COMMENT

BREAKING THE GREEN WASHING WAVE: THE NEED FOR ESG-FRIENDLY SECURITIES FRAUD CLASS ACTION STANDARDS POST-*GOLDMAN SACHS GROUP, INC. V. ARKANSAS TEACHER RETIREMENT SYSTEM*

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Climate change is an all-encompassing concern, requiring nearly every aspect of American life to adapt. Financial systems are not exempt. Accordingly, investors have begun embracing this need for change through "ESG" investing, which considers companies' environmental, social, and governance practices in order to promote "green" companies and general corporate "good." However, despite its enormous popularity, ESG investing suffers from a lack of regulation. What actually constitutes positive "ESG" indicators is obfuscated, causing confusion among the finance industry as a whole and leaving investors defrauded into thinking a company's practices are "green." This practice of sustainability-related misrepresentation has come to be known as "green washing."

Without a viable path to recourse, where are investors who bought into green-washed representations supposed to turn? In 2022, the U.S. Securities and Exchange Commission (SEC) proposed a climate-based disclosures rule as a potential answer to this question. While it is a step forward for ESG investors, the proposed rule is limited in scope and will likely face legal challenges if promulgated. Also in 2022, the Supreme Court issued its decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, which raised additional hurdles to certifying classes in securities fraud class actions. These hurdles are likely to be especially troublesome for injured ESG investors attempting to bring securities fraud suits.

This Comment argues that securities law must be updated to accommodate ESG investors, and to accomplish this, the SEC and Congress must reverse the barriers raised in *Goldman*. In doing so, this Comment first describes the current state of securities fraud law and the impact that the *Goldman* holding is likely to have on ESG-related class actions. Then, in response to *Goldman*, this Comment provides a framework for updating securities law to bring doctrine in line with the modern "reasonable investor" who may consider ESG information in their investment decisions.

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* J.D. Candidate, University of Wisconsin Law School, 2024. Many thanks to the *Wisconsin Law Review*, particularly T. J. Clark, Sarah Cannon, Thomas Baraldi, Sydney Baumeister, Julia Hoff, Riley Kennedy, and Mikaela Steckelis who all spent many hours polishing this Comment. My gratitude also extends to Jacob Neely, William Cole, Sarah Verzal, and Professor Steph Tai for their insightful feedback throughout the writing process. Without you all, this Comment would not have reached publication.

https://doi.org/10.59015/wlr.ELJR5485

Enabling ESG investors to seek recourse through securities fraud class actions will better protect investors, increase confidence in the ESG market, and likewise, help ensure ESG is effective in its goal of promoting corporate "good."

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INTRODUCTION

Environmental, social, and governance (ESG) investing is one of the hottest investing trends globally.[1] Literature has been published advocating for long-term climate considerations to be factored into a wide range of assets.[2] Likewise, ESG-focused assets have permeated an extensive variety of portfolios, including hedge funds,[3] index funds,[4] mutual funds,[5] and exchange-traded funds,[6] to name a few. ESG strategists propose that by considering the environmental effects, social impact, and internal governance practices of a company in making investment decisions, portfolio managers can promote companies that "do good" without sacrificing their returns.[7]

Currently, worldwide ESG assets are anticipated to exceed $53 trillion by 2025, which accounts for more than one-third of the projected total managed assets.[8] Furthermore, those in the industry seem to believe that ESG has become a permanent part of the investment landscape, with only thirteen percent of global institutional investors reporting that they believe ESG investing is a fad.[9] This statistic is noteworthy—institutional investors invest other people's money and largely intermediate household stakes in public companies

1. *See generally* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921 (2020) (discussing recent growth and current prevalence of ESG investments).

2. *See* Oguzhan Cepni, Riza Demirer, Linh Pham & Lavinia Rognone, *Climate Uncertainty and Information Transmissions Across the Conventional and ESG Assets*, 83 J. INT'L FIN. MKTS. INSTS. & MONEY 1, 1–2 (2023) (discussing ESG equities, bonds, and real estate holdings).

3. Strategic Consulting Team, *Sustaining Interest: ESG Drives Hedge Fund Allocations*, BARCLAYS (Nov. 11, 2022), https://www.cib.barclays/our-insights/3-point-perspective/hedge-fund-investors-achieve-greater-results-with-esg.html#:~:text=Financial%20decision%20makers%20are%20increasingly,ESG%20into%20their%20allocation%20choices [https://perma.cc/P5NT-PB2A].

4. Brakman Reiser & Tucker, *supra* note 1.

5. Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393 (2021).

6. Ryan Clements, *Why Comparability Is a Greater Problem than Greenwashing in ESG ETFs*, 13 WM. & MARY BUS. L. REV. 441 (2022).

7. *See* Witold Henisz, Tim Koller & Robin Nuttall, *Five Ways that ESG Creates Value*, 2019 MCKINSEY Q. 97, 97.

8. Adeline Diab & Gina Martin Adams, *ESG Assets May Hit $53 Trillion by 2025, a Third of Global AUM*, BLOOMBERG PRO. SERVS.: BLOOMBERG INTEL. (Feb. 23, 2021), https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/ [https://perma.cc/4KYQ-QH2V].

9. Jessica Ground, *ESG Global Study 2022*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 17, 2022), https://corpgov.law.harvard.edu/2022/06/17/esg-global-study-2022/ [https://perma.cc/C4Z5-Y7SE].

through means such as pension plans, investment advisors, and bank trust accounts.[10] Thus, as large shareholders, institutional investors have the means to influence public company policies.[11]

However, this transition of investment goals has not been without issue. Notably, there is no clear consensus on the definition of "ESG" itself: standards have been shown to vary widely.[12] Divergences in fund strategies[13] are likely driven by the fact that the firms providing the underlying ESG metrics and benchmarking ESG performance themselves cannot agree on what warrants a high ESG score.[14] There is no overlap between the three most heavily weighted categories in two prominent rating agencies' ratings: Kinder, Lydenberg, and Domini's (KLD) are "Climate Risk Management, Product Safety, and Remuneration," while Moody's ESG's are "Diversity, Environmental Policy, and Labor Practices."[15] When those measuring ESG cannot decide what "ESG" means, how can individual companies accurately assign themselves such a label? Given this ambiguity, investors are left without assurances that their investments match their investing goals.[16]

Meanwhile, the ESG investing phenomenon is, by design, increasing the pressure on publicly traded companies to "go green."[17] Businesses must "adapt and innovate or be swept aside."[18] This pressure to improve ESG metrics has in turn encouraged businesses to make

10. Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840, 857.

11. *Id.* at 858.

12. Emily Barman, *Doing Well by Doing Good: A Comparative Analysis of ESG Standards for Responsible Investment*, *in* 38 SUSTAINABILITY, STAKEHOLDER GOVERNANCE, AND CORPORATE SOCIAL RESPONSIBILITY 289, 290 (Sinziana Dorobantu, Ruth V. Aguilera, Jiao Luo & Frances J. Milliken eds., 2018).

13. Brakman Reiser & Tucker, *supra* note 1, at 1943 ("ESG investment strategies and the disclosures describing those strategies to investors vary significantly between funds.").

14. *Id.* at 1998.

15. Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 2022 REV. FIN. 1315, 1331.

16. Brakman Reiser & Tucker, s*upra* note 1, at 1999.

17. This effect is especially prominent in competitive markets, where initiative adoption can become contagious within an industry. *See* Olga Hawn & Hyoung-Goo Kang, *The Effect of Market and Nonmarket Competition on Firm and Industry Corporate Social Responsibility*, *in* 38 SUSTAINABILITY, STAKEHOLDER GOVERNANCE, AND CORPORATE SOCIAL RESPONSIBILITY 313, 314 (Sinziana Dorobantu, Ruth V. Aguilera, Jiao Luo & Frances J. Milliken eds., 2018) (noting that an arms race of "greening" initiatives between PepsiCo and the Coca-Cola Company had an industry-wide effect on companies' environmental responsibility strategies).

18. David A. Lubin & Daniel C. Esty, *The Sustainability Imperative*, HARV. BUS. REV., May 2010, at 42, 44.

false claims about how sustainable their company is.[19] Considering the capricious definition of "ESG" and present barriers to bringing securities fraud class actions in the ESG context, there are limited checks available to ensure companies do not make misleading statements about the quality of their sustainability initiatives in order to garner attention from ESG investors. This deceitful tactic is known as "green washing."[20] Investors are thus left without reliable ESG information or an avenue to ensure companies' "green" statements comport with their actual practices.

While green washing is not a novel issue,[21] it is one that is likely to be exacerbated by the Supreme Court's recent opinion in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*,[22] which dealt a major blow to the securities fraud class action.[23] In *Goldman*, the Supreme Court held that at the class certification stage of securities

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19. For a discussion of green washing drivers, see Lawrence Dore, *Greenwashing, Reputational Impact and Where ESG Will Go Now*, CHAMBERS & PARTNERS (June 28, 2022), https://www.chambers.com/legal-trends/greenwashing-reputational-impact-and-where-esg-will-go [https://perma.cc/P5WG-55BM]. Many household brands have been caught green washing red-handed. *See, e.g.*, Chris Hersh & Sophie Doyle, *Recycled Pods Make Bitter Brew: Keurig Fined $3 Million for Misleading Recyclability Claims*, NORTON ROSE FULBRIGHT (Jan. 21, 2022), https://www.nortonrosefulbright.com/en/knowledge/publications/9e3c3ff9/recycled-pods-make-bitter-brew-keurig-fined-3-million-for-misleading-recyclability-claims [https://perma.cc/L5AR-NU7K] (detailing how Keurig's instructions for recycling their coffee pods did not, in fact, make them widely recyclable); Matthew Stern, *H&M Case Shows How Greenwashing Breaks Brand Promise*, FORBES (July 13, 2022, 12:03 PM), https://www.forbes.com/sites/retailwire/2022/07/13/hm-case-shows-how-greenwashing-breaks-brand-promise/?sh=40b675fd1171 [https://perma.cc/XV2C-ZVUT] (finding H&M's sustainability "scorecards" included information that was "completely opposite from the truth," such as "touting products that used 30 percent more water as using 30 percent less water"); Beth Timmins, *Persil Advert Banned for Misleading Green Claims*, BBC NEWS (Aug. 31, 2022), https://www.bbc.com/news/business-62726666 [https://perma.cc/HUS3-D45K] (discussing a U.K. ban on a Unilever advertisement because of its ambiguous and unsubstantiated claim that Unilever's detergent was "kinder to our planet"); Harry Cockburn, *'Greenwashing' and 'Dirty Tricks': Shell Sparks Fierce Backlash with Emissions Tweet*, INDEPENDENT (Nov. 3, 2020, 6:14 PM), https://www.independent.co.uk/climate- change/news/shell-greenhouse-gas-emissions-aoc-greta-thunberg-b1558403.html [https://perma.cc/UNL2-8X3G] (discussing a Shell Twitter poll asking "What are you willing to change to help reduce emissions?" and its subsequent backlash).

