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 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 3,400 governance professionals who serve approximately 1,500 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 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 U.S. Court of Appeals for the Second Circuit held that Petitioners The Goldman

[1] 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. Pursuant to Supreme Court Rule 37.3, this brief has been filed with the written consent of all parties.

Sachs Group, Inc. and certain 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.

This case presents critically important legal questions regarding application of the *Basic* presumption of class-wide reliance. In this brief, the Society focuses on the *practical* importance of this dispute and the significant negative consequences that will occur if the Second Circuit's ruling is upheld. As explained below, this Court should reverse the judgment of the court of appeals to avoid a severe chilling effect on companies' willingness to make public statements, and to avoid penalizing more robust and socially beneficial statements with potentially crippling liability in securities-fraud class actions. If affirmed, the Second Circuit's approach will have the practical effect of discouraging public companies from making positive or aspirational public statements of principle on important internal and external issues. That result, in turn, would deprive those companies and their stakeholders of a crucial goal-setting mechanism on a broad range of issues, from corporate governance reforms, to environmental and societal goals and beyond.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The rule adopted by the court of appeals will have significant adverse consequences for a wide range of public companies nationwide. In today's environment, companies often choose—and frequently are expected—to make public statements on a wide range of issues, from matters of traditional corporate governance concerns to broader social issues, including sustainability, the environment, diversity, sexual harassment, worker safety amidst the Covid-19 pandemic, and other issues of pressing social concern. Increasingly, public companies have answered that call, often serving as leaders on issues such as corporate governance reforms, diversity and inclusion, racial and social justice, and the environment. The historical evolution of corporate annual reports, from offering a short precis of financial results, to lengthy documents that explain corporate values to internal and external audiences, confirms this trend. The decision below, however, will reverse the progress that companies have helped achieve in recent years. If affirmed, it will give companies a financial incentive to stay silent on important social issues, out of fear that even generalized or aspirational statements will become the basis for allegations of crippling securities-fraud liability.

For similar reasons, the Second Circuit's decision will deter companies from using public statements as a means to influence and improve internal corporate culture, as by making statements that confirm corporate commitments to diverse and inclusive workplaces or to environmental sustainability, anti-corruption, and other positive shared values.

Plaintiffs nationwide have increasingly premised class-action lawsuits on precisely such aspirational public statements. Irrespective of their ultimate merits, these lawsuits demonstrate the need for clear legal rules at the class-certification stage, including on what plaintiffs must allege to satisfy the reliance prong of a securities-fraud claim. 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 court of appeals, 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 (sometimes incorrectly) as presenting mixed questions of law and fact. And such defenses rarely reach the summary-judgment stage because defendants face intense pressure to settle once a class is certified. The Second Circuit's contrary suggestion is at odds with the actual experience of the Society's membership, and cannot be squared with empirical data about how modern securities class actions are litigated in practice.

2. The court of appeals also erred by imposing on defendants the ultimate burden of persuasion to rebut the *Basic* presumption. As Petitioners persuasively explain, the Second Circuit was wrong as a matter of law. The decision below 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 communication, and complicate efforts to prepare robust SEC disclosures and other outward-facing statements. The Society's members are also harmed by judge-created rules that assign the burden of persuasion to defendants in cases involving the *Basic* presumption.

The judgment below cannot stand.

ARGUMENT

I. The Decision Below Will Chill Companies from Making Positive Statements of Principle That Promote Socially Beneficial Progress on Issues Such as Corporate Governance, Diversity, and the Environment.

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 further 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-6a. On that basis, Respondents assert 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 generic statements of principle 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 statements beyond the legal 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 having a "green" or low-carbon business enterprise, lest a perceived failure to satisfy some technical aspect of those broad aspirations be the basis for later allegations of securities fraud.

This consequence of the Second Circuit's decision will be to 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 a few months ago: "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 consumer[ism]," 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). In-

deed, 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 recognition of the importance of the "Me Too" movement[4]; food companies that have

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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.

worked to end global hunger[5]; and companies that have made commitments regarding environmental issues such as sustainability or climate change.

