

No. 14-04764

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

TRINITY WALL STREET,
Plaintiff-Appellee,

v.

WAL-MART STORES, INC.,
Defendant-Appellant.

On Appeal From The United States District Court
For The District of Delaware

Case No. 1:14-cv-00405-LPS
The Honorable Leonard P. Stark, United States District Judge

**BRIEF OF ROBERT F. KENNEDY CENTER FOR JUSTICE AND HUMAN
RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE**

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TABLE OF AUTHORITIES

OTHER AUTHORITIES

Alison Mackey et. al., *Corporate Social Responsibility and Firm Performance: Investor Preferences and Corporate Strategies*, 32 Acad. Mgmt. Rev. 817 (2007).....11

Amnesty International, Submission for the UN Universal Periodic Review, 4 (2015), available at http://www.amnestyusa.org/sites/default/files/upr_as_submitted_2014.pdf.18

Arindrajit Dube et al., *Cross-Border Spillover: U.S. Gun Laws and Violence in Mexico*, 107 Am. Pol. Sci. Rev. 397 (2013).....20

As You Sow, *Proxy Preview, Tenth Anniversary Edition: Helping Shareholders Vote Their Values* 58 (2014), available at <http://www.asyousow.org/wp-content/uploads/2014/03/ProxyPreview2014.pdf>.15

Betsy Brill, *Sustainable Investing Doesn't Mean You Have To Lose Money*, Forbes, Sept. 17, 2010, <http://www.forbes.com/2010/09/17/sustainable-investing-philanthropy-intelligent-investing-bp.html>.6

BNY Mellon, Corporate Social Responsibility, <https://www.bnymellon.com/us/en/who-we-are/social-responsibility/index.jsp> (last visited Feb. 9, 2015).14

Christina M. Vogt, International Gender Organization West Virginia National Organization for Women, Report on Domestic Violence and Femicide Resulting from Inadequate Gun Control and Firearms Regulation in the United States (2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/NOW_NationalOrganizationforWomen.pdf.18

Cone Communications, Global CSR Study (2013), https://www.energystar.gov/ia/partners/downloads/2013_cone_communicationsecho_global_csr_study.pdf.....10

Costco, Personal Firearms/Guns In Costco Stores, available at https://customerservice.costco.com/system/templates/selfservice/costco_en_us/#!/portal/200500000001002/article/200500000003176/Personal-FirearmsGuns-in-Costco-Stores?fromQuery=firearms (last accessed Feb. 9, 2015).9

CVS Health Corporation Revenue & Earnings Per Share (EPS), NASDAQ.com,
<http://www.nasdaq.com/symbol/cvs/revenue-eps> (last visited Feb. 9, 2015).....9

David Hemenway & Matthew Miller, *Firearm availability and homicide rates across 26 high income countries*. 49 J. of Trauma 985 (2000).....19

David Hemenway, Tomoko Shinoda-Tagawa & Matthew Miller, *Firearm availability and female homicide victimization rates across 25 populous high-income countries*, 57 J. of the Am. Med. Women’s Ass’n 100 (2002).....18

Deloitte, *2014 Global Survey on Reputation Risk: Reputation@Risk*, 2 (2014).....12

Dossier: Franck Riboud, CEO, Danone, WorldofCEOs.com,
<http://www.worldofceos.com/dossiers/franck-riboud> (last visited Feb. 9, 2015)..8

Eurosif, *European SRI Study 2010: Revised Edition* 8 (2010).5

Hasbro, *Corporate Social Responsibility, Governance and Ethics, Managing CSR*,
<http://csr.hasbro.com/governance/managing-csr> (last visited Feb. 9, 2015).....14

Human Rights Resolution at Apple Calls for Greater Oversight to Stop Human Rights Abuses, Harrington Investments, Inc. (Feb. 21, 2013), <http://harringtoninvestments.com/corporate-responsibility/human-rights-resolution-at-apple-calls-for-greater-oversight-to-stop-human-rights-abuses/>....16

Jacqueline Doherty, *On the Rise*, Barron’s (Apr. 29, 2013),
<http://online.barrons.com/articles/SB50001424052748703889404578440972842742076>.10

KPMG International, *Foreword to Expect the Unexpected: Building business value in a changing world* (2012).....8

Large Capacity Ammunition Magazines Policy Summary, Law Center to Prevent Gun Violence (May 31, 2013), http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/#footnote_6_5980.20

Laura Stampler, *CVS Revenues Up After Cigarette Sales Ban*, Time, Nov. 4, 2014,
<http://time.com/3557120/cvs-revenues-increase-after-cigarette-ban/>.....9

