No. 20-222

In the Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., et al.,
Petitioners,

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, et al.

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

BRIEF OF THE SOCIETY FOR CORPORATE GOVERNANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1946, the Society for Corporate Governance ("Society") is a professional association of over 3,500 governance professionals who serve approximately 1,600 public, private, and not-for-profit companies of most every size and industry. The Society's members support the work of corporate boards and executive management regarding corporate governance and disclosure, compliance with corporate and securities laws and regulations, and stock-exchange listing requirements. The Society's mission is to shape corporate governance through education, collaboration, and advocacy, with the ultimate goal of creating long-term shareholder value through better governance.

The Society's members are often responsible for preparing corporate disclosures and other outward-facing statements on behalf of companies, including Forms 10-K and 10-Q, proxy statements, and other disclosures required by the Securities and Exchange Commission ("SEC"). The Society provides information to its members concerning environmental, social, and governance ("ESG") issues.

The Society has a direct and substantial interest in this Court's review of the Second Circuit's decision in this case because its members are intimately involved with the preparation of the types of disclosures and public statements that are at the heart of this dispute. In the opinion below, the Second Circuit held that Petitioners The Goldman Sachs Group, Inc. and certain

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[1] All parties were given timely notice and have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

of its executives (together, "Goldman") could not rebut the presumption of class-wide reliance recognized by this Court in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988), by pointing to the generalized and aspirational nature of the relevant public statements in an effort to establish that those statements did not affect the company's stock price. As the leading American association of corporate secretaries and other governance professionals, the Society is well-positioned to explain the practical implications of the opinion below.

The Petition presents critically important legal questions regarding application of the *Basic* presumption of class-wide reliance, and persuasively explains why this Court's intervention is needed to resolve a division of authorities among the courts of appeals. The Society focuses here on the *practical* importance of the Second Circuit's core holdings. Certiorari is urgently warranted to avoid the onset of a severe chilling effect on companies' public statements, and to avoid penalizing more robust and socially beneficial statements with potentially crippling liability in securities-fraud class actions.

For example, this decision—if allowed to stand—will have significant adverse consequences for the ability of public companies to make positive or aspirational statements of principle. This will strip those companies of a crucial goal-setting mechanism on a broad range of issues, from corporate governance reforms, to environmental and societal goals.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The decision below, if allowed to stand, will have significant real-world consequences for companies navigating an environment in which they are expected—and often choose—to make public statements on a wide range of issues, from traditional corporate governance concerns to social ones, including sustainability, the environment, diversity, sexual harassment, worker safety amidst the Covid-19 pandemic, and other issues of pressing social concern. Increasingly in recent years, companies have answered that call, and have often served as leaders on issues such as corporate governance reforms, diversity and inclusion, racial and social justice, and the environment. But the decision below threatens to curtail that trend, giving companies little choice but to stay silent on these important social issues, out of fear that even generalized or aspirational statements will be the basis for allegations of securities-fraud liability.

So too will the decision below impede companies from using public statements to positively influence internal corporate culture, as by making statements that confirm a commitment to workplaces free of racial or sexual harassment or to an enterprise that advances environmental sustainability, anti-corruption, and other positive shared values.

Plaintiffs nationwide have increasingly premised class-action lawsuits on precisely such aspirational public statements, known as "event-driven" litigation. Irrespective of the ultimate merits of each case, these lawsuits demonstrate the need for clear legal rules governing reliance questions at the class-certification

stage. While those rules should of course allow accountability for instances of true securities fraud, they should not deter companies from making appropriate aspirational statements. The Second Circuit's decision falls clearly on the wrong side of that line.

It is no answer to suggest, as did the opinion below, that claims premised on generalized representations may be filtered out at the motion-to-dismiss or summary-judgment stages on grounds of materiality. On the contrary, experience shows that materiality defenses often do not succeed at the pleadings stage because they are viewed (often incorrectly) as presenting mixed questions of law and fact. And such defenses rarely reach the summary-judgment stage because defendants face intense financial pressure to settle once a class is certified. The Second Circuit's contrary suggestion is at odds with the experience of the Society's membership, and cannot be squared with empirical data about how modern securities-law class actions are actually litigated.

