NO. ALB-21-01

IN THE SUPREME COURT OF THE UNITED STATES

BLAIR ASTORIA,

PETITIONER

v.

GENIUS GAMES, INC.,

RESPONDENT

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

BRIEF FOR PETITIONER

# **QUESTIONS PRESENTED**

1. Whether the Fourteenth Circuit Court of Appeals incorrectly affirmed Appellees’ compliance with Rule 10b-5 and § 10(b) the Securities Exchange Act of 1934, where Appellees refused to disclose their inaction regarding sexual harassment allegations or change their zero-tolerance policy against sexual harassment in periodic securities disclosures.
2. Whether the Fourteenth Circuit Court of Appeals incorrectly affirmed that the Act was unconstitutional under the extraterritoriality doctrine where the doctrine is unworkable precedent and an unnecessary tool for dormant Commerce Clause analysis, and the Act is outside the doctrine’s scope.

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# **PROCEEDINGS BELOW**

On August 15, 2019, Astoria filed a class action suit (“Astoria’s claim”) against Appellees Genius Games, Inc. (“GG”) and its board of directors in the United States District Court for the District of Albers. [R. 4]. Astoria filed the class action suit on behalf of herself and shareholders who bought shares in GG “between March 4, 2016 and June 30, 2019 (the ‘Class Period’)” and held their shares during the relevant events. [R. 4]. The class action sought damages to redress injuries stemming from two claims. [R. 4]. First, Astoria’s claim alleged that Appellees violated § 10(b) of the Securities Act of 1934 (“SEA”) and Rule 10b-5 by neither speaking truthfully about nor correcting the GG Code of Conduct’s materially false zero-tolerance policy for sexual harassment. [R. 4]. Per Astoria’s claim, GG’s materially false Code of Conduct convinced appellant-investors to buy stock in GG at an artificially inflated price that drastically dipped once the Albers Timespublished their exposé about GG’s disingenuous zero-tolerance policy. [R. 4]. Second, the class action asserts that GG’s steadfast unwillingness to include a female on their board violated Albers Senate Bill No. 455 (the “Act”). [R. 4]. Astoria’s claim sought statutory damages and an injunction to require GG’s compliance with the Act. [R. 5].

After class certification by the district court, discovery was conducted and established the uncontested facts below. [R. 5]. Post-discovery, “Appellees moved for summary judgment on both claims.” [R. 5]. As to the securities fraud claim, Appellees argued that (1) appellant-shareholders had no private right of action under Rule 10b-5, (2) GG’s zero-tolerance policy was immaterial, and (3) Appellees were not duty-bound to publicly speak about the sexual harassment allegations or correct GG’s zero-tolerance policy. [R. 5]. With respect to GG’s violation of the Act, Appellees argued that the Act violates the extraterritoriality doctrine and the Pikebalancing test and is thus unconstitutional under the Constitution’s dormant Commerce Clause. [R. 5].

The district court granted summary judgment on both claims for Appellees on February 6, 2020. [R. 5]. While the court ruled that Rule 10b-5 afforded the Appellees a private right of action, the court also determined that GG’s “zero-tolerance policy was immaterial and thus not actionable.” [R. 5]. Additionally, the court determined that the Act did not comply with the dormant Commerce Clause’s extraterritoriality doctrine. [R. 5].

On February 10, 2020, Astoria filed a timely appeal with the United States Court of Appeals for the Fourteenth Circuit. [R. 5]. Using their jurisdiction under 28 U.S.C. § 1291, the court of appeals reviewed both of the district court’s rulings *de novo* and affirmed the summary judgment grant on both claims in favor of Appellees. [R. 5, 17]. On January 22, 2021, the Supreme Court of the United States granted certiorari of Astoria’s petition to consider both the securities fraud and the constitutionality claims raised in the courts below. [R. 18].

# **CONSTITUTIONAL PROVISIONS**

**U.S. Const. art. I, § 8, cl. 3**

The Congress shall have power … [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes …

# **STATUTORY PROVISIONS**

**§ 10(b) of the Securities Exchange Act of 1934**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— …

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**Albers Senate Bill No. 455**

See Appendix B

# **AGENCY PROVISIONS**

**17 C.F.R. § 240.10b-5 - Employment of manipulative and deceptive devices**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

1. To employ any device, scheme, or artifice to defraud,
2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
3. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

# **STATEMENT OF THE CASE**

Incorporated and headquartered in Delaware, Appellee GG is a video game company that was founded in 2005 and went public in 2008. [R. 2]. Appellees Chuck Winnow (“Winnow”), Bartholomew Winnow, Noah Archibald, and Don Humphrey (the “directors”) collectively founded GG and, “at all relevant times,” made up its board. [R. 2]. GG has 2,500 shareholders including Albers resident Blair Astoria (“Astoria”) who bought 7.5% of GG’s common stock in 2008. [R. 2]. Per Item 406 of Regulation S-K, Appellees makes annual, publicly-available, security disclosures to the Securities and Exchange Commission (“SEC”). Appellees’ annual disclosures include references to GG’s Code of Conduct, which includes a “zero-tolerance policy for sexual harassment” (“zero-tolerance policy”). [R. 2]; see Appendix A-1.

On March 4, 2016, a female GG employee filed an internal report asserting that GG’s Chief Executive Officer, Appellee Winnow, had sexually harassed her. [R. 2]. An internal investigation led by the directors determined that the allegations were true but, despite Appellees’ zero-tolerance policy, Appellees took no action to remedy the situation or even reprimand Winnow. [R. 2]. Appellees also declined to speak publicly about the allegations and their quarterly and annual securities disclosures continued to reference their unchanged zero-tolerance policy. [R. 2].

In September 2018, five more female employees filed an internal report asserting that Winnow had sexually harassed them. [R. 3]. Appellees did not fire Winnow even though the women threatened to speak publicly about the allegations if Winnow was not fired. [R. 3]. No action was taken against Winnow’s despite Appellees’ zero-tolerance policy stating that employees would be immediately dismissed for sexual harassment and an internal investigation concluded that the sexual harassment allegations against Winnow were true. [R. 3]; Appendix A-1. Moreover, despite opportunities in multiple quarterly and annual securities disclosures, Appellees did not correct or remove their zero-tolerance policy from their Code of Conduct or speak publicly about the harassment claims, investigations, or conclusions. [R. 3]. No GG employees spoke publicly about the Code of Conduct or the sexual harassment claims made against Winnow, and Appellees have continued to include the unchanged Code of Conduct and zero-tolerance policy in annual disclosures. [R. 3].