The ability of businesses to promote social progress through their own commitments has been on prominent display during the Covid-19 pandemic. The ten largest retailers in the United States have all adopted mask mandates, which has both curtailed the spread of the virus in stores and raised awareness concerning guidance from public-health officials about prevention of transmission.[6] Many other companies have made statements encouraging their employees or the public to get vaccinated against the virus, and in some instances have offered financial incentives for doing so.[7]

The general trend towards more robust and wide-ranging corporate commitments has been particularly notable with respect to corporate annual reports, including the information provided on a company's SEC Form 10-K.[8] In recent years, these documents have

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[5] See Rise Against Hunger, *Kraft Heinz and the Kraft-Heinz Company Foundation Partnership* (2021), https://bit.ly/2LB2QgX.

[6] See Andy Markowitz, *10 Biggest Retail Chains Mandate Masks for Shoppers*, AARP (Nov. 13, 2020), https://bit.ly/3p1yG4L.

[7] See Taylor Telford, *Dollar General Will Pay Workers to Get the Coronavirus Vaccine*, Wash. Post (Jan. 13, 2021), https://wapo.st/3nWO0OP.

[8] See Securities & Exchange Comm'n, *How to Read a 10-K* (July 1, 2011), https://bit.ly/2YavgRw (noting that a company's Form "10-K typically includes more detailed information than the annual report," while an annual report "sometimes appears as a colorful, glossy publication"); see *id.* (explaining that many

evolved from dry recitations of financial results into lengthy documents that can serve as internal agenda-setting roadmaps and corporate branding platforms. One survey of long-standing Fortune 500 constituents found that, between 1950 and 2004, the average length of their 10-K reports increased more than ten-fold from 16 pages to 165.[9] By the mid-2010s, the average Form 10-K was around 42,000 words (just shy of the length of *The Great Gatsby*),[10] and some firms were

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companies "simply take their 10-K and send it as their annual report to shareholders"). Companies may face securities-fraud liability for any statement that was intended to reach the investing public, including not just SEC filings such as Form 10-K, but also disclosures on websites, in ESG publications, in annual reports, or in corporate responsibility reports. See Society for Corp. Governance & Gibson, Dunn & Crutcher LLP, *Legal Risks and ESG Disclosures: What Corporate Secretaries Should Know*, at 1, 6 & n.22 (June 2018), https://bit.ly/32nj4jn; see also Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 Vand. L. Rev. 859, 878–879 (2003) ("[M]isleading statements and omissions in corporate disclosure statements, whether voluntary or mandatory, give rise to federal securities fraud liability claims. The location, so to speak, of the alleged misstatements or omissions can be the required quarterly and annual reports, but it can also be a press release, conference call, or any other oral or written statement made by the company.").

[9] Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 Stan. L. Rev. 1465, 1547 (2007).

[10] Vipal Monga & Emily Chasan, *The 109,894-Word Annual Report*, Wall Street J. (June 2, 2015), https://www.wsj.com/articles/BL-CFOB-8071; *see* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 Minn. L. Rev. 11, 60 & n.227 (2017); Travis Dyer, Mark Lang &

filing reports that were nearly 2,000 pages long (including exhibits).[11] Beyond merely providing financial statistics, these reports now contain aspirational statements on issues ranging from corporate governance and corporate culture, to issues of broader social interest and importance.[12]

In the years since the SEC made Form 10-K the centerpiece of public company financial reporting in 1980,[13] annual reports and Form 10-K disclosures have evolved from narrowly focused recitations of financial performance into wide-ranging expressions of

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Lorien Stice-Lawrence, *The Ever-Expanding 10-K: Why Are 10-Ks Getting So Much Longer (And Does It Matter)?*, The CLS Blue Sky Blog (May 5, 2016), https://bit.ly/2XRE4eL.

[11] *See* Hertz Global Holdings, Inc. Annual Report (Form 10-K) (Mar. 19, 2014), https://bit.ly/2XUAzV8

[12] 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"); see also Duke Energy Corp., 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 (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").

