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.,

Respondents.

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

BRIEF FOR RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
99 M St. SE, Suite 700
Washington, DC 20003

SUSAN E. HURD
Counsel of Record
CARA M. PETERMAN
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000
susan.hurd@alston.com

Counsel for Amicus Curiae

February 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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OTHER AUTHORITIES Page(s)

Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* (2020), https://tinyurl.com/y7c7kmbh 15

John Streur, *Corporations and Investors Must Do More to Combat Racism*, Calvert Impact Blog (June 2, 2020), https://tinyurl.com/y5g9ablx 17

Kevin LaCroix, *Rare Securities Class Action Lawsuit Trial Results in Partial Verdict for Plaintiffs*, D&O Diary (Feb. 5, 2019), https://tinyurl.com/y57mfqvu 15

Leah Rozin, *ESG Risks Trickle into Financial Filings*, NACD BoardTalk (Oct. 21, 2019), https://tinyurl.com/y56u29f5 18

Letter from Cyrus Taraporevala, *President & CEO of State Street Global Advisors* (Jan. 28, 2020), https://tinyurl.com/y6bffeqh 17

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NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (Feb. 12, 2020), https://tinyurl.com/y2c7s75j 15

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White & Case, "ESG Disclosure Trends in SEC Filings" (Aug. 13, 2020), https://tinyurl.com/y2m474kd 18

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative national and regional retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including this Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The RLC and its publicly-traded members have a substantial interest in the outcome of this case. The court of appeals' decision allows plaintiffs in securities class actions to obtain class certification based on nothing more than generic aspirational statements that did not impact the share price when made. This "fast-track" to class certification will unduly increase pressure on defendants to settle, regardless of the

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. All parties have filed with the Clerk's office blanket consents to the filing of *amicus* briefs.

merits. The risk of significant liability is further heightened in the current era in which publicly-traded companies, including the RLC's members, are increasingly encouraged to speak to various Environmental, Social and Governance (ESG) goals and initiatives. Indeed, studies show that a substantial majority of the largest publicly-traded companies in the United States have significantly increased their ESG disclosures in the past two years. Under the court of appeals' ruling, these aspirational statements could improperly subject well-intentioned public companies, such as RLC members, to unwarranted litigation with potentially harmful results.

SUMMARY OF ARGUMENT

This appeal asks the Court to determine what evidence a defendant may use to rebut the presumption of class-wide reliance on a defendant's alleged misrepresentation that may be available to an investor class under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

Seven years ago, this Court reiterated that defendants must be given the opportunity to rebut the *Basic* presumption at class certification, including by offering direct or indirect evidence to show "that the alleged misrepresentation did not, for whatever reason, actually affect the [stock's] market price." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 269 (2014) ("*Halliburton II*"). Petitioners here met that burden by demonstrating through expert testimony and event studies that the market did not react to Goldman Sachs' generic and aspirational statements concerning the company's Business Principles and conflicts warnings that served as the basis of Respondents' fraud claims, and similarly did not react when the existence of Goldman's purported

conflicts of interest was discussed publicly on 36 separate dates throughout the class period. Pet. App. 10a.

In the face of this overwhelming evidence demonstrating no connection between the company's share price and the alleged misstatements, the court of appeals erred in affirming class certification. Moreover, by declining to consider Petitioners' evidence that the company's generic and aspirational statements could not, by their very nature, have impacted the share price, the court of appeals contravened this Court's holdings in *Basic* and *Halliburton II* that "*[a]ny* showing that severs the link between the alleged misrepresentation and [] the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. 248 (emphasis added); *Halliburton II*, 573 U.S. at 281.

Under the decision below, public-company defendants will face an increased risk of being sued over generic statements, which do not themselves impact the trading price of the stock, and will also face a virtually assured certification of the resulting shareholder class. Unfortunately, most companies will likely choose to settle under such circumstances rather than engage in costly, prolonged litigation in the hopes that "the wrongs" in the case will be righted at summary judgment or trial. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that [it] may find it economically prudent to settle and to abandon a meritorious defense.").

The court of appeals' decision is particularly troubling in light of recent investor demands for additional aspirational disclosures like those at issue here.

