NO. ALB-21-01

IN THE SUPREME COURT OF THE UNITED STATES

Blair ASTORIA, et al.,

PETITIONERS

v.

GENIUS GAMES, INC., Chuck Winnow,

Bartholomew Winnow, Noah Archibald & Don Humphrey,

RESPONDENTS

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

BRIEF FOR RESPONDENTS

ALB-21-01-R1

# QUESTIONS PRESENTED

1. Whether the Fourteenth Circuit correctly held that Genius Games properly complied with § 10(b) of the Securities Exchange Act and Rule 10b-5 because the zero-tolerance policy in Genius Games’s Code of Conduct was immaterial puffery.
2. Whether the Fourteenth Circuit correctly held that Albers Senate Bill No. 455 violates the extraterritoriality doctrine of the dormant Commerce Clause because the Bill regulates conduct occurring wholly outside of Albers.

# TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iv

Proceedings Below 1

Constitutional Provision 2

Statutory Provisions 3

Statement of the Case 4

Summary of the Argument 6

Argument 8

I. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT GENIUS GAMES COMPLIED WITH § 10(b) AND RULE 10b-5 BECAUSE THE ZERO-TOLERANCE POLICY WAS IMMATERIAL PUFFERY. 8

A. The Fourteenth Circuit erred when it allowed Petitioners to proceed with the present suit because Petitioners do not have a private right of action under Rule 10b-5. 9

B. The zero-tolerance policy in the Code of Conduct was immaterial puffery. 11

C. Genius Games complied with its obligations under Rule 10b-5 when the company refrained from making a public statement and included the same Code of Conduct in its annual disclosure following the investigation of sexual harassment. 13

1. Genius Games properly disclosed all required information. 14

2. Genius Games properly represented the facts in its Code of Conduct in the 2018 annual disclosure. 15

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT ALBERS SENATE BILL NO. 455 VIOLATES THE EXTRATERRITORIALITY DOCTRINE OF THE DORMANT COMMERCE CLAUSE BECAUSE THE BILL REGULATES CONDUCT OCCURING WHOLLY OUTSIDE OF ALBERS. 17

A. The extraterritoriality doctrine’s application to the Act renders the Act unconstitutional. 20

B. The rule of stare decisis supports the extraterritoriality doctrine because the doctrine remains undisturbed, remains necessary, provides a workable framework, and prevents confusion. 22

1. The extraterritoriality doctrine remains undisturbed. 22

2. The extraterritoriality doctrine remains necessary. 24

3. The extraterritoriality doctrine provides a workable framework and prevents confusion. 25

C. History, federalism, and the democratic process buttress the extraterritoriality doctrine. 26

Conclusion 29

Appendix A A-1

Appendix B B-1

# TABLE OF AUTHORITIES

**United States Supreme Court Cases**

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 18

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 11, 12

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) 18, 22

Cent. Bank v. First Interstate Bank, 511 U.S. 164 (1994) Passim

Chiarella v. United States, 445 U.S. 222 (1980) 9, 10

Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) 26, 27

Cooley v. Bd. Wardens, 53 U.S. (12 How.) 299 (1852) 18

CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987) 18

Edgar v. MITE Corp., 457 U.S. 624 (1982) Passim

Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011) 10

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) Passim

Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011) 11

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011) 9, 11, 14

New Energy Co. v. Limbach, 486 U.S. 269 (1988) 24

Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644 (2003) 22, 23

Pierce v. Underwood, 487 U.S. 552 (1988) 8

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 24

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 22, 24, 25, 28

S.C. State Highway Dep’t v. Barnwell Bros., 303 U.S. 177 (1938) 26, 27

Salve Regina Coll. v. Russell, 499 U.S. 225 (1991) 17

Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) 10, 11

Shaffer v. Heitner, 433 U.S. 186 (1997) 26, 27

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008) 10, 11

Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) 9, 10

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) 11

**Other Federal Cases**

A.S. Goldmen & Co. v. N.J. Bureau of Secs., 163 F.3d 780 (3d Cir. 1999) 19, 25

Am. Beverage Ass’n v. Snyder, 735 F.3d 362 (6th Cir. 2013) 19, 20, 21, 25

Am. Booksellers Found. v. Dean, 342 F.3d 96 (2d Cir. 2003) 19, 25

Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937 (9th Cir. 2013) 19, 23

Ass’n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018) 20, 21, 23, 25

Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990) 16

Bondali v. Yum! Brands Inc., 620 F. App’x 483 (6th Cir. 2015) 16, 17

Brody v. Transitional Hosps. Corp., 280 F.3d 997 (9th Cir. 2002) 14, 15

Carolina Trucks & Equip., Inc. v. Volvo Trucks, 492 F.3d 484 (4th Cir. 2007) 19, 25

City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651 (6th Cir. 2005) 14

City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS, 752 F.3d 173 (2d Cir. 2014) 12, 13, 17

Constr. Laborers Pension Tr. v. CBS Corp., 433 F. Supp. 3d 515 (S.D.N.Y. 2020) 12, 13, 15

Dean Foods Co. v. Brancel, 187 F.3d 609 (7th Cir. 1999) 19, 25

Energy & Env’t Legal Inst. v. Epel, 793 F.3d 1169 (10th Cir. 2015) 19, 23, 24, 25

IMS Health Inc. v. Mills, 616 F.3d 7 (1st Cir. 2010) 19, 23

In re Facebook, Inc., IPO Sec. & Derivative Litig., 986 F. Supp. 2d 428 (S.D.N.Y. 2013) 16

In re Goldman Sachs Grp., Inc., Sec. Litig., 2014 WL 2815571 (S.D.N.Y. June 23, 2014) 12, 13

In re Omnicare, Inc. Sec. Litig., 769 F.3d 455 (6th Cir. 2014) 14, 15

In re Quintel Ent. Inc. Sec. Litig., 72 F. Supp. 2d 283 (S.D.N.Y. 1999) 16

In re Time Warner Inc. Sec. Litig., 9 F.3d. 259 (2d Cir. 1993) 14

Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp.3d 12 (S.D.N.Y. 2016) 12, 13, 14