On November 30, 2018, Senate Bill No. 455 (the “Act”) was enacted by the State of Albers. See Appendix B-1. Section 301.3 of the Act promotes gender parity by amending Albers General Corporations Law to create a gender quota for corporate boards. [R. 3]; see Appendix B-1. The Act requires that publicly traded foreign corporations with more than 10% of shares owned by Albers residents, such as GG, add at least one female board member by June 30, 2019. [R. 3]; see Appendix B-2, 3. Corporations were allowed to expand the number of board seats to meet the quota, as long as they complied with the Act by June 30, 2019. [R. 3]; see Appendix B-3. The Act allows shareholders to bring suit for damages of $100 per share for each violation of the Act. [R. 12]; see Appendix B-3.

On December 5, 2018, shortly after the Act was passed, Winnow was quoted in an Albers Times article asserting that GG would not be complying with the Act’s quota because a woman would ruin his company’s dynamic and success. [R. 3]. In response, Astoria, who had purchased additional GG stock bringing her total to 10.2% of GG shares, sent a letter to GG demanding they comply with the Act. [R. 3-4]. The letter told GG to expand its board, nominate a female candidate for the new seat, and schedule a special shareholder meeting by the June 30 deadline. GG ignored the letter and its suggestions. [R. 4].

GG filed a timely annual disclosure on March 15, 2019, that included their Code of Conduct and zero-tolerance policy. [R.4]. On March 31, 2019, the Albers Times published an exposé recounting the story of the five women who had accused Winnow of sexual harassment. [R.4]. The story went national leading to an 18% decrease in GG stock by the end of June. [R. 4]. Still, Winnow and the GG board made no steps to comply with the Act and the board still had no female members by the Act’s June 30 compliance deadline. [R.4].

# **SUMMARY OF THE ARGUMENT**

This Court should reverse the Fourteenth Circuit’s finding that Appellees did not violate the Securities and Exchange Act of 1934 or Rule 10b-5 when Appellees failed to publicly share

any information about sexual harassment claims at GG. By neither mentioning the claims in their periodic securities disclosures nor correcting their zero-tolerance policy for sexual harassment, Appellees misrepresented material information and subsequently caused a sharp decline in GG’s public stock price. Astoria was unjustly harmed by the market upheaval and has a private right of action, supported by precedent and congressional intent, under Rule 10b-5 to pursue judicial remedies. Furthermore, Appellees’ zero-tolerance policy met Rule 10b-5’s materiality requirement. The policy was material and reasonable for investors to rely on and Appellees failed to comply with their general duty to speak truthfully and share news related to the policy. Moreover, Appellees had a duty to correct the policy once Appellees’ brusque handling of sexual harassment claims made their zero-tolerance policy inaccurate.

This Court should also reverse the Fourteenth Circuit’s finding that the Act is unconstitutional under the extraterritoriality doctrine of the dormant Commerce Clause. The Fourteenth Circuit concedes that the extraterritoriality doctrine lacks a clear standard of review, creating considerable confusion among the lower federal courts, but they were bound by stare decisis. The doctrine has become unclear, unworkable, and unnecessary; it is no longer the proper tool for analyzing the validity of a state corporation statutes. Therefore, this Court should consider overturning the extraterritoriality doctrine.

Even if this Court does not overturn the doctrine, the Fourteenth Circuit erred by interpreting the Act broadly. This Court should adopt a narrow approach and only consider whether the Act had the practical effect of regulating wholly out-of-state commerce. Under this approach, the Act is outside the scope of the extraterritoriality doctrine and not unconstitutional. Regardless of the approach used to evaluate the Act, the extraterritoriality doctrine regulates only wholly out-of-state commerce. Given its putative local benefits to the shareholders in the State of Albers, the Act does not regulate wholly out-of-state commerce and thus cannot be invalidated by the extraterritoriality doctrine. Additionally, state statutes that affect wholly out-of-state commerce are evaluated under the Pike balancing test, not the extraterritoriality doctrine. As the Act applies impartially to both in-state and out-of-state business and both parties concede that the Act presents no constitutionality issues when evaluated under the Pike test, this Court should find the Act to be constitutional under the extraterritoriality doctrine of the dormant Commerce Clause.

# **ARGUMENT**

## THE FOURTEENTH CIRCUIT COURT OF APPEALS INCORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT FOR APPELLEES BECAUSE APPELLEES VIOLATED REGULATORY RULE 10B-5 BY MATERIALLY MISREPRESENTING THEIR ZERO-TOLERANCE POLICY IN THEIR ANNUAL AND QUARTERLY SECURITIES DISCLOSURES.

This Court should reverse the Fourteenth Circuit Court of Appeal’s affirmation of summary judgment for Appellees on the securities fraud issue. The Fourteenth Circuit incorrectly held as a matter of law that Appellees’ zero-tolerance policy was mere puffery and that Appellees had no duty to honestly disclose or correct the policy. See [R. 11-12, 17]. This Court has jurisdiction to review the appellate court’s holdings under 28 U.S.C. § 1254 and, because solely questions of law are at issue on appeal, review the court’s findings *de novo*. U.S. v. Acosta, 363 F.3d 1141, 1144 (11th Cir. 2004).

The Securities Act of 1933 (the “SA”) and the Securities Exchange Act of 1934 were passed during a time of “dire national distress” in order to protect the public from fraudulently marketed securities. S. Rep. No. 73-47, at 6 (1933) (“The necessity for the bill arises out of the fact that billions of dollars have been invested in practically worthless securities … by the American public through incomplete, careless, or false representations.”). In submitting the 1933 bill to Congress, President Roosevelt emphasized that the burden should be on companies to disclose honestly and completely to prospective securities-purchasers. H.R. Rep. No. 73-85, at 2 (1933) (“Let the seller also beware.”) (internal quotations omitted).

Embodying the intent and efforts of Congress and President Roosevelt, the SA and SEA protect shareholders by requiring companies to “provide full and fair disclosure of the character of securities sold in interstate and foreign commerce.” 15 U.S.C. § 77a, § 78a. Specifically, section 10(b) of the SEA makes illegal the “use or employ, in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of [SEC] rules or regulations.” 15 U.S.C. § 78j(b). To ensure that potential investors have access to “honest, complete and correct” information about publicly traded companies, the SEA also requires security issuing companies to file periodic public reports with the SEC. 15 U.S.C. § 78m(a), § 78o(d); S. Rep. No. 73-1455, at 68 (1934). In parallel, regulatory Rule 10b-5 requires companies to never “make any untrue statement of a material fact” or misdirect investors by hiding information relevant to previous material statements. 17 C.F.R. § 240.10b-5 (2020).

For Astoria’s securities fraud claim to succeed, this Court must find that Astoria has a private right of action under either § 10(b) or Rule 10b-5 and that Appellees acted in violation of that section or rule. To best support Congress’s goals in enacting the SEA and to uphold vast federal-court precedent, this Court should find that Astoria has a private right of action under Rule 10b-5 to redress her securities fraud claim. Furthermore, this Court should find that Appellees violated Rule 10b-5 by including a material zero-tolerance policy in their Code of Conduct and failing to speak honestly about or correct the policy in periodic SEC disclosures after turning a blind eye to confirmed workplace sexual harassment.

