or  
16 satisfy the additional language in Section 10b-5  
17 that talks about your -- you needing to have a  
18 misleading statement.

19 MR. McDOWELL: With respect, Justice  
20 Jackson, that's not correct because Section 11  
21 goes on to say "or necessary to make the  
22 statements therein not misleading." So Section  
23 11 speaks to both pure omissions and half-truths  
24 expressly.

25 JUSTICE JACKSON: Right.

1 MR. McDOWELL: Subsection --

2 JUSTICE JACKSON: And it's different  
3 than 10(b), which doesn't have that first part,  
4 correct?

5 MR. McDOWELL: That -- that's correct.  
6 But -- but 10(b) does have the part that we are  
7 relying on and they're --

8 JUSTICE JACKSON: No, I understand.  
9 But, to the extent that 11 has two different  
10 things --

11 MR. McDOWELL: Right.

12 JUSTICE JACKSON: -- right, the part I  
13 read, "required to be stated," and the part that  
14 is similar to 10b-5, I don't understand your  
15 collapsing the two, and I feel like your  
16 argument is doing that.

17 MR. McDOWELL: No, Your Honor.  
18 They're distinct categories. So a pure omission  
19 would occur, for instance, if a company did not  
20 file an MD&A at all or, in the context of  
21 Section 11, if they omitted an entire category  
22 within a registration statement.

23 By contrast, a -- a half-truth is when  
24 you provide some disclosure under a particular  
25 category but omit other parts of the disclosure



1 and that renders the entire statement within  
2 that category misleading. So that's the  
3 distinction here, and --

4 JUSTICE JACKSON: And do you think the  
5 Second Circuit appreciated that distinction in  
6 its opinion? Because I -- I sort of thought  
7 that they were saying the first.

8 MR. McDOWELL: So, Your Honor, the  
9 Second Circuit's decision is unpublished. It  
10 has fairly limited reasoning. And I read it to  
11 basically cite and adopt the Second Circuit's  
12 precedential opinion on this issue, which is  
13 Stratte-McClure.

14 And Stratte-McClure does rely on, as I  
15 read it, a half-truths theory because it says  
16 that the -- an Item 303 violation renders the  
17 financial statement misleading, which I take to  
18 mean the MD&A, and that's exactly our position.

19 So I do think that the actual  
20 precedent within the Second Circuit does agree  
21 with our position, and I don't think it would do  
22 any good to just say -- to just basically say  
23 vacate and remand and -- and let them take  
24 another look because Stratte-McClure does decide  
25 this issue in the way that we think about it.

1           The other -- the other point I wanted  
2     to make about the PSLRA's pleading standard is I  
3     think they're -- the other side is suggesting  
4     that that pleading standard can substantively  
5     limit the scope of subsection (b) of Rule 10b-5.  
6     But that gets the analysis backwards because, if  
7     you look at the pleading standard and it's at  
8     page 11 of the addendum to the red brief, the  
9     pleading standard just tracks the language of  
10    subsection (b) of Rule 10b-5. It doesn't  
11    purport to change or restrict that language.

12           So I would read the PSLRA's pleading  
13    standard in light of the longstanding provision  
14    of subsection (b) of Rule 10b-5, not the other  
15    way around.

16           JUSTICE GORSUCH: Counsel --

17           MR. McDOWELL: So the only question --

18           JUSTICE GORSUCH: -- do you agree with  
19    Ms. Coberly, though, that lower courts have  
20    understood the PLSRA to require a more specific  
21    statement identification than you're proposing  
22    here?

23           MR. McDOWELL: No, Justice Gorsuch,  
24    not in this context, because this --

25           JUSTICE GORSUCH: No. No, no, no.

1 Put aside the 303 context. In all other  
2 contexts --

3 MR. McDOWELL: In the --

4 JUSTICE GORSUCH: -- as I understand  
5 it, district courts have understood, lower  
6 courts have understood generally that the PSLRA  
7 is more specific, has a more specific nuanced  
8 requirement than you're proposing.

9 MR. McDOWELL: In -- in the context of  
10 voluntary disclosures, yes. And that's --

11 JUSTICE GORSUCH: No, I understand  
12 that --

13 MR. McDOWELL: -- that was -- that's  
14 what I started with.

15 JUSTICE GORSUCH: -- I understand that  
16 distinction.

17 MR. McDOWELL: Right.

18 JUSTICE GORSUCH: But you agree that,  
19 outside this context, that's the standard?

20 MR. McDOWELL: Right, but -- yes, I  
21 agree with that --

22 JUSTICE GORSUCH: And the government  
23 doesn't object to that standard in all -- in  
24 other contexts?

25 MR. McDOWELL: In the voluntary

1 disclosure context, we do not.