2. The panel below also erred by imposing on defendants the ultimate burden of persuasion to rebut the *Basic* presumption. As the Petition persuasively explains, the Second Circuit is wrong as a matter of law on an important question that has divided the courts of appeals. The Second Circuit's decision is also bad policy. In an era when companies are expected (and choose) to make public statements on an ever-expanding range of issues, it is inappropriate to adopt a burden-shifting framework that makes it more difficult—and often effectively impossible—to avoid class certification for claims of securities fraud based on public statements that cannot reasonably be expected to have affected the price of a company's securities.

As the nation's leading association of corporate secretaries and other corporate governance professionals, the Society and its members are harmed by rules that needlessly chill important and socially beneficial corporate speech, and complicate efforts to prepare robust SEC disclosures and other outward-facing statements. The Society's members, who represent companies operating in all 50 states, are also harmed by the lack of nationwide uniformity in circuit law regarding the burden of persuasion in cases involving the *Basic* presumption.

As the Petition demonstrates—and as both the majority and dissenting opinions below recognized—the questions presented here are of substantial importance. The case urgently warrants this Court's review.

ARGUMENT

I. The Decision Below Will Chill Companies from Making Positive Statements of Principle That Promote Progress in Areas Such as Corporate Governance, Diversity, the Environment, and Other Social Issues.

Respondents have alleged that Petitioners made certain generalized statements about Goldman's business principles, such as "[o]ur clients' interests always come first" and "[i]ntegrity and honesty are at the heart of our business." Pet. App. 4a-5a. They then allege that, at the time, Petitioners had undisclosed conflicts of interest in four transactions in one part of Goldman's business. See Pet. App. 5a. And Respondents therefore conclude that Goldman committed securities fraud as a result of making these generic and aspirational statements.

The Second Circuit held that Goldman could not rely on the generic and aspirational nature of these statements to show that they did not affect the price of Goldman's stock, reasoning that allowing consideration of that factor would improperly "smuggl[e] materiality" into *Basic*'s price-impact inquiry. Pet. App. 22a.

If left uncorrected, this decision will have a significant practical effect on companies' future public disclosures. If statements as generic as these are all but conclusively presumed to affect the price of a company's securities, companies will have little choice but to limit such statements in the first instance. Although companies will of course make disclosures consistent with SEC requirements, see, *e.g.*, 17 C.F.R. §§ 240.13a-13, 240.15d-10, they will be disincentivized from making additional disclosures beyond the bare minimum. The decision below will also chill companies from, for example, making and disclosing goals on topics such as diversity and inclusion, gender pay equity, or aspirations about reducing carbon emissions, lest their perceived failure to satisfy some technical aspect of those commitments be the basis for later allegations of securities fraud.

This consequence of the Second Circuit's decision would deprive businesses of an important method of promoting progress, both inside and outside their organizations. Two prominent commentators explained the significance of organizational statements of principle earlier this month: "By committing to goals of responsible citizenship, companies allow stakeholders, institutional investors and the public to hold them accountable to their inclusive ideals," and simultaneously "set an example that institutional investors

should be required to follow in their own investing and voting policies." Leo E. Strine Jr. & Joey Zwillinger, *What Milton Friedman Missed About Social Inequality*, N.Y. Times (Sept. 10, 2020), https://nyti.ms/2DUYeOC. Put differently, organizational declarations of principle "move the conversation beyond the pronouncements of just the organizational leader," and "reinforce that these values are part of companies' DNA." Debbie Haski-Leventhal & Daniel Korschun, *Building Effective Corporate Engagement on LGBTQ Rights*, MIT Sloan Mgmt. Rev. (Nov. 21, 2019), https://bit.ly/35xTf1W. Discouraging these types of statements will have significant real-world costs.

As an initial matter, disincentivizing corporations from making aspirational or generalized statements of the type at issue here will limit companies' ability to facilitate beneficial progress on important societal issues. In recent years, a wide variety of factors—including divided government, the growth of "conscious consumerism," the rising importance of social media, and increasing political engagement among younger Americans, among others—"have pushed corporations to become leaders on social issues and influencers in social movements in particular." Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 Harv. Bus. L. Rev. 441, 444 (2019). Indeed, corporations can and do play a central role in encouraging positive cultural and social progress on a variety of issues.

