

No. 23-980

IN THE
Supreme Court of the United States

FACEBOOK, INC., *et al.*,

Petitioners,

v.

AMALGAMATED BANK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF *AMICI CURIAE*
TECHNOLOGY INDUSTRY POLICY
ADVOCATES AND INVESTORS
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CITED AUTHORITIES	ii
INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	6
ARGUMENT.....	9
A. Amici’s and other investors’ reactions demonstrate that the truth concerning the Cambridge Analytica scandal did not start to emerge until March 2018.....	10
1. Starting in 2018, shareholder proposals began to focus expressly on the Cambridge Analytica scandal	13
2. Starting in 2018, shareholders directly tied the Cambridge Analytica scandal to Facebook’s dual-class share structure.....	15
B. Amici and other investors are focused on accurate, material risk disclosures, which inform Amici’s and other investors’ investment and voting decisions	17
C. Amici and similarly situated investors are focused on issues of risk management and data security at Facebook and elsewhere	24
CONCLUSION	27

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Basic, Inc. v. Levinson</i> , 485 U.S. 224 (1988).....	17, 18, 23
<i>In Re Equifax Sec. Litig</i> , 357 F. Supp. 1189 (N.D. Ga. 2019)	22
<i>In re Facebook, Inc. IPO Sec. & Derivative Litig.</i> , 986 F. Supp. 2d 487 (S.D.N.Y. 2013).....	12
<i>Kas v. Fin. Gen. Bankshares, Inc.</i> , 617 F. Supp. 288 (D.D.C. 1985)	18
<i>Kas v. First Union Corp.</i> , 857 F. Supp. 481 (E.D. Va. 1994).....	23
<i>Kronfeld v. Trans World Airlines, Inc.</i> , 832 F.2d 726 (2d Cir. 1987)	18
<i>SEC v. Texas Gulf Sulphur Co.</i> , 401 F.2d 833 (2d Cir. 1968)	18
<i>TSC Indus. v. Northway, Inc.</i> , 426 U.S. 438 (1976).....	23
<i>United Paperworkers Int’l Union v. Int’l Paper Co.</i> , 985 F.2d 1190 (2d Cir. 1993)	12

Cited Authorities

Page

OTHER AUTHORITIES

Arjuna Solicitation (Form PX14A6G) (May 17, 2018), (2021), (2023) and (2024)	5, 13, 22
David Butow, <i>Trust in Facebook has dropped by 66 percent since the Cambridge Analytica scandal</i> , NBC (April 18, 2018), https://www.nbcnews.com/business/consumer/trust-facebook-has-dropped-51-percent-cambridge-analyti%20ca-scandal-n867011	14, 15
<i>Delay, Deny and Deflect: How Facebook’s Leaders Fought Through Crisis</i> (N.Y. TIMES Nov. 14, 2018)	16
Dual Class Share NorthStar Solicitation (Form PX14A6G) (May 7, 2019)	16
Ekō Solicitation (Form PX14A6G) (May 26, 2023)	20, 21
Facebook, Inc. Annual Meeting (Form 8-K) (May 27, 2021)	13
Facebook 2014 Proxy Statement Proposal Three —Give Each Share An Equal Vote	24, 26
Facebook 2015 Proxy Statement Proposal Four —Give Each Share An Equal Vote	24, 26

Cited Authorities

	<i>Page</i>
Facebook 2016 Proxy Statement Proposal Nine —Give Each Share An Equal Vote	24, 26
Facebook 2017 Proxy Statement	24, 26
Facebook 2018 Proxy Statement Proposal Three —Give Each Share an Equal Vote	24, 26
<i>Facebook has lost \$80 billion in market value since its data scandal</i> , CNN MONEY (Mar. 27, 2018).	16
Avi Gesser et al., <i>Lessons from Equifax on How to mitigate Post-Breach Legal Liability</i> , CYBERSECURITY L. REP. (Sept. 11, 2019), https://www.davispolk.com/sites/ default/files/lessonsfromequifax_cslr_ reprint.pdf [https://perma.cc/TJ8S-XV3Q]	22
Harrington Investments, Inc. Solicitation (Form PX14A6G) (April 12, 2023)	5, 13, 21
Illinois Solicitation (Form PX14A6G) (2021) and (2022), https://www.sec.gov/search-filings	13
<i>In Re Alphabet, Inc. Sec. Litig.</i> , File No. 3:18-cv- 06245-TLT, Order 5-6, ECF No. 228 (April 2, 2024).	23
<i>In Re Equifax Sec. Litig.</i> , No. 1:17-cv-03463-TWT, Amend. Compl. ¶¶138-150, Doc. 49 (April 23, 2018).	22