2 JUSTICE GORSUCH: Right.

3 MR. McDOWELL: But that's -- that  
4 distinction is critical because, when you have a  
5 reg --

6 JUSTICE GORSUCH: No, I -- I --

7 MR. McDOWELL: Yes.

8 JUSTICE GORSUCH: -- I do understand  
9 that. I just wanted to clarify. Thank you.

10 MR. McDOWELL: Yes. So -- and  
11 that distinct -- that distinction is critical  
12 because, when you have a regulation like this  
13 calling for all information in a particular  
14 category, the omission of information in that  
15 category will necessarily be misleading.

16 And just to take a step back and put  
17 the MD&A in context, it's part of a Form 10-K.  
18 And a Form 10-K document really is like a  
19 Question & Answer document with discrete  
20 categories, and as with any Q&A document, you  
21 can only understand an answer in light of the  
22 question being asked.

23 So just to -- to take it into a  
24 different context, suppose a company's CEO were  
25 on a phone call with an investor and the

1 investor says, what are all the big trends  
2 coming up for the next year -- may I complete  
3 the sentence?

4 CHIEF JUSTICE ROBERTS: You may  
5 complete the sentence, yes.

6 MR. McDOWELL: The investor asks, what  
7 are all the big trends coming up for the next  
8 year? If the -- if the CEO responded by listing  
9 five positive trends but omitting a negative  
10 trend, I think we would all understand that to  
11 be misleading in the context of the question.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Sort of looking at things from the  
15 30,000-foot level, I -- I thought we had, if we  
16 haven't said it categorically and expressly,  
17 indicated that we don't want to get any further  
18 into the business of implying private rights of  
19 action. And, here, it seems to me that at -- at  
20 least as presented, this is a question of  
21 whether or not we extend the existing private  
22 right of action to cover 303 omissions. I'm  
23 talking about the private actions of course.

24 Why isn't that something that should  
25 cause us to be reluctant to extend the -- the

1 right of action?

2 MR. McDOWELL: Mr. Chief Justice, I  
3 actually think that this issue is exactly like  
4 the issue you've -- your opinion faces -- faced  
5 in Halliburton. In Halliburton, the -- there  
6 was an established element of reliance, and the  
7 Court said that you can point to a different way  
8 of satisfying an established element after the  
9 PSLRA.

10 CHIEF JUSTICE ROBERTS: Oh -- well,  
11 but, I mean, it was the same principle that was  
12 being applied. Here, it's a different expansion  
13 under 303, an entirely different thing that we  
14 hadn't mentioned in any of our prior implied  
15 right of action jurisprudence.

16 MR. McDOWELL: With respect --

17 CHIEF JUSTICE ROBERTS: A substantive  
18 addition rather than applying the same rule in a  
19 different context.

20 MR. McDOWELL: So I would make two  
21 points about that, Mr. Chief Justice.

22 First, we are not relying on a new  
23 theory. We're relying on the half-truth theory,  
24 which has existed since 1942 when the SEC passed  
25 Rule 10b-5. We're just saying that this fits

1 within the half-truth theory, just like in --  
2 just like you said in Halliburton the basic  
3 presumption of reliance fits within the  
4 long-settled element of reliance.

5           The other thing I would say about this  
6 is I think Petitioners are over-reading this  
7 Court's decisions in Stoneridge and Janus. We  
8 read those decisions to reject attempts to  
9 expand the class of defendants who can be liable  
10 under Rule 10b-5 after the PSLRA. We don't read  
11 them to say that you can't simply plead an -- an  
12 old type of securities claim in a slightly new  
13 way.

14           CHIEF JUSTICE ROBERTS: Thank you.

15           MR. McDOWELL: And so that's the  
16 distinction.

17           CHIEF JUSTICE ROBERTS: Justice  
18 Thomas?

19           Justice Alito?

20           JUSTICE ALITO: Well, let me ask you  
21 the same question I asked -- I asked Mr.  
22 Frederick. What's your answer to the question  
23 on which we granted review? You changed the  
24 question. What's the question -- what's the  
25 answer to the question we agreed to review?