Examples abound. For instance, businesses have played an important role in advancing a culture of non-discrimination on grounds of race, gender, religion, nationality, or sexual orientation. See Fan, *supra*, at 476-84. On the subject of same-sex marriage,

"companies have helped to spur a rapid evolution in public opinion in the U.S., with a majority of Americans now supporting not only marriage equality but also laws to prevent discrimination against gay people." Richard Socarides, *Corporate America's Evolution on L.G.B.T. Rights*, New Yorker (Apr. 27, 2015), https://bit.ly/35B3XVg. Corporations have also made significant efforts to fight racial discrimination, and have made a variety of public statements concerning other issues of intense social concern.[2] Other companies have made significant strides to help combat social ills that bear a special relationship to their sectors, such as hotel companies that have made commitments to work against human trafficking[3]; entertainment companies that redoubled efforts to prevent sexual harassment in response to the "Me Too" movement[4]; or companies that have made commitments regarding environmental issues such as climate change. It therefore comes as no surprise that companies' SEC disclosures and other outward-facing statements often contain aspirational corporate statements on issues

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[2] See, *e.g.*, Caroline Kaeb, *Corporate Engagement with Public Policy: The New Frontier of Ethical Business*, 50 Case W. Res. J. Int'l L. 165, 174 (2018); *Brands Weigh in on National Protests Over Police Brutality*, Associated Press (June 2, 2020), https://bit.ly/3gCvAze.

[3] See Marriott Int'l, Inc., *Our Commitment to Human Rights* (Nov. 2012), https://bit.ly/31DhE3J.

[4] See Kaeb, *supra* note 2, at 175-76 & nn.43-46.

ranging from corporate governance and corporate culture, to anti-discrimination on the basis of race, gender, religion, or sexual orientation.[5]

Decisions like the one below will necessarily lead companies (and their attorneys) to consider "disclos[ing] only what is mandated by law" because there is "little upside" to disclosing more given the potential risk of securities-fraud claims. Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. Chi. L. Rev. 1313, 1334 (2018). If the decision below is left undisturbed, even generalized articulations of corporate principles—statements which would otherwise promote beneficial progress on issues of societal importance—will be discouraged. Issuers will naturally respond to the judicial creation of increased securities-fraud liability by "reduc[ing] the number of statements they make, and the definiteness of those they do make." Edmund W. Kitch, *The Theory*

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[5] See, *e.g.*, Best Buy Co., Inc., Annual Report (Form 10-K), at 6 (Feb. 2020), https://bit.ly/2EMo7QY (discussing the company's "commitment to equality and non-discrimination"); FedEx Corp., Annual Report (Form 10-K), at 6 (May 2019), https://bit.ly/3luBXs3 (discussing the company's "commitment to diversity and inclusion" on LGBTQ issues); Procter & Gamble Co. Form 10-K, at 4 (June 2018), https://bit.ly/2EKOCWP (discussing corporate commitments to "diversity and inclusion" and "gender equality"); Duke Energy Co., Quarterly Report (Form 10-Q), at 97 (June 2020), https://bit.ly/3bc0SM0 (discussing the company's "efforts to support and encourage diversity" and its promise to "continue to engage" on "social justice issues"); DuPont de Nemours, Inc., Transcript of Second Quarter 2020 Earnings Call, at 3 (July 30, 2020), https://bit.ly/3juToa5 (DuPont CEO's statement that he and his "leadership team * * * are committed to supporting racial equity with an intensified focus on the experiences of Black Americans").

and Practice of Securities Disclosure, 61 Brook. L. Rev. 763, 840 (1995).