20. WAYNE VISSER, DIRK MATTEN, MANFRED POHL & NICK TOLHURST, THE A TO Z OF CORPORATE SOCIAL RESPONSIBILITY 215–16 (rev. & updated ed. 2010).

21. *See* David Gelles, *Social Responsibility That Rubs Right Off*, N.Y. TIMES (Oct. 17, 2015), https://www.nytimes.com/2015/10/18/business/energy-environment/social-responsibility-that-rubs-right-off.html.

22. 141 S. Ct. 1951 (2021).

23 *See id.* at 1963.

fraud class actions, a court may consider evidence of whether an alleged misstatement was too generic to cause a price impact.[24] Though none of the plaintiffs' claims pertained to ESG, this decision will likely have a stronger effect on ESG claims due to the lack of specificity surrounding the term "ESG" itself. Green-washing claims, likewise, will face greater challenges in court.

This Comment focuses primarily on the "E" of ESG and proposes that the U.S. Securities and Exchange Commission (SEC) and Congress must act in conjunction to create workable securities fraud class action standards for ESG investor plaintiffs by reversing the tests adopted in *Goldman*. Part I of this Comment provides background on ESG regulation, including relevant rules from the SEC that are currently in place, the Commission's current proposed rule, and how ESG-related litigation has fared thus far in court. Part II summarizes *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System* and analyzes its potential impact on ESG securities. Considering *Goldman* and the current regulatory and case law barriers to bringing public interest securities fraud claims, Part III of this Comment proposes a framework to increase plaintiffs' access to ESG securities litigation and, therefore, hold publicly traded companies accountable for green-washed statements. Finally, Part IV concludes that implementation of such a framework could, by fostering more litigation, bolster the effectiveness of ESG and impact investing.

I. THE CURRENT REGULATORY STATE

This Part begins with an overview of the SEC's reporting requirements, which typically serve as the basis for securities fraud claims. Historically, these requirements have been limited to quantitative financial metrics and have not spoken on ESG issues. This Part then discusses the SEC's shift towards requiring qualitative public interest disclosures, including a proposed rule that would mandate publicly traded companies to disclose certain ESG information. Finally, this Part describes the rise of ESG-related litigation, both within the securities fraud cause of action and beyond, and highlights the regulatory potential that ESG securities fraud litigation holds.

A. SEC Reporting Requirements Are Structured to Protect Investors

A core principle in United States securities law is ensuring that investors have the necessary information to make informed investing

24. *Id.* at 1961.

decisions.[25] To help achieve this, the Securities Exchange Act of 1934 requires publicly traded companies to file reports on a regular basis.[26] This act empowers the SEC to prescribe the contents of such disclosures,[27] and the SEC in turn requires both quantitative and qualitative information be included in the reports.[28] More specifically, a publicly traded company must disclose "general information about its business, the competitive risks facing the business, legal proceedings involving the company, the experience and background of management and potential conflicts of interest, the structure of the board of directors, the contractual relationship between the issuer and its underwriters, and so forth."[29]

Until recently, the SEC has been hesitant to promulgate ESG regulations, including disclosure pertaining to any ESG metrics.[30] When engaged in rulemaking, the SEC is statutorily required to consider "whether an action is necessary or appropriate in the public interest" as well as investor protection, market efficiency, competition, and capital formation.[31] Despite this, the SEC has historically declined to require disclosures of public policy matters "unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[32] This standard is known as

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25. *Fund Disclosure at a Glance*, SEC, https://www.sec.gov/investment/fund-disclosure-at-a-glance [https://perma.cc/6GQB-XCRF] (last modified June 13, 2018).

26. 15 U.S.C. §§ 78l(a), 78m(a). Currently, the SEC requires companies to report an overview of their financial condition, including annual audited financial statements, quarterly unaudited financial statements, and the occurrence of certain business events (such as bylaw amendments or changes in control of the company). *Exchange Act Reporting and Registration*, SEC, https://www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting#:~:text=SEC%20rules%20require%20your%20company,statement%20for%20a%20public%20offering [https://perma.cc/M2QM-KN64] (last modified Apr. 6, 2023). Annual reports are filed on Form 10-K, quarterly reports are filed on Form 10-Q, and current reports (or reports required after the occurrence of certain specified events) are filed on Form 8-K. *Id.*

27. 15 U.S.C. § 78n(a)(2).

28. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1209 (1999).

29. *Id.*

30. *See id.* at 1246.

31. 15 U.S.C. § 78c(f).

32. Concept Release on Business and Financial Disclosure Required by Regulation S–K, 81 Fed. Reg. 23916, 23970 (Apr. 22, 2016) (discussing the SEC's refusal to require environmental disclosures in 1975). *See also Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979) ("Despite this broad discretion, however, the Commission contended that its authority was limited to contexts related to the objectives of the federal securities laws. And these laws . . . were designed generally to require disclosure of financial information in the narrow sense only.").

the "materiality" standard, referring to whether something is of "material importance to the average investor."[33] However, with the rise of ESG investing, the types of information that an average investor may find to be of material importance are rapidly changing.

B. Reporting Requirements Have Gradually Begun to Incorporate Public Policy Considerations

In recent years, the SEC has begun requiring disclosures that relate to public policy matters, as opposed to strictly financial concerns.[34] These disclosures have been promulgated largely pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[35] For instance, the Dodd-Frank Act requires disclosure of health and safety violations from mine operators.[36] This "represent[ed] a historic shift away from the SEC's mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation."[37] Under this Act, in 2015, the SEC required disclosure of the pay ratio of a company's CEO compared to its median employee,[38] which sparked discussion of income inequality in the United States (though it is unclear if that was the rulemaking intent).[39] In 2020, the SEC adopted rules that required companies to "disclose payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas, or minerals."[40] Another implementation of the Dodd-Frank Act, this rule was formulated with the goal of increasing transparency of payments to governments.[41]

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33. HERBERT S. WANDER, SECURITIES LAW DISCLOSURE AFTER SARBANES-OXLEY 34 (2004). This standard seems to be firmly rooted in securities disclosure law, having been initially established in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

34. *See generally* David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327 (2011).

35. *See id.*

36. *Id.* at 330.

37. *Id.*

38. Press Release, SEC, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), https://www.sec.gov/news/press-release/2015-160 [https://perma.cc/DRG5-FE7P].

39. *See* Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123 (2019).

40. Press Release, SEC, SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020), https://www.sec.gov/news/press-release/2020-318 [https://perma.cc/JM8T-TNPS].

41. *Id.*

Thus, modern disclosure requirements are not limited to strictly financial metrics.

In 2022, the SEC for the first time attempted to define ESG by proposing a rule that would create uniform ESG metrics and require disclosures of those metrics.[42] As part of this effort to reform ESG, the SEC also proposed a climate disclosures rule,[43] which, as written, would require publicly traded companies to disclose:

> (1) the registrant's governance of climate-related risks and relevant risk management processes; (2) how any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term; (3) how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; and (4) the impact of climate-related events (severe weather events and other natural conditions) and transition activities on the line items of a registrant's consolidated financial statements, as well as on the financial estimates and assumptions used in the financial statements.[44]

42. Press Release, SEC, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), https://www.sec.gov/news/press-release/2022-92 [https://perma.cc/H7CS-DZDN]. The same day, the SEC also proposed a "Names Rule" aimed at preventing misleading fund names. Press Release, SEC, SEC Proposes Rule Changes to Prevent Misleading or Deceptive Fund Names (May 25, 2022), https://www.sec.gov/news/press-release/2022-91 [https://perma.cc/M5PJ-48QD]. While this proposal did not explicitly define "ESG," it would paint a clearer picture for investors to assess the "sustainable value" of a company. Additionally, it would "combat greenwashing and modernize our financial system to respond to the continued growth of ESG considerations." Principles for Responsible Investment, Public Comment on Proposed Rule to Limit Misleading Investment Company Names 5 (Aug. 16, 2022), https://www.sec.gov/comments/s7-16-22/s71622-20136250-307284.pdf [https://perma.cc/7282-ANU5].

43. This Comment was written during the proposed rule's public comment period. As of October 2023, the SEC has not provided a timeline for when the rule might move forward. Richard Vanderford, *SEC Chair Gensler Declines to Give Timeline for Final Climate Disclosure Rule*, WALL ST. J. (Sept. 12, 2023), https://www.wsj.com/articles/sec-chair-gensler-declines-to-give-timeline-for-final-climate-disclosure-rule-bd7028e0.

44. Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/ND59-48PV].