1 MR. McDOWELL: The answer is that an  
2 Item 303 violation can form the basis for a Rule  
3 10b-5 claim. And Ms. Coberly I don't take to be  
4 saying that.

5 JUSTICE ALITO: Well, that wasn't the  
6 question we granted review on. Even in the  
7 absence of an otherwise misleading statement.

8 MR. McDOWELL: Right. And I read  
9 "otherwise misleading" to be misleading in  
10 its -- in its own -- on it -- by its own terms.  
11 We are saying that it doesn't have to be  
12 misleading on its own terms, but when you put it  
13 in the context of Item 303 disclosures, that's  
14 what makes it misleading.

15 JUSTICE ALITO: Well, don't you have  
16 to identify a statement or a number of  
17 statements, even if it's every single statement  
18 in the 303, that is otherwise misleading to  
19 bring -- to bring it within 10b-5(b)?

20 MR. McDOWELL: You do have to identify  
21 a statement, and we would say that the MD&A's  
22 narrative is the relevant statement. And  
23 there's nothing atypical about reading  
24 statements --

25 JUSTICE ALITO: Fine.



1 MR. McDOWELL: -- that way.

2 JUSTICE ALITO: Then there's an  
3 otherwise misleading statement, which is part of  
4 the question.

5 MR. McDOWELL: Well, with respect,  
6 Justice Alito, I don't think it gets you very  
7 far to answer the question that way because, as  
8 I mentioned earlier, the Second Circuit has  
9 already adopted our position on -- on the  
10 half-truths --

11 JUSTICE ALITO: Yeah. Well, do you  
12 think the requirement to -- to identify the  
13 Question Presented means, particularly with  
14 respect to an amicus, the question that you  
15 would like us to address to provide guidance to  
16 the bar or to advance your interests? Do you  
17 think that's what the requirement is?

18 MR. McDOWELL: No, Your Honor. We  
19 answered the Question Presented by saying an  
20 Item 303 violation can give rise to a Rule 10b-5  
21 claim, and we presented two alternative theories  
22 for that. One is the half-truth theory under  
23 subsection (b), and one is the omission theory  
24 under subsections (a) and (c).

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Quick question.

4 The Commission enforces Item 303, correct?

5 MR. McDOWELL: That's right.

6 JUSTICE KAVANAUGH: And Mr. Frederick  
7 referred to that as meager. Do you have a  
8 response to that?

9 (Laughter.)

10 MR. McDOWELL: So -- so I think -- so  
11 I do have a response to that. I do think that  
12 the SEC's resources in this area are -- are  
13 limited. This Court has repeatedly said that  
14 private litigation under Rule 10b-5 is an  
15 essential supplement to SEC enforcement actions.  
16 And that applies with full force here.

17 The SEC has a few hundred employees  
18 that are tasked with reviewing tens of thousands  
19 of forms from registered companies each year,  
20 and it's simply not realistic to think that  
21 those employees will be able to routinely  
22 detect, investigate, and penalize the many  
23 disclosure violations that are taking place.

24 JUSTICE KAVANAUGH: Wouldn't someone  
25 provide information to the SEC staff when they

1 think something was amiss?

2 MR. McDOWELL: I -- I don't know that  
3 they would. I mean, I think that's -- that's a  
4 bit speculative to think that. But I -- it may  
5 -- perhaps in some cases. But I would say also  
6 that the difference here is between enforcing it  
7 pursuant to Section 13 as opposed to Rule 10b-5,  
8 and there are greater penalties that the SEC can  
9 seek when they go under Rule 10b-5. And when  
10 there is an intentionally deceptive disclosure  
11 violation, I think it makes good sense to allow  
12 the SEC to pursue those additional penalties.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 Justice Jackson?

17 Thank you, counsel.

18 Rebuttal?

19 REBUTTAL ARGUMENT OF LINDA T. COBERLY

20 ON BEHALF OF THE PETITIONERS

21 MS. COBERLY: Your Honor, I thought it  
22 was revealing that counsel is persisting in the  
23 argument that any failure to comply with Item  
24 303 is actionable because it makes the entire  
25 MD&A misleading. Every company has to file

1 10-Ks and 10-Qs, every company, and every  
2 company has to comply with Item 303 and provide  
3 an MD&A.