[13] See *Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides; Integration of Securities Acts Disclosure Systems*, 45 Fed. Reg. 63,630 (Sept. 25, 1980).

corporate values and identity—frequently including discussion of important social issues of the day. For example, the 1981 annual corporate report of Wal-Mart, Inc.—America's largest employer—was a 28-page document that consisted largely of financial statistics and explanations of accounting methodologies[14]; last year, Wal-Mart's annual report was three times longer and included information on the company's efforts to reduce greenhouse gas emissions and to support women-owned businesses.[15] Similarly, Intel Corp.'s 1981 annual report was 24 pages and consisted almost entirely of financial statements and explanations of semiconductors[16]; the company's 2019 annual report was 132 pages and documented the company's $300 million program to promote diversity and inclusion, its commitment to supply chains free of forced labor, and its efforts to reduce greenhouse gas emissions and conserve water.[17]

Upholding the Second Circuit's decision would likely cause many companies to pump the brakes on their use of annual reports to make public commitments on these important issues. It would necessarily lead companies (and their attorneys) to revisit beneficial corporate disclosures and instead "disclose only what is mandated by law" because there is "little up-

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[14] Wal-Mart Stores., Inc., Annual Report (1981), https://bit.ly/3coHTAL.

[15] Walmart, Inc. Annual Report (including Form 10-K), at 88 (Mar. 20, 2020), https://bit.ly/3irF8PT.

[16] Intel Corp. Annual Report (1981), https://intel.ly/39NjVMD.

[17] Intel Corp. Annual Report (including Form 10-K), at 12-14 (2019), https://bit.ly/3a2AzrO.

side" 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). Similarly, under the Second Circuit's rule, 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 expansion of 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 and Practice of Securities Disclosure*, 61 Brook. L. Rev. 763, 840 (1995).

Moreover, a regime that precludes defendants from rebutting the presumption of price impact from 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 here. 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 oxygen will be removed from companies' ability to promote positive internal corporate culture, and external social values. And given that many companies use these types of statements to reaffirm important and socially beneficial workplace values and cultures, the Second Circuit's decision would remove an important tool to help reinforce internal expectations for employees and other stakeholders. 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).

In other putative class actions, plaintiffs have pursued a range of claims based on allegedly false aspirational statements. For instance, plaintiffs brought securities-fraud claims in the wake of a data breach, where the defendant had allegedly stated that "it was a 'trusted steward' of personal data and that it employed 'strong data security and confidentiality standards on the data that [it] provide[s] and on the access to that data.'" *In re Equifax Inc. Sec. Litig.*, 357 F. Supp. 3d 1189, 1218 (N.D. Ga. 2019). Likewise, shareholders alleged securities fraud claims against a telecommunications provider arising from the company's "statements that its strategies were based on meeting customer needs and bundling in order to provide value to customers" and statements regarding the company's code of conduct. *In re CenturyLink Sales Practices & Sec. Litig.*, 403 F. Supp. 3d 712, 727-28 (D. Minn. 2019). And other shareholders recently pursued securities-fraud claims based on a for-profit healthcare company's statements that it "provided high-quality services, adequately staffed its facilities, and complied with applicable laws and regulations." *St. Clair Cty. Emps. Ret. Sys.* v. *Acadia Healthcare Co.*, No. 3:18-cv-00988, 2021 WL 195370, at *1 (M.D. Tenn. Jan. 20, 2021).

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. 703, 707, 719-23 (2018) (discussing cases).

To be clear, this Court can reverse the Second Circuit's judgment without needing to grapple with the ultimate merits of any of the lawsuits mentioned above, and the Society is not expressing an opinion on any of those cases, individually or collectively. Moreover, Petitioners do not seek a blanket exemption shielding all aspirational statements in all cases from securities-fraud liability. See Pets. Br. 27-29. Rather, the Court need only 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 must 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 Petitioners correctly explain, defense claims of non-materiality often fail at the pleadings stage because they are perceived as presenting mixed questions of law and fact. See Pets. Br. 37; 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 filter out 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.[18] As Petitioners have explained, that rule is plainly incorrect as a matter of law. See Pets. Br. 37-43. But in addition to its legal defects, 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. "[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

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[18] Other courts have correctly rejected that proposition. See *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016).

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 discrimination,[19] public health,[20] gun regulation,[21] campaign finance,[22] and LGBTQ rights[23]—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

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[19] 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.

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

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

[22] 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").

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

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 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 bet-

ter 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.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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