### Astoria has a private right of action under Rule 10b-5 because her securities fraud claim is in line with Congress’s goals in enacting the SEA and overwhelmingly supportive federal-court precedent.

Although neither § 10(b) nor Rule 10b-5 explicitly grants a private right of action, this Court has held since 1971 that Rule 10b-5 impliedly provides a private right of action to certain shareholders. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729-30 (1975) (“[W]e confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist.”) (citing Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n. 9 (1971)). However, not every claimant can maintain a private right of action under Rule 10b-5 for a securities-related claim. See Blue Chip, 421 U.S. at 754-55 (finding that claimants lacked a 10b-5 private right of action because they did not purchase or sell any shares); see also Cent. Bank of Denver, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 191 (1994) (finding that claimants lacked a 10b-5 private right because defendants were alleged to have aided and abetted, rather than directly perpetrated, securities fraud). Here though, Astoria has a valid basis for a 10b-5 private right of action because her securities fraud claim both aligns with the intent of Congress in enacting the SEA and overwhelmingly supportive federal-court precedent.

#### Rule 10b-5 gives Astoria a private right of action because the SEA specifically prohibits including misleading statements in SEC disclosures.

Whether Rule 10b-5 provides a right of action for a particular issue depends in large part on “how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act.” See Cent. Bank, 511 U.S. at 173 (quoting Musick, Peeler & Garrett v. Emps. Ins. of Wausau, 508 U.S. 286, 294 (1993)). Specifically, whether the claim at issue would have been deemed actionable by the 1934 Congress depends on whether the claim falls within “the express causes of action in the securities Acts.” See id. at 178 (“Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts.”). One such express cause of action is within Section 18 of the SEA, which “prohibits any person from making misleading statements in reports filed with the SEC.” See id. at 179 (citing 15 U.S.C. § 78r). Because Appellees’ misleading securities disclosures in periodic SEC filings harmed Astoria and other investors, Astoria’s claim is based on the exact behavior prohibited by the SEA’s Section 18. [R. 4]; see Cent. Bank, 511 U.S. at 178-79. Therefore, the 1934 Congress would have likely found Astoria’s claim actionable and Rule 10b-5 should provide Astoria with a modern-day right of action. See Cent. Bank, 511 U.S. at 173.

#### Rule 10b-5 provides Astoria a private right of action because federal courts typically grant private rights of action to petitioners alleging harm from the effect of securities fraud on the public market.

Astoria’s securities fraud claim should also be deemed actionable under Rule 10b-5 because of the strong precedent that federal courts have set in finding similar class action claims actionable. See [R. 8] (“[E]ach federal court that has considered this type of claim has assumed that plaintiffs can proceed under the 10b-5 private right of action.”); see also Basic Inc. v. Levinson, 485 U.S. 224, 241-49 (1988) (finding that claimants had a private right of action by virtue of the effect of material misrepresentations on an efficient public market). Astoria’s claim, like that in Basic, stems from harm to investors caused by the effect of material misrepresentations on the public stock exchange. See [R. 3-4, 8]; see also 485 U.S. at 241-49. Therefore, just as previous similar cases were deemed actionable, Astoria’s claim should be actionable under Rule 10b-5 as well.

Overall, because Astoria’s claim fits within the type of claims that the 1934 Congress would have likely found actionable and is in line with abundantly supportive judicial federal precedent, Astoria’s claim should be found actionable under Rule 10b-5.

### Appellees repeatedly violated Rule 10b-5 in periodic SEC disclosures by materially misrepresenting their zero-tolerance policy for sexual harassment.

In addition to Astoria’s private right of action under Rule 10b-5, Appellees violated Rule 10b-5 by neither disclosing truthfully about nor correcting their material zero-tolerance policy. Violation of Rule 10b-5 by a publicly-traded company requires: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” Matrixx Initiatives, Inc v. Siracusano, 563 U.S. 27, 37-38 (2011) (quoting Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 157 (2008)). The issue here is solely whether Appellees’ unwillingness to accurately disclose about or correct GG’s zero-tolerance policy constituted a material misrepresentation or omission. [R. 8].

Materiality under Rule 10b-5 has two connected components. A misrepresentation or omission satisfies the materiality element of Rule 10b-5 when a company has (a) material information and (b) a duty to disclose the information. See Matrixx, 563 U.S. at 44; see also Basic, 485 U.S. at 239 n.7 (“Silence, absent a duty to disclose, is not misleading under Rule 10b–5.”). Here, Appellees’ zero-tolerance policy was material and they had both a general duty to speak honestly about and a duty to correct the policy after failing to respond to verified sexual harassment claims.

#### Appellees’ zero-tolerance policy was material because of the policy’s specificity, periodic appearances in public SEC disclosures, and effect on the market when revealed as inaccurate.

This Court should find Appellees’ zero-tolerance policy material because the policy’s specificity and frequency in securities disclosures was considered important and reliable by reasonable investors. For a misrepresentation or omission to be material, there must be “a substantial likelihood that, under all the circumstances, the omitted fact [or misrepresentation] would have assumed actual significance in the deliberations of the reasonable shareholder.” TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (“The question of materiality … is an objective one.”). Turning to materiality of ethical statements in codes of conduct, ethical statements by companies are material, rather than mere puffery, when they are specific and reliable enough for reasonable investors to believe important. See Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc., 583 F.3d 935, 944 (6th Cir. 2009) (noting puffery to include “loosely optimistic statements that are so vague … that no reasonable investor could find them important”); see also ECA, Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009) (finding disclosures in SEC filings about defendant’s reputation for integrity to be puffery because the statements were “too general to cause a reasonable investor to rely upon them”).

In assessing whether statements are puffery, courts rely on “context-specific factors, including specificity, emphasis, and whether certain statements are designed to distinguish the company in some meaningful way to the investing public.” In re Signet Jewelers Ltd. Sec. Litig., 389 F. Supp. 3d 221, 230 (S.D.N.Y. 2019); compare Ind. Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85, 97-98 (2d Cir. 2016) (finding statements in an annual company report about ethics to be mere puffery because they were too general to serve as a guarantee that the company would always act in line with them),with In re Petrobras Sec. Litig., 116 F. Supp. 3d 368, 381 (S.D.N.Y. 2015) (finding defendant’s “statements regarding its general integrity and ethical soundness” to be material because “the statements were made repeatedly in an effort to reassure the investing public about the Company’s integrity”).

