No. 20-80026

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

LEAD PLAINTIFF PUERTO RICO GOVERNMENT EMPLOYEES AND JUDICIARY RETIREMENT SYSTEMS ADMINISTRATION
Plaintiff-Respondent,

v.

VOLKSWAGEN AG, ET AL.,
Defendants-Petitioners.

On Petition for Permission to Appeal from the United States District Court for California, Case No. 2:15-MDL-2672, Hon. Charles R. Breyer

MOTION OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND THE ALLIANCE FOR AUTOMOTIVE INNOVATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION TO APPEAL

DEANNE E. MAYNARD
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue NW
Washington, D.C. 20006
Telephone: (202) 887-8740
DMaynard@mofo.com

STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

JORDAN ETH
MARK R. S. FOSTER
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-6948

Counsel for the Chamber of Commerce of the United States of America
(additional counsel on inside cover)

KEVIN CARROLL
SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
Suite 800
Washington, DC 20001
Telephone: (202) 962-7382

Counsel for the Securities Industry and Financial Markets Association

CHARLES HAAKE
ALLIANCE FOR AUTOMOTIVE
INNOVATION
1050 K Street, NW
Washington, DC 20001
Telephone: (202) 326-5500

Counsel for the Alliance for Automotive Innovation

Pursuant to Federal Rule of Appellate Procedure 29(a), proposed *amici curiae* the Chamber of Commerce of the United States of America ("Chamber"), the Securities Industry and Financial Markets Association ("SIFMA"), and the Alliance for Automotive Innovation respectfully move the Court to grant leave to file the attached brief. Amici have received Petitioners' consent for the filing of this brief. Respondent Puerto Rico Government Employees and Judiciary Retirement Systems Administration, however, has advised amici that it does not consent. Amici thus seek this Court's leave to file their brief.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases, including securities appeals like this one, that raise issues of concern to the nation's business community. *E.g.*, *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019) (joint brief with SIFMA).

SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of

our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

Formed in 2020, the Alliance for Automotive Innovation is the singular, authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, the Alliance for Automotive Innovation represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the U.S. The newly established organization, a combination of the Association of Global Automakers and the Alliance of Automobile Manufacturers, is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, as well as technology and other automotive-related companies. The Alliance for Automotive Innovation

is headquartered in Washington, DC, with offices in Detroit, MI and Sacramento, CA. For more information, visit our website http://www.autosinnovate.org.

Amici have a strong interest in this case. Many of amici's members are subject to the U.S. securities laws, and they will be adversely affected by the district court's decision expanding the *Affiliated Ute* presumption of reliance. Under the district court's approach, securities-fraud plaintiffs would be able to avoid their obligation to prove reliance on the defendant's purportedly misleading statements simply by characterizing their claims as focused on the defendant's corresponding "omissions." The result would be to make class certification a near certainty in all such cases, while simultaneously depriving defendants to an otherwise-available defense. Amici have long been concerned about the costs that securities class actions impose on the American economy. The district court's decision threatens to further increase those costs.

Amici's proposed brief will also help this Court. Given their broad and diverse membership, amici are particularly able to assess the degree to which a judicial decision will affect both future cases and business interests more generally. As the proposed brief details, the decision below is likely to further contribute to what has already been a significant increase in costly class-action securities-fraud litigation. Amici are well-positioned to explain how this increased litigation has a

detrimental impact on *all* U.S. public companies, not just those that are the defendants in such suits.

For the foregoing reasons, amici respectfully request that the Court grant leave to file the accompanying brief in support of petitioners.

Dated: February 10, 2020

Respectfully submitted,

/s/ Deanne E. Maynard

DEANNE E. MAYNARD
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue NW
Washington, D.C. 20006
Telephone: (202) 887-8740
DMaynard@mofo.com

JORDAN ETH
MARK R. S. FOSTER
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-6948

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STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

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KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
Suite 800
Washington, DC 20001
Telephone: (202) 962-7382

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CHARLES HAAKE
ALLIANCE FOR AUTOMOTIVE INNOVATION
1050 K Street, NW
Washington, DC 20001
Telephone: (202) 326-5500

Counsel for the Alliance for Automotive Innovation

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the length limits of Ninth Circuit Rule 27-1 because this motion contains 676 words excluding those parts authorized by Fed. R. App. P. 32(f), which, when divided by 280 as provided by Ninth Circuit Rule 32-3, yields a page count less than or equal to twenty pages as required by Ninth Circuit Rule 27-1(1)(d).