Lisa Hepburn & David Hemenway, *Firearm availability and homicide: A review of the literature*, 9 *Aggression and Violent Behavior: A Review Journal* 417 (2004).....19

Matthew Miller, Deborah Azrael & David Hemenway, *Firearm availability and unintentional firearm deaths, suicide, and homicide among 5-14 Year Olds*, 52 *J. of Trauma* 267 (2002).....19

Matthew Miller, Deborah Azrael & David Hemenway, *Firearm availability and unintentional firearm deaths, suicide, and homicide among women*, 79 *J. of Urb. Health* 26 (2002).....18

Matthew Miller, Deborah Azrael & David Hemenway, *Household firearm ownership levels and homicide rates across U.S. regions and states, 1988-1997*, 92 *Am. J. of Pub. Health* 1988 (2002).....19

Matthew Miller, Deborah Azrael & David Hemenway, *State-level homicide victimization rates in the U.S. in relation to survey measures of household firearm ownership, 2001-2003*, 64 *Soc. Sci. & Med.* 656 (2007).....19

McDonald’s Corporation, Report of the Sustainability Committee and Corporate Responsibility Committee of the Board of Directors 2 (2014), available at <http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Human%20Rights.pdf>.13

Mee-Hyoe Koo, *ESG-Themed Investments: What Are They And How Are They Managed?*, *Forbes*, July 31, 2013, <http://www.forbes.com/sites/meehyoekoo/2013/07/31/esg-themed-investments-what-are-they-and-how-are-they-managed/>.7

Paul Hawken, *A Predictor of Performance*, in *Evolutions in Sustainable Investing: Strategies, Funds and Thought Leadership* 28, 28 (Cary Krosinsky et. al. eds., 2012).....7

Rachel Abrams, *CVS Stores Stop Selling All Tobacco Products*, *N.Y. Times*, Sept. 3, 2014, http://www.nytimes.com/2014/09/03/business/cvs-stores-stop-selling-all-tobacco-products.html?_r=0.....8

Richard Edleman, *Good Purpose Goes Global*, 6 A.M. Edelman Communications Nov. 3, 2010 <http://www.edelman.com/p/6-a-m/good-purpose-goes-global/>.10

RobecoSAM, Alpha from Sustainability 2 (2014).7

Robert A. G. Monks & Nell Minow, Corporate Governance 80-85 (2011).11

Robert G. Eccles et al., The Impact Of Corporate Culture of Sustainability on Behavior and Performance 6-7 (2011).7

Sarah Altschuller, *Corporate Social Responsibility And The Role Of The Board Of Directors*, Corporate Secretary, reprinted in Business Insider, June 21, 2011, <http://www.businessinsider.com/corporate-social-responsibility-and-the-role-of-the-board-of-directors-2011-6#ixzz3R7zNlqEy>.12

Sarah Anderson and John Cavanagh, *Top 200: The Rise of Global Corporate Power*, Corporate Watch (2000), available at <https://www.globalpolicy.org/component/content/article/221/47211.html> (last visited Feb. 9, 2015).17

Shareholder Convinces Target Corporation to Commit to Stronger Human Rights Oversight, Harrington Investments, Inc. (Mar. 12, 2014), <http://harringtoninvestments.com/human-rights/shareholder-convinces-target-corporation-to-commit-to-stronger-human-rights-oversight/>.....16

Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, *Final Report submitted by Barbara Frey*, ¶ 43, Sub-Comm’n on the Promotion and Protection of Human Rights, Human Rights Council, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (by Barbara Frey), available at <http://www.refworld.org/docid/45c30b560.html>.18

United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, HR/PUB/11/04 (2011).....10

Zacks Equity Research, Costco Q1 Earnings Beat on Comps Growth Revenues Rise (2014), available at <http://www.zacks.com/stock/news/156902/costco-q1-earnings-beat-on-comps-growth-revenues-rise>.9

INTEREST OF *AMICUS CURIAE*

Robert F. Kennedy Center for Justice and Human Rights, a/k/a/ Robert F. Kennedy Human Rights (hereafter, “Robert F. Kennedy Human Rights”), is a 501(c)(3) non-governmental organization and was founded as a living memorial to Robert F. Kennedy in 1968.¹ Ever since, Robert F. Kennedy Human Rights has honored journalists, authors, and human rights activists who, often at great personal risk and sacrifice, are on the front lines of the international movement for human rights and social justice. Partnering with these courageous and innovative human rights defenders, RFK Partners for Human Rights is the litigation, advocacy, and capacity-building arm of the organization. Combining a rights-based approach and extended multi-year partnerships with the RFK Award Laureates and other human rights activists, RFK Partners for Human Rights leverages its legal expertise, resources, and prestige to advance social justice goals around the world.