Moreover, a regime that discourages the kind of aspirational statements at issue here will also constrain companies' ability to use their public statements in communicating to their internal corporate audiences (*e.g.*, management and employees) in order to positively influence corporate culture. These principles are well-reflected in the record of this case. One of Goldman's experts in the district court—Laura Starks, Ph.D.—explained why companies make the kinds of generalized statements at issue in this case. See D. Ct. Doc. 170-3 (Nov. 6, 2015). Dr. Starks explained that "[g]eneral statements regarding a company's business principles * * * are commonly included in company communications to investors and other stakeholders such as employees." *Id.* ¶ 19. Such statements "do not provide information on the company's future financial performance and value" or otherwise supply data that "investors find to be pertinent to making investment decisions." *Ibid.* Instead, "statements of the company's mission and vision" are made for other reasons, "including employee motivation and creation or affirmation of organizational culture." *Ibid.* Statements concerning the "principles, standards, values, and goals of the organization as aspired to by the company's founders and top management" also serve the function of "corporate brand formation." *Id.* ¶ 30.

If these kinds of statements become an essentially irrebuttable basis for certifying securities-fraud class actions—that is, if defendants cannot rebut the *Basic* presumption by showing such statements did not affect the stock price—then companies will be hindered

in their attempts to influence internal corporate culture. And given that many companies use these types of statements to reaffirm important and socially beneficial workplace values and cultures,[6] the Second Circuit's decision would remove an important tool to help set expectations for employees and deter undesirable behavior, ranging from corruption to discrimination on the basis of race, gender, religion, or sexual orientation. Put differently, the decision will not only chill companies' communications to external audiences regarding their ethics and values, but also will eliminate an important form of internal messaging designed to avoid the exact kind of intra-corporate misconduct at the core of many securities lawsuits.

These concerns are not hypothetical. On the contrary, plaintiffs have recently filed a flood of securities-fraud class actions premised on aspirational public statements.

For example, a publicly traded jewelry retailer recently settled a lawsuit after the district court certified a class of individuals who alleged that the company's generalized statements concerning gender parity (including the statement that it was "committed to a workplace * * * free from sexual * * * harassment") were misleading given an alleged pattern of sexual harassment by certain senior executives. *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-cv-6728, Docket entry No. 143 at 8-9 (S.D.N.Y. Mar. 15, 2019). A settlement also resulted from securities-fraud claims premised on

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[6] See, *e.g.*, JPMorgan Chase Co., 2019 Annual Report, at 13, https://bit.ly/2QDJRBa ("We will remain steadfast, continue to work now and in the future, and remain ever-vigilant in our effort to maintain a culture where racism cannot live or thrive.").

a company's statements that "operations were conducted with full transparency and in compliance with applicable laws and regulations." *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 375 (S.D.N.Y. 2015), *class certified*, 312 F.R.D. 354 (S.D.N.Y. 2016), *aff'd in part and vacated in part*, 862 F.3d 250 (2d Cir. 2017).

Other lawsuits have targeted companies' aspirational statements about environmental issues, alleging that various aspirational goals on sustainability amounted to "greenwashing" and violated the securities laws. See, *e.g.*, Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 Ecology L. Q. 704, 707, 719-23 (2018) (discussing cases). Still other plaintiffs have targeted companies' safety-related disclosures, and have survived motions to dismiss even though the challenged statements were generalized. See, *e.g.*, *In re Massey Energy Sec. Litig.*, 883 F. Supp. 2d 597 (S.D. W. Va. 2012) (denying motion to dismiss securities-fraud class action in which plaintiffs claimed, after a fire at a coal mine, that the defendant company had misled consumers by claiming in SEC filings that safety was its "first priority every day" and that mine safety was "improving"); see also *In re BP plc Sec. Litig.*, No. 4:12-cv-1256, 2013 WL 6383968 (S.D. Tex. Dec. 5, 2013) (similar).

To be clear, in granting certiorari here, this Court would not need to grapple with—and the Society is not expressing an opinion on—the ultimate merits of any of the lawsuits mentioned above. And the Petition does not seek a blanket exemption shielding all aspirational statements in all cases from securities-fraud liability. Rather, the Court would evaluate whether, at the class-certification stage, courts should be able to

consider whether the generic and aspirational nature of certain public statements rebuts any presumption that the purported misrepresentations impacted the price of the relevant securities. Because price impact is the critical premise underlying the *Basic* presumption of class-wide reliance, companies should not be subject to artificial limitations on what evidence can be proffered in seeking to break the causal chain between a public statement and the price of a security.