Publicly traded companies would also be required to disclose direct greenhouse gas emissions, indirect emissions from purchased energy, and other greenhouse gas emissions in their supply chains.[45]

C. ESG Litigation Is Mounting, but These Claims Have Been Largely Unsuccessful

Meanwhile, litigation concerning ESG practices has been on the rise. Many early cases surrounding fraudulent practices as they relate to ESG standards have been outside of securities litigation, and instead have focused on consumer fraud claims regarding misrepresentations and omissions in product labeling, company websites, or other company representations.[46] However, these claims have largely proven to be unsuccessful.[47]

ESG-based claims have typically failed unless the alleged misrepresenting statement is "verifiable" and goes beyond being merely "aspirational."[48] As a result, consumer claims have been effectively limited to "concrete commitments."[49] For example, in *Ruiz v. Darigold, Inc.*,[50] forty-nine plaintiffs brought an action against Darigold, a dairy marketing and processing company, regarding representations in their Corporate Social Responsibility (CSR) Report.[51] These representations included statements describing "sustainable farming practices, animal-well-being, and fair treatment of employees" despite the fact that questions surrounding the "treatment of workers and animals at Darigold member facilities" had recently surfaced in a separate lawsuit against Darigold filed by Darigold employees.[52] The court found that the CSR Report statements were not actionable because they were "nuanced assessments of the current situation," "aspirational," or "[had] not been shown to be false in any material respect."[53] However, the court went on to state that such statements would have been

45. *Id.*

46. David Hackett, Reagan Demas, Douglas Sanders, Jessica Wicha & Aleesha Fowler, *Growing ESG Risks: The Rise of Litigation*, 50 ENV'T L. REP. 10849, 10850 (2020).

47. *Id.*

48. *Id.* at 10852.

49. *Id.*

50. No. C14-1283, 2014 U.S. Dist. LEXIS 155384 (W.D. Wash. Nov. 3, 2014).

51. *Id.* at *1–2. *See also* Hackett, Demas, Sanders, Wicha & Fowler, *supra* note 46, at 10852 (discussing background information of case).

52. Hackett, Demas, Sanders, Wicha & Fowler, *supra* note 46, at 10852 (quoting *Ruiz*, 2014 U.S. Dist. LEXIS 155384, at *7).

53. *Ruiz*, U.S. Dist. LEXIS 155384, at *10.

actionable if they were more concrete. For instance, the plaintiffs' statement would have been actionable if Darigold represented that it "already had in place measures to protect and enhance animal well-being or that such measures had been (or would be) 100% effective."[54]

On the other hand, securities fraud is a statutory claim that functions much like a common law tort claim.[55] The securities fraud cause of action was created in Section 10(b) of the Securities and Exchange Act,[56] which prohibits use of a "manipulative or deceptive device" in "connection with the purchase or sale of any security," and in SEC Rule 10b-5,[57] which bans fraudulent practices in the sales and purchases of securities, including untrue statements or omissions of any "material fact."[58] Federal judges have subsequently filled in the elements and parameters of these actions,[59] which require plaintiffs to "prove several different elements: (1) fraud, (2) 'in connection with' the purchase or sale of security, (3) reliance, (4) causation, (5) damages, and (6) scienter."[60] In most cases, federal law preempts any state causes of action, leaving federal courts as the sole venue for most securities fraud litigation.[61]

ESG securities fraud litigation, though currently not widely utilized,[62] has the potential to be an important market-based regulatory tool. Legal scholars have hailed the regulatory role that securities fraud actions play within U.S. markets. In particular, Steven Ramirez argues that private securities fraud actions act as a powerful market governance instrument for five reasons: (1) they are disconnected from politics and, likewise, from possible agency capture; (2) these claims do not require any government funding or support other than use of the court system; (3) victims are compensated; (4) they reduce the need for regulations; and (5) the broad definition of "security," which includes over twenty financial investment instruments, provides these claims

54. *Id.* at *11.

55. Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 815 (2009).

56. 15 U.S.C. § 78j(b).

57. 17 C.F.R. § 240.10b-5 (2022).

58. *Id.*

59. *See* Fisch, *supra* note 55, at 815.

60. Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 ALA. L. REV. 325, 328 (2004).

61. *Id.* at 325.

62. *See* Hackett, Demas, Sanders, Wicha & Fowler, *supra* note 46, at 10852–53 (collecting cases).

with a far reach over the financial markets.[63] There is no reason that Ramirez's enumerated securities fraud virtues should not extend into the ESG market as well. In fact, because environmental issues tend to be partisan,[64] Ramirez's second point—insulation from agency capture—should be even more powerful in the ESG context.[65]

Moreover, Jennifer O'Hare argues that private actions such as securities fraud class actions are better at keeping up with industry innovation than administrative agencies, which tend to "ossif[y]" the status quo due to hurdles in promulgating new rules.[66] This feature of securities fraud litigation should also prove especially virtuous within the ESG context, where the meaning of ESG itself is rapidly evolving.[67] This again shows that securities fraud litigation could serve an exceptionally impactful regulatory function in combatting corporate green washing.

However, as the law currently stands, many ESG securities fraud cases have been rejected by courts because the alleged misrepresentations underlying the plaintiffs' claims were "too . . . aspirational" for investors to reasonably rely on, much like the consumer fraud ESG cases discussed above.[68] For example, in *Ferris v. Wynn Resorts*,[69] plaintiffs alleged that Wynn Resorts's Code of Conduct was misleading.[70] The code stated that "'[h]arassment' and 'discrimination of any sort will not be tolerated'" and that "[a]ll reported violations of the Code will be taken seriously and promptly investigated."[71] Despite this language, the company condoned founder and former CEO Steven Wynn's pattern of sexual misconduct and did not take action against him until this pattern was revealed by *The Wall*

63. Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 LOY. U. CHI. L.J. 669, 722–26 (2014).

64. *See* Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 GEO. ENV'T L. REV. 455, 485 (2018).

65. Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic* Ex Post *Regulation,* 43 GA. L. REV. 63, 65, 91–92 (2008).

66. *Id.* at 91.

67. See Robert G. Eccles, Linda-Eling Lee & Judith C. Stroehle, *The Social Origins of ESG: An Analysis of Innovest and KLD*, 33 ORG. & ENV'T 575 (2020) for a brief overview of the history of ESG and the formation of two of the oldest ESG data vendors.

68. Lauren Aguiar, Anita Bandy & Tansy Woan, *Recent ESG Litigation and Regulatory Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 25, 2022), https://corpgov.law.harvard.edu/2022/07/25/recent-esg-litigation-and-regulatory-developments/ [https://perma.cc/8ZP5-C6PW].

69. 462 F. Supp. 3d 1101 (D. Nev. 2020).

70. *Id.* at 1111.

71. *Id.* (quoting First Am. Compl. ¶¶ 92, 93).

Street Journal.[72] The court dismissed the plaintiffs' claim, finding that the Code of Conduct "expresses opinions as to what actions are preferable, as opposed to implying that all staff, directors, and officers always adhere to its aspirations."[73] The court found that the language in the code did not save it from being too aspirational.[74] This aspirational hurdle has been the biggest challenge for plaintiffs seeking to make a securities fraud claim related to ESG.[75]

This aspirational hurdle has stymied the utility that private securities fraud litigation should have as a regulatory tool. As discussed above, securities fraud litigation should be especially valuable in ESG market regulation because the private suits protect against agency capture and administrative ossification.[76] Denying "aspirational" ESG claims, however, puts the onus on administrative agencies—namely, the SEC—to promulgate rules to address this regulatory gap.[77] By punting ESG claims largely into administrative territory, the ESG market is thus deprived of these securities fraud characteristics that should be exceptionally beneficial in the ESG context.

Still, plaintiffs have not been deterred from continuing to file such claims.[78] The SEC too seems to have been increasingly pursuing securities fraud cases regarding ESG-related representations.[79] In March 2021, the SEC created a Climate and ESG Enforcement Task

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72. *Id.*

73. *Id.* at 1121 (quoting *Retail Wholesale & Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017)).

74. *Id.*

75. *See* John C. Friess, *Board Diversity Shareholder Suits: Diverging Materiality Tests Under Rules 10b-5 and 14a-9*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 155, 177 (2021).

76. *See supra* text accompanying notes 62–67.

77. *See* Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/DVR5-JFM6] ("Proactively addressing emerging disclosure gaps that threaten investors and the market has always been core to the SEC's mission.") [hereinafter SEC Climate and ESG Issues Task Force Announcement].

78. Aguiar, Band & Woan, *supra* note 68.

79. Roger E. Barton, *The Greenwashing Wave Hits Securities Litigation*, REUTERS (Sept. 22, 2022, 10:42 AM), https://www.reuters.com/legal/legalindustry/greenwashing-wave-hits-securities-litigation-2022-09-22/ [https://perma.cc/48WL-FJ6F] (collecting cases). *See also Enforcement Task Force Focused on Climate and ESG Issues*, SEC, https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues#:~:text=The%20SEC%20launched%20the%20Climate,ESG%2Drelated%20disclosure%20and%20investment [https://perma.cc/Q85B-BJS2] (last modified Apr. 11 2023) (listing six new actions filed in 2022, as opposed to only two new ESG filings in 2020 and 2021, respectively).

Force to oversee ESG-related investments and disclosures,[80] and in March 2022, the commission listed "ESG-related advisory services and investment products" as a focus in its 2022 Examination Priorities release.[81] As investors continue to weigh ESG factors in their investment decisions, and as companies continue to feel pressure to improve their ESG metrics, it is likely that ESG securities fraud actions will continue to increase in number.[82]

II. THE *GOLDMAN* HOLDING

In 2021, the Supreme Court decided *Goldman Sachs v. Arkansas Teacher Retirement System*,[83] a monumental case for securities fraud class actions.[84] This Part takes a closer look at the *Goldman* holding and the standards applicable to securities fraud class actions in general. First, this Part discusses the *Basic* presumption, which served as the focal point of the *Goldman* holding. Next, this Part details the Supreme Court's *Goldman* decision and how it altered the traditional framework for applying the *Basic* presumption. Though the facts of *Goldman* did not touch upon ESG securities, the impact of the tests that *Goldman* set forth will likely be magnified in the ESG context.