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: February 10, 2020

/s/ Deanne E. Maynard
Deanne E. Maynard

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on February 10, 2020.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 10, 2020

/s/ Deanne E. Maynard
Deanne E. Maynard

sf-4187656

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JAMES R. SIGEL
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Telephone: (415) 268-6948

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(additional counsel on inside cover)

KEVIN CARROLL
SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
Suite 800
Washington, DC 20001
Telephone: (202) 962-7382

Counsel for the Securities Industry and Financial Markets Association

CHARLES HAAKE
ALLIANCE FOR AUTOMOTIVE
INNOVATION
1050 K Street, NW
Washington, DC 20001
Telephone: (202) 326-5500
Counsel for the Alliance for Automotive Innovation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici certify the following:

The Chamber of Commerce of the United States of America is a non-profit business federation. The Chamber has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The Securities Industry and Financial Markets Association has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The Alliance for Automotive Innovation is a non-profit trade association. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Dated: February 10, 2020

s/ Deanne E. Maynard
Deanne E. Maynard

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INTERESTS OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. On behalf of the industry's nearly 1 million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services.

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[1] Pursuant to Rule 29(a)(4)(E), amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

The Alliance for Automotive Innovation is a non-profit trade association representing the manufacturers, tier-one suppliers, and value-chain partners that produce nearly 99 percent of all cars and light-duty trucks sold in the United States. The Alliance for Automotive Innovation was formed in January 2020 by the combination of the nation's two largest automobile associations, the Association of Global Automakers and the Alliance of Automobile Manufacturers.

Amici have a strong interest in this important case. Many of amici's members are subject to the U.S. securities laws, and they will be adversely affected by the district court's decision expanding the *Affiliated Ute* presumption of reliance. Amici have long been concerned about the costs that securities class actions impose on the American economy. The district court's decision threatens to further increase those costs.

INTRODUCTION

Reliance is an "essential element" of a securities-fraud claim, ensuring "the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). In *Affiliated Ute Citizens of Utah v. United States,* the Supreme Court carved out a narrow exception to plaintiffs' general obligation to prove this element: reliance may be presumed where (1) the plaintiff attacks the defendant's silence

when (2) the defendant was duty-bound to disclose information due to a fiduciary or similar relationship. 406 U.S. 128, 153-54 (1972).

The district court's order erases these carefully circumscribed limits. It allows securities-fraud plaintiffs to avoid their obligation to prove reliance even when their claims are ultimately premised not on the defendant's silence in the face of a free-standing duty to disclose, but rather the defendant's allegedly misleading statements.

If this order is left standing, the economic consequences would be significant. U.S. businesses are already subject to a deluge of class-action securities-fraud claims, with more filed last year than ever before. By effectively eliminating the reliance requirement, the district court's expansion of *Affiliated Ute* will make class certification a near certainty in such actions while simultaneously depriving defendants of their rights to an otherwise-available defense. The order will only further embolden plaintiffs to bring suit and extort settlements with the threat of speculative, yet potentially disastrous, class-wide damage awards. Neither businesses, nor investors, nor the public benefit from such litigation. This Court should grant review and reverse.

BACKGROUND

A. The *Affiliated Ute* Presumption

To prevail in a securities-fraud action, a plaintiff must prove, among other things, both a "material misrepresentation or omission by the defendant" and the

plaintiff's "reliance upon the misrepresentation or omission." *Matrixx Initatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011). This case concerns the interaction between these two requirements.