North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016) 19, 25

Or. Pub. Emps. Ret. Fund v. Apollo Grp., Inc., 774 F.3d 598 (9th Cir. 2014) 15

Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d. 66 (1st Cir. 2001) 23

Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268 (9th Cir. 2017) 14, 15, 17

**Constitutional Provisions**

U.S. Const. art. I, § 8, cl. 3 2, 18

**Federal Statutory Provisions**

15 U.S.C. § 78b 8, 10

15 U.S.C. § 78j 1, 3, 8

**State Statutory Provisions**

Albers Senate Bill No. 455, ch. 237 §2(a)…………………………………………………..Passim

**Federal Regulations**

17 C.F.R. § 240.10b-5 (1951) 1, 8, 9, 14

**Other Authorities**

Faith Stevelman, Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law, 34 Del. J. Corp. L. 57, 60 (2009) ………………………………………………………….27

# PROCEEDINGS BELOW

On August 15, 2009, Petitioners filed a class action suit against Respondents Genius Games, Inc. (“GG”), and its directors in the United States District Court for the District of Albers. [R. 4]. The proposed class consisted of shareholders who purchased and owned shares in GG during a specified time period. [R. 4]. Petitioners raised two claims. [R. 4]. First, petitioners alleged a violation of § 10(b) of the Securities Exchange Act and Rule 10b-5. [R. 5]; see also 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5 (1951). Second, petitioners alleged a violation of Albers Senate Bill No. 455 (the “Act”). [R. 4]; see also infra App. B. The class sought damages and injunctive relief requiring GG to change the composition of its corporate board. [R. 5].

The district court certified the class. [R. 5]. The parties conducted discovery. [R. 5]. GG moved for summary judgment on both claims. [R. 5]. And on February 6, 2020, the district court, Basset, J., presiding, granted summary judgment for GG. [R. 1, 5]. Specifically, the district court held that the zero-tolerance policy in GG’s Code of Conduct was immaterial and thus not actionable. [R. 5]. The district court also held that the Act violated the extraterritoriality doctrine of the dormant Commerce Clause. [R. 5].

On February 10, 2020, Petitioners appealed to the United States Court of Appeals for the Fourteenth Circuit. On June 17, 2020, the Fourteenth Circuit, Featherington, Danbury, and Whistledown, JJ., presiding, affirmed the district court’s decision granting summary judgment on both claims. [R. 1, 2, 17]. The Fourteenth Circuit similarly held that the zero-tolerance policy was immaterial and that the Act violated the extraterritoriality doctrine. [R. 11, 17].

On January 22, 2021, the Supreme Court granted Petitioners a writ of certiorari to consider all issues raised below. [R. 18].

# CONSTITUTIONAL PROVISION

**U.S. Const. art. I, § 8, cl. 3****.**

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

# STATUTORY PROVISIONS

**Securities Exchange Act of 1934, §10(b),** **15 U.S.C. § 78j****.**

SECTION 10

. . . .

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****, ch. 237, § 2(a).**

See Appendix B for full text. Section 2(a) is printed here.

SECTION 2

. . . .

(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.

# STATEMENT OF THE CASE

Genius Games, Inc. (“GG”), produces popular video games. [R. 2]. Chuck Winnow (“Winnow”), Chief Executive Officer (“CEO”) of GG, and three other founders, now directors, launched GG. [R. 2]. GG complies with the applicable securities regulations and includes the GG Code of Conduct (“Code”) in its annual disclosures. [R. 2]. The Code “sets the standards” for GG’s workplace and articulates GG’s values. [R. A-1]; infra App. A. The Code also outlines a zero-tolerance sexual harassment policy (“zero-tolerance policy”), which includes a prompt investigation and dismissal of an employee who engages in sexual harassment. [R. A-1].

In 2016, an employee alleged she was sexually harassed by Winnow. [R. 2]. The other directors investigated and confirmed the allegation pursuant to the Code. [R. 2].In 2018, five other employees alleged they were sexually harassed by Winnow. [R. 3]. In accordance with the Code, GG investigated and verified the report. [R. 3].Winnow was not fired.[R. 3].GG employees refrained from making a public statement about the allegations. [R. 3].On March 15, 2019, GG continued to comply with securities regulations, and, in a timely manner, incorporated the same Code in its disclosure for fiscal year 2018.[R. 3].On March 31, 2019, the *Albers Times* published an account from the five employees who said they had been sexually harassed by Winnow. [R. 3].

On November 30, 2018, The State of Albers enacted Albers Senate Bill No. 455 (the “Act”). [R. 3, B-1]. The Act applies to publicly traded foreign corporations if Albers residents own more than 10% of the corporation’s shares. [R. 3, B-2]. The Act imposes a gender quota on corporate boards. [R. 3, B-2]. If a corporation fails to comply with the Act, then the Act entitles shareholders to bring a suit against the corporation and seek damages of $100 per share for each violation. [R. 3, B-3].

GG did not comply with the Act. [R. 4]. The Act classifies GG as a publicly traded foreign corporation because GG is incorporated and headquartered in Delaware, not Albers. [R. 2]. A single Albers resident—just one of GG’s 2,500 shareholders—acquired a total of 10.2% of GG’s stock. [R. 3]. This acquisition made GG susceptible to civil liability under the Act. [R. 3].

# SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit’s holding that shareholders had a private right of action to bring the instant suit and affirm the Fourteenth Circuit’s holding that Genius Games, Inc. (“GG”) complied with its obligations under § 10(b) of the Securities Exchange Act of 1934 (“SEA”) and under Rule 10b-5. Although this Court recognizes private rights of action in some contexts, this Court narrowly construes § 10(b) and Rule 10b-5 to closely align with the text and effectuate Congress’s intent to facilitate honest markets for securities transactions.