A. A Brief History of the Basic *Presumption*

Securities fraud class actions as a whole have long struggled with the reliance requirement of the Federal Rules of Civil Procedure,[85] in which plaintiffs must establish a class-wide reliance on the alleged misrepresentation.[86] In its 1988 *Basic v. Levinson*[87] holding, the Supreme Court sought to remedy this issue by establishing a rebuttable fraud on the market presumption (the *Basic* presumption).[88] In other words, because investors purchase stocks in reliance on the market's "integrity of that price,"[89] that reliance may be presumed on a class-

80. SEC Climate and ESG Issues Task Force Announcement, supra note 75.

81. SEC, 2022 EXAMINATION PRIORITIES REPORT 13 (2022), https://www.sec.gov/files/2022-exam-priorities.pdf [https://perma.cc/T5L9-QPHN].

82. Barton, *supra* note 79.

83. 141 S. Ct. 1951 (2021).

84. *Id.* at 1957.

85. FED. R. CIV. P. 23(b)(3).

86. *See* Nancy My Nguyen, *Materiality Immaterial? Revisiting Standards for Securities Fraud Class Certification in* Amgen v. Connecticut Retirement Plans and Trust Funds, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 155 (2013).

87. 485 U.S. 224 (1988).

88. *Id.* at 250.

89. *Id.* at 247.

wide basis.[90] This presumption was later upheld by the Supreme Court in *Halliburton II*;[91] however, in doing so, it noted that evidence of a lack of price impact may be considered to rebut the *Basic* presumption "so long as it [was] for the purpose of countering a plaintiff's showing of market efficiency, rather than directly rebutting the [fraud on the market] presumption."[92] Thus, the design of the *Basic* presumption was not designed to permit divulgence into the merits of a case during the class certification stage.

B. The Goldman *Decision: A Blow to* Basic

One recent Supreme Court holding has the potential to dramatically impact ESG securities fraud actions by more easily allowing defendants to rebut the *Basic* presumption, which would force plaintiffs to undertake the insurmountable task of proving reliance. In *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*,[93] Goldman Sachs Group, Inc. shareholders sought to bring a class action lawsuit against Goldman for securities fraud.[94] Specifically, the plaintiffs asserted that the multinational investment bank maintained an inflated stock price by repeatedly misrepresenting their conflict-of-interest policy.[95] Some of these alleged misrepresentations included: "we have extensive procedures and controls that are designed to identify and address conflicts of interest"; "our clients' interests always come first"; and "integrity and honesty are at the heart of our business."[96] Despite making these statements, plaintiffs allege that Goldman had engaged in conflicted transactions without disclosing those conflicts of interest.[97] Once these conflicted transactions were made known to the public via a government investigation and corollary news reports, plaintiffs allege, Goldman's stock price deflated, harming shareholders.[98]

On appeal, Goldman challenged the decision to grant class certification, arguing that the Second Circuit erred in concluding that

90. Victor E. Schwartz & Christopher E. Appel, *Rebutting the Fraud on the Market Presumption in Securities Fraud Class Actions:* Halliburton II *Opens the Door*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 33, 39 (2015).

91. 573 U.S. 258 (2014).

92. *Id.* at 280.

93. 141 S. Ct. 1951 (2021).

94. *Id.* at 1959.

95. *Id.* at 1957.

96. *Id.* at 1959.

97. *Id.*

98. *Id.* at 1959–60.

the generic nature of the misrepresentations was irrelevant to the price impact question at the class certification stage.[99] Ultimately, the Supreme Court agreed, remanding the case for the Second Circuit to consider the evidence relating to price impact, regardless of whether that evidence overlaps with the question of materiality.[100]

In reaching this decision, the Court briefly discussed the merits of proving price inflation indirectly.[101] It found that where "there is a mismatch between the contents of the misrepresentation and the corrective disclosure," the inference of price inflation is less convincing.[102] Furthermore, it stated that this "mismatch" can occur where the statement generating inflation is generic and the corrective statement is more specific.[103] Though the case was remanded for consideration of whether Goldman's statements were too generic to affect its stock price,[104] by including this dicta, the Court seemed to suggest that this logic applied here.

This aspect of the majority opinion in *Goldman* was met with a strong dissent. Justice Sotomayor stated that the *Goldman* holding essentially created a materiality test stage by asking courts to determine "whether the alleged misstatements are, in *Goldman*'s words, 'immaterial as a matter of law'" at the class certification stage.[105] Under the Federal Rules of Civil Procedure,[106] the question of materiality is irrelevant during class certification.[107] The addition of a test that, as Justice Sotomayor argues, is effectively a materiality test at the class certification stage thus carries consequential effects for securities fraud class actions as a whole and especially for ESG-concerned actions.

III. REVISING SECURITIES FRAUD CLASS ACTIONS WITH THE MODERN ESG INVESTOR IN MIND

This Part evaluates the securities fraud cause of action in light of the Supreme Court's *Goldman* holding and discusses actions that should be taken to bring ESG market oversight in accordance with the goals of

99. *Id.* at 1958.
100. *Id.* at 1961.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1964 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 267 (2020)).
106. FED. R. CIV. P. 23.
107. *Goldman*, 141 S. Ct. at 1964 (Sotomayor, J., concurring in part and dissenting in part).

securities law. First, it discusses the impact that *Goldman* is likely to have on the securities fraud action, including the ESG context, and evaluates where ESG securities law stands today. Next, it discusses the need to remedy *Goldman*'s impact through: (1) congressional backing of the SEC's proposed rule; and (2) a more plaintiff-friendly securities fraud standard. Finally, given the need for these additional measures, this Part proposes a framework for ensuring the effectiveness of ESG market regulations post-*Goldman*.

A. Goldman *Will Have Consequences on ESG Securities Fraud Class Actions*

The Supreme Court's *Goldman* holding signaled a need to make securities fraud actions more plaintiff-accessible. This signal should not be ignored. Securities class actions are the most frequently litigated category of class actions in the United States.[108] Though its full effects are likely still yet to be seen,[109] *Goldman* is set to have a far-reaching impact on the securities fraud class action as a whole.

There is no bright-line test to determine whether common issues predominate; each case must be addressed considering its unique set of facts.[110] As a result of the *Goldman* holding, even more discretion is left to trial judges about whether or not they want to "sidestep the complex statistical evidence involved by crediting a defendant's claim that the plain language of its alleged misstatement is excessively generic,"[111] leaving the *Basic* presumption rebuttable upon a judge's whim. Presumptions of reliance, in the securities fraud context, are generally implemented to "protect investors from fraud and promote the integrity of American markets."[112] Formed as a result of the "unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market,"[113] the *Basic* presumption is no exception. Thus, chipping away at the *Basic* presumption, as the Supreme Court did in

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108. Friess, *supra* note 75, at 162.

109. As of October 9, 2023, *Goldman* has been cited in fifty-six cases according to the case's Lexis Plus *Shepard's* Citing Decisions Analysis.

110. 5 MOORE'S FEDERAL PRACTICE—CIVIL § 23.45(1) (3d ed. 2023).

111. Matthew C. Turk, *The Securities Fraud Class Action After* Goldman Sachs, 59 AM. BUS. L.J. 281, 335 (2022).

112. Michael J. Kaufman & John M. Wunderlich, *Fraud Created the Market*, 63 ALA. L. REV. 275, 309 (2012).

113. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). The *Basic* Court established that class-wide reliance places an "unrealistic evidentiary burden" on plaintiffs. Otherwise, plaintiffs would have to "show a speculative state of facts," such as how they *would* have acted if the disclosures had not been omitted or if a misrepresentation had not been made. *Id.*

its *Goldman* holding, undoubtedly produces a more defendant-friendly standard in all securities fraud class actions.

This blow to the *Basic* presumption, however, will likely be especially impactful in ESG securities fraud actions as it compounds already existing issues plaintiffs face when bringing an action for green-washed misrepresentations. First, mismatches in specificity between front- and back-end statements are commonplace in ESG cases; allotting more weight to this factor will disproportionately prohibit class certification in ESG securities fraud actions. Second, it is uncertain what information is considered material for ESG-oriented investors. Applying *Goldman*'s pseudo-materiality test when determining whether *Basic* should apply will exceptionally burden ESG plaintiffs. Finally, aside from the securities fraud cause of action, ESG plaintiffs have few other avenues available to them in which they can seek recourse for green-washed misrepresentations.

1. Mismatches Are Commonplace in ESG Cases

"Sustainability" and "ESG" are two amorphous terms that are core to the practice of ESG investing.[114] As mentioned in the Introduction of this Comment, standards for determining whether an individual security is ESG-friendly vary widely from firm to firm.[115] Thus, there will likely almost always be a mismatch between the specificity of the statement generating inflation and the corrective statement in the ESG context.[116]

The facts of *In re Vale Securities Litigation*[117] demonstrate why consideration of mismatches between front- and back-end statements is not suitable for ESG litigation. In *Vale*, a class of plaintiffs brought a securities fraud action against Vale S.A., a Brazilian mining company, after one of the company's dams collapsed catastrophically, causing its stock price to immediately drop by eight percent.[118] Prior to the dam collapse, Vale and its board members made statements such as "we are driven by our commitment to safety to people and to preserve the

114. *See supra* notes 1–7 and accompanying text.

115. *See supra* note 12 and accompanying text.

116. This mismatch criterion seems to be better suited for the fact patterns of traditional securities fraud cases involving alleged misrepresentations of financial metrics. *See, e.g.*, *In re Apple Secs. Litig.*, No. 19-cv-2033, 2022 U.S. Dist. LEXIS 23771, at *28 (N.D. Cal. Feb. 4, 2022) (rejecting Apple's argument that front-end statements that Apple was not underperforming in China did not match back-end disclosures showing a negative performance in China).