As the studies discussed herein demonstrate, many public companies—including RLC members—have responded to recent investor requests for broader disclosures related to their social responsibility efforts. But by doing so, they risk exposure to additional liability under the court of appeals' holding that the nature of an alleged misstatement cannot be considered at class certification. The holding, thus, has significant and deleterious implications beyond the financial industry.

The Court should therefore overturn the court of appeals' erroneous holding that the generic and aspirational nature of alleged misstatements may not be considered at class certification in order to uphold this Court's precedent in *Basic* and *Halliburton II* and to curtail additional vexatious litigation against the nation's public companies based solely on aspirational statements.

ARGUMENT

I. THE COURT OF APPEALS' DECISION VIOLATES THIS COURT'S MANDATE THAT DEFENDANTS BE AFFORDED A MEANINGFUL OPPORTUNITY TO REBUT THE *BASIC* PRESUMPTION AT CLASS CERTIFICATION.

A. Defendants Must be Permitted to Offer at Class Certification "Any" Evidence that "Severs the Link" Between an Alleged Misrepresentation and Share Price.

Reliance on an alleged misstatement is a fundamental element of every private securities action brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated

thereunder, 17 C.F.R. § 240.10b-5. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). Proof of reliance is an essential safeguard against abusive litigation and helps enforce "'the careful limits on 10b-5 recovery mandated by'" this Court's precedent. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994)).

Basic held that a rebuttable presumption of class-wide reliance may exist based on the theory that, if a company's stock trades in an efficient market, the stock price will reflect all material publicly-available information, including any material misrepresentations. 485 U.S. at 244. Essential to the *Basic* framework, however, was the recognition that the alleged misstatements would actually cause some quantifiable level of artificial inflation in the trading price of the stock, or what is now commonly referred to as "price impact." *Id.* at 245. *Basic* also recognized that defendants must have the opportunity to "rebut proof of the elements giving rise to the presumption, or show that the misrepresentation in fact did not lead to a distortion of price." *Id.* at 248. "*Any* showing that severs the link between the alleged misrepresentation and [] the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance." *Id.* (emphasis added).

The Court's later decisions reiterated the precept that defendants must have a meaningful opportunity to rebut the *Basic* presumption at class certification by demonstrating "that the alleged misrepresentation did not, for whatever reason, actually affect the [stock's] market price." *Halliburton II*, 573 U.S. at 269. As this Court held in *Halliburton II*, the district court may not

"artificially limit" defendants' rebuttal evidence at class certification, and defendants "may seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence." *Id.* at 283.

Once a defendant demonstrates the absence of price impact from the alleged misrepresentations, "*Basic*'s fraud-on-the-market theory and presumption of reliance collapse." *Halliburton II*, 573 U.S. at 278. As a result, reliance becomes an individualized inquiry, common questions will not predominate, and a class may not be certified under Rule 23(b)(3).

B. Plaintiffs' Invocation of the Inflation Maintenance Theory Significantly Increases the Burden on Defendants to Rebut the *Basic* Presumption and Has Recently Led to a Number of Substantial Settlements Against Retailers.

Enterprising plaintiffs, however, have attempted to thwart the principles set forth in *Halliburton II* by employing at class certification an "inflation maintenance" theory – a legal fiction that posits that a misrepresentation can "impact" trading price, even if it does not actually increase share price, because it either confirms existing market expectations or prevents the price from falling. Under the lower courts' interpretation of this theory at class certification, plaintiffs need only point to a decline in share price following what they self-servingly deem to be a "corrective" disclosure as purported evidence that the price "must have been" inflated all along, and that the inflation was due to the defendant's prior alleged misrepresentation.