In general, only defendants' statements can give rise to liability. *Chiarella v. United States*, 445 U.S. 222, 227-28 (1980). Thus, under Rule 10b-5(b), the failure to affirmatively provide information is fraudulent only where disclosure is needed "'to make the statements *made*, in light of the circumstances under which they were made, not misleading.'" *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1278 (9th Cir. 2017) (quoting Rule 10b-5 (emphasis added)). Omissions, standing alone, are actionable only if the defendant has a "duty to disclose." *Chiarella*, 445 U.S. at 228. Such a duty may "arise[] when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" *Id.*

In *Affiliated Ute*, the Supreme Court addressed the application of the reliance requirement to claims under Rule 10b-5(a) and (c) involving a fiduciary's failure to disclose. 406 U.S. at 153. "The traditional (and most direct) way for a plaintiff to demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction … based on that specific misrepresentation." *Amgen Inc. v. Conn. Ret. Plan & Trust Funds*, 568 U.S. 455, 461 (2013) (quotation marks omitted). But in *Affiliated Ute*, there was no "misrepresentation" on which

the plaintiffs—members of an Indian Tribe induced to sell tribal securities to employees of a bank—could have relied. 406 U.S. at 138-39, 153. Rather, the bank's employees had through their silence breached a disclosure duty they owed the plaintiffs by virtue of their special relationship to them. *Id.* at 153. In those circumstances, the Court held, "positive proof of reliance is not a prerequisite to recovery." *Id.* Instead, the "obligation to disclose and th[e] withholding of a material fact establish the requisite element of causation." *Id.* at 154.

Affiliated Ute thus created a narrow exception to the requirement that securities-fraud plaintiffs must affirmatively demonstrate reliance. Properly understood, the *Affiliated Ute* presumption applies only where two conditions are satisfied. *First*, because its underlying rationale is "the difficulty of proving 'a speculative negative'—that the plaintiff relied on what is not said," *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999), the presumption applies only where "reliance as a practical matter is impossible to prove" because "no positive statements exist," *Waggoner v. Barclays PLC*, 875 F.3d 79, 95 (2d Cir. 2017). *Second*, because the presumption also rests on the understanding that it is "natural to expect a plaintiff to rely on the candor of one who owes him a duty of disclosure," it applies only where the plaintiff was "relying on [the defendant's] candor" because the defendant had such a duty. *Regents of the Univ. of Cal. v. Credit Suisse First*

Boston, 482 F.3d 372, 385 (5th Cir. 2007). Where either condition is absent, the presumption is inapplicable.

B. The District Court's Expansion Of *Affiliated Ute*

The district court here extended *Affiliated Ute*'s presumption well past these limits. Plaintiff, a public pension fund, purchased bonds from Volkswagen Group of America Finance LLC. *In re Volkswagen "Clean Diesel" Mktg.*, 328 F. Supp. 3d 963, 966 (N.D. Cal. 2018) ("*Bondholders III*"). Nothing in this sale created any sort of fiduciary or similar relationship giving rise to a disclosure duty. *Id.* at 986. Defendants did, however, issue an offering memorandum. *Id.* at 966. This memorandum contained various statements respecting Volkswagen's general priorities and risks, such as: "Volkswagen's top priority for research and development in recent years has been to develop engines and drivetrain concepts to reduce emissions," and "Volkswagen's vehicles must comply with increasingly stringent requirements concerning emissions." *Id.* at 967 (alterations and quotation marks omitted). A little more than a year later, the EPA announced that Volkswagen had been installing "defeat devices" that enabled evasion of emissions-test procedures. *In re Volkswagen "Clean Diesel" Mktg.*, 2018 WL 1142884, at *2 (N.D. Cal., Mar. 2, 2018) ("*Bondholders II*").

In response, plaintiff (and many others) sued for securities fraud. Plaintiff claimed the statements contained in the bonds' offering memorandum had been

materially misleading given the failure to disclose Volkswagen's use of defeat devices. *Bondholders III*, 328 F. Supp. 3d at 973-74.