Shareholders’ claim revolves around allegations of sexual harassment and thus stretches § 10(b) beyond its intended scope. In addition, Petitioners fail to establish an actionable claim under § 10(b) and Rule 10b-5 that identifies a materially misleading statement or omission. A material statement contains facts that a reasonable shareholder would rely upon when making an investment decision. The GG Code of Conduct contained general, aspirational statements which amounted to immaterial puffery. Furthermore, GG complied with all of its duties to disclose and properly represented the facts in its yearly 2018 disclosure. Thus, this Court should hold that Genius Games complied with the applicable securities provisions under §10(b) and Rule 10b-5.

This Court should also affirm the Fourteenth Circuit’s holding that Albers Senate Bill No. 455 (the “Act”) violates the extraterritoriality doctrine of the dormant Commerce Clause. This Court should continue to apply the extraterritoriality doctrine to statutes that have the practical effect of regulating wholly out-of-state commerce. And, under this doctrine, the Act must fail. Otherwise, the actions of a single Albers resident would trigger application of Albers legislation to a Delaware corporation engaging in commerce wholly outside of Albers.

Principles of stare decisis support applying the extraterritoriality doctrine to the Act. This Court has not limited the doctrine’s applicability to only price-affirmation or protectionist statutes. Instead, the doctrine fills important gaps in this Court’s dormant Commerce Clause jurisprudence. The doctrine remains workable—six circuit courts apply the doctrine in a variety of contexts. And the doctrine maintains clarity and a limiting principle on extraterritorial legislation.

So too, our constitutional history, federalism, and democratic processes support holding the Act to be unconstitutional. A holding to the contrary could result in a deluge of extraterritorial legislation as states project inconsistent regulations into other states. For these reasons, this Court should hold that the Act violates the extraterritoriality doctrine.

# ARGUMENT

## THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT GENIUS GAMES COMPLIED WITH § 10(b) AND RULE 10b-5 BECAUSE THE ZERO-TOLERANCE POLICY WAS IMMATERIAL PUFFERY.

This Court should affirm the Fourteenth Circuit’s holding that Genius Games, Inc. (“GG”), complied with its obligations under § 10(b) of the Securities Exchange Act of 1934 (“SEA”) and under Rule 10b-5. This Court reviews questions of law de novo. See Pierce v. Underwood, 487 U.S. 552, 558 (1988).

The SEA regulates securities transactions in order to maintain “fair and honest markets” for securities. Securities Exchange Act of 1934 §10(b), 15 U.S.C. § 78b. Section 10(b) states, “It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.” 15 U.S.C. § 78j. Rule 10b-5 further clarifies the obligations under § 10(b), stating that “[i]t shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading.” 17 C.F.R. § 240.10b-5 (1951).

In order for shareholders to bring the instant securities fraud claim, shareholders must first establish that they have a private right of action under Rule 10b-5, which the Court narrowly construes when interpreting such rights. See Cent. Bank v. First Interstate Bank, 511 U.S. 164, 177 (1994). Second, a shareholder’s suit fails if the shareholder cannot establish either a material “untrue statement” or misleading material omission. See 17 C.F.R. § 240.10b-5. Finally, because the applicable securities laws “do not create an affirmative duty to disclose any and all material information,” a suit brought under § 10(b) and Rule 10b-5 cannot succeed where the company properly complied with all of its duties to disclose a fact or correct a prior disclosure. Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011). Because Petitioners have no private right of action to bring the present suit, the statements contained in GG’s Code of Conduct (the “Code”) were immaterial puffery, and GG complied with all obligations to disclose under the applicable securities regulations, the Fourteenth Circuit correctly affirmed the district court’s grant of summary judgement for GG.

### The Fourteenth Circuit erred when it allowed Petitioners to proceed with the present suit because Petitioners do not have a private right of action under Rule 10b-5.

Petitioner shareholders enjoy no private right of action under Rule 10b-5 to bring the present suit. Neither § 10(b) of the SEA nor Rule 10b-5 explicitly allow a shareholder to bring a private civil suit against a company to better enforce the Act or the rule. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. To be sure, this Court allows certain plaintiffs to bring a private suit against a company under § 10(b) and Rule 10b-5. SeeSuperintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10, 12-13 (1971) (allowing a city bond seller to bring a § 10(b) claim, despite the bond sellers’ particular role as “creditors of the defrauded corporate buyer or seller of securities,” because the parties’ transaction connected to the sale of a security). But generally, this Court adopts a narrower reading of the SEA’s text to limit the kinds of parties who may bring private § 10(b) suits and the conduct which may be actionable under the provision. See Cent. Bank, 511 U.S. at 173 (declining to hold aiders and abettors liable for securities fraud under § 10(b) where Congress did not explicitly endorse such liability); Chiarella v. United States, 445 U.S. 222, 232-34 (1980) (refusing to endorse a “new and different” theory of liability under § 10(b), with no basis in the text or evidence of Congress’ overall intent, where an individual, with no connection to the company and under no duty to disclose, used nonpublic information in connection with a securities transaction); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479-80 (1977) (rejecting a claim alleging a violation of a fiduciary duty as a manipulation actionable under Rule 10b-5 by narrowly construing securities “fraud”). Thus, because Congress did not provide a private right of action to enforce § 10(b), this Court adopts a narrow interpretation of the right and hews closely to the text of the SEA to determine whether a private suit aligns with Congress’ intent and may be actionable under §10(b) and Rule 10b-5. SeeJanus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011) (“[W]e are mindful that we must give ‘narrow dimensions . . . to a [Rule 10b-5] right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited’ the law.” (first and second alteration in original) (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 167 (2008)).

Furthermore, the SEA protects “interstate commerce, the national credit, the Federal taxing power,” as well as other national financial systems, by regulating securities transactions and related matters in order to maintain “fair and honest markets” for securities. 15 U.S.C. § 78b. Both parties affirm that Rule 10b-5 ultimately functions to “maximize shareholder wealth” by ensuring shareholders learn of possible risks to their investments. [R. 6.]. Any claim under § 10(b) must reflect the ultimate purpose of the SEA—eliminating securities fraud. SeeCent. Bank, 511 U.S. at 174 (“Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.” (quoting Chiarella, 445 U.S. at 234-35 (1980)); see also Santa Fe Indus., Inc., 430 U.S. at 479 (“We thus adhere to the position that ‘Congress by § 10(b) did not seek to regulate transaction which constitute no more than internal corporate mismanagement.’”) (quoting Superintendent of Ins., 404 U.S. at 12)).