The burden then shifts to the defendant to try to disprove the asserted "back-end" price impact by

showing that the price decline was not, in fact, attributable to the revelation of the alleged falsity of a prior statement and was due *solely* to newly-disclosed information. The burden is nearly impossible to meet in most cases because "simply identifying other pieces of price-affecting news on the corrective disclosure date is not sufficient; such a showing does not demonstrate that *no* component of the change was associated with the disclosure." Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1078 (2019) (emphasis in original); *see also* Pet. App. 44a (if Petitioners' evidence showing no price impact of the alleged misstatements "can be neutralized by the mere assertion that the SEC's repackaging of those disclosures must have at least contributed to the stock price declines, then the *Basic* presumption is truly irrebuttable and class certification is all but a certainty in every case")(Sullivan, J., dissenting).[2] Indeed, as the court below noted, "[i]n the wake of the Supreme Court's 2014 decision in *Halliburton II*, securities plaintiffs invoked the inflation-maintenance theory in 20/28 (71%) of federal district court cases involving a defendant's attempt to rebut the *Basic* presumption . . . . In all twenty of those cases, the district court held that the defendant failed to rebut the *Basic* presumption." Pet. App. 19a-20a (citations omitted).

Thus, relying solely on the theory of inflation maintenance, plaintiffs can successfully avoid incon-

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[2] The burden on Petitioners to disprove inflation maintenance was particularly heavy under the court of appeals' mistaken determination that, contrary to Federal Rule of Evidence 301, defendants seeking to rebut the *Basic* presumption at class certification bear both the burden of production and the burden of persuasion. Pet. App. 32a.

venient facts that would be highly probative of the absence of price impact—like the fact that the alleged misstatements at issue did not affect the trading price of the stock—and force defendants to pursue the significantly more challenging path to rebuttal via proof that new facts disclosed on a given day were the *sole* cause of the price decline at issue.

The retail industry has already faced the adverse consequences of certification based on the inflation maintenance theory, where the alleged misstatements resulted in no price change, or even a downward movement in price. When faced with such a certification ruling, many retail defendants decide to settle, given the limited and discretionary relief of an interlocutory appeal under Rule 23(f) and the potential for months (if not years) of litigation at great expense and distraction before the merits of their defenses will be decided.

In *Willis v. Big Lots, Inc.*, for example, the plaintiffs alleged that the company made false and misleading statements regarding its sales and financial prospects. 242 F. Supp. 3d 634, 641 (S.D. Ohio 2017). At class certification, the defendants demonstrated—and the plaintiffs conceded—that the alleged misrepresentations did not result in a statistically significant increase in share price at the time they were made, *i.e.*, there was no "front-end" price impact. *Id.* at 656. The district court, however, accepted the plaintiffs' bare invocation of the inflation maintenance theory, holding that price impact may be demonstrated "either through evidence that a stock's price rose in a statistically significant manner after a misrepresentation or that it declined in a statistically significant manner after a corrective disclosure." *Id.* at 657. The court concluded that "[d]efendants failed to show that there

was no statistically significant price impact following the corrective disclosures," held that they therefore did not rebut the *Basic* presumption of reliance, and certified the class. *Id.* at 659. Following certification, the parties settled for $38 million. *Willis v. Big Lots, Inc*., Civ. No. 12-604 (S.D. Ohio Nov. 9, 2018), ECF No. 124.

This fact pattern has, unfortunately, become all too common in securities class actions brought against retailers and other corporate defendants across a variety of industries. *See, e.g.*, *Marcus v. J.C. Penney Co.*, Civ. No. 13-736, 2017 U.S. Dist. LEXIS 33257, at *5 (E.D. Tex. Mar. 8, 2017) (certifying class claims against large retailer, despite finding no "front-end price impact" at the time of the alleged misrepresentations; shortly thereafter, the parties reached a $97.5 million settlement); *In re Signet Jewelers Ltd. Sec. Litig.*, Civ. No. 16-6728, 2019 U.S. Dist. LEXIS 114695, at *52 n.8 (S.D.N.Y. July 10, 2019) (finding defendants failed to "establish[] an absence of back-end price impact" and certifying the class, resulting in a $240 million settlement); *Pirnik v. Fiat Chrysler Autos., N.V.*, 327 F.R.D. 38, 45-46 (S.D.N.Y. 2018) (certifying class on the theory that defendant's share price "was already inflated by the first day of the Class Period based on misrepresentations that occurred before the Class Period began," prompting a $110 million settlement); *Zwick Partners L.P. v. Quorum Health Corp.*, Civ. No. 16-cv-02475, 2019 U.S. Dist. LEXIS 54810, at *34 (M.D. Tenn. Mar. 29, 2019) (granting class certification based on plaintiff's price maintenance theory despite rebuttal evidence demonstrating that there was no statistically significant reaction to defendants' alleged misstatement and that "financial analysts uniformly attributed the decline [in share price] to other financial metrics" unrelated to