Cited Authorities

	<i>Page</i>
Internal Revenue Code § 501(c)(4).....	3
<i>In the Matter of Altaba Inc., f/d/b/a Yahoo! Inc., Respondent</i> , Release No. 3937, (Apr. 24, 2018) . . .	23
Mike Isaac, <i>Facebook Renames Itself Meta</i> , N.Y. Times, Oct. 28, 2021	2
Meta Platforms, Inc. Proxy Statement (Form DEF 14A) (April 19, 2024).....	22, 25
NorthStar Solicitation (Form PX14A6G) . . .	2, 13, 15, 26
Order Preliminarily Approving Settlement, Doc. 163 (Feb 25, 2020)	22
S'holder Ass'n. for Rsch. and Educ. Solicitation (Form PX14A6G) (May 25, 2022)	21
SumOfUs, <i>Risky Business: An investor briefing on Meta</i> (April 11, 2022), https://s3.amazonaws.com/ s3.sumofus.org/images/Risky_Business- An_investor_briefing_on_Meta.pdf	5
SumOfUs Solicitation (Form PX14A6GC) (May 26, 2017).....	4, 26
<i>The Facebook data breach wasn't a hack. It was a wake-up call</i> , Vox (Mar. 28, 2018)	16
Trillium Solicitations (Form PX14A6G)	13, 14

INTERESTS OF *AMICI CURIAE*¹

NorthStar. NorthStar Asset Management, Inc. (“NorthStar”), founded in 1990, currently manages approximately \$775 million in assets on behalf of retail and institutional investors. NorthStar’s mission is to provide a client-centered, integrative approach to portfolio management, connecting its clients’ social concerns to stock selection, asset allocation, and shareholder activism.

NorthStar’s investment-management process begins with in-depth conversations with its clients, along with analyses of social, ecological, and political issues and problems. Those conversations and analysis result in NorthStar’s construction of individualized portfolios that integrate investor-clients’ financial and social goals. As a registered investment advisor, NorthStar has a fiduciary duty to its clients under the Investment Advisers Act of 1940 to serve the best interest of its clients at all times, and to provide investment advice and management services in its clients’ best interests, based on client objectives.

The NorthStar Asset Management, Inc. Funded Pension Plan has been invested in Facebook’s² securities

1. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

2. Throughout this brief, “Facebook” or the “Company” refers to the company named Facebook, Inc. until October 28, 2021, on which date it changed its name to Meta Platforms, Inc. Public reporting at the time of Facebook’s name change stated that “renaming Facebook may help distance the company from the social networking controversies it is facing, including how it is used

since 2012, and as of the date of this brief, holds shares valued at approximately \$143,000. As long-term Facebook investors, NorthStar and its clients are interested in ensuring to the extent possible the Company's long-term financial health, as well as understanding information relevant to the Company's current and future financial sustainability and growth.

In every year since 2014, NorthStar has filed shareholder proposals, supported by a substantial portion of Facebook shareholders, requesting the Board to implement changes to the Company's capital structure that would make it so each share of Facebook common stock entitles its holder to one vote. For example, in May 2015, NorthStar filed a proposal encouraging shareholders to vote in favor of the Facebook Board moving from the Company's dual-class share structure that (to this day) affords founder, CEO, and chair Zuckerberg voting control, noting in an exempt solicitation the risks that Facebook's dual-class structure may "insulate management from addressing shareholder issues and concerns," leading to "a negative impact on long-term shareholder value."³ NorthStar filed substantially similar exempt solicitations in 2016, 2017.⁴

Each NorthStar proposal to eliminate Facebook's dual-class share structure has received between 16% and

to spread hate speech and misinformation," and occurred while the Company "grappled with some of the most intense scrutiny in its history." Mike Isaac, *Facebook Renames Itself Meta*, N.Y. Times, Oct. 28, 2021.

3. NorthStar Solicitation (Form PX14A6G) (May 4, 2015).

4. NorthStar Solicitations (June 6, 2016 and April 27, 2017).

28% support overall. Excluding Zuckerberg and others' Class B votes demonstrates the substantial support among "outside" public shareholders: since 2014, ten out of eleven proposals recommending one vote per share received over 80% support from outside shareholders, with support sometimes spiking above 96% of the public shareholders.⁵

NorthStar's proposals reflect NorthStar's and its clients' belief that reforms to the Company's governance structure are a necessary step toward more effective risk-management practices by the Company's insular Board and CEO, particularly with regard to issues of high social impact that they believe are being mismanaged by the Company, such as data privacy and content management.

Ekō. Ekō (formerly SumOfUs) is a global organization with over 20 million members, organized as a social welfare nonprofit under Section 501(c)(4) of the Internal Revenue Code. Ekō focuses its work on corporate accountability and ensuring that investors and consumers have appropriate information necessary to make informed decisions, including concerning investment transactions

5. Voting data for and against the proposals discussed herein was derived from information included in Forms 8-K filed by the Company reporting information under Item 5.07 ("Submission of Matters to a Vote of Security Holders"). The insider holdings of Class A and Class B shares, reported in the Securities & Ownership section of the Company's Forms DEF 14-A, were tallied to calculate total insider votes, consolidating Class A (one vote per share) and Class B (10 votes per share). All calculated insider votes were presumed to be cast against a shareholder proposal. This total insider vote was then subtracted from the data reported on the pertinent Form 8-K to calculate the percentage of independent votes cast for and against the shareholder proposal.

and shareholder voting. Ekō represents numerous Facebook shareholder members and has long played a role in communicating with Facebook investors concerning the broad range of issues that bear on the Company's financial condition, sustainability, and value.