Here, Petitioners assert a claim which stretches securities fraud regulations beyond their intended scope. [R. 1] Because the SEA makes no mention of sexual harassment and the SEA should be read narrowly to avoid expanding a right that Congress did not authorize, the Petitioners private right of action must fail. See Janus Cap. Grp., 546 U.S. at 142. Furthermore, Petitioners’ suit contravenes the ultimate purpose of the SEA by attempting to use securities fraud to tighten corporate compliance with certain sexual harassment policies. See Cent. Bank, 511 at 174; Santa Fe Indus., Inc., 430 U.S. at 479. Thus, the Fourteenth Circuit erred in allowing the Petitioners to pursue their claim through a private right of action under Rule 10b-5.

### The zero-tolerance policy in the Code of Conduct was immaterial puffery.

Petitioners fail to establish an actionable securities fraud claim because the allegations of sexual harassment and the zero-tolerance policy in the Code are immaterial under securities law. In order to make a securities fraud claim under § 10(b) and a Rule 10b-5 claim, a plaintiff must establish “(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., 563 U.S. at 37-38 (2011) (quoting Scientific-Atlanta, Inc., 552 U.S. at 157). The only element at issue is whether GG correctly represented and properly disclosed all material facts.

A misrepresentation or omission must be material in order to succeed. “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); see also Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (adopting the reasonable shareholder standard for material omission or misrepresentation securities fraud claims). The “fact-specific” materiality inquiry “filter[s] out essentially useless information that a reasonable investor would not consider significant, even as a part of a larger ‘mix’ of factors to consider in making his investment decision.” Basic Inc., 485 U.S. at 234. A reasonable investor relies on “statement[s] as a guarantee of some concrete fact or outcome.” City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS, 752 F.3d 173, 186 (2d Cir. 2014). Accordingly, aspirational or “general statements about reputation, integrity, and compliance with ethical norms are inactionable ‘puffery.’” Id. at 183; see also Lopez v. CTPartners Exec. Search, Inc., 173 F. Supp.3d 12, 26-28 (S.D.N.Y. 2016) (finding that CTPartner’s Code of Business Conduct and Ethics, which applies to all its employees and “expects all employees and directors to act” ethically, contained “quintessential[]” corporate puffery). Likewise, statements generally outlining a certain policy are immaterial puffery, but companies which tout a “extensive procedures and controls” that directly conflict with the corporation’s actions are material and generate an investor’s reasonable reliance. See Constr. Laborers Pension Tr. v. CBS Corp., 433 F. Supp. 3d 515, 533 (S.D.N.Y. 2020) (holding CBS’s statements that “it ‘will promptly and thoroughly investigate’ and that those who report sexual harassment ‘will not be retaliated against’ were “nonetheless too general . . . to be material”). In re Goldman Sachs Grp., Inc., Sec. Litig., No. 10 Civ. 3461(PAC), 2014 WL 2815571, at \*1, \*5 (S.D.N.Y. June 23, 2014) (holding Goldman Sachs’s representations about its “extensive procedures and controls” to mitigate conflicts of interests with its clients were material because they directly contradicted their practice of “betting against and profiting from the clients’ losses”).

Here, GG’s Code sets out general expectations for the company. [R. A-1]. (“[W]e therefore *expect* that all employees read and abide by the policies set forth herein.” (emphasis added)). The Code also articulates a set of beliefs and goals, including a zero-tolerance sexual harassment policy. [R. A-1]. (“We strongly believe that no employee should be subject to sexual harassment by another employee.”). Thus, the Code contains general statements about reputation and aspirational statements about compliance that a reasonable investor would not consider sufficiently important in comparison with other factors relevant to an investment decision. SeeConstr. Laborers Pension Tr., 433 F. Supp. 3d at 533 (finding CBS’s statements that it “has a ‘zero tolerance’ policy for sexual harassment” as “mere puffery” because it is “far too general and aspirational to invite reasonable reliance”); CTPartners Exec. Search, Inc., 173 F. Supp.3d at 28. In addition, although the Code outlines a process for managing reports of sexual harassment, including a prompt investigation and dismissal, the Code does not contain detailed or extensive procedures to adhere with the policy such that GG’s actions directly contradicted the policy. See Constr. Laborers Pension Tr., 433 F. Supp. 3d at 533; In re Goldman Sachs Grp., Inc., 2014 WL 2815571, at \*1. The Code conditions continued employment on compliance with the Code’s provisions but ultimately treats compliance as an expectation. [R. A-1]. (“All employees . . . are *expected* to comply with it as a condition of their continued employment.” (emphasis added)). Accordingly, the Code’s three steps to enforce the zero-tolerance policy (a report, internal investigation, and dismissal) does not guarantee compliance, and therefore no reasonable investor would consider the Code’s provisions important enough to weigh when making an investment decision. See City of Pontiac Policemen’s & Firemen’s Ret. Sys., 752 F.3d at 186; CTPartners Exec. Search, Inc., 173 F. Supp. 3d at 28. Thus, the Fourteenth Circuit correctly held that the zero-tolerance policy in GG’s Code was immaterial puffery.

### Genius Games complied with its obligations under Rule 10b-5 when the company refrained from making a public statement and included the same Code of Conduct in its annual disclosure following the investigation of sexual harassment.

GG complied with the disclosures mandated by securities law. In order to violate Rule 10b-5, a person must “make any untrue statement of a material fact or . . . 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.” 17 C.F.R. § 240.10b-5. Thus, a person violates Rule 10b-5 only if the person makes either an “untrue statement” or an omission which makes a prior statement “misleading.” Id. GG properly complied with all required disclosures by refraining from making a public statement and by incorporating the same Code in its annual disclosure statement.