After wrestling with the issue (*compare, e.g.*, *id.* at 978, *with Bondholders II*, 2018 WL 1142884, at *8-9), the district court applied the *Affiliated Ute* presumption and rejected defendants' summary-judgment motion. *In re Volkswagen "Clean Diesel" Mktg.*, 2019 WL 4727338, *1-3 (N.D. Cal., Sept. 26, 2019) ("*Bondholders IV*"). The court recognized that plaintiff "base[d] its claims on certain affirmative statements in the bond offering memorandum." *Id.* at *1. Nevertheless, the court concluded that plaintiff "need not prove that it or its investment manager actually relied" on these statements because the "'heart of the case' is an omission." *Id.* It explained that "the reason" the offering memorandum's statements "are relevant is that they may have been rendered misleading by Volkswagen's failure to disclose its emissions fraud." *Id.* The court went on to conclude that defendants' evidence that plaintiff did not even read the offering memorandum failed to rebut the *Affiliated Ute* presumption, reasoning that had the offering memorandum disclosed Volkswagen's use of defeat devices, plaintiff would have ultimately "been made aware of" that information. *Id.* at *3.

REASONS FOR GRANTING REVIEW

Defendants explain why the underlying order meets all the prerequisites for interlocutory review under 28 U.S.C. § 1292(b), as the district court itself

recognized. Pet. 13-24. Amici highlight the importance of the question presented and the harm that will ensue if the district court's error remains uncorrected.

A. The Decision Undermines The Reliance Requirement's Protections

As both Congress and the Supreme Court have long recognized, federal securities lawsuits pose "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975); *see* H.R. Conf. Rep. No. 104-369, at 31 (1995) (PSLRA intended to address problem of securities-fraud plaintiffs engaging in "abusive practices," including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price"). Given the costs of defending against such litigation and the potential for massive liability, securities-fraud defendants have strong incentives to settle any case regardless of merit. *See* Stanford Clearinghouse, *Securities Class Action Filings: 2019 Year In Review* 16 (2020) (less than 1 percent of securities class action filings from 1997 to 2018 reach trial verdict, and nearly half settle).[2] Aware of these dynamics, "plaintiffs with weak claims" can seek "to extort settlements from innocent companies." *Stoneridge*, 552 U.S. at 163.

[2] http://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-YIR.pdf.

The reliance requirement serves as one bulwark against abusive litigation. In particular, securities-fraud plaintiffs' need to prove reliance is often determinative of whether their claims can proceed on a class basis. *Desai v. Deutsche Bank Securities Ltd.*, 573 F.3d 931, 940 (9th Cir. 2009) (whether a "putative class can meet the requirements of Rule 23(b)(3)" turns on whether each plaintiff "would have to prove reliance"). And class certification, of course, puts "'considerable pressure on the defendant to settle' independent of the merits of the plaintiffs' claims." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958 (9th Cir. 2005). Thus, much of current securities litigation focuses on plaintiffs' entitlement to the fraud-on-the-market presumption of reliance—available only where the plaintiff shows, among other things, that the alleged misrepresentations were publicly known and that the security traded in an efficient market. *Amgen Inc.,* 568 U.S. at 462-63 ("Absent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages … ."). But this theory is inapplicable in many important circumstances, including initial public offerings. *E.g.*, *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

The district court's order opens up an entirely new avenue to class-action securities plaintiffs—one that could effectively render the reliance requirement, and the protections it provides, obsolete. The district court allowed plaintiff to invoke

the *Affiliated Ute* presumption of reliance because the challenged statements were misleading given defendants' "failure to disclose" certain material facts. *Bondholders IV*, 2019 WL 4727338, at *1, 3. Under this logic, *any* affirmative misrepresentation claim could be transformed into a claim challenging an ostensible "omission." That is because any purported false statement also involves a corresponding "omission," as the defendant will have also "fail[ed] to disclose which facts in the representation are not true." *Little v. First Cal. Co.*, 532 F.2d 1302, 1304 n.4 (9th Cir. 1976). Thus, by applying *Affiliated Ute* where the defendants' *statements*—and not their silence in the face of an independent duty to disclose (*supra*, pp. 3-6)—were the necessary trigger for any possible liability, the district court's approach would "permit the *Affiliated Ute* presumption to swallow the reliance requirement almost completely." *Desai*, 573 F.3d at 941.