117. No. 19-CV-526, 2020 U.S. Dist. LEXIS 91150 (E.D.N.Y. May 20, 2020).

118. *Id.* at *21.

environment,"[119] that there had been "[s]ignificant progress achieved" on the dam with respect to health and safety,[120] and that "the Company seeks to have a clear view of its major risks, the best cost-benefit mitigation plans and the effectiveness of the controls in place, monitoring the potential impact of operational risk . . . ."[121] In contrast, Vale stock price dropped upon the following news reports: the company was "halting some operations in its Brucutu mine per a Brazilian court order issued to help improve safety"; it "would declare force majeure on certain iron ore supply contracts due to the court-ordered suspension of Brucutu mine operations"; and it was "warned of the likely rupture of Dam 1 given leaks and a TÜV SÜD report finding drainage problems and recommending installation of new water pressure monitors."[122]

Vale presents an egregious case of misrepresentation that led to a catastrophic outcome. It falls well within the goals of securities law—"protect[ing] investors"; "maintain[ing] fair, orderly, and efficient markets"; and "facilitat[ing] capital formation"[123]—to hold Vale accountable for its dam collapse. Likewise, the Eastern District of New York ultimately denied Vale's motion to dismiss plaintiffs' claims[124] and later granted class certification.[125] However, even in an egregious case such as *Vale*, there is still a clear mismatch in specificity of front-end and back-end statements: a vague commitment to safety and the environment does not match the specificity of news reports of Dam 1's safety issues and collapse. Though the district court's class certification decision in *Vale* was the "right" outcome, it is worth noting that Vale did not challenge the *Basic* presumption on the grounds of lack of price impact, and likewise, did not raise the issue of front- and back-end statement mismatches.[126] Had the price impact issue been more

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119. Consolidated Class Action Complaint at 45, *In re Vale S.A. Secs. Litig.*, No. 19 CV 526, 2020 U.S. Dist. LEXIS 91150 (E.D.N.Y. May 20, 2020).

120. *Id.* at 46.

121. *Id.* at 48.

122. *In re Vale S.A. Secs. Litig.*, 2020 U.S. Dist. LEXIS 91150, at *22.

123. *Our Goals*, SEC, https://www.sec.gov/our-goals#:~:text=The%20SEC's%20long%2Dstanding%20tripartite,capital%20formation%E2%80%94remains%20our%20touchstone [https://perma.cc/Z9YK-CELR] (last modified Apr. 6, 2023).

124. *In re Vale S.A. Secs. Litig.*, 2020 U.S. Dist. LEXIS 91150, at *54.

125. *In re Vale S.A. Secs. Litig.*, No. 19-CV-526, 2022 U.S. Dist. LEXIS 60374, at *21 (E.D.N.Y. Mar. 31, 2022). As of November 19, 2022, this case was still ongoing.

126. *See* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification and Appointment of Class Representative and Class Counsel at 5–12, *In re Vale S.A. Secs. Litig.*, No. 19-CV-526, 2022 U.S. Dist. LEXIS 60374 (E.D.N.Y. Mar. 31, 2022). Vale instead attempted to rebut the *Basic* presumption by

disputable in this case,[127] invoking *Goldman*'s mismatch consideration may have opened the door for a different outcome during class certification.

As "sustainability" is not well-defined, mismatches arising from ESG cases are likely to be even more apparent without specific, uniform criteria—such as a net greenhouse gas emissions threshold—that would qualify a company as sustainable.[128] Moreover, ESG securities litigation, as was the case in *Vale*, is more likely to be event-driven.[129] Plaintiffs seeking class certification are thus faced with the challenge of linking a misrepresentation or omission, an event, and a price drop together, all under the *Goldman* test. Giving great weight to the mismatch factor in these scenarios allots more grounds for the defendant to challenge the *Basic* presumption,[130] which in turn may make it more difficult for plaintiffs to bring these class actions. Thus, *Goldman* is likely to have harsh consequences in the ESG context.

2. The Definition of "Material" Is in Flux as It Pertains to ESG Indicators

Furthermore, by allowing courts to conduct a materiality assessment at the class certification stage, the *Goldman* Court has further complicated this body of law and posed another hurdle for ESG-investing plaintiffs. The materiality of information depends on whether a "reasonable investor" would rely on it[131]—a question historically linked to quantitative financial metrics.[132] But how materiality relates to

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showing that Vale securities were not being traded in an efficient market. *Id.* The district court rejected this argument. *In re Vale S.A. Sec. Litig.*, 2022 U.S. Dist. LEXIS 60374 at *8–15.

127. Sharp declines in Vale's stock price were recorded shortly after various news reports were released, including a drop of nearly twenty percent per share after Vale issued a press release detailing the consequences of the dam collapse. Consolidated Class Action Complaint, *supra* note 119, at 10.

128. ESG securities litigation is currently limited in number, but the issue of the vague meaning of "sustainability" has troubled plaintiffs in other contexts, such as consumer fraud. *See, e.g.*, *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 149–51 (S.D.N.Y. 2022) (dismissing plaintiff's claims that Allbirds's representations of its practices as "sustainable" were misleading because the plaintiff could not demonstrate what emissions calculations a reasonable consumer would expect Allbirds to use).

129. John Neuwirth & Caroline Zalka, *Securities Litigation*, *in* LITIGATION TRENDS 2022 92, 93 (2022).

130. *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988).

131. *See id.*

132. Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 BERKELEY BUS. L.J. 391, 393–94 (2020) ("The reasonable investor archetype, which arose from early 20th century case law,

public interest factors (like ESG metrics) is not well-defined.[133] The emergence of ESG investing has proven that linking materiality to discretely financial factors is outdated, as investors are increasingly relying on non-financial public interest factors in making their investment decisions.[134] Moreover, there is evidence that positive ESG performance, at least in some aspects of the term "ESG" do correlate to positive financial performance as well,[135] further obfuscating whether materiality here should apply.

Despite this, little has been done to date to bridge this gap between the historic "reasonable investor" and their modern counterpart,[136] which has in turn resulted in a convoluted body of case law attempting to analyze the reasonable ESG investor.[137] Even major asset managers in the industry seem unsure of what materiality means in regard to ESG.[138] BlackRock, for example, states that one hundred percent of its portfolios "incorporat[e] material ESG information."[139] However, the phrase "material ESG information" is not further defined by BlackRock.[140] When major asset managers, such as BlackRock, cannot clearly define what ESG means, how can investors trust individual companies who assign themselves such a label? With such great uncertainty surrounding what constitutes "material ESG information," posing a test that is essentially a materiality inquiry at the class certification stage will only serve to heighten this pre-existing hurdle for ESG plaintiffs.

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conceives of the investor as an economically rational actor who relies solely on financial disclosures in making decisions about the purchase and sale of securities.").

133. *See supra* Section I.A and accompanying notes.

134. Diab & Adams, *supra* note 8.

135. *See* Todd Court & Daniel Esty, *ESG Standards: Looming Challenges and Pathways Forward*, 33 ORG. & ENV'T 491, 492 (2020) (comparing studies of ESG performance as it relates to financial performance).

136. *See* Saad & Strauss, *supra* note 132, at 398–99, 432 n.195 (noting that until recently, the SEC has employed a "watch and wait" approach to ESG rulemaking, resulting in the commission lagging behind investor demands).

137. For example, compare *Andropolis v. Red Robin Gourmet Burgers, Inc.*, 505 F. Supp. 2d 662, 685–86 (D. Colo. 2007) (finding that ethics codes are too aspirational to be actionable in securities fraud litigation), with *In re Petrobras Secs. Litig.*, 116 F. Supp. 3d 368, 381 (S.D.N.Y. 2015) (declining to dismiss claims that a code of conduct constituted a material misrepresentation).

138. Friess, *supra* note 75, at 181.

139. *Id.*

140. *Id.* at 182. BlackRock's client letter does describe some environmental considerations, such as a commitment to "remove companies generating more than twenty-five percent of revenues from thermal coal production" from its portfolios but still declines to define what exactly "material ESG information" entails. *Id.* at 181–82.

3. LACK OF ALTERNATIVE REGULATORS MAGNIFIES *GOLDMAN*'S IMPACT ON ESG

Finally, the impact of *Goldman* is magnified by the lack of alternative market regulations. Though it has raised some proposals regarding ESG reform, Congress has yet to pass anything related to the matter.[141] Up until its March 2022 proposed rule, the SEC has similarly declined to promulgate any ESG market regulations.[142] Coupled with a more defendant-friendly securities fraud cause of action post-*Goldman*, there are limited pathways to hold green-washing companies accountable for their misrepresentations.[143] While the proposed SEC rule is undoubtedly a step in the right direction, as discussed further below, Congress must supplement this rule by defining both the *Basic* presumption and the reasonable investor as they are applied within the public interest context in order to bring the field of ESG in line with the goals of securities law.

B. The Political Weaponization of the Major Questions Doctrine Presents a Need for Congressional Backing of the SEC's Proposed Rule

Congressional backing is necessary if the SEC's proposed rule is to be effective. The SEC's organic statute authorizes it to require disclosures that are "necessary or appropriate in the public interest or for the protection of investors."[144] Currently, there is a Republican-led push in the courts to limit climate action,[145] which seems to pose a high likelihood that the SEC's proposed regulation, if promulgated, would be challenged.

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141. *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 281 n.12 (listing recent congressional proposals).

142. *Id.* at 281.

143. *See supra* Section I.C (detailing the shortcomings of other causes of action, such as consumer fraud, that seek to hold companies accountable for greenwashed statements).

144. The SEC justifies its proposed rule under this authorization in The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239 & 249) (first citing The Securities Act of 1933, 15 U.S.C. §§ 77g, 77s(a); and then citing The Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 78m, 78w(a)(1)).

145. *See* Coral Davenport, *Republican Drive to Tilt Courts Against Climate Action Reaches a Crucial Moment*, N.Y. TIMES, https://www.nytimes.com/2022/06/19/climate/supreme-court-climate-epa.html (last updated June 28, 2022) (listing recent attempts to block climate regulations).