One of Robert F. Kennedy Human Rights’ programs, RFK Compass Program, works with institutional investors to advance a discussion of the connections among investment performance, fiduciary duty, and public interest issues to optimize risk-adjusted rates of returns and address current and future

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

global challenges. The program challenges traditional notions and considers revised approaches. Senior-level decision-makers from the investment, policy, and academic communities convene at its intimate, interactive conferences and programs held around the world, covering issues of fiduciary duty, macroeconomic and financial market trends, particular sustainability issues, investment opportunities, and risk-management solutions.

The conventional view, that fiduciaries can make investment decisions based solely on narrow economic criteria, omits critical risk variables. The political upheavals in the Middle East and Africa, the Gulf Coast oil disaster, debt imbalances in both Europe and the United States, and the subprime calamity illustrate how issues of sustainability – including human rights, economic, environmental, social, and governance factors – can materially affect sustainable investment returns. The perception that considerations of public policy inevitably create a trade-off with financial performance is incorrect. Public interest considerations can be crucial elements of investment risk management.

Furthermore, fiduciaries responsible for long-term investments have a legal duty of intergenerational impartiality. This requires them to consider anything that impacts long-term outcomes. Sustainable investing, by definition, is consistent with long-term investing. The premise is simple: investments can generate collateral benefits – or costs – in addition to financial returns; social,

environmental, and governance factors can positively (or negatively) affect the performance of the financial asset or publicly held corporation; and investment decisions are better when based on financial returns and extra-financial impacts.

Robert F. Kennedy Human Rights has filed *amicus curiae* briefs in tribunals around the world on matters that relate to its work in furtherance of Robert F. Kennedy's legacy of social justice. In the present case, Robert F. Kennedy Human Rights is concerned that if the District Court's decision is overturned, it will represent a great setback for shareholders' and fiduciaries' use of Sustainable Investing factors – namely social issues – in valuing and protecting their investments.

SUMMARY OF THE ARGUMENT

Upholding the District Court's decision is necessary to protect and facilitate the use of Sustainable Investing factors as a best practice in the financial evaluation of a company and the role of shareholders. Sustainable Investing, where shareholders integrate Environmental, Social, and Governance (“ESG”) factors into their financial objectives, is an investment philosophy gaining much traction for its effectiveness in evaluating a long-term bottom-line of a company and shareholder value.

Companies have recognized the benefit of analyzing Sustainable Investing factors, especially those that affect their brand and reputation, and have begun to institute Board-level governance structures to monitor and maintain compliance with such factors.

Shareholders engaged in the practice of Sustainable Investing have increasingly relied on stockholder proposals and proxy votes to ensure companies are abiding by and effectively governing Sustainable Investing factors to ensure that shareholder value is retained, in particular over the long-term in light of changing societal demands for companies to engage in socially responsible behavior.

The sale of products that are dangerous to public health is a serious policy and human rights issue with which Sustainable Investors are deeply concerned. Accordingly the District Court's decision is necessary to protect Sustainable Investors' attempts to ensure that Defendant-Appellant Wal-Mart Stores, Inc. ("Wal-Mart" or the "Company"), is appropriately and effectively governing relevant Sustainable Investing factors.

ARGUMENT

Upholding the District Court’s Decision is Necessary to Protect the Growing Field of Sustainable Investing as a Best Practice to Value and Protect Shareholders’ and Fiduciaries’ Investments

As a matter of policy the Court should uphold the District Court’s decision to allow the stockholder proposal concerning improved corporate governance (the “Proposal”) to protect the growing use of Sustainable Investing factors that integrate economic, social, and governance factors into shareholders’ financial objectives as a best practice.

I. Sustainable Investing is Becoming a Shareholder Best Practice

All investments have social and environmental impacts. In addition to reviewing the financial data of a company, prudent and farsighted investors – meeting their fiduciary duty – consider how a company impacts the environment, how it treats its labor force, how it respects and impacts human rights, and how aligned the management team is with outside shareholders. Sustainable Investing is an investment philosophy that integrates these ESG² factors with investors’ financial objectives. What distinguishes this approach from impact investing or ethical investing is its focus on ESG as well as on the financial and economic challenges that companies will need to address in the middle to long-term.