Facebook has consistently been a focus of Ekō's work, given the Company's vast scale and its impact throughout the United States and beyond. A chief concern that Ekō has raised repeatedly has been the lack of transparency concerning the Company's operational risk management. In 2017, Ekō filed a proposal and solicited shareholder votes in favor of the Company installing an independent Board chair, stressing that along with the Company's dual-class share structure, Mark Zuckerberg's dual role as chair and CEO impedes transparency, runs counter to shareholder interests, and risks impeding the Board's governance and oversight functions.⁶ Leading proxy advisor to institutional investors Institutional Shareholder Services ("ISS") supported that reform.

In addition, in May 2018, on the heels of the Cambridge Analytica scandal breaking, Ekō solicited shareholder votes for a proposal to call on the Board "to appoint a Risk Oversight Committee, the presence of which may have anticipated and mitigated today's [Cambridge Analytica] crisis." ISS supported that proposal as well, and Ekō's solicitation noted that "ISS assigns a risk score of 10, its highest level of risk, to Facebook because of the board structure, executive compensation, and shareholder rights."⁷

6. SumOfUs Solicitation (Form PX14A6GC) (May 26, 2017).

7. SumOfUs Solicitation (Form PX14A6G) (May 23, 2018).

In advance of Facebook’s 2022 annual shareholder meeting, Ekō’s members filed two proposals for shareholder consideration, including one urging the Board to commission an independent assessment of the Company’s Audit and Risk Oversight Committee’s capacities and performance in overseeing risks to company value, which specifically referenced the Cambridge Analytica scandal as a key risk-management failure.⁸ Ekō discussed those resolutions in its 2022 report “Risky Business: An investor briefing on Meta,” which detailed the threats to revenue and shareholder value that the Cambridge Analytica scandal represented (and which remain present due to Facebook’s failure to take adequate corrective action).⁹

Tech Justice. The Tech Justice Law Project (“Tech Justice”) is a legal initiative of Campaign for Accountability, organized as a public-interest nonprofit under Section 501(c)(3) of the Internal Revenue Code. Tech Justice works with a collective of legal experts, policy advocates, digital rights organizations, and technologists to ensure that legal and policy frameworks are fit for the digital age. By bringing together a range of critical players in the technology law and policy space, Tech Justice advocates for better, safer, and accountable online spaces. A key issue of concern for Tech Justice is the data-security practices of very large tech platforms like Facebook.

8. Harrington Investments, Inc. Solicitation (Form PX14A6G) (April 12, 2023); Arjuna Capital Solicitation (Form PX14A6G) (April 28, 2023).

9. SumOfUs *Risky Business: An investor briefing on Meta*, (April 11, 2022), https://s3.amazonaws.com/s3.sumofus.org/images/Risky_Business-_An_investor_briefing_on_Meta.pdf

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici include NorthStar, a large asset manager that along with its clients has been invested in Facebook securities since 2012; Eko, a nonprofit focused on corporate accountability that has a long-demonstrated focus on Facebook’s corporate governance and risk management and whose members include Facebook public shareholders; and Tech Justice, a nonprofit focused on technology law and policy.

The question on which the Court granted certiorari rests on a fundamental, incorrect assumption: that Facebook’s data-security failures that were manifest in the 2015 Cambridge Analytica data breach—which was not disclosed publicly until 2018—presented “no known risk of ongoing or future business harm.” Pet. i. As discussed below, the Cambridge Analytica breach was highly material to Facebook’s investors and the technology community, precisely because of the inherent risks of present and future harm that Facebook’s omissions concealed and misrepresented.

Amici, as investors and technology-industry policy advocates, have been focused on the governance and data-security risks that the Cambridge Analytica scandal implicated. For example, Facebook-shareholder members of Ekō stress that they “rely on the companies . . . to disclose any big risks, particularly if the risk involves violations of the privacy of myself and others,” and that Facebook “[h]aving a fast-and-loose, fix-it-later approach to [user] privacy and safety didn’t benefit. . . . shareholder[s]. . . . The issue presented in this situation

is a sign that Meta’s governance and culture is a risk to my investment.”

Respondents detail in their briefing the material impact of the Cambridge Analytica data breach on Facebook’s operations, revenues, and growth. *See, e.g.*, Resp. Br. 16-17, 23, 28. Amici write separately to focus on the importance of the scandal, and underlying data-security failures, to shareholder voting decisions, corporate-governance issues, and the technology community.

First, and contrary to Petitioners’ unfounded claim, the truth concerning the Cambridge Analytica scandal did not begin to emerge until March 2018. Petitioners suggest that December 2015 reporting in *The Guardian* concerning Cambridge Analytica’s use of Facebook user data to help Ted Cruz’s campaign target voters somehow fully disclosed Cambridge Analytica’s misappropriation and misuse of over 87 million users’ personal data. But the 2015 *Guardian* reporting said nothing of the sort, and instead was accompanied by contemporaneous, strident, and false denials by Cambridge Analytica and the Cruz campaign. At the same time, Facebook represented that it was investigating the issue and would “take swift action” against wrongdoers (which never occurred), and falsely reassured the public in 2017 that the Company’s investigation did not uncover any wrongdoing.