As the Supreme Court has recently dealt a major blow to the breadth of the EPA's authority,[146] the need for clear congressional authorization is also heightened in the wake of this decision. The Supreme Court made waves in its June 2022 decision in *West Virginia v. EPA*[147] in which it "took an anti-administrative-state"[148] stance, striking down a regulation promulgated by the EPA under the Clean Air Act.[149] The Clean Air Act authorized the EPA to, in relevant part, "(1) determine, taking into account various factors, the best system of emission reduction which . . . has been adequately demonstrated, (2) ascertain the degree of emission limitation achievable through the application of that system, and (3) impose an emissions limit on new stationary sources that reflects that amount."[150] Relying on this authority, the EPA set forth a new regulatory framework with the goal of "restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030."[151]

Despite the EPA having regularly established emissions limits prior to the case at hand,[152] the Supreme Court ultimately struck down the EPA's decision under the major questions doctrine.[153] In other words, because the proposed scheme, in essentially revamping the nation's energy infrastructure,[154] was a decision of great "magnitude and consequence," either Congress must execute the scheme itself or very clearly delegate the power to execute such a scheme to the relevant administrative body.[155] The Court found this lack of authority for three reasons: (1) the EPA did not cite to a specific statutory authority for their energy scheme—the authority it cited was an "obscure, never-used section of the law"; (2) the cited authority has never been interpreted to confer such power before; and (3) the

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146. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022).

147. 142 S. Ct. 2587 (2022). For a brief primer on *West Virginia v. EPA* and the holding's ramifications generally, see also David Giordano, *A Basic Primer on the Major Questions Doctrine*, DAVIS POLK (July 14, 2022), https://www.davispolk.com/insights/client-update/basic-primer-major-questions-doctrine [https://perma.cc/B9D6-985S].

148. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

149. *Id.* at 2615–16.

150. *Id.* at 2601 (first citing The Clean Air Act, 42 U.S.C. § 7401(a)(1); and then citing 80 Fed. Reg. 64538 (2015)) (internal quotations omitted) (cleaned up).

151. *Id.* at 2607.

152. *Id.* at 2610.

153. *Id.* at 2616.

154. The EPA's Clean Power Plan would have mandated a shift in power generation—first from coal-fired power plants to natural gas-fired power plants, and then from natural gas-fired power plants to wind and solar energy sources. *Id.* at 2602–03.

155. *Id.* at 2616.

"claimed power 'requires technical and policy expertise not traditionally needed in [the] EPA's regulatory development.'"[156]

Almost immediately following the *West Virginia v. EPA* decision, many other regulations were challenged in court by plaintiffs citing the major questions doctrine.[157] Climate change, in particular, has become a greatly polarized subject of political debate.[158] Environmental initiatives in various shapes and sizes have been met with hostility from Republican officials at both state and federal levels.[159] Even prior to the Supreme Court's holding in *West Virginia v. EPA*, the major questions doctrine had routinely been used to challenge greenhouse gas regulations.[160] The SEC's proposed climate disclosures are not exempt from this hostility either. The proposed rule has not received unanimous support internally: SEC Commissioners Hester Peirce[161] and Mark Uyeda[162] have publicly spoken out against the proposed disclosure

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156. *Id.* at 2624 (Gorsuch, J., concurring) (emphasis omitted).

157. *See* Shay Dvoretzky, Emily J. Kennedy & Elizabeth A. Malone, West Virginia v. EPA*: Implications for Climate Change and Beyond*, SKADDEN, https://www.skadden.com/insights/publications/2022/09/quarterly-insights/west-virginia-v-epa [https://perma.cc/4C5Z-ZEET].

158. *See* Jaffe, *supra* note 64, at 486 ("The Republican leadership has surmised that there is no political advantage to be gained by embracing pro-environmental policies."). *See also* Sedona Chinn, P. Sol Hart & Stuart Soroka, *Politicization and Polarization in Climate Change News Content, 1985-2017*, 42 SCI. COMMC'N 112 (2020) (suggesting that polarization is increasing with time).

159. David Gelles, *How Republicans Are 'Weaponizing' Public Office Against Climate Action*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html [https://perma.cc/7U4R-5KQK].

160. *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 256 (2022).

161. *See, e.g.*, Hester M. Peirce, Comm'r, SEC, Chocolate Covered Cicadas, Remarks Before the Brookings Institution, SEC (July 20, 2021) https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021 [https://perma.cc/7LVV-QQN6]; Hester M. Peirce, Comm'r, SEC, We Are Not the Securities and Environment Commission—At Least Not Yet, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/DC5L-UX89]; Hester M. Peirce, Comm'r, SEC, Social, and Governance Disclosures for Investment Advisers and Investment Companies, U.S. SECS. & EXCH. COMM'N (May 25, 2022), https://www.sec.gov/news/statement/peirce-statement-esg-052522 [https://perma.cc/L3YT-XWAC] [hereinafter We Are Not the Securities and Environment Commission]; Hester M. Peirce, Comm'r, SEC, It's Not Just Scope 3, Remarks at the American Enterprise Institute, SEC (Dec. 7, 2022), https://www.sec.gov/news/speech/peirce-remarks-american-enterprise-institute-120722 [https://perma.cc/M95W-4SKZ].

162. *See, e.g.*, Mark T. Uyeda, Comm'r, SEC, Remarks at the 2022 Cato Summit on Financial Regulation, SEC (Nov. 17, 2022), https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722 [https://perma.cc/L9NE-US7G]; Mark T. Uyeda, Comm'r, SEC, Remarks at

rule, arguing that promulgating such a rule is outside of the scope of the SEC's expertise and that the disclosure requirement carries the potential for abuse. Peirce, in fact, invokes the same logic used in the majority opinion of *West Virginia v. EPA*: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[163] Furthermore, the proposed rule is already in the crosshairs of West Virginia's attorney general, who has announced his plans to challenge the regulation if promulgated.[164]

It is hard to tell whether the SEC's proposed rule would survive these challenges. Specifically, without a well-articulated test from the Court,[165] it is unclear how the climate disclosures proposal would fare against the major questions doctrine. The SEC has broad authority to ensure investors receive "full and fair disclosure" of the securities they purchase and to "prevent frauds" in securities sales as necessary or appropriate in the "public interest."[166] In fact, the SEC has been requiring corporate disclosures for decades, including a 1971 requirement that companies disclose "material matters involving the environment and civil rights."[167] Still, even this requirement stayed true to the traditional regime of financially material disclosures, as the 1971 environmental disclosures only included instances where compliance with a law "may necessitate significant capital outlays, may materially affect the earnings power of the business or cause material changes in registrant's business."[168]

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the California '40 Acts Group, SEC (Jan. 27, 2023), https://www.sec.gov/news/speech/uyeda-remarks-california-40-acts-group [https://perma.cc/88MU-QXHE].

163. We Are Not the Securities and Environment Commission, *supra* note 161 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

164. Maxine Joselow, *The Supreme Court's EPA Ruling Was the Beginning of Something Bigger*, WASH. POST (July 6, 2022, 8:14 AM), https://www.washingtonpost.com/politics/2022/07/06/supreme-court-epa-ruling-was-beginning-something-bigger/ [https://perma.cc/KWK4-G588].

165. Brunstein & Revesz, *supra* note 160, at 219 n.5.

166. Securities Act of 1933, Pub L. No. 73-22, 48 Stat. 74 (codified as amended at §§ 77a–77mm).

167. Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, *Climate Change,* West Virginia v. EPA*, and the SEC's Distinctive Statutory Mandate*, 47 ADMIN. & REGUL. L. NEWS 9, 10 (2022).

168. Eileen Shanahan, *S.E.C. Details Disclosure Required on Environment*, N.Y. TIMES (July 19, 1971), https://www.nytimes.com/1971/07/19/archives/sec-details-disclosure-required-on-environment-rules-for-civil.html [https://perma.cc/9DJ8-ZK8C] (quoting the SEC's then-Chairman William J. Casey).

Opponents of the proposed climate disclosures allege that requiring information about a corporation's sustainability practices falls outside of the SEC's "subject matter boundaries."[169] The SEC itself has previously acknowledged such limitations within the context of potential ESG-disclosure mandates.[170] The Supreme Court has additionally held in the past that the words "public interest" do not grant the authority to create any rule promoting the general welfare.[171] Therefore, the SEC is unlikely to find any support for its proposed climate disclosures in the "public interest" language of its statutory scheme.[172] While there is an argument that climate metrics are inherently financial, as prioritizing the "E" in ESG now hedges against long-term climate uncertainty,[173] this link is certainly more abstract than that of quantitative information traditionally understood to be financially material. The SEC thus still must overcome the hurdle that the proposed climate disclosure rule is a stark departure from the traditional financial metrics-based disclosure scheme.[174] In doing so, the SEC may be met with the challenge of finding sufficient statutory support for its authority to promulgate the proposed rule.

Thus, given the high probability that the proposed rule will be met with major questions doctrine challenges in court if it is promulgated, it is important that Congress very clearly authorize the SEC to implement such an ESG disclosure framework to ensure it withstands judicial review. Failure to do so may result in the proposed rule being struck down under the major questions doctrine just as the EPA's regulation was in *West Virginia v. EPA*. It is noteworthy that

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169. We Are Not the Securities and Environment Commission, *supra* note 161.

170. *See* Jacqueline M. Vallette & Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2022), https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/ [https://perma.cc/MRF8-LBKF] (citing Business and Financial Disclosure Required by Regulation S–K, 81 Fed. Reg. 23916, 23970 (Apr. 22, 2016) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240 & 249)).

171. *Id.* (citing *NAACP v. FPC*, 425 U.S. 662, 669 (1976)).

172. *Id.*

173. Cepni, Demirer, Pham & Rognone, *supra* note 2, at 13–14.

174. Whitney Cloud, Eric Forni, Paul Lewis & Madeline Cordray, *More Signs That the Major Questions Doctrine From* West Virginia v. EPA *May Impact the SEC's Authority on Proposed Climate and Cybersecurity Disclosure Rules*, DLA PIPER (Oct. 31, 2022), https://www.dlapiper.com/en-us/insights/publications/2022/10/more-signs-that-the-major-questions-doctrine-from-west-virginia-v-epa [https://perma.cc/FN2M-VSS6] ("[D]etractors of the SEC's proposed rules have argued that climate and cybersecurity are distinct from financially material information that historically has been at the core of required disclosure under the federal securities laws.").