According to one expert:

² Eurosif, European SRI Study 2010: Revised Edition 8 (2010).

Sustainable Investing is what all investing must be: future-oriented, risk-adjusted and opportunity-directed. It looks at what companies can do to lessen risk and create opportunity to be ahead of the curve in their respective industries in order to create long-term value. It helps us identify those ‘predictable surprises,’ such as climate change, diminishing water availability, human rights issues and others that influence investment outcomes.³

Not including a proper analysis of these ESG factors results in an incomplete assessment of the potential investment and could even lead to erroneous decisions.

Based on studies conducted in this field in recent years, it is fair to say that integrating ESG factors, at the minimum, buttresses the downside protection while potentially improving the upside. Some studies have shown a positive correlation between ESG score improvements and performance. Several academics and industry experts have substantiated this view. Anthony L.T. Cragg, Managing Director and Senior Portfolio Manager of Wells Capital Management, has said the following:

Our belief is that the integration of ESG factors enhances our ability to analyze companies and helps us make more informed investment decisions – sometimes looking at the factors that other investors didn’t notice.....Integrating ESG factors, when it’s done wisely and with focus, can help us better hone in on opportunities and identify risks. It can make us smarter investors. Again, our track record to date shows this is possible.⁴

³ Betsy Brill, *Sustainable Investing Doesn’t Mean You Have To Lose Money*, Forbes, Sept. 17, 2010, <http://www.forbes.com/2010/09/17/sustainable-investing-philanthropy-intelligent-investing-bp.html>.

⁴ Mee-Hyoe Koo, *ESG-Themed Investments: What Are They And How Are They Managed?*, Forbes, July 31, 2013,

Likewise, in his research, Paul Hawken has found that “[c]ompanies that looked farther ahead and embraced social and environmental constraints outperformed companies that favored the status quo. Longer term value-strategies produced more robust earnings outcomes.”⁵

Over an 18-year study period, firms that had a long history of adopting policies guiding their impact on society and environment outperformed those in the sample that had not, in terms of both stock market and accounting measures, especially in Business-to-Consumer sectors and in sectors (including companies such as Wal-Mart) where companies compete on the basis of brands and human capital.⁶

There is a positive relationship between corporate sustainability and financial performance as measured by stock returns, and the investment strategy based on RobecoSAM Corporate Sustainability data delivered positive information ratios in bull and bear markets, highlighting its effectiveness as an all-weather approach.⁷

<http://www.forbes.com/sites/meehyoekoo/2013/07/31/esg-themed-investments-what-are-they-and-how-are-they-managed/>.

⁵ Paul Hawken, *A Predictor of Performance, in Evolutions in Sustainable Investing: Strategies, Funds and Thought Leadership* 28, 28 (Cary Krosinsky et. al. eds., 2012).

⁶ Robert G. Eccles et al., *The Impact Of Corporate Culture of Sustainability on Behavior and Performance* 6-7 (2011).

⁷ RobecoSAM, *Alpha from Sustainability* 2 (2014).

Consumer and investor values are changing, and as they change, more corporations are recognizing there is profit and opportunity in a broader sense of responsibility beyond the next quarter's results. More and more investors are recognizing that what is good for people and the planet is also critical for the long-term bottom line and shareholder value.⁸

II. Companies Recognize the Importance of Effective Governance of Sustainable Investing Factors

Today's most successful companies foresee and adjust to the trends and demands of the increasingly socially aware consumer. Such companies are changing business models to provide new products, and are adapting practices to increase consumer loyalty and enhance brand value.⁹

Pharmaceutical retail giant, CVS Healthcare, has been in the news recently for being first among its peers to stop selling cigarettes across all stores nationwide in 2014.¹⁰ CVS showed that it is possible to be socially responsible, yet grow. In

⁸ KPMG International, *Foreword to Expect the Unexpected: Building business value in a changing world* (2012).

⁹ Dossier: Franck Riboud, CEO, Danone, WorldofCEOs.com, <http://www.worldofceos.com/dossiers/franck-riboud> (last visited Feb. 9, 2015).