Although Amici and other investors raised corporate-governance and risk-management concerns in investor proposals and proxy solicitations before 2018, it was only in 2018 that such proposals and solicitations expressly referenced the Cambridge Analytica breach and underlying data-security failures. If all material

information about the breach had actually been disclosed in 2015, Amici and other investors would have included their concerns about the breach in earlier proposals and urged Facebook to take corrective action at the time. They did not because the truth about the breach did not begin to emerge until March 2018.

Second, Amici and other investors are focused on Facebook's risk disclosures, which inform their investment and voting decisions. For Facebook, whose operations, revenues, and growth rely on user trust, user data, and the advertising revenue they enable, information about data security is paramount.

Contrary to Petitioners' suggestion, Amici and other investors do not want "overdisclosure" of risks or past events. Rather, Amici want accurate disclosure of material risks, consistent with long-established policy, practice, and regulation. The omitted information here implicated Facebook's present and future ability to maintain and grow value for the Company and its investors, as reflected in the massive loss of shareholder value after the truth emerged in March and July 2018, the \$5.1 billion in FTC and SEC penalties that followed, and attendant declines in user and advertiser trust and confidence. Amici and other investors do not want irrelevant, immaterial information, but rather accurate information concerning extant risks, which is part of the mix of information that they consider in making investment and voting decisions.

Third, Amici, other investors, and other industry actors are focused on the type of corporate governance issues that contribute to the risk-management and data-security failures that the Cambridge Analytica data breach laid bare. Amici and other shareholders have

repeatedly made shareholder proposals and solicited shareholder votes in favor of a “one share per vote” structure at the Company, as opposed to Facebook’s dual-class share structure that vests voting control in CEO, chair, and founder Mark Zuckerberg.

ARGUMENT

Amici understand that the question on which the Court granted certiorari is whether risk disclosures are “false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm[.]” Pet. i. Amici respectfully suggest that this case—concerning Facebook’s risk-management and data-security failures that led to the unauthorized taking and misuse of over 87 million users’ personal data by third-party vendor Cambridge Analytica—does not present a situation where there is “no known risk of ongoing or future business harm.” Rather, as organizations focused on investment management, shareholder engagement, and the technology sector, Amici are well positioned to understand the substantial risks of ongoing and future harm to which the Company’s risk-management and data-security failures expose Facebook and its shareholders.

As the Ninth Circuit Court of Appeals correctly concluded, Cambridge Analytica’s misappropriation and misuse of tens of millions of Facebook users’ private data was harmful to “Facebook’s business, reputation, and competitive position,” and as Facebook itself recognized, “Facebook’s business will suffer if the public does not perceive Facebook’s products to be ‘useful, reliable, and trustworthy.’” Pet. App. 21a.

Amici and other Facebook investors understand those harms all too well. As the Ninth Circuit also recognized when crediting Respondents' loss-causation allegations, "the March 2018 revelation" caused the Company's stock to decline in price because it showed that "users did not have control over their personal information on the platform," and Facebook's July 2018 stock price drop was "caused by dramatically lowered user engagement, substantially decreased advertising revenue and earnings, and reduced growth expectations going forward." Pet. App. 34a-36a (quotation marks omitted). The business harm that the Cambridge Analytica breach caused is further supported by the \$5.1 billion in penalties that Facebook was forced to pay to the FTC and the SEC in the wake of the scandal breaking.

Tellingly, none of these business harms occurred in 2015—which belies Facebook's claim that the truth came out back then. There is no credible basis to suggest that this case concerns a situation involving "no known risk of ongoing or future business harm."

A. Amici's and other investors' reactions demonstrate that the truth concerning the Cambridge Analytica scandal did not start to emerge until March 2018.

Petitioners claim that the public knew the truth about Cambridge Analytica's misappropriation and improper use of Facebook user data in December 2015, when an article in *The Guardian* reported on Cambridge Analytica's use of Facebook user data to help Ted Cruz's campaign target certain voters. Pet. Br. 8. But Amici—investors and industry actors who for years have closely followed Facebook's securities filings and other public disclosures,

as well as pertinent news about the Company—did not learn the truth until Facebook’s March 2018 admission that it had known for years about Cambridge Analytica’s misappropriation and misuse of a large number of Facebook users’ data. J.A. 631-33.

Rather, investors would have reasonably believed the Cruz campaign’s explanation that “all the information [wa]s acquired legally and ethically with permission of the users,” J.A. 618, and Cambridge Analytica’s similar reassuring statements that it had “full permission to use the data and user contribution for any purpose” and the user data at issue was limited in scope and volume. *Id.* 621. Investors also would have reasonably believed Facebook when, in response to the December 2015 *Guardian* article, the Company represented that it was “carefully investigating” the issue and would “take swift action” against any third-party wrongdoers. J.A. 619. At the time, Facebook took no action against Cambridge Analytica, which further underscored that no data had been misappropriated. In 2017, Facebook even doubled down on that false impression by assuring the public that its “investigation to date has not uncovered anything that suggests wrongdoing,” including with respect to Cambridge Analytica’s work on subsequent issues and campaigns. J.A. 7-8.