Congress has not legislatively overridden the climate disclosures proposal—it has not hesitated to do so in response to SEC disclosure enhancements in the past.[175] However, given the polarization of environmental politics,[176] it is unlikely that any explicitly climate-focused amendments to the Securities and Exchange Acts will make it through congressional gridlock.

C. Securities Fraud Actions Are Essential to Correcting the ESG Opaqueness Issue

Even if the proposed rule is promulgated and then survives its anticipated challenges in court, it must be supplemented by a restrengthened civil securities fraud cause of action in order to produce an outcome that is both effective and in line with the goals of securities law. Allowing securities fraud to be a usable route for ESG plaintiffs comports with a more modern idea of the reasonable investor.

The SEC does not have the capacity to pursue every incident of securities fraud, nor does prosecution by the SEC produce an equitable result from investors harmed by fraudulent conduct. As experts in securities markets and not necessarily the environment or sustainability sciences, the SEC is also not well equipped to properly define "sustainability" as it applies to ESG investing. Allowing plaintiffs to bring ESG-related securities fraud actions strikes a better balance, as it allows more flexibility in what sustainability-related information may be material to investors. Thus, even if the proposed rule fails to take effect, modernization of securities fraud doctrine is necessary to bring

175. Fisch, Georgiev, Nagy & Williams, *supra* note 167, at 9–10.

176. *See* Adam Liptak, *Gridlock in Congress Has Amplified the Power of the Supreme Court*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/us/supreme-court-congress.html (noting that "[t]he major environmental laws have not been amended in decades"). While the Inflation Reduction Act (IRA) was a recent victory for climate justice advocates, none of the environmentally concerned portions of the act touched on securities law. *See Fact Sheet: Inflation Reduction Act Advances Environmental Justice*, WHITE HOUSE (Aug. 17, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/17/fact-sheet-inflation-reduction-act-advances-environmental-justice/ [https://perma.cc/X5N6-B3XH] (summarizing the environmental justice impacts of the act). Even given the IRA's successful enactment, the battle surrounding the act is not over as Democrats now must work to maintain its climate provisions. Lisa Friedman & Carol Davenport, *As Historic Climate Bill Heads to Biden's Desk, Young Activists Demand More*, N.Y. TIMES (Aug. 12, 2022), https://www.nytimes.com/2022/08/12/climate/biden-climate-bill-young-activists.html (quoting a former Bush Administration EPA head, who believes Democrats will "have to fight to keep the clean energy incentives, fight to keep any regulations . . . [and] Republicans will try to claw it back, unless at some point enough Republicans feel that they are politically free to convert").

the ESG sector in line with the modern reasonable investor, and, therefore, the goals of securities law.

1. IT IS NOT EFFICIENT FOR THE SEC TO PURSUE ESG SECURITIES FRAUD ACTIONS ON ITS OWN

Plaintiffs must be able to bring civil cases for ESG-related securities fraud because it is neither efficient nor practical for the SEC to pursue these actions on its own. As noted by the Ninth Circuit, "[t]he resources of the Securities Exchange Commission are adequate to prosecute only the most flagrant abuses."[177] This would likely remain true even if the SEC acquired "considerably more resources."[178] Moreover, even assuming the fiction that it was possible for the SEC to prosecute every securities fraud action, doing so would be substantially costlier than private litigation, which, in contrast, only requires the cost of operation of the federal court system.[179]

Furthermore, SEC prosecution of these claims does not inspire as much confidence in the market as the availability of civil litigation does. Public prosecutions, including SEC actions, typically do not focus on compensating the victim,[180] and thus often fail to make injured investors whole. The SEC does compel disgorgement in some cases, and the funds from which are either returned to injured investors or paid to the U.S. Treasury.[181] However, even in the cases where disgorgement funds are returned to investors—tied in with the issue of lack of resources—the SEC will often settle cases lower than what settlements would likely have been in a civil cause of action in order to move on to other cases.[182]

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177. *Berner v. Lazzaro*, 730 F.2d 1319, 1322–23 (9th Cir. 1984) ("[P]rivate actions brought by investors have long been viewed as a necessary supplement to SEC enforcement actions.").

178. Brian S. Sommer, Note, *The PSLRA Decade of Decadence: Improving Balance in the Private Securities Litigation Arena with a Screening Panel Approach*, 44 WASHBURN L.J. 413, 419 n.34 (2005) (quoting *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urb. Affs.*, 103d Cong. 37 (1993) (statement of William R. McLucas, Director, Division of Enforcement, SEC)).

179. Ramirez, *supra* note 63, at 724.

180. *Id.* at 725.

181. *See* SEC, DISGORGEMENTS 4 (2001).

182. Ramirez, *supra* note 63, at 725. *See also* Edward Wyatt, *Promises Made, and Remade, by Firms in S.E.C. Fraud Cases,* N.Y. TIMES (Nov. 7, 2011), https://www.nytimes.com/2011/11/08/business/in-sec-fraud-cases-banks-make-and-break-promises.html (discussing how the "small price" firms pay in SEC enforcement cases fails to deter repeat offenses).

Investor confidence in the market is preserved when investors know that they have "effective remedies against persons who would defraud them."[183] As the most effective means of protecting investors' pocketbooks, private securities litigation is essential to preserving this confidence.[184] The Supreme Court too has recognized the importance of investor confidence in the market, affirming its role as a core tenet of securities law.[185] Investor confidence has been shown to have substantial economic consequences;[186] when confidence in the market falls, so too does market stability.[187] While SEC enforcement actions have been shown to have a deterrent effect among peer firms in the same industry,[188] this deterrence goal is incompatible with compensating injured investors[189] and thus does not provide the same holistic remedy that private litigation offers. As ESG investing continues to grow, it is important that investors feel confident in where they direct their funds. With or without the enactment of the proposed rule, private litigation is an essential tool to prosecuting securities fraud, making injured investors whole, and, thus, ensuring confidence in the ESG market.

2. THE SEC IS UNLIKELY TO STRIKE THE PROPER BALANCE WHEN DEFINING "SUSTAINABILITY"

Additionally, it is not possible for the SEC to articulate every possible category of information that investors may deem material to their investment decisions. "Sustainability" and "ESG" have remained

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183. S. REP. NO. 104-98, at 37 (1995) ("[P]rivate actions perform a critical role in preserving the integrity of our securities markets.").

184. Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1083 (1999).

185. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002) ("Among Congress' objectives in passing the [Securities Exchange] Act was 'to insure honest securities markets and thereby promote investor confidence' after the market crash of 1929.").

186. Ramirez, *supra* note 62, at 679 n.58.

187. For a discussion of financial instability caused by investors mass exiting the market following the Enron scandal, see *id.* at 700–04. In essence, Enron's senior management engaged in accounting fraud to hide profits and losses, enhance accounting performance, and enrich senior management at the expense of shareholders. *Id.* at 701. After Enron's accounting fraud surfaced, a series of other accounting frauds were also brought to light and investors lost confidence in the market as a whole. *Id.* at 703.

188. *See* Kristy Marie Schenck, The Deterrence Effects of SEC Enforcement Actions (2012) (Ph.D. dissertation, Pennsylvania State University) (on file with Pennsylvania State University Libraries).

189. Adam Reiser, Note, *Compensating Defrauded Investors While Preserving the SEC's Mission of Deterrence: A Call for Congress to Counteract the Troubling Consequences of* Stoneridge, 2009 UTAH L. REV. 257, 265–66.

amorphous terms for a reason: they encapsulate a wide body of information.[190] In fact, it has been estimated that there are about three hundred different definitions of "sustainability" in use.[191] Within the securities investment industry alone, major asset managers have noted that "the materiality of ESG considerations varies by client objectives, investment style, sector, and macro considerations," which in turn presents a need for "flexibility across investment teams."[192] It is therefore impossible to define every public interest metric that may be material to investors. As experts on financial materiality and not necessarily environmental politics,[193] the SEC is unlikely to promulgate the optimal ESG disclosure parameters in this unfamiliar territory. Even if the SEC were to look to the industry to articulate an exacting definition of ESG, how could it do so when the industry itself cannot agree on a meaning? Instead of attempting to place the term "sustainability" in a well-defined box, the SEC should refocus its efforts on broadening the definitions of materiality and of the reasonable investor so as to make the securities fraud class action usable for injured ESG investors.[194]

3. Empowering ESG Plaintiffs to Bring Securities Fraud Class Actions Will Strike the Right Balance

Civil securities fraud actions, if made more plaintiff-friendly, have the potential to allow investors to determine information that they deem material to their investment decisions, rather than force materiality into a concretely-defined box.[195] There is no law that precludes courts from addressing the materiality of non-financial statements using a different test than used for financial representations.[196] Broadening the assessment of what a reasonable

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190. Jeffry L. Ramsey, *On Not Defining Sustainability*, 28 J. AGRIC. ENV'T ETHICS 1075 (2015).

191. Paul Johnston, Mark Everard, David Santillo & Karl-Henrik Robèrt, *Reclaiming the Definition of Sustainability*, 14 ENV'T SCI. & POLLUTION RSCH. 60, 60 (2007).

192. BLACKROCK, *BlackRock ESG Integration Statement* (Mar. 2023), https://www.blackrock.com/corporate/literature/publication/blk-esg-investment-statement-web.pdf [https://perma.cc/JTV6-Q2DF].

193. Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1842–43 (2021).

194. *See Basic Inc. v. Levinson*, 485 U.S 224, 231–32 (1988) (discussing the reasonable investor); 17 C.F.R. § 230.405 (defining "material").

195. *See* 17 C.F.R. § 230.405.