#### Genius Games properly disclosed all required information.

GG complied with all securities law requirements when the company refrained from making a public statement about the allegations of sexual harassment because the company had no duty to disclose the allegations. “Section 10(b) and Rule 10b-5 do not create an affirmative duty to disclose any and all material information.” Matrixx Initiatives Inc., 563 U.S. at 45; see also In re Time Warner Inc. Sec. Litig., 9 F.3d. 259, 267 (2d Cir. 1993) (“A corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts.”). “A duty to affirmatively disclose ‘may arise when there is insider trading, a statute requiring disclosure,’ or . . . [a] ‘misleading prior disclosure.’” In re Omnicare, Inc. Sec. Litig., 769 F.3d 455, 471 (6th Cir. 2014) (quoting City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 669 (6th Cir. 2005)). “To be actionable under the securities laws, an omission must be misleading; in other words it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists.” Brody v. Transitional Hosps. Corp., 280 F.3d 997, 1006 (9th Cir. 2002). A statement in a Code of Conduct does not mislead where the statement does not guarantee compliance with the Code. See Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268, 1278 (9th Cir. 2017) (holding that there was “no duty to disclose because HP’s and Hurd’s failures to speak did not ‘affirmatively create an impression of a state of affairs which differs in a material way from the one that actually exists’” because “[t]he promotion of ethical conduct at HP did not reasonably suggest that there would be no violations of the [Code of Conduct] by the CEO or anyone else ” (quoting Brody, 280 F.3d at 1006)).

Here, GG complied with all of its duties to disclose when GG published the same Code in its annual disclosures and refrained from making a public statement regarding the sexual harassment allegations. The Code did not create an impression of a state of affairs that differed materially from the one that actually existed. The Code contained aspirational statements, not guarantees that no employee would violate the Code. [R. 19, A-1]. GG properly investigated both allegations of sexual harassment. Id. Although the Code also contains steps outlining a prompt dismissal, the Code does not contain a concrete timeline for dismissal. Id.The Code furthermore contains aspirational language that “[n]o confirmed instances of workplace sexual harassment will be allowed to persist” without specifying a concrete deadline or process for the dismissal. Id.Thus, because the Code did not create an impression of a state of affairs that differed materially from the one that existed, GG complied with its duty to disclose by refraining from making a public statement when there was no obligation to do so. See Hewlett-Packard Co., 845 F.3d at 1278; Constr. Laborers Pension Tr., 433 F. Supp. 3d at 533.

#### Genius Games properly represented the facts in its Code of Conduct in the 2018 annual disclosure.

GG correctly represented the facts in its 2018 annual disclosure by incorporating the same Code. “A misrepresentation is an affirmative statement that is misleading or false.” In re Omnicare, Inc. Sec. Litig., 769 F.3d at 470. Determining whether a statement is “true or false” requires “an objective standard.” Or. Pub. Emps. Ret. Fund v. Apollo Grp., Inc., 774 F.3d 598, 607 (9th Cir. 2014) (describing public report of “an incorrect amount for the accounting impact of a transaction” as an “objective misstatement”). Vague statements in a code of conduct may be aspirational statements, not objective facts, and therefore not misleading. See Bondali v. Yum! Brands Inc., 620 F. App’x 483, 490 (6th Cir. 2015) (finding Yum’s statement that “[a]ny product suspected to be unsafe must immediately be pulled from its distribution until safety can be assured” in its Code of Conduct was not misleading because the statement was aspirational rather than objective). Additionally, a person has a duty to correct a prior disclosure if the speaker discovers it was “misleading when made.” Backman v. Polaroid Corp., 910 F.2d 10, 16-17 (1st Cir. 1990). A company only has a duty to correct “specific statements” that “‘involve[] the representation of existing facts’ . . . readily capable of verification.” In re Facebook, Inc., IPO Sec. & Derivative Litig., 986 F. Supp. 2d 428, 465 (S.D.N.Y. 2013) (quoting In re Quintel Ent. Inc. Sec. Litig., 72 F. Supp. 2d 283, 291-92 (S.D.N.Y. 1999) (finding NASDAQ did have a duty to correct or update specific statements “concerning NASDAQ’s capability and reliability to carry out enormous volumes of orders at sub-microsecond speeds” which NASDAQ later attempted to verify through system tests).

Here, GG correctly portrayed the objective facts. GG incorporated the same Code in its 2018 annual securities disclosure statement. [R. 3]. The Code contained aspirational statements about the beliefs and values of GG. SeeBondali, 620 F. App’x at 490. The Code did not contain objective statements of fact, such as a deadline or process, easily verified through an objective process. See id.; In re Facebook, Inc., 72 F. Supp.2d at 465. Genius Games did not guarantee an outcome nor a particular result. See Bondali, 620 F. App’x at 489 (holding Yum’s statements about its protocols were not misleading because the fact that “a few suppliers did not adhere to the standards does not mean Yum did not have the standards in place, and it is not reasonable to interpret Yum’s statements as a guarantee that its suppliers would, in all instances, abide by the corporate standards and protocols”). Because the Code’s statements were aspirational, and therefore correctly presented the objective facts capable of verification, GG properly complied with its disclosure obligations and did not make a material misrepresentation in incorporating the same Code in its annual disclosure.

In conclusion, the Fourteenth Circuit correctly held that Petitioners failed to state an actionable claim for securities fraud. GG properly complied with § 10(b) of the SEA and Rule 10b-5. The Petitioners do not enjoy a private right of action to bring the present suit because the suit revolves around issues of sexual harassment and push § 10(b)’s purpose beyond its intended scope. See Cent. Bank v. First Interstate Bank, 511 U.S. at 177. Furthermore, the statements in the Code were general statements that no reasonable shareholder would rely on when making an investment decision and therefore were immaterial puffery. See City of Pontiac Policemen’s & Firemen’s Ret. Sys., 752 F.3d at 186. In addition, GG fully complied with all of its obligations to disclose where the company refrained from making a public statement about the allegations and incorporated the same Code in its annual filing because the annual disclosure properly represented the objective facts capable of verification. See Hewlett-Packard Co., 845 F.3d at 1278; Bondali, 620 F. App’x at 490.

## THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT ALBERS SENATE BILL NO. 455 VIOLATES THE EXTRATERRITORIALITY DOCTRINE OF THE DORMANT COMMERCE CLAUSE BECAUSE THE BILL REGULATES CONDUCT OCCURING WHOLLY OUTSIDE OF ALBERS.

This Court should affirm the Fourteenth Circuit’s holding that Albers Senate Bill No. 455 (the “Act”) violated the extraterritoriality doctrine of the dormant Commerce Clause because the Act sought to regulate wholly out-of-state conduct of corporations. The constitutionality of a state statute is a question of law that this Court reviews de novo. See Salve Regina Coll. v. Russell, 499 U.S. 225, 239 (1991).

This case is not about the Albers legislature’s well-researched policy decisions. This case is about whether the Albers legislature can enact a statute such that the actions of a single Albers resident—here, one shareholder acquiring 10.2% of shares in Genius Games, Inc. (“GG”)—can result in state regulation of wholly out-of-state-conduct. [R. 3].

The Commerce Clause reserves for Congress the power “[t]o regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. This Court has recognized a negative component to the Commerce Clause since 1852. Edgar v. MITE Corp., 457 U.S. 624, 640 (1982) (citing Cooley v. Bd. Wardens, 53 U.S. (12 How.) 299 (1852)). And this Court has recognized the extraterritoriality doctrine of the dormant Commerce Clause since at least 1935. See Healy v. Beer Inst., Inc., 491 U.S. 324, 332 (1989) (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)). The extraterritoriality doctrine proscribes a state’s laws from having “the ‘practical effect’ of regulating commerce occurring wholly outside of that [s]tate’s borders.” Id. (holding unconstitutional Connecticut statute requiring beer companies to sell at a price in Connecticut that was less than or equal to price used in bordering states).

This Court has explicitly used the extraterritoriality doctrine to strike down a statute three times. Healy, 491 U.S. at 337-40 (holding price-affirmation statute unconstitutional); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582-84 (1986) (same); Baldwin, 294 U.S. at 521 (same). Essential to this case, this Court has twice considered application of the extraterritoriality doctrine to state corporation statutes. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 80-81 (1987) (holding Indiana statute satisfied extraterritoriality concerns); Edgar, 457 U.S. at 641-43 (plurality opinion) (concluding Illinois statute failed under extraterritoriality doctrine).

This Court should continue to apply the extraterritoriality doctrine to statutes that have “the ‘practical effect’ of regulating commerce occurring wholly outside of that [s]tate’s borders.” Healy, 491 U.S. at 332. Three circuits have begun to stray from this Court’s precedent by limiting the extraterritoriality doctrine to price-affirmation statutes or statutes that raise protectionist concerns. See, e.g., Energy & Env’t Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015) (limiting extraterritoriality doctrine to price-affirmation statutes); Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013) (same); IMS Health Inc. v. Mills, 616 F.3d 7, 30-31 (1st Cir. 2010), vacated on other grounds sub nom. IMS Health, Inc. v. Schneider, 564 U.S. 1051 (2011) (noting statutes invalidated under extraterritoriality doctrine “raise[] independent concerns about protectionism”). At least six circuits, though, continue to apply the extraterritoriality doctrine without limiting it to price-affirmation or protectionist contexts. See, e.g., North Dakota v. Heydinger, 825 F.3d 912, 919-20 (8th Cir. 2016) (invalidating Minnesota statute that established environmental standards related to emissions); Am. Beverage Ass’n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013) (invalidating Michigan statute regulating bottle markings); Am. Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003) (invalidating Vermont statute regulating distribution of indecent material); Dean Foods Co. v. Brancel, 187 F.3d 609, 614-16 (7th Cir. 1999) (invalidating Wisconsin statute regulating milk processors’ payment of volume premiums); cf. Carolina Trucks & Equip., Inc. v. Volvo Trucks, 492 F.3d 484, 492 (4th Cir. 2007) (interpreting South Carolina statute regulating automobile sales in manner that avoided violation of extraterritoriality doctrine); A.S. Goldmen & Co. v. N.J. Bureau of Secs., 163 F.3d 780, 784-85 (3d Cir. 1999) (considering application of extraterritoriality doctrine to New Jersey statute regulating securities transactions before holding statute regulated conduct within New Jersey). This Court should adhere to its precedent and not disturb the preponderance of the circuit courts by continuing to proscribe state statutes that regulate extraterritorially.

### The extraterritoriality doctrine’s application to the Act renders the Act unconstitutional.

The Act has “the ‘practical effect’ of regulating commerce occurring wholly outside of that [Albers’] borders,” and therefore, it is unconstitutional. Healy, 491 U.S. at 332. Five factors are relevant to the practical-effect inquiry. First, if a statute’s triggering condition is wholly out-of-state conduct, then the statute is more likely to violate the extraterritoriality doctrine. See Ass’n for Accessible Meds. v. Frosh, 887 F.3d 664, 670 (4th Cir. 2018) (holding Maryland statute unconstitutional because, among other things, “the Act is not triggered by any conduct that takes place within Maryland”). Second, the risk of legal consequences for out-of-state actors suggests the legislation is unconstitutionally extraterritorial. See Snyder, 735 F.3d at 376 (noting that “other states must react today to Michigan’s unique-mark requirement or face legal consequences”).

Third, “the ‘Commerce Clause . . . 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.’” Healy, 491 U.S. at 336 (alteration in original) (quoting Edgar, 457 U.S. at 642-43 (plurality opinion)). Fourth, in determining whether a statute directly controls wholly out-of-state commerce, “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” Id. Fifth, a statute is more likely to violate the extraterritoriality doctrine if other states enacting similar statutes would “impose a significant burden on interstate commerce.” Frosh, 887 F.3d at 670; see also Edgar, 457 U.S. at 642 (“[I]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.”).