Given Facebook’s (and the Cruz campaign’s and Cambridge Analytica’s) outright denials and misdirection after the December 2015 *Guardian* reporting, investors and industry actors (including Amici) were taken by surprise when, on March 16, 2018, Facebook disclosed that it knew in 2015 that Cambridge Analytica had misappropriated and misused a large amount of Facebook

user data. J.A. 631-35, 640. As previously noted, the shocked public reaction demonstrates beyond question that Facebook’s March 16, 2018 disclosure was the start of the public becoming fully aware of the nature and scope of Cambridge Analytica’s improprieties and Facebook’s awareness of them.

Indeed—unlike in 2015 when nothing happened—Facebook’s revelations in March 2018 sparked a media frenzy, calls for government investigations, and caused Facebook’s stock price to decline precipitously, with the Company losing \$100 billion in shareholder value within a week.

Simply put, the investing public does not react that way to news that it already knows.

Facebook’s earlier public representations, and earlier public reporting, had nothing like the “degree of intensity and credibility sufficient to counter-balance effectively” the false impression that the Company’s Class Period omissions caused. *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 521 (S.D.N.Y. 2013); see *United Paperworkers Int’l Union v. Int’l Paper Co.*, 985 F.2d 1190, 1199 (2d Cir. 1993) (“the mere presence in the media of sporadic news reports . . . should not be considered to be part of the total mix of information that would clarify or place in proper context the company’s representations”). Rather, the Company, the Cruz campaign, and Cambridge Analytica falsely reassured Amici, other similarly situated investors and tech-industry organizations, and the public.

1. Starting in 2018, shareholder proposals began to focus expressly on the Cambridge Analytica scandal.

The Cambridge Analytica scandal has featured prominently in platform-risk-management focused shareholder proposals each year since 2018. For example, a 2022 solicitation by Ekō and other institutional investors recognized that “[t]he devastating impact of” the lack of a risk-management prior to 2018 only “became apparent once the Cambridge Analytica scandal broke” in 2018.¹⁰ Sixty-eight percent of public shareholders voted for the referenced resolution.¹¹ Similarly, a 2022 proposal urging a human rights impact statement that discussed data privacy among other issues received 77.9% outside support, *id.*, while a 2021 proposal urging action to combat platform misuse, which directly referenced data privacy and Cambridge Analytica, received 63.3% outside support.¹²

Since the disclosures of 2018, the Cambridge Analytica breach has been the leading focus for investors as to why governance reforms are needed at Facebook. It is no accident that after March 2018, Amici and other

10. Harrington Invs. Solicitation (Form PX14A6G)(April 12, 2022); *see also* Arjuna Solicitation (Form PX14A6G) (May 17, 2018), (2021), (2023) and (2024); Trillium Solicitations (Form PX14A6G) (2019) and (2020); NorthStar Solicitation (Form PX14A6G)(2019); Illinois Solicitation (Form PX14A6G)(2021) and (2022), *available at* <https://www.sec.gov/search-filings>. (“Solicitations”).

11. Facebook, Inc. Annual Meeting (Form 8-K) (May 27, 2022).

12. Facebook, Inc. Annual Meeting (Form 8-K) (May 27, 2021).

investors began to expressly reference in their shareholder proposals and solicitations the Cambridge Analytica scandal and the specific data-security failures that had just been revealed. Following Facebook's March 2018 disclosure, shareholder proposals concerning whether the Company's corporate governance structure insulated management from oversight and locked shareholders out of adequate influence over corporate decisions (*see infra* 15-17, 25-26) explicitly shifted to the risks laid bare by Cambridge Analytica's recently disclosed breach of Facebook user's data security.

Post-March 2018 shareholder proposals reflected investors' immediate, and subsequently sustained, concern. On April 17, 2018, Trillium Asset Management urged shareholders to vote to establish a Risk Oversight Board Committee, made necessary by governance failures including "The Cambridge Analytica scandal and the misuse of data to influence elections around the world."¹³

Consistent with Trillium's concerns, contemporaneous reporting found that "Facebook users' confidence in the company . . . plunged by 66 percent as a result of revelations that data analysis firm Cambridge Analytica inappropriately acquired data on tens of millions of Facebook users."¹⁴ The independent research firm that

13. Trillium Solicitation (Form PX14A6G) (April 17, 2018) (discussing the Cambridge Analytica scandal's "direct reputational and financial risk for Facebook," including decline in market value, advertising revenue, and public trust).

14. David Butow, *Trust in Facebook has dropped by 66 percent since the Cambridge Analytica scandal* NBC (April 18, 2018), <https://www.nbcnews.com/business/consumer/trust-facebook-has-dropped-51-percent-cambridge-analyti%20ca-scandal-n867011>

collected that data was “shocked,” noting that “people care deeply about their privacy and when there is a mega data breach, as in the case of Facebook, people will express their concern. And some people will actually vote with their feet and leave.”¹⁵

2. Starting in 2018, shareholders directly tied the Cambridge Analytica scandal to Facebook’s dual-class share structure.

After March 2018, annual proposals to end the Company’s dual-class share structure made the direct connection between the lack of Board accountability to shareholders, the data-privacy issues that led to the Cambridge Analytica breach, and threats to the Company’s bottom line.¹⁶ Tellingly, each such proposal received over 80% support from outside shareholders.