A drop in the prices of shares after news of withheld information can also serve as proof that the information was material. See No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding, 320 F.3d 920, 935 (9th Cir. 2003) (finding a post-disclosure 31% drop in stock price to “further suppor[t] a finding of materiality”); see also The New Orleans Emps. Ret. Sys. v. Celestica, Inc., 455 Fed. App’x. 10, 16 (2d Cir. 2011) (finding materiality supported by “the precipitous decrease in share price that occurred” after disclosure of “the true state” of the company's inventory). Finally, “in view of the prophylactic purpose of the [securities fraud] Rule” and companies’ control over their own disclosures, close judgments of materiality should be resolved in favor of plaintiffs. TSC Indus., 426 U.S. at 448 (“[I]t is appropriate that these doubts be resolved in favor of those the statute is designed to protect.”).

Here, Appellees’ zero-tolerance policy was objectively material because reasonable shareholders, such as the class of shareholders bringing suit, likely relied on Appellees’ policy in their investment deliberations. [R. 4]; see TSC Indus., 426 U.S. at 446, 449. While ethical statements within codes of conduct can be strictly aspirational, Appellees’ policy went beyond aspiration by describing itself as “zero-tolerance” and including detailed steps for enforcement. See Appendix A-1; see also Ind. State, 583 F.3d at 944; see also Ind. Pub., 818 F.3d at 97-98. Specifically, the zero-tolerance policy explains that “[u]pon a report that an employee has been harassed by another employee, the Company will promptly begin an internal investigation” and that perpetrators “will be dismissed immediately.” Appendix A-1.

In addition to being specific, Appellees’ zero-tolerance policy, like that in Petrobras, was periodically reemphasized by Appellees’ in their periodic SEC disclosures. [R. 3]; see 116 F. Supp. 3d at 381. Moreover, the 18% drop in share price after the Albers Times article is further proof that investors relied on the truth of Appellees’ zero-tolerance policy in their investment decision making. [R. 4]; see No. 84, 320 F.3d at 935. Finally, even if uncertainty remains as to the importance of Appellees’ zero-tolerance policy, close judgments should be resolved in favor of Astoria. See TSC Indus., 426 U.S. at 448. Therefore, this Court should find Appellees’ specific and periodically repeated disclosures about its zero-tolerance policy to be material.

#### By choosing to include references to their Code of Conduct in SEC filings, Appellees had a duty to speak truthfully and completely about their material zero-tolerance policy in order to not mislead investors.

The materiality element of Rule 10b-5 is met in Astoria’s case, not only because Appellees’ zero-tolerance policy was material, but also because Appellees had a general duty to speak truthfully about the policy in their securities disclosures. A general duty of honest disclosure arises when companies speak about material issues, including through mandatory disclosures to the SEC. See Ackerman v. Schwartz, 947 F.2d 841, 848 (7th Cir. 1991) (noting that when a publicly-traded company “speak[s] it must tell the truth about material issues”) (citing Basic, 485 U.S. at 232–36); see also H.R. Rep. No. 73-1383, at 11 (1934) (emphasizing “the vital importance of true and accurate corporate reporting as an essential cog in the proper functioning of the public exchanges”). Specifically when speaking about material issues, companies have a general duty to speak completely without any misleading gaps in detail. See First Va. Bankshares v. Benson, 559 F.2d 1307, 1317 (5th Cir. 1977), cert. denied, 435 U.S. 952 (1978) (“A duty to speak the full truth arises when a defendant undertakes to say anything.”); see also SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 861-862 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969) (finding that although defendant’s press release about an ore strike was factually accurate, it was still a potentially misleading half-truth because it left out available evidence of the strike’s magnitude). Moreover, Rule 10b-5 itself explicitly prohibits omitting material facts “necessary in order to make [previous] statements made, in the light of the circumstances under which they were made, not misleading.” 17 C.F.R. § 240.10b–5.

Given that Appellees’ zero-tolerance policy was material, Appellees had a general duty to speak honestly and completely about the policy in their public disclosures to the SEC. See Ackerman, 947 F.2d at 848. By omitting any mention of unresolved sexual harassment claims at GG, Appellees’ securities disclosures painted an incomplete picture of company policy. [R. 3]; see SEC, 401 F.2d at 861-62. Even worse, unlike in SEC, Appellees’ “zero-tolerance” policy was not even factually accurate. [R. 3]; see 401 F.2d at 861-862. After investigating and then ignoring multiple sexual harassment claims at GG, Appellees’ subsequent SEC disclosures, “in the light of the circumstances under which they were made,” misled investors. [R. 3]; see 17 C.F.R. § 240.10b–5. Overall, Appellees failed to comply with their general duty to speak honestly and completely about their zero-tolerance policy in multiple quarterly and annual securities disclosures.

#### Once Appellees realized their forward-looking and reasonably reliable zero-tolerance policy was inaccurate, they had a duty to correct the policy.

Not only did Appellees have a general duty to speak truthfully and completely about their zero-tolerance policy, Appellees also had a duty to correct their policy once they realized it was inaccurate. Companies are duty-bound to correct disclosures “if a disclosure is in fact misleading when made, and the speaker thereafter learns of this.” Backman v. Polaroid Corp., 910 F.2d 10, 16-17 (1st Cir. 1990). Specifically, subsequently inaccurate disclosures should be corrected if they contained forward-looking and reasonably reliable statements. Compare In re Healthco Int’l Sec. Litig., 777 F. Supp. 109, 114 (D. Mass. 1991) (finding no duty to correct a third-quarter report that omitted impending fourth-quarter losses because the third-quarter report was not “necessarily indicative of the results to be expected from the full fiscal year”), with In re Facebook, Inc., IPO Sec. and Derivative Litig., 986 F.Supp.2d 428, 465 (S.D.N.Y. 2013) (finding a duty to correct prior statements “once they were found to be untrue” because “Defendants made specific statements leading up to the Facebook IPO ensuring ‘on-time, on-target and ready-to-launch’ technology”).

Here, Appellees had a duty to correct their zero-tolerance policy, referenced in all their securities disclosures, once they realized that the policy was misleading. See Backman, 910 F.2d at 16-17. Specifically, Appellees’ zero-tolerance policy misled investors by claiming “that [the policy] applies to all employees” and that “[a]ny employee who … is found to have sexually harassed another employee will be dismissed immediately.” Appendix A-1. In reality, Appellees confirmed and then took no action to respond to internal sexual harassment claims in 2016 and again in 2018. [R. 2-3]. Moreover, unlike the siloed third-quarter earnings report in Healthco, Appellees’ zero-tolerance policy spoke to both current and ongoing procedures and standards by stating that “the Company *maintains* a zero-tolerance … policy” and that all employees “are expected to comply … as a condition of their *continued* employment.” Appendix A-1 (emphasis added); see 777 F. Supp. at 114.