¹⁰ See, e.g., Rachel Abrams, *CVS Stores Stop Selling All Tobacco Products*, N.Y. Times, Sept. 3, 2014, http://www.nytimes.com/2014/09/03/business/cvs-stores-stop-selling-all-tobacco-products.html?_r=0.

fact, despite loss of revenue from assorted tobacco product sales, CVS experienced a growth in year-on-year revenues.¹¹

Another example of a consumer driven business taking a principled stand despite the potential of alienating some of its customer base is Costco's policy of not selling firearms, nor allowing shoppers to carry guns onto store premises.¹² Notwithstanding its stance, Costco remains the biggest of the warehouse stores, with year-over-year revenue growth of 7% in 2014.¹³

In an age of socially conscious consumers, corporations' responding to the issue *du jour* is not enough. Today's information-saturated times demand companies go beyond good intentions and press releases. Businesses need to show genuine and sustained commitment followed by evident action. Over 30% of consumers believe businesses should operate in ways that help address social and environmental needs, whereas only 6% agreed that "businesses exist to make

¹¹ See, e.g., Laura Stampler, *CVS Revenues Up After Cigarette Sales Ban*, Time, Nov. 4, 2014, <http://time.com/3557120/cvs-revenues-increase-after-cigarette-ban/>; CVS Health Corporation Revenue & Earnings Per Share (EPS), NASDAQ.com, <http://www.nasdaq.com/symbol/cvs/revenue-eps> (last visited Feb. 9, 2015).

¹² Costco, Personal Firearms/Guns In Costco Stores, *available at* https://customerservice.costco.com/system/templates/selfservice/costco_en_us/#!/portal/200500000001002/article/200500000003176/Personal-FirearmsGuns-in-Costco-Stores?fromQuery=firearms (last accessed Feb. 9, 2015).

¹³ Zacks Equity Research, *Costco Q1 Earnings Beat on Comps Growth Revenues Rise (2014)*, *available at* <http://www.zacks.com/stock/news/156902/costco-q1-earnings-beat-on-comps-growth-revenues-rise>.

money for shareholders and are not responsible for supporting social and environmental issues.”¹⁴

A quarter of the U.S. population is millennials, current and future consumers, whose yearly spending exceeds a trillion dollars.¹⁵ Born in the digital age, they are paying increasing attention to the products and practices of corporations and expect them to be responsive to societal concerns. One among three millennials looked for brands “to make a positive impact on the world.”¹⁶

One of the emerging trends in Corporate Social Responsibility is the expectation that businesses should respect human rights in their operations. This is reflected in the 2011 UN Guiding Principles on Business and Human Rights.¹⁷ A core element of these principles – human rights due diligence – involves the implementation of policies, assessment mechanisms and internal oversight and

¹⁴ Cone Communications, *Global CSR Study* (2013), https://www.energystar.gov/ia/partners/downloads/2013_cone_communicationsecho_global_csr_study.pdf.

¹⁵ Jacqueline Doherty, *On the Rise*, *Barron's* (Apr. 29, 2013), <http://online.barrons.com/articles/SB50001424052748703889404578440972842742076>.

¹⁶ Richard Edleman, *Good Purpose Goes Global*, 6 A.M. Edelman Communications Nov. 3, 2010 <http://www.edelman.com/p/6-a-m/good-purpose-goes-global/>.

¹⁷ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, HR/PUB/11/04 (2011).

control systems to identify, prevent, and address the actual and potential adverse human rights impacts associated with a company's operations.¹⁸

Corporations also assume a fiduciary duty to their owners, although it is not necessarily solely to maximize shareholder wealth. Rather, they are required only to carry out the "lawful directives of shareholders."¹⁹ Thus, managers can engage in activities that reduce shareholder wealth as long as they "do not engage in fraud or self-dealing and make rational, informed decisions."²⁰

There are various views about corporations' responsibility towards the society in which it operates, and how far businesses should reflect society's priorities rather than its own commercial ones. One of the four Engel Principles²¹ that form the critical basis for developing a theory of corporate performance measurement is that corporations adhere to the Kew Gardens Principle.²² According to this principle, corporations should act when failing to do so would certainly create serious damage for society.²³

¹⁸ *Id.* at 17.

¹⁹ Alison Mackey et. al., *Corporate Social Responsibility and Firm Performance: Investor Preferences and Corporate Strategies*, 32 *Acad. Mgmt. Rev.* 817 (2007) (quoting L.M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-profit Corporations with Non-Shareholder Beneficiaries*, 59 *Wash. & Lee L. Rev.* 409 (2002)).

²⁰ *Id.*

²¹ Robert A. G. Monks & Nell Minow, *Corporate Governance* 80-85 (2011).