Judicial decisions implementing the securities laws ought to carefully balance the risks of under-deterrence (which could potentially allow violations of the securities laws to go unaddressed) and over-deterrence (which, as discussed above, would discourage companies from making statements of principle at all). See Robert Allen, *Securities Litigation As A Coordination Problem*, 11 U. Pa. J. Bus. L. 475, 477 (2009) (noting that "excessive penalties" for securities fraud "will over-deter, perhaps discouraging socially-beneficial activity like the disclosure of business-related information"). The opinion below falls on the latter side of this line, and will chill companies from making statements or taking positions that would otherwise serve as a catalyst for meaningful and beneficial dialogue on issues of societal importance.

The Second Circuit acknowledged the risk that its decision could invite a wave of meritless securities-fraud litigation, but believed that defendants would still have "numerous avenues for challenging materiality," including at the pleading stage or a motion for summary judgment. Pet. App. 26a-27a. But the suggestion that those avenues will consistently filter out

claims premised on generalized and aspirational public statements is at odds with practical realities and the experience of the Society's members.

As the Petition explains, defense claims of non-materiality often fail at the pleadings stage because they are perceived as presenting mixed questions of law and fact. See Pet. 29; see also *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360 (2d Cir. 2010) ("[B]ecause the materiality element presents 'a mixed question of law and fact,' it will rarely be dispositive in a motion to dismiss."); *United States* v. *Peterson*, 101 F.3d 375, 380 (5th Cir. 1996) (similar). One empirical study found that only about a third of all securities class actions are terminated via motions to dismiss, and that, even in cases that are dismissed, materiality is seldom the reason why. Instead, the plaintiff's failure to satisfy the other elements of a securities-fraud claim—primarily scienter and falsity—is the predominant reason for dismissals at the pleadings stage. See Wendy Gerwick Couture, *Around the World of Securities Fraud in Eighty Motions to Dismiss*, 45 Loy. U. Chi. L.J. 553, 553, 559 (2014).

Because "materiality is not often decided at the pleading stage of a case," the Second Circuit's suggestion that motions to dismiss will always filter against meritless claims is cold comfort at best. Allan Horwich, *An Inquiry into the Perception of Materiality as an Element of Scienter Under SEC Rule 10b-5*, 67 Bus. Law. 1, 10-11 (2011). As a result, "an unwary company [can] find itself facing costly discovery and potential liability for statements that it thought were sufficiently vague [to avoid implicating the securities laws], but a court found concrete and falsifiable" at the

pleadings stage. Society for Corp. Governance & Gibson, Dunn & Crutcher LLP, *Legal Risks and ESG Disclosures: What Corporate Secretaries Should Know*, at 5 (June 2018), https://bit.ly/32nj4jn. And "because securities litigation is so high risk for defendants, these cases—should they survive motions to dismiss and obtain class certification—will almost always settle." Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013).

II. Defendants Should Not Bear the Ultimate Burden of Persuasion to Rebut the *Basic* Presumption.

The Second Circuit has squarely and repeatedly held that a securities-law defendant bears "the burden of persuasion" to rebut the *Basic* presumption of class-wide reliance. Pet. App. 11a. But as the Petition explains, the courts of appeals are sharply divided on this question. Compare *Waggoner* v. *Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), cert. denied, 138 S. Ct. 1702 (2018), and *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 610 (7th Cir. 2020), with *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016). The Eighth Circuit—not the Second—has adopted the correct rule. In addition to its legal defects, see Pet. 21-23, the Second Circuit's rule is also bad policy, and will create significant adverse consequences for many companies.