the misstatement; the parties thereafter reached an $18 million settlement); *IBEW Local 98 Pension Fund v. Best Buy Co.*, Civ. No. 11-429, 2014 U.S. Dist. LEXIS 108409, at *19 (D. Minn. Aug. 6, 2014) (granting class certification against large retailer and holding that the alleged misrepresentations may have "prolonged the inflation of the price, or slowed the rate of fall. This impact on the stock price can support a securities fraud claim."), *rev'd*, 818 F.3d 775 (8th Cir. 2016); *In re Advance Auto Parts, Inc. Sec. Litig.*, Civ. No. 18-212, 2020 U.S. Dist. LEXIS 208085, at * 10 (D. Del. Nov. 6, 2020) (certifying class over defendants' rebuttal evidence demonstrating that the alleged misrepresentations caused either a decrease or no change in stock price when made); *SEB Inv. Mgmt. AB v. Symantec Corp.*, Civ. No. 18-02902, 2020 U.S. Dist. LEXIS 81661, at *28 (N.D. Cal. May 8, 2020) (certifying class and holding that defendants bore the burden of showing that the alleged misrepresentations made during an investor call "did not in some way stem" the already 33% decline in share price following that call).

In short, even before the decision presently on appeal, the lower courts' application of this theory, which allows courts to discount highly probative "front-end" evidence that the alleged misstatement did not affect the price, had already forced at least hundreds of millions of dollars in settlements. If affirmed, the court of appeals' decision will further embolden shareholder plaintiffs to extract outrageous settlements of meritless claims following class certification.

C. The Court of Appeals Contravened *Halliburton II* in Prohibiting Petitioners' Evidence that Generic and Aspirational Statements Could Not Have Artificially Maintained Share Price.

Defendants face a nearly insurmountable burden when plaintiffs invoke the inflation maintenance theory at class certification. The court of appeals has now magnified this harm by refusing to consider the generic and aspirational nature of a defendant's alleged misstatements in assessing price impact.

Unlike the disclosures at issue in the actions above (*supra* at 9-10),[3] Goldman's alleged misrepresentations did not concern the company's financial condition, assure its present compliance with specific regulatory requirements, or contain any other information

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[3] In *J.C. Penney*, for instance, plaintiffs alleged that defendants made materially false and misleading statements regarding the company's liquidity and financing needs. 2017 U.S. Dist. LEXIS 33257, at *8; *see also Signet Jewelers*, 2019 U.S. Dist. LEXIS 114695, at *5 (alleging that defendants made false and misleading statements regarding the company's credit portfolio); *Fiat Chrysler*, 327 F.R.D. at 42 (alleging false and misleading statements concerning the company's compliance with safety and emissions regulatory requirements); *Quorum Health*, 2019 U.S. Dist. LEXIS 54810, at *25 (plaintiffs alleged false and misleading statements regarding the company's financial estimates following a spin-off); *Best Buy*, 2014 U.S. Dist. LEXIS 108409, at *3 (alleging false and misleading statements regarding the company's ability to meet its annual earnings-per-share guidance); *Advance Auto Parts*, 2020 U.S. Dist. LEXIS 208085, at *1 (plaintiffs alleged that defendants made materially false and misleading statements concerning projected sales and operating margins); *Symantec*, 2020 U.S. Dist. LEXIS, at *4 (alleging misstatements regarding the company's revenue growth and cost-saving initiatives).

that could credibly have artificially maintained share price. The alleged misstatements include:

- "Our clients' interests always come first . . ."
- "As we have expanded the scope of our business and our client base, we increasingly have to address potential conflicts of interest . . ."
- "Integrity and honesty are at the heart of our business."

Pet. App. 4a-5a. Virtually every public company makes similarly unremarkable statements in their code of ethics and other public disclosures. It strains credulity to believe that such generic and vague statements played any role in inflating or maintaining the company's share price. As Judge Sullivan correctly observed in dissenting below: "[N]o reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based." *Id.* at 45a.