²² *Id.*

²³ *Id.*

Corporate stakeholders, including shareholders, employees, communities and public officials, expect companies to manage, mitigate or prevent the adverse social and environmental impacts that may be associated with a company's operations. Failure to address stakeholder concerns effectively can expose companies to a range of financial and non-financial risks, including loss of access to finance, poor employee morale, community opposition, and heightened exposure to regulatory fines and lawsuits. Adverse impacts, even those that result from a single incident, expose companies to lasting reputational damage.²⁴ Eighty-eight percent of executives in a 2014 survey said they are explicitly focusing on reputation risk as a key business challenge.²⁵

Increasingly, shareholders, especially in a post-financial crisis environment, expect a greater oversight by the board of directors over the social impact of corporate activities as well as their risk management policies. In addition to ensuring existence of policies to manage social and environmental risk, boards also are expected to monitor compliance of corporate activities with stated corporate beliefs and established standards. Boards are also critical in ensuring that corporate strategies are consistent with the long-term sustainability of the enterprise.

²⁴ Sarah Altschuller, *Corporate Social Responsibility And The Role Of The Board Of Directors*, Corporate Secretary, *reprinted in* Business Insider, June 21, 2011, <http://www.businessinsider.com/corporate-social-responsibility-and-the-role-of-the-board-of-directors-2011-6#ixzz3R7zNlqEy>.

²⁵ Deloitte, *2014 Global Survey on Reputation Risk: Reputation@Risk*, 2 (2014).

Several companies have formed committees that perform such functions.

McDonald's Corporation's Sustainability and Corporate Responsibility Committee provides independent oversight of the Company's risk profile and its mitigation strategies related to sustainability and corporate social responsibility matters. The Committee monitors the Company's activities and risks as they relate to human rights, community engagement, diversity, employment practices, the environment, government relations, products, public affairs, safety and sourcing.²⁶

The Corporate Social Responsibility Committee of the Board of Directors of The Bank of New York Mellon Corporation was formed to promote a culture that emphasizes and sets high standards for corporate social responsibility and review corporate performance against those standards. The Committee considers the impact of the Corporation's businesses, operations and programs from a social responsibility perspective, taking into account the interests of shareholders, clients, employees, communities and regulators. The Committee is expected to provide oversight of the Corporation's operations and programs regarding human rights, as

²⁶ McDonald's Corporation, Report of the Sustainability Committee and Corporate Responsibility Committee of the Board of Directors 2 (2014), *available at* <http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Human%20Rights.pdf>.

reflected in the Corporation's policies and actions toward employees, suppliers, clients and communities, among other issues.²⁷

Hasbro, Inc.'s Nominating, Governance, and Social Responsibility Committee has wide-ranging oversight duties, including environmental and social impacts, risks, and opportunities. This Committee's oversight areas range from ethical conduct and transparency to environmental sustainability and climate change, ethical sourcing, public policy matters, responsible marketing practices, philanthropy, and the Company's obligations to the communities in which it operates. In 2013, human rights and climate change were added to the Committee's charter, reflecting the growing importance of these issues.²⁸

III. Shareholder Resolutions are Critical to Protecting and Fostering Sustainable Investing Factors Tied to Value

For the last four decades, active investors have effectively used proposals and dialogues with corporate management to influence corporate practices. Fiduciaries and other shareholders must see themselves as owners and assume responsibilities that go along with ownership. Being a responsible shareowner implies corporate engagement that includes developing proxy voting guidelines and procedures for ESG factors and voting of proxies.

²⁷ BNY Mellon, Corporate Social Responsibility, <https://www.bnymellon.com/us/en/who-we-are/social-responsibility/index.jsp> (last visited Feb. 9, 2015).

²⁸ Hasbro, Corporate Social Responsibility, Governance and Ethics, Managing CSR, <http://csr.hasbro.com/governance/managing-csr> (last visited Feb. 9, 2015).

Proxy voting on shareholder proposals to help influence companies to be more fiscally, socially, and/or environmentally responsible is one fundamental way investors both exercise fiduciary responsibility and weigh in on social and environmental issues. Proxy votes can encourage better business practices, such as domestic partner benefits, labor standards for overseas suppliers, commitment to confront environmental and social risks in their operations and supply chains, climate risk reporting, human rights due diligence, and board oversight.

Shareholders file resolutions requesting structural governance reforms in terms of how companies manage and oversee social and environmental issues, including specific requests asking boards to develop committees for specific issues. The topic of board oversight of sustainability has been showing up in proxy statements for last four decades now.²⁹ Since the 1978 Calvert Investments' proposal asking Firestone Tire and Rubber for a board ethics committee, more than 100 proposals on board oversight of various issues have appeared in proxy statements in the U.S.³⁰

The American Federation of State, County, and Municipal Employees (AFSCME) filed a shareholder resolution with Halliburton in 2013, asking the

²⁹ As You Sow, *Proxy Preview, Tenth Anniversary Edition: Helping Shareholders Vote Their Values* 58 (2014), available at <http://www.asyousow.org/wp-content/uploads/2014/03/ProxyPreview2014.pdf>.