Like the technology assurances in Facebook, Appellees’ zero-tolerance policy was forward-looking in describing how investors and GG employees alike should expect Appellees to react to any and all sexual harassment claims at GG. See Appendix A-1; see also 986 F.Supp.2d at 465. Just like statements in Facebook ensured inventors about specific technology standards, Appellees’ zero-tolerance policy ensured investors that “[n]o confirmed instances of workplace sexual harassment will be allowed to persist at the company.” See Appendix A-1; see also 986 F.Supp.2d at 465. The specific applicability and enforcement steps detailed within Appellees’ zero-tolerance policy ensured reasonable investors of the policy’s reliability. See Appendix A-1; see also 986 F.Supp.2d at 465. Therefore, once Appellees realized that their zero-tolerance policy was inaccurate, Appellees had a duty to correct it.

Overall, Appellees repeatedly violated Rule 10b-5 in securities disclosures by materially misrepresenting their zero-tolerance policy for sexual harassment. Appellees’ zero-tolerance policy was material to the investing public and Appellees never lived up to their general duty to speak truthfully about the Code’s sexual harassment policy. After realizing the inaccuracies within their zero-tolerance policy Appellees failed to meet their duty to correct and speak out about the inaccuracies.

## THE FOURTEENTH CIRCUIT INCORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT FOR APPELLEES BY FINDING THE ACT UNCONSTITUTIONAL UNDER THE EXTRATERRITORIALITY DOCTRINE BECAUSE THE DOCTRINE HAS PROVEN UNWORKABLE AND UNNECESSARY AND THE ACT IS BEYOND THE DOCTRINE’S SCOPE.

This Court should reverse the Fourteenth Circuit’s affirmation of the district court’s decision that the Act is unconstitutional under the extraterritoriality doctrine of the dormant Commerce Clause. The Act promotes gender diversity in Albers in a manner consistent with the principles of the Commerce Clause and does not regulate wholly out-of-state commerce. This Court reviews questions of constitutionality de novo. See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n, 945 F.3d 206, 212 (5th Cir. 2019).

The Commerce Clause gives Congress power to regulate interstate commerce. U.S. Const., art. I, § 8, cl. 3. The dormant Commerce Clause is an implied negative component of the Commerce Clause, which limits a state’s ability to pass legislation that interferes with interstate commerce. Id.; CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987). The extraterritoriality doctrine is a judge-made rule grounded in the dormant Commerce Clause that precludes state legislation from either expressly regulating out-of-state commerce or having the effect of regulation, regardless of the legislature’s intent. Healy v. Beer Inst., 491 U.S. 324, 326 (1989).

The extraterritoriality doctrine has primarily been used to address the constitutionality of price affirmation and price control statutes. There are few cases where this Court has used the extraterritoriality doctrine to address the constitutionality of state corporation statutes. Variations in those holdings show that the doctrine has become unworkable and unclear and is no longer a useful tool for dormant Commerce Clause analysis. The lack of clear elements or a standard of review has created confusion for lower federal courts, a circuit split, and inconsistent approaches in evaluating the scope of the doctrine. The doctrine and its precedent should be overturned and no longer be applied in future cases.

Furthermore, even if this Court does not overturn the doctrine’s precedent, the doctrine is not the appropriate tool for analyzing the Act. The doctrine applies only to “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors,” not those that merely expose companies to inconsistent regulations. See New Energy Co. v. Limbach, 486 U.S. 269, 271 (1988); Dean Foods Co v. Brancel, 187 F.3d 609, 616 (7th Cir. 1999). Interpreted broadly, the doctrine examines whether a state statute will lead to a company being exposed to inconsistent regulations. However, the Constitution does not guarantee a uniform national regulatory scheme for all actors choosing to participate in interstate commerce. Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978). This Court should find that the Fourteenth Circuit erred in adopting a broad approach to the doctrine and instead consider only whether the statute had the actual effect of regulating wholly out-of-state commerce. Under the narrow approach adopted by the First and Tenth Circuits, the Act is outside the scope of the extraterritoriality doctrine.

Even if this Court adopts a broad approach and analyzes the Act under the doctrine, the Act does not violate the doctrine. Because the Act affects shareholders within the State of Albers, it regulates both in and out-of-state commerce, not commerce occurring wholly outside the state. The correct method for analyzing a facially neutral statute that affects wholly out-of-state commerce is the Pike balancing test, not the extraterritoriality doctrine. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Should this Court decide the Act affects wholly out-of-state commerce, it must analyze the Act under the Pike test. The Act would not be invalidated under the Pike test because the requirements set forth by the Act are not unduly burdensome when weighed against the putative benefits for the State of Albers. Id.

### The extraterritoriality doctrine is no longer a useful tool for dormant Commerce Clause analysis because it is unworkable and unclear, and developments in related legal principles law have made the doctrine unnecessary and outdated.

### 

This Court should reverse the Fourteenth Circuit’s finding that the Act is unconstitutional under the extraterritoriality doctrine of the dormant Commerce Clause. The precedent set by the extraterritoriality doctrine should be overturned; the Act should not be evaluated under the doctrine nor should the doctrine be applied in future cases. While much deference should be given to the precedent set by this Court, the rule of stare decisis is not an "inexorable command." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion) (finding that rules in a prior decision may ultimately "prove[] to be intolerable simply in defying practical workability"); see also Payne v. Tennessee, 501 U.S. 808, 842 (1991) (concluding that wrongly decided and unworkable precedent should be overruled, and that stare decisis should not apply “as rigidly in constitutional cases as in nonconstitutional cases”).

This Court has been faced with the question of whether or not to overrule past decisions numerous times. A list of non-exhaustive factors was identified in Planned Parenthood to guide this Court when it considers overruling precedent. See 505 U.S. at 855-56. Here, the Court should consider whether the rule has become unworkable so that reliance on the rule would create hardships and whether developments in related principles of law have made the rule outdated and unnecessary. Id.; see also Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

#### Extraterritoriality doctrine jurisprudence has become unworkable and unclear, creating confusion in the lower federal courts.

While precedent set by this Court should be given deference, the doctrine's lack of clarity and workability is grounds for overturning it. See Montejo v. Louisiana, 556 U.S. 778, 779 (2009) (finding that once a decision has proved unworkable, the court has traditional grounds to overrule it); see also Planned Parenthood, 505 U.S. at 854. The extraterritoriality doctrine is over a century old but, as the Fourteenth Circuit acknowledged, this Court still has not established clear elements for review under the doctrine, making the doctrine too difficult to apply uniformly. [R. 15]; see Bonaparte v. Tax Ct., 104 U.S. 592, 845 (1881). The unworkability of the doctrine and its unclear standards have left lower court judges with too much discretion, causing unpredictable and contradictory outcomes and creating a circuit split over the doctrine’s scope. Compare Ass’n for Accessible Meds v. Frosh, 887 F.3d 664, 673 (4th Cir. 2018) (applying the doctrine’s scope broadly and assessing whether a challenged statute could potentially subject companies to inconsistent regulations), with Dean Foods, 187 F.3d at 616 (adopting a narrower approach and only considering whether the statutes would have the practical effect of regulating out-of-state commerce).