All factors point towards the Albers Act being unconstitutional. First, GG’s failure to satisfy the Act’s gender quota—the Act’s triggering condition—involved conduct occurring wholly outside of Albers. See Frosh, 887 F.3d at 670. Any employment contracts between GG and woman board members would have presumably been signed or enforced in Delaware, where GG is incorporated and headquartered. [R. 2]. Conversely, no conduct in Albers triggered GG’s liability under the Act (the Albers resident’s 10.2% ownership of the stock was a necessary but not sufficient condition for liability). See Frosh, 887 F.3d at 670. Second, GG risked being civilly liable for $100 per share if it did not comply with the Act. See Snyder, 735 F.3d at 376.

Third, the Act applies to commerce that takes place wholly outside of Albers’s borders—namely, employment contracts signed and enforced in Delaware. Fourth, the practical effect of the Act is to control conduct outside of Albers. Healy, 491 U.S. at 336. GG would presumably sign and enforce employment contracts in Delaware if it were to comply with the Act Id. Fifth, other states enacting statutes similar to the Act would “impose a significant burden on interstate commerce.” Frosh, 887 F.3d at 670. Both the Albers Act here and the Illinois statute in Edgar only required resident shareholders to own 10% of a corporation’s shares in order to make a corporation liable. Edgar, 457 U.S. at 627. The Edgar Court held that states enacting similar statutes to the Illinois statute at issue would burden interstate commerce. See id. at 642. Here too, states enacting similar statutes could subject corporations to multiple regulations, none of which their home state enacted. Thus, all factors dictate that the Act is unconstitutional under the extraterritoriality doctrine. This Court should strike it down.

### The rule of stare decisis supports the extraterritoriality doctrine because the doctrine remains undisturbed, remains necessary, provides a workable framework, and prevents confusion.

The rule of stare decisis supports a continued application of the extraterritoriality doctrine to state corporation statutes that have the practical effect of regulating wholly out-of-state conduct. “[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to . . . gauge the respective costs of reaffirming and overruling a prior case.” Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). Two considerations are relevant. First, “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.” Id. at 855. And second, “whether the rule has proven to be intolerable in simply defying practical workability.” Id. at 854.

#### The extraterritoriality doctrine remains undisturbed.

Other dormant Commerce Clause principles have *not* “developed as to have left the old rule no more than a remnant of abandoned doctrine.” Id. at 855. In Brown-Forman, this Court cited the Edgar plurality’s extraterritoriality analysis with approval. See Brown-Forman, 476 U.S. at 579 (“When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.”) (citing Edgar, 457 U.S. at 624, 640-43)). This Court did so again in Healy. See Healy, 491 U.S. at 336 (“[T]he ‘Commerce Clause . . . precludes the application of a state statute to commerce that takes wholly outside of the State’s borders, whether or not the commerce has effects within the state . . . .’” (first alteration in original) (citing Edgar, 457 U.S. at 624, 642-43)).

And this Court has not limited or overruled Healy, nor has it renounced the extraterritoriality doctrine’s applicability to state corporation statutes. In Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644 (2003), this Court held constitutional a Maine statute that encouraged drug manufactures to negotiate rebates with the State. See 538 U.S. at 653-54. Under the statute, Maine could subject drug manufacturers who refused to enter into rebate agreements to an authorization scheme that would reduce the manufacturers’ market share in Maine. See id. at 657. The Walsh Court discussed whether the statute satisfied extraterritoriality doctrine:

[T]he Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state products.

Id. at 669 (quoting Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d. 66, 81-82 (1st Cir. 2001)). The Walsh Court then concluded that “[t]he rule that was applied in Baldwin and Healy accordingly is not applicable to this case.” Id.

This conclusion did not limit Healy and the extraterritoriality doctrine. Id. But see Epel, 793 F.3d at 1175 (finding Walsh limited extraterritoriality doctrine to price-affirmation statutes); Harris, 729 F.3d at 951 (same). To the contrary, this language simply distinguished the price-affirmation statute in Healy from the scheme in Walsh. See, e.g., Frosh, 887 F.3d at 670 (4th Cir. 2018) (rejecting argument that Walsh limited extraterritoriality doctrine); see also Mills, 616 F.3d at 27-30 (omitting any claim that Walsh limited extraterritoriality doctrine while nevertheless limiting doctrine to statutes that raise protectionist concerns). And Walsh and Healy *are* distinguishable: “The Maine program challenged in Walsh directly affected only transactions in Maine and did not impact the price drug manufacturers could charge elsewhere.” Frosh, 887 F.3d at 670. Moreover, if the Walsh Court had intended to limit the extraterritoriality doctrine to price-affirmation statutes, then it presumably would have discussed prior applications of the extraterritoriality doctrine in other contexts. See Walsh, 538 U.S. at 669-70. Instead, however, the Walsh Court did not include a single citation to Edgar or CTS Corp., the cases applying the extraterritoriality doctrine to state corporation statutes. See id.

#### The extraterritoriality doctrine remains necessary.

The extraterritoriality doctrine is more than just “a remnant of abandoned doctrine.” Casey, 505 U.S. at 855. Rather, the extraterritoriality doctrine provides coverage where other dormant Commerce Clause doctrines are absent. Besides the extraterritoriality doctrine, this Court applies the dormant Commerce Clause in two ways. Epel, 793 F.3d at 1171 (“[D]ormant commerce clause cases are said to come in three varieties.”). First, this Court routinely invalidates “state statutes that clearly discriminate against interstate commerce.” New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988). Second, this Court applies a balancing test that invalidates a state statute only if “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

These two tests will not disturb state statutes that are facially neutral, provide invaluable local benefits, and wholly regulate out-of-state commerce. In this case, the Act could survive the discrimination test because the Act is facially neutral and does not “clearly discriminate against interstate commerce.” Limbach, 486 U.S. at 274. So too, the Act could survive the Pike balancing test because the Act provides an invaluable—if not intangible—benefit to Albersians by advancing gender equity. Pike, 397 U.S. at 142; see also Epel, 793 F.3d at 1171 (noting the Pike balancing test “requir[es] judges (to attempt) to compare wholly incommensurable goods for wholly different populations”). But the Albers act nevertheless wholly regulates commerce in Delaware—specifically, contracts signed by GG’s corporate board. Thus, the extraterritoriality doctrine is the only dormant Commerce Clause doctrine that could address legislation such as the Act.