On May 17, 2018, NorthStar urged shareholders to vote in favor of a one-vote-per-share structure (rather than the dual-class structure that, as discussed above, vests voting control in CEO and chair Zuckerberg), and for the first time directly referenced in its proxy solicitation the newly disclosed scope of the Cambridge Analytica data breach.¹⁷

In 2019, NorthStar expressly pointed to the Cambridge Analytica breach and its connection to governance failures at the Company, stating in an exempt solicitation that:

15. *Id.*

16. See Solicitations *supra*, note 10.

17. NorthStar Solicitation (Form PX14A6G) (May 17, 2018).

The Proponent believes that these recent incidents clearly illustrate the need for shareholders to have the opportunity to have influence and oversight regarding Company policies that affect shareholder value. . . . In the opinion of the Proponent, the current share structure affords the shareholders who put capital at risk since the Company went public **absolutely no consequential manner of communicating dissent** with any decision Mr. Zuckerberg makes. In light of recent scandals in particular, the Proponent believes that equal voting is one crucial mechanism needed to safeguard future loss of shareholder value.¹⁸

As NorthStar’s 2019 solicitation stressed, “Recently, Facebook has been criticized repeatedly for ethical concerns, data breaches, and failures to protect users’ privacy. The Proponent believes that these recent incidents clearly illustrate the need for shareholders to have the opportunity to have influence and oversight regarding Company policies that affect shareholder value.”¹⁹ NorthStar cited numerous headlines from March 2018 and the following months connecting the Cambridge Analytica data breach to governance failures at Facebook and the Company’s concomitant loss of market value.²⁰

18. Dual Class Share NorthStar Solicitation (Form PX14A6G) (May 7, 2019) (emphasis in original).

19. *Id.*

20. *Id.* (E.g., *Delay, Deny and Deflect: How Facebook’s Leaders Fought Through Crisis* (N.Y. TIMES Nov. 14, 2018); *Facebook has lost \$80 billion in market value since its data scandal*. CNN MONEY (Mar. 27, 2018); *The Facebook data breach wasn’t a hack. It was a wake-up call*. VOX (Mar. 28, 2018).)

If all material information about the data breach had been disclosed in 2015, it makes no sense that Amici and other investors would not have included their express data-privacy and Cambridge Analytica-related concerns in their earlier proposals. Rather, had the 2015 *Guardian* reporting actually disclosed the risk-management and data-security failures that gave rise to the Cambridge Analytica breach, Amici and other concerned investors would have urged Facebook to take necessary corrective actions at the time.

B. Amici and other investors are focused on accurate, material risk disclosures, which inform Amici’s and other investors’ investment and voting decisions.

In its briefing, Facebook contends that, unless the Court rejects the longstanding rule that companies may not represent already-transpired material risks as mere hypothetical possibilities, it (and other companies required to disclose material risks to investors) will be required to make such voluminous disclosures that investors would be lost in a flood of potentially irrelevant information. Pet. Br. 33-34. But as this Court recognizes, “[d]isclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 234 (1988).

To start, Facebook does not provide any proof that this well-established rule—which has been advocated by the SEC and has long been the law in many circuits—has resulted in such purported “overdisclosure” of past events.

More fundamentally, Facebook misses the point. Amici would not want “overdisclosure” of “less useful” information that would be “burdensome” or constitute

“information overload.” Pet. Br. 33-34. Rather, Amici and other investors want and should be entitled to disclosure of information concerning risks that—like the omitted information concerning the Company’s data-privacy failures here—implicate the Company’s present and future ability to maintain and grow value for Facebook and its investors. *See, e.g., Basic*, 485 U.S. at 231 (“[a] fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote”), 234 (the purpose of “the materiality requirement is not to attribute to investors a child-like simplicity . . . but to filter out essentially useless information that a reasonable investor would not consider significant”).

Put differently, the omitted information here would have “provid[ed] [investors] with otherwise unobtainable information without which an informed decision [could not] be made.” *Kas v. Fin. Gen. Bankshares, Inc.*, 617 F. Supp. 288, 291 (D.D.C. 1985). The omitted information bore directly on Facebook’s earnings, growth, and business model—supported by, among other things, the FTC’s \$5 billion fine, the massive drop in share price following the March 2018 and July 2018 disclosures, and the loss of user and advertiser confidence in Facebook (and related revenues). Accordingly, the omitted information was material, as it “affect[ed] the probable future of the company and . . . the desire of investors to buy, sell, or hold the company’s securities.” *Kronfeld v. Trans World Airlines, Inc.*, 832 F.2d 726, 732 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)). It is a question of quality, not quantity: Amici and similarly situated investors and organizations are focused on

accurate and complete disclosure, not necessarily more disclosure for its own sake.

As Respondents discuss in detail, information concerning the Cambridge Analytica data breach was highly material to Facebook's operations, revenues, and growth. *See, e.g.*, Resp. Br. 16-17, 23, 28. Amici write separately to stress that the omitted information here was material because it would have been part of the "total mix" of information that Amici and other reasonable investors considered when making voting decisions and otherwise engaging on governance-related issues.

The investor, industry, and broader public focus on data security is particularly salient for companies where, like Facebook, operations and revenues center on collecting users' data through their engagement with the company's products and services. And the business risks of data-security failures are inherent in Facebook's and similar companies' model of monetizing user data, such as by making the data available to third parties who in turn purchase or are otherwise responsible for targeted advertising sales to users based on the data.