³⁰ *Id.*

company to report on the process for identifying and analyzing potential and actual human rights risks of the company's products, operations and supply chain.³¹

Harrington Investments brought a shareholder resolution on Apple Corporation's proxy ballot in 2013, which would authorize Apple's board of directors to amend the company's bylaws to create a separate board committee on human rights.³² This committee would be responsible for reviewing the implications of the company policy and operations when it comes to human rights abuses.³³

To encourage Target to pay close attention to its vast, global supply chain where most of the labor law violations occur, last year Harrington Investments convinced Target to increase its human rights oversight. Harrington accomplished this when it filed a shareholder resolution calling for a human rights committee based on previous settlements for abuses.³⁴ After discussions with Harrington Investments, Target agreed to make human rights oversight an explicit

³¹ *Id.* at 50.

³² *Human Rights Resolution at Apple Calls for Greater Oversight to Stop Human Rights Abuses*, Harrington Investments, Inc. (Feb. 21, 2013), <http://harringtoninvestments.com/corporate-responsibility/human-rights-resolution-at-apple-calls-for-greater-oversight-to-stop-human-rights-abuses/>.

³³ *Id.*

³⁴ *Shareholder Convinces Target Corporation to Commit to Stronger Human Rights Oversight*, Harrington Investments, Inc. (Mar. 12, 2014), <http://harringtoninvestments.com/human-rights/shareholder-convinces-target-corporation-to-commit-to-stronger-human-rights-oversight/>.

responsibility of the company's Corporate Responsibility Committee.³⁵ The company further agreed that making a commitment to human rights oversight was its fiduciary obligation pursuant to law. Following the agreement with Target, the Harrington shareholder resolution was withdrawn.³⁶

Shareowners are demanding greater accountability and transparency on human rights and environmental impacts of the companies they own. Influencing corporate behavior in such a way not only has positive social impact, but also helps reduce financial and social risk. Today more than half of the world's 100 largest economies are companies.³⁷ In some cases, these corporations will have greater impact on society and the environment than governments and international organizations, thus making it incumbent upon institutional and individual investors, as well as corporations, to exercise their fiduciary duties.

IV. The Sale of Goods Dangerous to the Public Health Is a Significant Social Factor Affecting Shareholder Interests in Wal-Mart

The sale of goods that pose a danger or risk to public health falls squarely within the "Social" factor of Sustainable Investing. The sale of guns, and in particular high capacity magazines and other military grade firearms and

³⁵ *Id.*

³⁶ *Id.*

³⁷ Sarah Anderson and John Cavanagh, *Top 200: The Rise of Global Corporate Power*, Corporate Watch (2000), available at <https://www.globalpolicy.org/component/content/article/221/47211.html> (last visited Feb. 9, 2015).

equipment implicate international human rights standards. The United Nations Special Rapporteur on the issue of preventing human rights abuses committed with small arms and light weapons found that governments must take “[e]ffective measures consistent with due diligence include the prohibition of civilian possession of weapons designed for military use” and that there is an “affirmative duty under international human rights law to protect groups that are most vulnerable.”³⁸

In addition to the general risk to public safety posed by the proliferation of gun sales to the general public, guns pose disproportionate threats to women,³⁹ minorities – in particular African Americans⁴⁰ – and children.⁴¹ Studies show that

³⁸ Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, *Final Report submitted by Barbara Frey*, ¶ 43, Sub-Comm’n on the Promotion and Protection of Human Rights, Human Rights Council, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (by Barbara Frey), *available at* <http://www.refworld.org/docid/45c30b560.html>.

³⁹ See Christina M. Vogt, International Gender Organization West Virginia National Organization for Women, Report on Domestic Violence and Femicide Resulting from Inadequate Gun Control and Firearms Regulation in the United States (2010), *available at* http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/NOW_NationalOrganizationforWomen.pdf; Matthew Miller, Deborah Azrael & David Hemenway, *Firearm availability and unintentional firearm deaths, suicide, and homicide among women*, 79 J. of Urb. Health 26 (2002); David Hemenway, Tomoko Shinoda-Tagawa & Matthew Miller, *Firearm availability and female homicide victimization rates across 25 populous high-income countries*, 57 J. of the Am. Med. Women’s Ass’n 100 (2002).