Most Supreme Court cases evaluating state statutes under the extraterritoriality doctrine are associated with price affirmation or price control statutes. See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519, 521-24 (1935); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); Healy, 491 U.S. at 326, 334-38. Looking to the few cases where the Court has used the doctrine to address the constitutionality of state corporation statutes, variations in the holdings show that the doctrine has become unworkable and unclear. Compare Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion) (utilizing the extraterritoriality doctrine to invalidate a statute even though the statute was not a price affirmation or price control statute), with Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 649 (2003) (rejecting the application of the extraterritoriality doctrine to invalidate Maine’s Medicaid rebate program because the program was not a price affirmation or price control statute).

#### Developments in related law have made the extraterritoriality doctrine outdated and unnecessary.

Justice Thomas has stated that "precedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of stare decisis." Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 636 (1997) (Thomas, J., dissenting). In a landmark case that declared a long-standing precedent to be unconstitutional, the Court found that, while stare decisis helps with stability of the law, it does not compel the Court to follow a past decision when the rationale no longer “withstand[s] careful analysis." Lawrence v. Texas, 539 U. S. 558, 577 (2003). Justice Scalia has argued in many of his dissents that the Constitution does not contain a negative commerce clause nor is it plainly required by the Court’s prior decisions, and that “uncertainty in application has been attributable in no small part to the lack of any clear theoretical underpinning for judicial ‘enforcement’ of the Commerce Clause.” Tyler Pipe Indus. v. Washington State Dep’t of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., dissenting) (arguing that discrimination against citizens of other states should be regulated by the Privileges and Immunities Clause of the Constitution, not the Commerce Clause); see also Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1807-08 (2015) (Scalia, J., dissenting) (calling the extraterritoriality doctrine a “judge-invented rule” that is a “judicial fraud”).

This Court should overturn the extraterritoriality doctrine and instead rely on developments in related principles of law and the growth of other judicial doctrine. The doctrine is redundant because most state statutes invalidated under it would also be invalidated under other dormant Commerce Clause principles. See Healy, 491 U.S. at 326. In Healy, this Court invalidated a state price affirmation statute because it discriminated against out-of-state commerce and because it violated the extraterritoriality doctrine. Id. This Court noted that the statute in Healy would have been invalidated under the first prong of the dormant Commerce Clause alone; application of the extraterritoriality doctrine was not necessary. Id.; see Brown-Forman, 476 U.S. at 579 (finding that, under the first prong of the dormant Commerce Clause, state regulations that facially discriminate against or have a discriminatory effect on out-of-state commerce are unconstitutional). Additionally, the Pike balancing test serves to invalidate any other state regulations that may not discriminate against wholly out-of-state commerce but could potentially be improperly burdensome to interstate commerce. 397 U.S. at 142.

This Court has held that precedence should not be adhered to in the name of stare decisis once it has proved to be unworkable, unclear, and impractical. While grounded in the Constitution’s grant of power over interstate commerce, the extraterritoriality doctrine is a judge-made rule that should be overturned because it is no longer useful or necessary. This Court should overturn the extraterritoriality doctrine and not apply it in this or future cases.

### The Act is valid under the extraterritoriality doctrine of the dormant Commerce Clause because it affects both in and out-of-state commerce, putting it outside the doctrine’s scope.

Regardless of whether this Court decides to overturn the precedent of the extraterritoriality doctrine, the Act is not violative of the dormant Commerce Clause. The doctrine only applies to statutes that regulate wholly out-of-state commerce, not to statutes that only have indirect effects. Healy, 491 U.S. at 336. A broad approach examines the potential effects of a state’s regulation on wholly out-of-state conduct, and a narrow approach considers only whether a state statute has the practical effect of regulating wholly out-of-state commerce. See, e.g., Frosh, 887 F.3d at 673; Dean Foods, 187 F.3d at 616. This Court should adopt the narrow approach and find the doctrine only applies if a statute directly regulates wholly out-of-state commerce, not when it only has indirect effects.

Moreover, even if the Court chooses a broad approach and finds that the Act is within the doctrine’s scope, the Act is still constitutional under the Commerce Clause. The extraterritoriality doctrine only applies if the Act regulates wholly out-of-state commerce; the Constitution does not guarantee freedom from the effects of state regulations for companies choosing to participate in interstate commerce. See Dean Foods, 187 F.3d at 616. Given that the Act affects both in-state and out-of-state activities, mere exposure to inconsistent regulations should not be reason enough for this Court to strike down the Act.

Lastly, even if this Court determines that the Act regulates wholly out-of-state commerce, the Pike balancing test would be the correct tool for analysis. Under the Pike test, any burdens the Act imposes on out-of-state commerce must not be clearly excessive in comparison to the local benefits. Pike, 397 U.S. at 142. The Act is still constitutional under the Pike balancing test because its regulation is not unduly burdensome to interstate commerce. Id.

#### Under a narrow approach, the Act is outside of the scope of the extraterritoriality doctrine and does not violate the dormant Commerce Clause.

The extraterritoriality doctrine “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” MITE Corp., 457 U.S. at 642-43. The doctrine is only meant to prohibit any direct regulation of interstate commerce by the states. Id. at 639. Incidentalregulation of interstate commerce is permitted. Compare id. at 624 (invalidating an Illinois antitakeover statute because it directly regulated transactions occurring outside the border), with CTS Corp., 481 U.S. at 87 (upholding an Indiana antitakeover statute because the mere fact that a state regulation may discriminate against some interstate companies does not mean the regulation directly affects only out-of-state commerce).

Most cases that apply the extraterritoriality doctrine have been associated with price affirmation or price controls statutes. The doctrine’s limited application to state regulatory corporate law creates an unclear standard of review for the lower federal courts to apply. Circuits are split on how to determine whether a statute regulates wholly out-of-state commerce and would benefit from clarifying guidance by this Court. Because a clear test has not yet been provided, this Court should take this opportunity to bring coherence to dormant Commerce Clause jurisprudence by clarifying the scope of its prior decisions. This Court should revisit its holding in Walsh and find that the scope of the doctrine should be narrowed to only preclude state statutes that explicitly or practically violate the dormant Commerce Clause. 538 U.S. at 649 (upholding Maine’s Medicaid rebate program against claims that it violated the extraterritoriality doctrine because neither its express term nor its inevitable effects discriminated against interstate commerce). Alternatively, this Court should look to the approaches of the First or Tenth Circuits to find that the Act is outside the doctrine’s scope.