Nevertheless, the court of appeals refused to consider the generic nature of these statements in evaluating whether Petitioners had successfully rebutted the *Basic* presumption, holding instead that such an inquiry would impermissibly probe the materiality of the statements and that "materiality is not an appropriate consideration at the class certification stage." *Id*. at 21a (quotations and citations omitted).

The court of appeals' decision in this respect violates this Court's holdings in *Basic* and *Halliburton II* that *any* showing that severs the link between share price and the alleged misstatement is sufficient to rebut the presumption of reliance, and that defendants must be

afforded a meaningful opportunity to rebut the presumption at class certification "through direct *as well as indirect* price impact evidence." *Halliburton II*, 573 U.S. at 283 (emphasis added). Indeed, *Halliburton II* explicitly held that "if a defendant could show that the alleged misrepresentation did not, *for whatever reason*, actually affect the market price . . . then the presumption of reliance would not apply." *Id.* at 269 (emphasis added).

Petitioners supplied just such a reason: the company's generic, aspirational alleged misstatements were not capable of affecting the stock price. Having adopted the notion that Petitioners' statements could have maintained an artificially inflated share price, despite the absence of any proof in support of that hypothesis, the court of appeals should not have then excluded rebuttal evidence demonstrating *why* they, in fact, did not.

This holds true even if the same evidence would separately be relevant at the merits stage of the proceedings. *Halliburton II*, 573 U.S. at 282-84; *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (courts at the class certification stage must "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim"); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 [] have been satisfied . . . . Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.") (quotations and citations omitted). This Court has long recognized that questions relevant to the applicability of the *Basic* presumption may be adjudicated both at class

certification and on the merits. *Dukes*, 564 U.S. at 351, n.6 ("To invoke [the *Basic*] presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, ... an issue they will surely have to prove again at trial in order to make out their case on the merits.").[4]

In applying the inflation maintenance theory to Petitioners' generic and aspirational disclosures and then declining to consider Petitioners' rebuttal evidence demonstrating why such disclosures did not affect share price, the court of appeals adopted a framework that will essentially guarantee class certification following a significant stock drop upon negative news. In other words, the presumption that this Court said was "rebuttable" becomes in effect rebuttal-proof because essential evidence directly relevant to price impact is deemed off limits to defendants.

The court of appeals' ruling will have a significant and detrimental impact on publicly-traded retailers. First, the sheer volume of securities class actions continues to rise and is now at an all-time high. In 2019 alone, shareholder plaintiffs filed 268 new securities class actions, nearly double the historical average, and approximately one in every 14 S&P 500 companies (or 7.2%) was subject to a securities action

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[4] The court of appeals' reliance on *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013) is misplaced. *Amgen* stands for the proposition that plaintiffs are not required to prove the materiality of an alleged misrepresentation at class certification. It does not speak to the type of rebuttal evidence that a defendant may offer and a court must consider in evaluating price impact. As set forth above, *any* evidence that severs the link between a misrepresentation and share price is properly before the court at class certification. *Supra*, at 5.

in federal court. Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* (2020), at 5, 45, https://tinyurl.com/y7c7kmbh. The bulk of these cases are filed in the Second Circuit, where in 2019 filings increased by 45% to 103 new actions, the highest number on record. *Id.* at 38. The inescapable reality is that the *overwhelming* majority of securities class claims will settle if a class is certified, and less than 1% of such cases have reached a trial verdict. *Id.* at 16; *see also* Kevin LaCroix, *Rare Securities Class Action Lawsuit Trial Results in Partial Verdict for Plaintiffs*, D&O Diary (Feb. 5, 2019), https://tinyurl.com/y57mfqvu (noting that fewer than 25 of the over 5,200 securities class actions filed since 1996 have gone to trial). All told, over $104 billion has been paid to settle securities class actions since 1996. *See* Stanford Law School, Securities Class Action Clearinghouse, https://tinyurl.com/y58lwf2l (last visited Jan. 28, 2021). Moreover, a substantial portion of these considerable settlements has historically been awarded to plaintiffs' counsel, to the detriment of both the defendant companies and their current shareholders. In 2019, for instance, the ten largest settlements of securities class claims totaled over $1.43 billion, $345 million of which was allocated to plaintiffs' attorneys' fees and expenses. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review*, (Feb. 12, 2020), https://tinyurl.com/y2c7s75j.