B. The Decision Will Impose Significant Costs

If left standing, the district court's order would exacerbate an already-growing problem: the explosion of securities class actions. In 2019, "[p]laintiffs filed 428 new securities class actions across federal and state courts, the highest number on record and nearly double the 1997-2018 average." Stanford Clearinghouse, *supra,* at 5. Roughly a quarter of these suits are filed in this Circuit, making the clarity and consistency of its law especially important. *Id.* at 38. Overall, these cases are "larger than before and therefore threaten much higher litigation and settlement costs than

cases filed in prior years—nearly three times larger than the average for 1997 to 2017." U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System* 2 (Feb. 2019).[3] Such claims also are increasingly being brought by a small subset of the plaintiffs' bar, indicating an increase in the sort of lawyer-driven, meritless litigation Congress long sought to eliminate. *Id.* at 14.

The expansion of securities class actions is particularly pronounced with respect to "event-driven" litigation like this case. When some disaster or bad press causes a corporation's stock price to fall, plaintiffs immediately bring securities litigation alleging that the company should have previously disclosed the risks or misconduct that ultimately precipitated this price drop. *Id.* at 9. But companies have no general "duty to 'disclose uncharged, unadjudicated wrongdoing.'" *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014); *Retail Wholesale*, 845 F.3d at 1278. Nevertheless, enterprising plaintiffs try to evade these limits by claiming that broad, innocuous-seeming statements—such as "Volkswagen's vehicles must comply with increasingly stringent requirements concerning emissions," *Bondholders III*, 328 F. Supp. 3d at 967—are actionably misleading given undisclosed facts. These event-driven suits will further swell

[3] https://www.instituteforlegalreform.com/uploads/sites/1/Securites-Class-Action-System-Reform-Proposals.pdf.

without immediate review and reversal of the district court's order. Otherwise, other courts may follow the district court's approach and permit securities-fraud plaintiffs to challenge such bland "misstatements," while absolving them of the requirement to demonstrate their reliance on them.

The benefits of such litigation, if any, are slight. The primary result of class-securities settlements is to transfer wealth from one group of innocent shareholders to another, after subtracting a sizable share for attorneys' fees. U.S. Chamber Institute for Legal Reform, *Risk and Reward: The Securities-Fraud Class Action Lottery* 4 & n.16 (Feb. 2019).[4]

Yet the costs on American businesses, investors, and employees are significant. One recent study showed that, due in part to the rise in event-driven litigation, as many as one in eleven S&P 500 companies will be sued annually in a securities class action. U.S. Chamber Institute for Legal Reform, *Containing the Contagion* 11. The costs of such litigation are spread to all U.S. public companies, which must pay more for insurance and to access capital, all while competing with overseas counterparts not subject to the same constant litigation threat. See C. Metzger & B. Mukherjee, *Challenging Times: The Hardening D&O Insurance*

[4] https://www.instituteforlegalreform.com/uploads/sites/1/Risk_and_Reward_WEB_FINAL.pdf.

Market, Harvard Law School Forum on Corporate Governance (Jan. 29, 2020).[5] Many companies may instead choose to remain private, depriving the public of investment opportunities previously open to them. *See* M. Wusterhorn & G. Zuckerman, *Fewer Listed Companies: Is that Good or Bad for Stock Markets?* WALL STREET JOURNAL (Jan. 4, 2018) (noting that the number of public companies dropped by more than half since 1996).

The business community is already vulnerable to massive, unpredictable liability from securities class actions. This Court should not permit the district court's erroneous extension of *Affiliated Ute* to increase that exposure.

[5] https://corpgov.law.harvard.edu/2020/01/29/challenging-times-the-hardening-do-insurance-market/.

CONCLUSION

This Court should grant the petition for review.

Dated: February 10, 2020

Respectfully submitted,

s/ Deanne E. Maynard

STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
Suite 800
Washington, DC 20001
Telephone: (202) 962-7382

Counsel for the Securities Industry and Financial Markets Association

CHARLES HAAKE
ALLIANCE FOR AUTOMOTIVE INNOVATION
1050 K Street, NW
Washington, DC 20001
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DMaynard@mofo.com

JORDAN ETH
MARK R. S. FOSTER
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-6948

Counsel for the Chamber of Commerce of the United States of America

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This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Dated: February 10, 2020

s/ Deanne E. Maynard
Deanne E. Maynard

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on February 10, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 10, 2020

s/ Deanne E. Maynard
Deanne E. Maynard

sf-4184969