A broad approach, such as the one adopted by the Fourth Circuit, considers a state statute’s potential effects on wholly out-of-state conduct and whether it would subject corporations to inconsistent regulations. See, e.g., Frosh, 887 F.3d at 673. However, the Fourth Circuit fails to consider that the Commerce Clause serves to protect the interstate market as a whole, not particular interstate firms, from potential burdensome regulations. Exxon Corp., 437 U.S. at 127 (affirming Maryland’s use of a price control statute, and disallowing an argument against the statute that related to its wisdom, not its burden on interstate commerce, because inconvenience to a corporation is irrelevant to a statute’s constitutionality); see also Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (holding that nothing in the Commerce Clause prohibits a state from favoring its own citizens and that, because the practical effect of a Maryland price control statute was to benefit and protect the state, the statute was allowed to create inconsistent regulations that favored its citizens).

A narrower approach considers only the practical effects of regulating wholly out-of-state commerce. The doctrine seeks to protect out-of-state corporations from “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” New Energy Co., 486 U.S. at 271. The First Circuit concluded that the goal of the dormant Commerce Clause is preventing economic protectionism, not enforcing geographical limits of state powers necessary to regulate commerce. See, e.g., IMS Health Inc. v. Mills, 616 F.3d 7, 30-31 (1st Cir. 2010), vacated on other grounds sub nom. IMS Health v. Schneider, 564 U.S. 1051 (2011). The First Circuit further asserted that “the Supreme Court has not barred states from regulating any commercial transactions beyond their borders that involve their own citizens and create in-state harms.” Id.; see also Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal.”).

The Tenth Circuit takes an even narrower approach to find that the doctrine should only be applied to price affirmation and control statutes. Energy & Env’t Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015). It adopts the position in Baldwin, Brown-Forman, and Healy that the “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” Healy, 491 U.S. at 336.

Here, the Act concerns precisely the kind of traditional state concerns that the Supreme Court has held fall outside the reach of the dormant Commerce Clause. See IMS Health 616 F.3d at 30-31; Davis, 553 U.S. at 342. Appellees concede that the Act does not violate the doctrine under either the First or Tenth Circuit narrow approaches because either way the Act falls outside the doctrine’s scope. [R. 16]. The Act does not affect price and it is not economic protectionism. See Appendix B-2. The Act does not burden out-of-state competitors but allows the State of Albers to act on its constitutional right and duty to protect its citizens. See id. In short, it does not aim to micromanage the boards of directors of any corporation; the Act simply aims for gender parity by regulating a policy that creates harms both in and out-of-state.

The doctrine is not an all-purpose deregulatory tool for companies to use to avoid regulations they would rather not follow by claiming said regulations violate the Commerce Clause. This Court should adopt a narrow approach and only apply the extraterritoriality doctrine to state statutes that have the practical effect of projecting their legislation onto other states. See Baldwin, 294 U.S. at 521.

#### Because the Act regulates both in and out-of-state activities, the Act is outside the doctrine’s scope and it is not precluded by the doctrine’s ban on statutes regulating wholly out-of-state commerce.

For the Act to be evaluated under the doctrine, the Act would need to regulate commerce occurring wholly outside Alber’s borders. Healy, 491 U.S. at 336. When determining if control is wholly outside the state, “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” Id. The extraterritoriality doctrine is meant to control excessive variance of in-state commerce laws that would subject interstate companies to conflicting regulatory regimes. Id. at 336-37. But it is not the role of the Constitution to guarantee a uniform national regulatory scheme. Exxon Corp., 437 U.S. at 127. A business choosing to perform interstate operations makes a conscientious choice that requires it to be prepared to conform with various and often conflicting state laws. Nowhere in the Commerce Clause does it imply that an enterprise should be granted special privileges just because it happens to operate across state lines. Id.

In CTS Corp., this Court acknowledged that every state has laws that regulate corporate governance and affect certain aspects of interstate commerce, especially those corporations with shareholders in many states. 481 U.S. at 94. In MITE Corp., this Court struck down an Illinois antitakeover statute that was written in a way that could regulate takeovers that did not affect a single Illinois shareholder. 457 U.S. at 642. Here, Astoria owns 10.2% of GG stock and resides in Albers, as do other members of the Appellant shareholder class. [R. 2]. Arguing that the Act’s regulations are wholly out-of-state is tantamount to arguing that the rights and concerns of Astoria and other shareholders residing in the State of Albers are irrelevant to GG. Because the Act regulates both in and out-of-state commerce it is outside of the scope of the doctrine and the Act cannot be found unconstitutional under the doctrine.

#### The Act should not be evaluated under the extraterritoriality doctrine because any remaining concerns of inconsistent state regulations can be evaluated under the Pike balancing test.

Even if this Court were to conclude that the Act regulates wholly out-of-state commerce, it does so in a facially neutral way and should instead be analyzed under the Pike balancing test. See State v. Heckel, 24 P.3d 404, 409 (Wash. 2001) (finding the Pike balancing test governs when a statute “is facially neutral, applying impartially to in-state and out-of-state businesses”); see also Pike, 397 U.S. at 142. The district court found that the Act would be constitutional under the Pike balancing test and Appellees have not challenged that finding. Both parties concede that the Act neither facially discriminates against, nor has a discriminatory effect on, out-of-state commerce. [R. 13]. A state statute must be upheld if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.

The benefits of the Act are clear. Citing multiple studies and statistics, the Act lays out the benefits to corporations of having more women on their boards. See Appendix B-1. It costs nothing, neither financially nor reputability, for corporations to comply with the Act, but the performance and economic benefits of achieving economic parity are numerous. More women on boards leads to better earnings per share, improved sustainability and stock performance, and a higher net income growth rate. See id. Discriminatory statutes can be unconstitutional under Pike if they place an “undue burden” on interstate commerce, but a long overdue call for gender equality places no such burden. Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535, 545 (4th Cir. 2013). Thus, if this Court finds that the Act regulates wholly out-of-state commerce, the Pike test should be applied, and the Act should be found constitutional.

# **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Court REVERSE the Fourteenth Circuit Court of Appeal’s grant of summary judgment for Appellees.

Respectfully Submitted,

Blair Astoria

By her attorneys,

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Attorney 1

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Attorney 2

# **APPENDIX A**

**Genius Games Code of Conduct**

**Purpose of the Code of Conduct**

This Code of Conduct sets the standards by which Genius Games (the “Company”) operates as a company. We take immense pride in being an ethical and inclusive workplace, and we therefore expect that all employees read and abide by the policies set forth herein. Any violations of the policies, rules, and standards set forth in this Code are absolutely unacceptable. The Company will take appropriate action against any alleged violations of any provision in this Code.