If the decision below is affirmed, these already alarming figures will only continue to skyrocket as plaintiffs file meritless claims based on generic and aspirational statements, given the near certainty they will be granted certification of an extensive class following a stock drop and, thereby, obtain a significant settlement windfall. The Court should overturn

the decision below to curtail this otherwise inescapable surge.

II. AS SOCIAL RESPONSIBILITY DISCLOSURES EXPAND, SO TOO DOES LIABILITY RISK UNDER THE COURT OF APPEALS' DECISION.

The decision below is especially troubling in light of recent shareholder initiatives to broaden the scope of public disclosures, such as those related to a corporation's social responsibility efforts. As retailers and others expand their Environmental, Social and Governance (ESG) reporting to share their non-financial corporate goals, they become more vulnerable to meritless securities class actions arising out of aspirational statements akin to those at issue here. The court of appeals' acceptance of generic and aspirational disclosures as the basis for class certification—despite ample evidence that Petitioners' statements did not impact the company's share price when made—will force publicly-traded retailers into a difficult choice: resist issuing more robust ESG disclosures, or speak publicly and risk litigation without a meaningful ability to challenge price impact.

Over the last several years, U.S. public companies including large retailers have faced increasing pressure from investors to disclose their goals and initiatives related to matters ranging from climate change to diversity and sustainability to data privacy.[5]

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[5] While the SEC has not, to date, required the disclosure of ESG issues outside the general materiality framework, the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee recently recommended that the agency generate an ESG-specific disclosure framework, and such a framework may be forthcoming. *See* Recommendation from the Investor-as-

Last year, for instance, the chairman of BlackRock, Inc., the world's largest asset manager, penned an open letter to the CEOs of the nation's leading companies, urging them to report additional sustainability and climate-related metrics. The letter admonished: "[W]e will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them." Letter from Larry Fink, CEO and Chairman of BlackRock, Inc. (Jan. 28, 2020), https://tinyurl.com/ycluszll. Other large investors have similarly lobbied U.S. corporations to disclose their sustainability efforts in routine SEC filings and have threatened to "take appropriate voting action against board members at companies" that fail to do so. Letter from Cyrus Taraporevala, President & CEO of State Street Global Advisors (Jan. 28, 2020), https://tinyurl.com/y6bffeqh; *see also* T. Rowe Price, *Environmental, Social and Governance 2019 Report* (Apr. 2020), at 29, https://tinyurl.com/y3wze46r ("At T. Rowe Price, we've been active in using our scale and influence to drive change. In fact, ESG disclosure was our #1 engagement topic of 2019, with environmental disclosure a feature of 38% of our ESG engagements.").

Likewise, in the wake of recent protests in support of racial equity, numerous significant investors have called for additional disclosures regarding workplace diversity and have urged companies to "publicly state what they are doing to combat racism and police brutality." John Streur, *Corporations and Investors*

Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure (May 14, 2020), https://tinyurl.com/yy4r53wx.

Must Do More to Combat Racism, Calvert Impact Blog (June 2, 2020), https://tinyurl.com/y5g9ablx; *see also* Ross Kerber & Simon Jessop, *The Heat's on Corporate America to Reveal Racial Diversity Data*, Reuters (July 2, 2020), https://tinyurl.com/yyle49my ("Activist investors say efforts to make diversity data public are gathering momentum, partly since this can be easier than reforms like adding social metrics to CEO pay programs or naming new board members.").

Many public companies—including RLC members—are therefore increasingly discussing their goals and plans to combat climate change, further diversify their workforce and board composition, and protect their consumer and employee data, among other things. An estimated 76% of retail and other consumer-facing companies in the Russell 3000 index included some level of ESG disclosure in their 2018 annual reports filed with the SEC. *See* Leah Rozin, *ESG Risks Trickle into Financial Filings*, NACD BoardTalk (Oct. 21, 2019), https://tinyurl.com/y56u29f5. A recent survey of SEC filings by the top 50 companies by revenue in the Fortune 100 revealed that every company surveyed increased its ESG disclosures in at least one category in their proxy statements between 2019 and 2020, and 42% of those surveyed also increased their ESG disclosures in at least one category in their annual report on Form 10-K. White & Case, "ESG Disclosure Trends in SEC Filings" (Aug. 13, 2020), https://tinyurl.com/y2m474kd. This recent proliferation of aspirational statements, however, could put RLC members directly in the cross-hairs of the court of appeals' decision, with potentially punitive results.