196. Saad & Strauss, *supra* note 132, at 425–27 (discussing courts' application of the Private Securities Litigation Reform Act).

investor would have relied on in this context to permit a totality of the circumstances approach, including what expectations a company's statements would evoke from a reasonable investor, would allow flexibility in what statements are actionable, better serving investor needs.[197] In light of the ambiguous and ever-evolving definition of "ESG," this flexibility is key to staying current with investor behavior and expectations.

A common counterargument to making securities fraud class actions more plaintiff-friendly is that the courts will be met with a wave of frivolous litigation.[198] However, these claims are largely overstated. Deterrents to filing frivolous claims are already built into both the Private Securities Litigation Reform Act and the Federal Rules of Civil Procedure, which pose sanctions to attorneys filing claims without reasonable inquiry and factual support for those claims.[199] Furthermore, a majority of surveyed defense attorneys have reported that discovery costs have no bearing on the likelihood of settlement, rebutting the common perception that discovery is used abusively.[200] Studies have additionally shown that the settlement rate for class actions is nearly identical to that of all other federal court claims.[201] Instead of reducing frivolous claims, access barriers have resulted in more frequent dismissal of merited claims.[202] Faulty perceptions surrounding the merits of securities class actions should not stem efforts to make the cause of action more accessible to ESG investor plaintiffs.

C. A Framework for Reform

In order for the securities fraud class action to be usable for harmed ESG-investor plaintiffs, reform is needed. The Supreme Court's *Goldman* decision has made this need readily apparent. Consistent with the values articulated above, steps should be taken to remove plaintiff access barriers to securities fraud class actions.

First, the generality of a statement should not be a viable rebuttal to the *Basic* presumption during class certification. As the Second Circuit stated in *Goldman*, "Whether alleged misstatements are too

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197. *Id.*

198. *See, e.g.*, Ramirez, *supra* note 62.

199. Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 LAW & CONTEMP. PROBS. 55, 76–77 (2012).

200. *Id.* at 78.

201. *Id.* at 79. The class action settlement rate is actually slightly lower than for all other cases, with class actions settling at a rate of seventy-three percent and all other cases settling at a rate of seventy-seven percent. *Id.*

202. *Id.* at 90.

general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones."[203] Presumably, a general statement for one plaintiff is still a general statement for *all* plaintiffs in a class. Furthermore, "Rule 23 is not a weed whacker for merits problems."[204] A materiality assessment has no place at the class certification stage. Undergoing such a test at this phase of the lawsuit only creates another judicial barrier to plaintiffs and a more defendant-friendly arena.[205] While some may argue that refusing to allow a materiality-based rebuttal to the *Basic* presumption makes class certification too plaintiff sided,[206] the *Basic* presumption only speaks to the reliance requirement of class actions. Rule 23 does not include any materiality factor.[207] The critical question at this stage is only "whether plaintiffs' claims stand or fall together."[208] Even where a misrepresentation is found to be immaterial, this would hold true for the entire class.[209] Assessing materiality at this stage is therefore improper. Congress should accordingly act to codify the *Basic* presumption to ensure that is not rebuttable by undertaking a pseudo-materiality test. This analysis should instead be restricted to a market efficiency determination only.

Next, "materiality" must be broadened to include ESG-related non-financial statements.[210] Having done just that in 2019,[211] the European Union (E.U.) provides a framework for implementing an ESG-friendly "materiality" definition. Instead of focusing solely on financial-based metrics, the E.U.'s approach contains two paths to materiality.[212] The first path resembles the U.S. approach, stating that information pertaining to "development, performance [and] position" is

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203. *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 268 (2d Cir. 2020).

204. *Id.*

205. *See supra* Section II.A and accompanying notes.

206. Nguyen, *supra* note 86, at 166–68.

207. FED. R. CIV. P. 23.

208. *Conn. Ret. Plans & Tr. Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011).

209. *Id.*

210. *See* 17 C.F.R. § 230.405 (2022); Paul Munter, *Assessing Materiality: Focusing on the Reasonable Investor When Evaluating Errors*, SEC (Mar. 9, 2022), https://www.sec.gov/news/statement/munter-statement-assessing-materiality-030922 [https://perma.cc/4A9B-AWUF] (discussing materiality and explaining that "high quality financial information . . . should be the focus of all those involved in financial reporting").

211. European Commission, Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information, 2019 O.J. (C 209) 4–5.

212. *Id.*

financially material.[213] The second is information that refers to "impact of [the company's] activities" which comprises "environmental and social materiality."[214] In order words, the European Commission elaborated that this definition includes information "necessary for an understanding of the company's development, performance, position, and impact of its activities."[215] Furthermore, as Chris Wright notes in his Comment on the E.U.'s new materiality definition, use of a similar "materiality" definition in the United States would minimally burden large multinational corporations who likely already conform to the E.U.'s language.[216]

This approach in the United States would provide the necessary flexibility to the definitions of "materiality" and "reasonable investor" required to keep up with the ever-evolving interpretation of "ESG." A double materiality definition would therefore increase ESG investor access to securities fraud class actions, provide a more reliable path for recourse, and bolster confidence in the ESG market. Though not as explicitly linked to climate metrics as the current proposed rule discussed in this Comment, such a proposal from the SEC would still likely be met with Republican pushback.[217] So, courts and juries should also use this definition as guidance for assessing whether an alleged misrepresentation is material in securities fraud class actions.

While this Comment focuses on regulation efforts that affect publicly traded companies, private corporations are notably left out of the picture. Securities fraud claims may still be brought against private companies, but such claims are far less common because their securities are not held by the public.[218] Likewise, securities fraud class actions play a relatively insignificant role in the private capital market.[219] Looking forward, the lack of regulation in private markets should be considered when implementing ESG market reform measures.[220]

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213. *Id.* at 4.

214. *Id.*

215. *Id.*

216. Chris Wright, Comment, *Adopting Components of European Union ESG Securities Regulations into United States Securities Regulation*, 11 PA. ST. J.L. & INT'L AFFS. 326, 359 (2022).

217. *See* Joselow, *supra* note 164.

218. Robert K. Cowan, *Time for Plan(et) B? Why Securities Litigation Is a Misguided Attempt at Regulating Climate Change*, 33 GEO. ENV'T L. REV. 333, 390 (2021).

219. Elizabeth Pollman, *Private Company Lies*, 109 GEO. L.J. 353, 402–03 (2020).

220. See *id.* at 390–98, for a discussion of measures that can be taken to promote private company accountability generally.

Finally, underlying this discussion is the debate over whether ESG and other forms of impact investing are successful in promoting corporate "good" at all.[221] One of the benefits of ESG is that it hedges against long-term environmental risks, such as climate change—a benefit that is nearly impossible to empirically measure in the present.[222] However, what is clear about ESG investing is that it is a trend that is not slowing down.[223] Given the global need to rapidly transition towards sustainable development, a reorientation away from purely profit-driven finance to a system focused on a low carbon economy and climate change adaptation is crucial.[224] The current attention given to ESG investing presents a prime opportunity to drive such a change. Congress and the SEC should seize this opportunity, starting by holding individual companies accountable for ESG fraud.

CONCLUSION

ESG investing, as a non-traditional management strategy, has presented novel challenges to the traditional securities trading infrastructure. Despite marking a departure from traditional strictly financially focused investment strategies, ESG has become a pervasive marketing term used by many global investment leaders. It is thus clear that ESG is more than just a fad; it is a new industry norm. However, the Supreme Court's recent holding in *Goldman* signaled that current securities law is not structured with ESG investors in mind. Thus,

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221. *See, e.g.*, Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing [https://perma.cc/S8Z7-K6AA] (arguing that ESG investments perform poorly in both financial and ESG measures). *Cf.* Linda-Eling Lee, *What Does ESG Investing Really Mean? Implications for Investors of Separating Financial Materiality and Social Objectives* (Pension Rsch. Council, Wharton Sch., Univ. of Penn., Working Paper No. 2021-18, 2021) (finding that even ESG indices with broad goals, as opposed to focusing on a single ESG criterion, showed lower carbon densities than the benchmark).

222. Curtis, Fisch & Robertson, *supra* note 5, at 446. Uncertainty about the future paths of climate change, clean energy transition, policy, and adaptation measures in the long run, coupled with a lack of information (such as historical data), have seriously complicated efforts to price climate risks. Egemen Eren, Floortje Merten & Niek Verhoeven, *Pricing of Climate Risks in Financial Markets: A Summary of the Literature* 2 (Monetary & Econ. Dept., Bank Int'l Settlements, Working Paper No. 130).

223. *See supra* Introduction and accompanying notes.

224. Mauro Sciarelli, Silvia Cosimato, Giovanni Landi & Francesca Iandolo, *Socially Responsible Investment Strategies for the Transition Towards Sustainable Development: The Importance of Integrating and Communicating ESG*, 33 TQM J. 39, 40 (2021).

securities law and the securities fraud cause of action must be updated to accommodate this new standard of investor expectations.

Allowing plaintiffs to more effectively pursue securities fraud class actions in the ESG context would better align this cause of action with the goals of securities law. Specifically, the definitions of "materiality" and the "reasonable investor" should be updated to better reflect the modern investor. Furthermore, because *Goldman*'s standards for rebutting the *Basic* presumption are likely to be more easily met in ESG cases, Congress should take steps to codify the *Basic* presumption as it stood pre-*Goldman*, without a test that too closely resembles a materiality test at the class certification stage.

Even if the securities fraud class action is updated to accommodate modern ESG plaintiffs, it is worth noting that this approach is limited: private corporations are left out of the picture. Further steps in securities law should focus on closing this gap and implementing regulations that would bring ESG standards for private companies in line with what investors expect from public companies. After all, climate change is one of the biggest challenges of this generation. Almost every aspect of American life must change to mitigate environmental changes and to adapt to the new climate. Our financial systems are not exempt from these reform needs. Time is of the essence, and it is clear that investors are currently welcoming a new definition of financial success that takes the environment into consideration. Congress and the SEC should act now by mandating ESG-related disclosures, rejecting the tests set forth in *Goldman*, and broadening financial materiality standards to ensure the legal system supports this need for change.

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