. . . .

**Zero-Tolerance Harassment Policy**

(a) Zero-tolerance harassment policy. Maintaining a safe and comfortable workplace environment is essential to fostering high-quality work product and trust within the Company. We strongly believe that no employee should be subjected to sexual harassment by another employee. Accordingly, the Company maintains a zero-tolerance sexual harassment policy that applies to all employees.

(b) Enforcement of zero-tolerance policy. The Company takes all alleged incidents of sexual harassment seriously. Upon a report that an employee has been harassed by another employee, the Company will promptly begin an internal investigation into the allegations to be conducted by the Company. If you report an instance of workplace sexual harassment, your identity will remain anonymous to the extent possible. Any employee who, after such an internal investigation, is found to have sexually harassed another employee will be dismissed immediately.

(c) Applicability. This zero-tolerance policy applies to all employees of the Company. No confirmed instances of workplace sexual harassment will be allowed to persist at the Company. All employees are hereby on notice of this policy and are expected to comply with it as a condition of their continued employment with the Company.

**APPENDIX B**

**Senate Bill No. 455**

CHAPTER 237

An act to add Sections to the Albers General Corporations Law, relating to corporations.

Introduced May 1, 2018. Approved by Governor November 30, 2018. Filed with Secretary of State November 30, 2018.

THE PEOPLE OF THE STATE OF ALBERS DO ENACT AS FOLLOWS:

**SECTION 1.**

The Legislature finds and declares as follows:

(a) More women directors serving on boards of directors of publicly held corporations will boost the Albers economy, improve opportunities for women in the workplace, and protect Albers taxpayers, shareholders, and retirees. Yet studies predict that it will take 40 or 50 years to achieve gender parity, if something is not done proactively.

(b) Numerous independent studies have concluded that publicly held companies perform better when women serve on their boards of directors, including:

(1) A 2016 study by MSCI found that United States companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were 45 percent higher than those companies with no female directors at the beginning of the period.[[1]](#footnote-1)

(2) In 2014, Credit Suisse found that companies with at least one woman on the board had an average return on equity (“ROE”) of 12.2 percent, compared to 10.1 percent for companies with no female directors. Additionally, the price-to-book value of these firms was greater for those with women on their boards: 2.4 times the value in comparison to 1.8 times the value for zero-women boards.[[2]](#footnote-2)

(3) A 2012 University of California, Berkeley study called “Women Create a Sustainable Future” found that companies with more women on their boards are

more likely to “create a sustainable future” by, among other things, instituting strong governance structures with a high level of transparency.[[3]](#footnote-3)

(4) Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance. For companies with a market capitalization of more than $10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent. The Credit Suisse report included the following findings:

(A) There has been a greater correlation between stock performance and the presence of women on a board since the financial crisis in 2008.

(B) Companies with women on their boards of directors significantly outperformed others when the recession occurred.

(C) Companies with women on their boards tend to be somewhat risk averse and carry less debt, on average.

(D) Net income growth for companies with women on their boards averaged 14 percent over a six-year period, compared with 10 percent for companies with no women directors.[[4]](#footnote-4)

(c) 32 percent of Albers’s public companies in the Russell 3000 index have NO women on their boards of directors; and for the rest of the companies, women hold only 10.5 percent of the board seats. A 2017 report conducted by University of Albers professor Beth Bertrand found the following:

(1) As of December 2017, among the 104 publicly traded companies included in the Russell 3000 index and incorporated or headquartered in Albers, representing nearly $1.4 trillion in market capitalization, women directors held 278 seats, or 10.5 percent of seats, while men held 2,377 seats, or 89.5 percent of seats.

(2) More than one-quarter, numbering 26, of the Russell 3000 companies based in Albers have NO women directors serving on their boards.

(3) Only 12, or 12 percent, of these companies have three or more female directors on their boards.

(4) Smaller companies are much more likely to lack female directors. Among the 50 Albers-based companies with the lowest revenues, with an average of $13 million in 2015 revenues, only 8.4 percent of the director seats are held by women, and nearly half, or 48 percent, of these companies have NO women directors.

**SEC. 2.**

Section 301.3 is added to the AGCL, to read:

**301.3.**

(a) No later than June 30, 2019, a publicly held domestic corporation, a foreign corporation with principal executive offices in Albers, or a foreign corporation with 10% or more of its shares owned by Albers residents shall have a minimum of one female director on its board. A corporation may increase the number of directors on its board to comply with this section.

(b) No later than the close of the 2020 calendar year, a publicly held domestic corporation, a foreign corporation with principal executive offices in Albers, or a foreign corporation with 10% or more of its shares owned by Albers residents shall comply with the following:

(1) If its number of directors is six or more, the corporation shall have a minimum of three female directors.

(2) If its number of directors is five, the corporation shall have a minimum of two female directors.

(3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.

(c) No later than August 1, 2019, the Secretary of State shall publish a report on its Internet Web site documenting the number of corporations subject to this statute who have at least one female director.

(d) No later than March 1, 2020, and annually thereafter, the Secretary of State shall publish a report on its Internet Web site regarding, at a minimum, all of the following:

(1) The number of corporations subject to this section that were in compliance with the requirements of this section during at least one point during the preceding calendar year.

(2) The number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

(e) A shareholder of a corporation subject to this section may commence a civil action against the corporation for failure to comply with this section. Notwithstanding any other remedies, a shareholder may recover a civil penalty of $100 per share for each violation of this section.

(f) For purposes of this section, the following definitions apply:

(1) “Domestic corporation” means a corporation organized under the laws of the State of Albers.

(2) “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

(3) “Publicly held corporation” means a corporation with outstanding shares listed on a major United States stock exchange.

(4) “Foreign corporation” means a corporation organized under the laws of a state other than the State of Albers.

1. Meggin Thwing Eastman, Damion Rallis & Gaia Mazzucchelli, MSCI ESG Research LLC, The Tipping Point: Women on Boards and Financial Performance 3 (2016), https://www.msci.com/documents/%2010199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb. [↑](#footnote-ref-1)
2. 3 Credit Suisse AG Research Institute, The CS Gender 3000: Women in Senior Management 16 (2014), https://directwomen.org/sites/default/files/news-pdfs/9.pdf. [↑](#footnote-ref-2)
3. Pamela Tom, More Female Board Directors Add Up to Improved Sustainability Performance, BerkeleyHaas (Nov. 15, 2012), https://newsroom.haas.berkeley.edu/more-female-board-directors-add-improved-sustainability-performance/. [↑](#footnote-ref-3)
4. Credit Suisse AG Research Institute, Gender Diversity and Corporate Performance (2012), https://wappp.hks.harvard.edu/files/wappp/files/gender\_diversity.pdf. [↑](#footnote-ref-4)