4           Item 303 refers to the MD&A as a  
5 whole, and its function and purpose is to allow  
6 investors to see the company from the  
7 perspective of management. So the rule that you  
8 heard from both Moab and the government is  
9 tantamount to a rule that we don't have to -- a  
10 plaintiff doesn't have to identify a specific  
11 statement, a specific misleading statement,  
12 within the financial statements or the MD&A as  
13 long as that information was required to be  
14 disclosed by Item 303.

15           That is functionally the pure omission  
16 theory that the Second Circuit adopted and that  
17 we object to. It's also tantamount to a  
18 requirement to -- to a definition of omission  
19 that includes the words "required to be stated,"  
20 which appears in Section 11 but conspicuously  
21 not in Section -- in Rule 10b-5(b).

22           The Commission had as its model for  
23 Rule 10b-5(b) both Section 11 and Section  
24 17(a)(2), and it didn't choose to follow the  
25 omission definition in Section -- in Section 11,

1 and I think we need to attribute some  
2 consequence to that.

3 Further, counsel referred to a  
4 hypothetical that said, if you're required to  
5 list all of your executives and you list most of  
6 them, but you leave one out, that could be a  
7 misleading statement. I agree, and that's the  
8 statement that should be pleaded in the  
9 complaint, the paragraph, the sentence that  
10 lists in -- that provides an incomplete list of  
11 the executives.

12 The fact that something was required  
13 to be disclosed actually doesn't add very much  
14 to the analysis there. It -- the -- the  
15 statement would be misleading on its face  
16 whether or not there was a requirement to  
17 disclose. So we think that actually supports  
18 the notion that a specific statement needs to be  
19 identified.

20 Now counsel for Moab argue that they  
21 did identify specific statements, and that's  
22 very interesting because the brief in opposition  
23 doesn't mention them. Neither did the  
24 paragraphs in the complaint that purported to  
25 state this theory based on Item 303. Now I

1     assume that's because they were relying on the  
2     Second Circuit's rule in Stratte-McClure that  
3     said that you don't have to identify specific  
4     misleading statements when you are pleading  
5     something that is a violation of Item 303.

6             And if you look at those paragraphs in  
7     the complaint, paragraphs 277 and 278, they do  
8     not refer to any specific misleading statement,  
9     any paragraph or sentence where a list was given  
10    that was incomplete, for example.

11            In order for that kind of analysis to  
12    -- analogy to apply here, there would need to be  
13    a list that was incomplete, and the plaintiff  
14    would need to identify it and point to it and  
15    say that's why -- say why the statement is  
16    misleading. And then we would have the  
17    opportunity to address that statement in a  
18    motion to dismiss.

19            Now the theory that you heard counsel  
20    for Moab articulate here is actually in some  
21    ways the theory that they pleaded in their  
22    complaint and that they lost in the district  
23    court and in the Second Circuit. Their  
24    complaint went through very specific statements,  
25    listing them, and it was not only in the

1 voluntary statements, as counsel for the  
2 government referenced.

3           The plaintiff in this case followed  
4 the common practice in district courts across  
5 the nation, which is to list the specific parts  
6 of not only the transcripts of calls but the  
7 10-Qs and the 10-Ks. It went on for pages and  
8 pages. And they said here's a specific  
9 statement in the Ks and Qs, and here's why we  
10 think it's misleading.

11           The district court looked at those  
12 statements and it concluded that no claim had  
13 been stated, and that's because many of the  
14 statements were forward-looking, some of them  
15 were statements of opinion, others in context  
16 were not misleading by omission. The district  
17 court dismissed the case based on those specific  
18 statements.

19           The Second Circuit did not revive it,  
20 with the exception of the two specific  
21 statements that Justice Sotomayor pointed out,  
22 which the court found to be pleaded allegedly  
23 misleading because of a very specific factual  
24 omission about the content of the base of  
25 customers.

1                   So that claim is proceeding. The  
2 claim the -- the Second Circuit allowed to  
3 proceed is a far broader claim that allows a --  
4 a -- a case to proceed based simply on the  
5 notion that there's an omission of something  
6 required by Item 303. And we think the Court  
7 needs to vacate.

8                   CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10                   MS. COBERLY: Thank you.

11                   CHIEF JUSTICE ROBERTS: The case is  
12 submitted.

13                   (Whereupon, at 11:09 a.m., the case  
14 was submitted.)

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## Official

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