#### The extraterritoriality doctrine provides a workable framework and prevents confusion.

The extraterritoriality doctrine has *not* “proven to be intolerable in simply defying practical workability.” Casey, 505 U.S. at 845. In Frosh, for example, the Fourth Circuit distilled several guiding principles for reviewing the constitutionality of a statute: (1) whether out-of-state conduct triggers the statute; (2) whether the statute impacts transactions that occur wholly outside of the enacting state; and (3) whether the statute, “if similarly enacted by other states, would impose a significant burden on interstate commerce.” 887 F.3d at 670-74. Moreover, courts successfully distinguish between price-control regulations and regulations with incidental upstream pricing impacts. See id. at 672; Epel, 793 F.3d at 1173. In sum, at least six circuit courts have found the extraterritoriality doctrine workable in contexts beyond price-affirmation statutes. See Heydinger, 825 F.3d at 919-20; Snyder, 735 F.3d at 376; Volvo Trucks, 492 F.3d at 492; Dean, 342 F.3d at 103; A.S. Goldmen, 163 F.3d at 784-85; Brancel, 187 F.3d at 614-16.

To the contrary, cabining the extraterritoriality doctrine to price-affirmation statutes would prove unworkable. Could New Mexico pass a statute that only requires New Mexico residents to own 5% of shares in a corporation? What about 1%? What about just one share? This Court should avoid trading a workable framework for one with no limiting principle for extraterritorial legislation. Because the extraterritorial doctrine remains good law, plays a necessary role in dormant Commerce Clause jurisprudence, provides a workable framework, and avoids confusion, this Court should continue to apply the extraterritoriality doctrine to state corporation statutes and hold the Act unconstitutional.

### History, federalism, and the democratic process buttress the extraterritoriality doctrine.

This Court should continue to follow its interests in adhering to the framers’ intent, respecting our federalist system, and protecting democratic representation. See Healy, 491 U.S. at 335-36 (noting principles of the extraterritoriality doctrine “reflect the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres” (footnote omitted)). These interests are not mutually exclusive; they all point to the need for the extraterritoriality doctrine beyond the context of price-affirmation statutes.

The dormant Commerce Clause adheres to the framers’ intent and our Constitutional history. See Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1794 (2015) (“By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce.”); see also The Federalist Nos. 7, 11 (Alexander Hamilton), No. 42 (James Madison). Moreover, our system of federalism implies that “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.” Edgar, 457 U.S. at 643 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1997)).

Additionally, the desire to avoid subjugating state residents to a patchwork of in-state and out-of-state regulations inheres in this federalism principle. See Healy, 491 U.S. at 336. Finally, our democratic system prohibits one state from making policy decisions for out-of-state actors who have no representation and thus cannot respond democratically. See S.C. State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938) (“[W]hen . . . regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”).

In this case, the Act gave Albers jurisdiction over a corporation incorporated in Delaware, headquartered in Delaware, with up to 89.8% of its stock owned by non-Albers residents, and with up to 2,499 of its 2,500 shareholders residing outside of Albers. [R. 2, 3]. The Act burdens a Delaware corporation, which could tempt Delaware to enact retaliatory legislation—“one of the chief evils that led to the adoption of the Constitution.” Comptroller of the Treasury, 135 S. Ct. at 1794. Moreover, the Act is an attempt to “assert extraterritorial jurisdiction over persons or property,” which could reasonably offend Delaware. Edgar, 457 U.S. at 643 (quoting Shaffer, 433 U.S. at 197); see also Faith Stevelman, Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law, 34 Del. J. Corp. L. 57, 60 (2009) (describing Delaware’s corporate laws as source of revenue and prestige for the state).

Additionally, any corporation could become subject to a patchwork of inconsistent regulations if other states adopted legislation with conditions that are similar to the Act. See Healy, 491 U.S. at 336-37. Texas could pass a statute requiring an out-of-state corporation with 15% or more of its shares owned by Texans to have a minimum of one lawyer on its board. And Idaho could pass a statute requiring an out-of-state corporation with 5% or more of its shares owned by Idahoans to have a minimum of one registered Republican on its board. Whatever the wisdom of these policy decisions, the regulations would quickly spiral out of control for the non-Albersian, non-Texan, and non-Idahoan corporation. See id. Even worse, non-Albersian, non-Texan, and non-Idahoan corporate executives could not turn to state democratic channels if they disagreed with these policy decisions. See S.C. State Highway Dep’t, 303 U.S. at 184 n.2. To avoid results that frustrate our constitutional history, federalism, and democratic processes, the Act must fail under the extraterritoriality doctrine.

This Court should apply the extraterritoriality doctrine to the Act and invalidate the Act as unconstitutional because it regulates wholly out-of-state conduct. See Edgar, 457 U.S. at 627. Stare decisis supports continuing to apply the extraterritoriality doctrine to state corporation statutes. See Casey, 505 U.S. at 854-55. And holding otherwise would offend our constitutional history, federalism, and democratic system. See Healy, 491 U.S. at 335-36.

# CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court AFFIRM the judgment of the Fourteenth Circuit and request from this Court all other relief that is just and equitable.

Respectfully submitted,

Genius Games, Inc., Chuck Winnow, Bartholomew Winnow, Noah Archibald, and Don Humphrey,

By their attorneys,

[Attorney’s Name Redacted]

[Attorney’s Name Redacted]

# 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.

**SECTION 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. 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-boarddirectors-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)