In light of Facebook's global scope; dependence on interrelated factors of user engagement, user data, and advertising revenue; and the Company's exposure to continued business loss and public scrutiny; there is no apparent basis to assume that the kinds of platform-management failures that enabled the Cambridge Analytica breach do not (and as of March 2018, did not) pose risks of present and future harm.

Amici's work has been focused on precisely these risks, including efforts by Ekō and its members to address them. Ekō members who are Facebook shareholders have attempted to engage the Company both in discussions and in shareholder proposals on these critical issues.²¹ Ekō member and Facebook shareholder Mari Mennel-Bell expressed concerns shared by many Ekō members:

I rely on the companies I invest in to disclose any big risks, particularly if the risk involves violations of the privacy of myself and others. The situation with Facebook and Cambridge Analytica was never disclosed . . . I only learned about it after the fact. Needless to say as a shareholder, I am also concerned about prolonged litigation and the effect on shareholder value.²²

Ekō member and Facebook shareholder Mary Hawkins is similarly focused on the potential for the Company's data-security failures to further erode user trust, engagement, and shareholder value:

I bought my shares in Facebook before the Cambridge Analytica scandal. . . . Having a fast-

21. Solicitations, *supra* note 3.

22. The quotations from Ekō's members contained herein were communicated in writing to Ekō, and are on file with the author. In addition, Ms. Mennel-Bell was the proponent of a 2023 shareholder proposal calling for Facebook to produce a report regarding allegations of political entanglement and content-management biases in India. Ekō Solicitation (Form PX14A6G) (May 26, 2023).

and-loose, fix-it-later approach to my privacy and safety didn't benefit me as a shareholder. I have not bought more shares since that scandal and have considered liquidating my position a few times. If they're not coming clean about issues that were widely reported, what else are they failing to either notice or fix? The issue presented in this situation is a sign that Meta's governance and culture is a risk to my investment. As we move into an age where sites like Facebook, Instagram and Threads start using the information that their users have given them for their own AI models, I only see more privacy and market risks. People don't want to feel like the sites they use to talk to their friends and family don't care about them. We've seen a mass exodus from Twitter/X over the last few years as people try to replace that site with other social networks because they think the ownership is problematic.²³

Ekō is not alone: Ekō's resolutions focused on international content concerns have been introduced in partnership with Denmark's largest academic pension fund, Akademiker Pension, and Norway's largest asset manager, Storebrand.²⁴ Ekō has worked with retail and

23. *Id.* In addition, Ms. Hawkins was a proponent of a 2023 shareholder proposal calling for Meta to evaluate the Board's audit and risk committee's performance, in light of scandals and failures including the Cambridge Analytica scandal and the risks those failures present to shareholder value. Harington Inv., Inc. Solicitation (Form PX14A6G) (Apr. 18, 2023).

24. S'holder Ass'n. for Rsch. and Educ. Solicitation (Form PX14A6G) (May 25, 2022).

institutional investors, including Arjuna Capital and the AFL-CIO, to obtain information about and guard against continued and future risk-management and data-security failures, and downstream harms to the Company, its shareholders, and the broader public interest, among others.²⁵

The public outcry, massive share-price decline, \$5 billion FTC penalty that included meaningful governance and data-privacy reforms, and the loss of user and advertiser confidence that the Cambridge Analytica scandal precipitated all support and are consistent with investors' focus on data-security risks. Similar public and investor reaction to data-security scandals and underlying risk-management failures underscores those issues' importance. For example, the day after news broke about the 2017 Equifax data breach, the company's stock dropped by nearly 15%; financial consequences included a subsequent loss of approximately \$3 billion in market value, a \$425 million settlement with regulators on behalf of affected consumers, \$100 million in additional regulatory fines, a \$149 million securities-fraud class action settlement, and a \$32.5 million derivative-action settlement.²⁶

25. Arujna Capital Solicitation (Form PX14A6G) (April 27, 2022); Meta Platforms, Inc. Proxy Statement (Form DEF 14A) (April 19, 2024).

26. *In Re Equifax Sec. Litig.*, 357 F. Supp. 1189, 1214 (N.D. Ga. 2019); *In Re Equifax Sec. Litig.*, No. 1:17-cv-03463-TWT, Am. Compl. ¶¶ 138-150, Doc. 49 (April 23, 2018); Order Preliminarily Approving Settlement, Doc. 163 (Feb 25, 2020); Avi Gesser et. al, *Lessons from Equifax on How to mitigate Post-Breach Legal Liability*, CYBERSECURITY L. REP. (Sept. 11, 2019), https://www.davispolk.com/sites/default/files/lessonsfromequifax_cslr_reprint.pdf [<https://perma.cc/TJ8S-XV3Q>].