The troubling implications of the court of appeals' decision on the retail industry are not difficult to imagine. For instance, retailers that make general

public statements such as "we are committed to diversity and inclusion" or "we maintain policies to ensure a discrimination-free work environment" open themselves up to potentially significant liability based on those statements if in the future, for example, an EEOC investigation alleges race or gender discrimination at the organization and the stock price falls, even if the investigation was prompted by public reports which themselves had no price impact.[6]

Under the court of appeals' decision, it would be nearly impossible for the retailer defendant to rebut the *Basic* presumption at class certification by showing that its ESG disclosures had no price impact. In the hypothetical above, the defendant could offer event

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[6] Public companies' statements regarding the promotion of diverse employees to management positions and the role that diversity plays in the board nomination process have become the focus of shareholder litigation in recent months. *See, e.g.*, *Lee v. Fisher*, Civ. No. 20-06163 (N.D. Cal. Sept. 1, 2020), ECF No. 1 (shareholder derivative action filed against The Gap, Inc. board alleging that the company's directors made "false assertions about the Company's commitment to diversity," in breach of their "duty of candor [and in violation] of the federal proxy laws"); *Falat v. Sacks*, Civ. No. 20-01782 (C.D. Cal. Sept. 18, 2020), ECF No. 1 (shareholder breach of fiduciary duty action against the board of Monster Beverage Corporation, alleging that the board lacks "meaningful representation" despite the company's claims that diversity is a "tremendous asset"); *Klein v. Ellison*, Civ. No. 20-04439 (N.D. Cal. July 2, 2020), ECF No. 1 (derivative action against the Oracle board); *Kiger v. Mollenkopf*, Civ. No. 20-1355 (N.D. Cal. July 17, 2020), ECF No. 1 (derivative action against the Qualcomm board); *City of Pontiac Gen. Emp. Ret. Sys. v. Bush*, Civ. No. 20-06651 (N.D. Cal. Sept. 23, 2020), ECF No. 1 (derivative action against the Cisco board). While not brought under the federal securities laws, these actions nevertheless demonstrate that the type of aspirational ESG disclosures companies are encouraged to make may increase shareholder litigation.

studies demonstrating that neither the aspirational statements nor the subsequent public reports of discrimination actually resulted in a statistically significant price change, but that would not suffice. Pet. App. 29a-30a (upholding the district court's determination that "the absence of price movement, . . . in and of itself, is not sufficient to sever the link between the first corrective disclosures and the subsequent stock price drop."). Nor would the defendant be entitled to point to the generic and aspirational nature of its statements at class certification because, according to the court of appeals, the nature of the statements speaks to materiality and must be left for adjudication on the merits. Pet. App. 22a.

The defendant's sole avenue to defeat class certification would be to demonstrate that the stock drop at the end of the class period was *entirely* attributable to the only "new" information released on that day (e.g., the announcement of an EEOC investigation) and not a reaction by the market to what had already come to light—the possibility that the company did not always succeed in preventing workplace discrimination. The court of appeals' decision would thus place on defendants an insuperable burden that would most likely lead to a significant settlement of otherwise meritless claims.

Finally, the court of appeals' application of the inflation maintenance theory to largely aspirational and generic statements of the type often contained in ESG disclosures, and the court's refusal to take into account the nature of those statements at class certification, may compel publicly-traded retailers to reconsider making such disclosures. The risk of effectively automatic certification of a shareholder class following a decline in share price could therefore have a chilling

effect on public companies' communications with their shareholders. The Court should overturn the court of appeals' decision to prevent this outcome.

CONCLUSION

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,

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER, INC.
99 M St. SE, Suite 700
Washington, DC 20003

SUSAN E. HURD
Counsel of Record
CARA M. PETERMAN
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000
susan.hurd@alston.com

Counsel for Amicus Curiae

February 2021