⁴⁰ See Amnesty International, Submission for the UN Universal Periodic Review, 4 (2015), *available at* http://www.amnestyusa.org/sites/default/files/upr_as_submitted_2014.pdf.

across high-income countries and across states in the U.S., where more guns are available to the public, there are more homicides.⁴²

The sale of high capacity magazines and other military-grade firearm equipment pose an especially elevated threat to public health. As we have seen in the long line of recent and tragic mass killings – from Sandy Hook Elementary School in Newtown, Connecticut, to Columbine High School, Virginia Tech, Fort Hood, Tucson, the Sikh temple in Oak Creek, and Aurora – when military grade equipment and large capacity magazines are used, more people suffer from injuries and more people die.⁴³

A review of 56 mass shootings (incidents in which at least four people were murdered with a gun) between January 2009 and January 2013 found that incidents where assault weapons or large capacity ammunition magazines were used resulted in 135% more people shot and 57% more killed, compared to other mass

⁴¹ See *id.*; Matthew Miller, Deborah Azrael & David Hemenway, *Firearm availability and unintentional firearm deaths, suicide, and homicide among 5-14 Year Olds*, 52 J. of Trauma 267 (2002).

⁴² See Lisa Hepburn & David Hemenway, *Firearm availability and homicide: A review of the literature*, 9 Aggression and Violent Behavior: A Review Journal 417 (2004); David Hemenway & Matthew Miller, *Firearm availability and homicide rates across 26 high income countries*. 49 J. of Trauma 985 (2000); Matthew Miller, Deborah Azrael & David Hemenway, *Household firearm ownership levels and homicide rates across U.S. regions and states, 1988-1997*, 92 Am. J. of Pub. Health 1988 (2002); Matthew Miller, Deborah Azrael & David Hemenway, *State-level homicide victimization rates in the U.S. in relation to survey measures of household firearm ownership, 2001-2003*, 64 Soc. Sci. & Med. 656 (2007).

⁴³ Pls.' Br. at 1.

shootings.⁴⁴ Similarly, in Mexico, after the U.S. federal ban on assault weapons expired in 2004, the homicide rates in areas in Mexico along the Texas, New Mexico, and Arizona borders increased 40% increase compared to areas along the California border where high capacity magazines and military grade weapons were still banned by state law.⁴⁵

The subject matter of the stockholder proposal in the present case must therefore be found to focus directly on issues relevant to shareholder value utilizing Sustainable Investing factors. The District Court's decision must be upheld in order to protect shareholder use of Sustainable Investing factors and techniques to protect the value of their investments and ensure appropriate and effective Board governance of economic, social, and governance issues critical to the Company's long-term bottom line.

⁴⁴ *Large Capacity Ammunition Magazines Policy Summary*, Law Center to Prevent Gun Violence (May 31, 2013), http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/#footnote_6_5980; *see also* Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings 1* (2013), *available at* <https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf>.

⁴⁵ Arindrajit Dube et al., *Cross-Border Spillover: U.S. Gun Laws and Violence in Mexico*, 107 Am. Pol. Sci. Rev. 397 (2013).

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiff-Appellee's brief, the District Court's decision should be upheld.

Dated: February 11, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7), that the foregoing Brief contains 5,054 words, excluding the parts of the Brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF DIGITAL SUBMISSION AND VIRUS CHECK

I hereby certify that, in accordance with Third Circuit Local Appellate Rule 31.1(c), the electronically-filed version of the foregoing brief is identical to the paper copies of the same document filed with the Clerk of the United States Court of Appeals for the Third Circuit, and that the electronically-filed version of the foregoing brief is free from viruses according to a scan for viruses conducted with Malwarebytes Anti- Malware, Version: 2.00 4.1028, Malware Database: v2015.1.05.12, Rootkit Database: v2014 .12.30.1; Scan Type : Threat Scan, Result: Complete – No Threats Detected.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d), I hereby certify that I am a member in good standing of the United States Court of Appeals for the Third Circuit.

Dated: February 11, 2015

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the Robert F. Kennedy Center for Justice and Human Rights is a 501 (c)(3) nonprofit charitable organization, headquartered in Washington, D.C. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2015, I electronically filed the foregoing Motion and Brief of the Robert F. Kennedy Center for Justice and Human Rights as *Amicus Curiae* in Support of the Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused ten (10) copies of the foregoing brief to be dispatched via hand delivery to the Clerk of the Court for the United States Court of Appeals for the Third Circuit.

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