Other recent data-security scandals have led to similarly massive financial and other consequences: when news broke in 2018 that Yahoo had suffered multiple large data breaches, the company faced a \$35 million settlement with the SEC and an \$80 million securities-fraud class action settlement, and Yahoo was subsequently acquired by Verizon for \$350 million less than the purchase price Verizon had initially offered.²⁷ And the data breach that Alphabet identified and announced in the wake of the Cambridge Analytica scandal breaking in March 2018—along with another Alphabet data breach affecting tens of millions of users’ data—led to a \$350 million securities-fraud class action settlement, a significant stock-price decline, and Alphabet’s decision to discontinue its Google+ platform.²⁸

The numerous on-topic shareholder proposals (and the ample support for them) spanning years both before and after news broke about the Cambridge Analytica scandal underscore the “substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic*, 485 U.S. at 231 (same). That is the case whether any of those proposals received a majority vote (which would not occur given the Company’s dual-class share structure) or even whether “disclosure of the false or omitted fact would have caused [a shareholder] to change his vote.” *Kas v. First Union Corp.*, 857 F. Supp. 481, 490 (E.D. Va. 1994).

27. *In the Matter of Altaba Inc., f/d/b/a Yahoo! Inc., Respondent*, Release No. 3937, (Apr. 24, 2018).

28. *In Re Alphabet, Inc. Sec. Litig.*, File No. 3:18-cv-06245-TLT, Order 5-6, ECF No. 228 (April 2, 2024).

C. Amici and similarly situated investors are focused on issues of risk management and data security at Facebook and elsewhere.

Beyond the specific Facebook/Cambridge Analytica data-security breach at issue in this case, information concerning risk management and data security is highly relevant to Amici and to similarly situated investors and organizations.

Facebook’s shareholders, including Amici, have expressed sustained, and increasing, concern that “corporate governance practices of the Facebook board do not appear to be well aligned with sustainable shareholder interests”²⁹ and create substantial, undue risk exposure for the Company and its investors. Consistent with those concerns, Amici and other investors have regularly made governance-related shareholder proposals and proxy solicitations to Facebook shareholders throughout Facebook’s time as a publicly traded company. Shareholders have repeatedly demonstrated their focus on expanding disclosures about, and reforming deficient practices and policies around, risk management and corporate governance.

Specific areas of shareholder focus have included Facebook’s dual-class share structure, which accords

29. *See, e.g.*, Facebook 2014 Proxy Statement Proposal Three—Give Each Share An Equal Vote; Facebook 2015 Proxy Statement Proposal Four—Give Each Share An Equal Vote; Facebook 2016 Proxy Statement Proposal Nine—Give Each Share An Equal Vote; Facebook 2017 Proxy Statement, Facebook 2018 Proxy Statement Proposal Three—Give Each Share an Equal Vote.

disproportionate voting rights to the Company’s founder, CEO, and chairman Zuckerberg. Under this structure, “regular,” public shareholders hold “Class A” shares, each of which affords its holder one vote. By contrast, Zuckerberg—and in the past, other corporate insiders—holds “Class B” shares, each of which affords its holder 10 votes. As a result, Zuckerberg holds, and has always held, a majority of the Company’s voting power (53.3% in 2018, 61% in 2024) despite holding a less than 15% economic stake in the Company.³⁰ Simply put, maintaining one person’s hold over the company without a board that’s accountable to shareholders places shareholder value at risk.

Based on express concerns that Facebook’s dual-class share structure has exposed the Company and its public shareholders to substantial risk and loss of value, there has been broad support from public shareholders to reform the company’s voting structure.

In every year since 2014, a substantial portion of Facebook shareholders has voted in favor of NorthStar’s shareholder proposals in favor of a one-vote-per-share capitalization structure. For example, in May 2015, NorthStar’s solicitation stressed the risks that Facebook’s dual-class structure may “insulate management from addressing shareholder issues and concerns,” leading to “a

30. According to Facebook’s 2018 and 2024 proxy statements, Zuckerberg controlled 53.3% of voting power in 2018 and 61% in 2018. While other executives have held Class B shares in the past, Zuckerberg currently holds 99.7% of all Class B shares. Meta Platforms, Inc. (Form DEF14A) (May 5, 2018 and April 19, 2024).

negative impact on long-term shareholder value.”³¹ Since 2014, ten out of eleven proposals recommending one vote per share received over 80% support from Facebook’s public shareholders, with support sometimes spiking above 90%.³² And Ekō filed a similar exempt solicitation in 2017 urging shareholders to vote in favor of separating the CEO and board chair roles, in order to strengthen the Board’s governance and oversight functions.³³

Given the sustained investor focus on Facebook’s risk-management and data-security practices, and attendant disclosures, there should be no genuine dispute that Facebook’s failures to disclose Cambridge Analytica’s misappropriation and improper use of tens of millions of Facebook users’ data was highly material to shareholders’ investment and voting decisions.

31. NorthStar Solicitation (Form PX14A6G) (May 4, 2015).

32. *See, e.g.*, Facebook 2014 Proxy Statement Proposal Three—Give Each Share An Equal Vote; Facebook 2015 Proxy Statement Proposal Four—Give Each Share An Equal Vote; Facebook 2016 Proxy Statement Proposal Nine—Give Each Share An Equal Vote; Facebook 2017 Proxy Statement, Facebook 2018 Proxy Statement Proposal Three—Give Each Share an Equal Vote.

33. SumOfUs Solicitation (Form PX14A6G) (May, 26, 2017).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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