"Companies are expanding their environmental and social responsibility efforts at significant rates" and are "increasingly disseminating significant amounts of information about these current efforts and future commitments." See *Legal Risks and ESG*

*Disclosure*s, *supra,* at 1.[7] "[M]ost of these statements are voluntarily made" by companies that recognize the benefits of publicly engaging on these issues and appreciate that their stakeholders want and expect corporate leadership on ESG matters. *Ibid.*

In other cases, companies have made such statements in part as a response to external stimuli. "Driven by client demand, reputational risk management and a supportive body of financial research, many investors are demanding that companies think more broadly about their ESG impacts * * * and disclose their ESG-related efforts." Society for Corp. Governance & BrownFlynn, *ESG Roadmap: Observations and Practical Advice for Boards, Corporate Secretaries and Governance Professionals*, at 1 (June 2018), https://bit.ly/33gOpn0. Companies are also experiencing rising pressure from stakeholders to speak out on social and political issues, even when those issues are not directly related to the company's business. Indeed, one 2016 study found that "[m]ore than three-quarters of" companies with over $15 billion in annual revenue reported that "they experienced increased pressure to weigh in on social issues." Doug Pinkham, *Why Companies Are Getting More Engaged on Social Issues,* Pub. Affairs Council (Aug. 30, 2016), https://bit.ly/2EREiMD. In recent years, companies have responded to this emerging dynamic by making statements and developing policies on issues such as racial

[7] Companies may face securities-fraud liability for any statement that was intended to reach the investing public, including not just SEC filings, but also disclosures on websites or in ESG publications or corporate responsibility reports. See *Legal Risks and ESG Disclosure*s, *supra,* at 1, 6 & n.22.

discrimination,[8] public health,[9] gun regulation,[10] campaign finance,[11] and LGBTQ rights[12]—all topics on which many Americans of prior generations likely would not have expected companies to speak.

In the coming years, statements on ESG issues may not just be expected, but also legally mandated. Indeed, "disclosures regarding environmental and social issues are" already "increasingly being required or encouraged by international, federal and state laws and regulatory bodies." *Legal Risks and ESG Disclosures*, *supra*, at 1; see *id.* at 20-22 (listing a variety of statutes and regulations that currently require ESG disclosures in various circumstances); Petition for Rulemaking, SEC File No. 4-730 (Oct. 1, 2018), https://bit.ly/3lxubh1 (petition requesting that the SEC initiate rulemaking to develop rules requiring companies to make detailed disclosures on ESG issues).

"While the pressure to make public disclosures on ESG matters has never been greater," that pressure

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[8] See Amy Harmon et al., *From Cosmetics to NASCAR, Calls for Racial Justice Are Spreading*, N.Y. Times (June 13, 2020), https://nyti.ms/3hHLzgE.

[9] See Michael Corkery & Sapna Maheshwari, *Retailers Under Growing Pressure to Let Workers Wear Masks*, N.Y. Times (Apr. 1, 2020), https://nyti.ms/32EStwX.

[10] See Heidi Przybyla, *Gun Control Coalition Amps Up Pressure on Corporations*, NBC News (Sept. 12, 2019), https://nbcnews.to/3lwL37F.

[11] See Ann M. Lipton, *Reviving Reliance*, 86 Fordham L. Rev. 91, 105 (2017) (noting that "shareholders have forced corporations to disclose more information about political spending").

[12] See Jon Schuppe, *Corporate Boycotts Become Key Weapon in Gay Rights Fight*, NBC News (Mar. 26, 2016), https://nbcnews.to/31FpWIn.

comes with attendant risks, as companies may end up "pay[ing] a pretty price for those disclosures." Sarah Fortt, Margaret Peloso & Tom Wilson, *ESG Matters: Texas-Size Challenges in Managing Supply Chains*, 82 Tex. B.J. 852, 852 (Dec. 2019). Legal rules that increase the risk of lengthy, burdensome, and expensive securities-fraud lawsuits based on aspirational statements place companies between a rock and a hard place—forced to choose between silence (in tension with public expectations of corporate speech on numerous issues) or speech (which may expose the company to costly litigation).

The Second Circuit's approach is exactly such a rule. Imposing on defendants the ultimate burden of persuasion to rebut the *Basic* presumption (rather than just the initial burden of production) will, by definition, make it more difficult for defendants to defeat class certification in suits premised on such statements. Doing so will not only increase the overall cost to companies of defending non-meritorious class actions, but will disincentivize companies from making those general assertions in the first instance. The better rule—the one that will facilitate the types of socially beneficial speech that stakeholders demand while also shielding companies from the specter of inappropriate liability or *in terrorem* pressure to settle following class certification—is to place the burden of persuasion with plaintiffs, as the Eighth Circuit has recognized.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted.

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