No. 21-60626

In the United States Court of Appeals for the Fifth Circuit

ALLIANCE FOR FAIR BOARD RECRUITMENT,
NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,

Petitioners,

– v. –

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

No. 34-92590

BRIEF OF ACADEMIC EXPERTS IN THE FIELDS OF BUSINESS, MANAGEMENT, AND ECONOMICS AS AMICI CURIAE IN SUPPORT OF RESPONDENT SECURITIES AND EXCHANGE COMMISSION

Dated: February 25, 2022

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTERESTS OF AMICI[1]

Proposed Amici Curiae Gennaro Bernile,[2] Douglas Cumming,[3] Daniel P. Forbes,[4] Aida Sijamic Wahid,[5] and Scott E. Yonker,[6] joined by K.J. Martijn Cremers,[7] Amy Hillman,[8] Frances J. Milliken,[9] and Quinetta M. Roberson,[10] (collectively, "Amici"), are academic experts in business, management, and economics, with particular expertise in

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than Amici, their members, and their counsel contributed money to fund this brief.

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studying the role of corporate board diversity in company performance. Amici's written works are frequently cited in their field, including, as detailed further below, in the record underlying the Nasdaq Proposal, Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, 85 Fed. Reg. 80,472 (Dec. 11, 2020) ("Nasdaq Proposal"), and the SEC's order approving it, Order Approving Proposed Rule Changes Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, SEC Release No. 34-92590 at 35 (Aug. 6, 2021) ("SEC Order").

The Petitioners in this case have argued that the SEC's approval of the Nasdaq Proposal must be vacated because the proffered benefits of the Nasdaq Proposal were not supported by substantial evidence in the record. *See* AFBR Br. at 54–63; NCPPR Br. at 47–49.

Given Amici's expertise in studying the role of board diversity in company performance, they are particularly well-positioned to synthesize and explain the state of the empirical research relating to the Nasdaq Proposal to inform this Court's evaluation of the evidence underpinning the Proposal and the SEC's decision to approve it.

STATEMENT REGARDING PARTIES' CONSENT

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, on February 22, 2022, counsel for Amici conferred with counsel for Petitioners AFPB and NCPPR, counsel for Respondent, and counsel for Intervenor Nasdaq, and all parties consented to the filing of this brief.

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ARGUMENT

Amici come before this Court to explain the state of empirical research related to Nasdaq's proposal to require disclosure and explanation to the public by companies whose governing boards do not meet certain diversity targets.

Based on their deep familiarity with the literature surrounding diversity and corporate board performance, including both their own work and that of other peers in the field, Amici believe the Petitioners in this case mischaracterize the administrative record and the body of work on board diversity in stating that the Nasdaq Proposal contained "no substantial evidence to support the ultimate goal (diverse boards)." *See*, *e.g.*, AFBR Br. at 60.

On the contrary, ample evidence supports Nasdaq's statement that "there is a compelling body of credible research on the association between economic performance and board diversity." Nasdaq Proposal, 85 Fed. Reg. at 80,477. While the SEC ultimately chose to emphasize the disclosure benefits of the Rule when approving it, rather than its expected effects on corporate performance,[11] Amici write separately to

[11] *See* SEC Order at 35 (Aug. 6, 2021) (approving the Proposal "[i]n light of the disclosure benefits that [it] would provide").

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explain that the body of evidence Nasdaq and the SEC considered in evaluating the links between board diversity and corporate performance would be independently sufficient to uphold the Proposal, and therefore also sufficient to uphold the SEC's conclusion that the Proposal would provide investors information relevant to the pursuit of the Exchange Act's goals. *See* SEC Br. at 27–28 (arguing that the investor protection goals of the Exchange Act may be furthered by information disclosure even if the judgments investors make aren't conclusively supported by a consensus of empirical research). Put differently, if the evidence is sufficient to warrant Nasdaq's belief that board diversity would likely improve corporate performance, it is necessarily the case that the evidence is sufficient to conclude that disclosure of board diversity metrics would likely be relevant information for investors.

As Amici discuss below, a large body of high-quality evidence in the record supports a link between board diversity and a variety of corporate performance outcomes, such as risk, innovation, and shareholder protection. Several studies in the record also support a link between board diversity and narrower indicators of firm financial performance. The record further supports the SEC's conclusion that the

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transparency benefits of the Proposal, independent of the effects on corporate performance, will be substantial.

Finally, because experts in this field continue to study the link between diversity and board performance, Amici wish to highlight additional studies published since the SEC's Decision, which reinforce Nasdaq's conclusion.

The sum total of the academic literature in this space is sufficient to support the Nasdaq Proposal as advancing the goals of the Exchange Act, by being designed to "prevent fraudulent and manipulative acts and practices," "promote just and equitable principles of trade," "remove impediments to and perfect the mechanism of a free and open market," and "protect investors and the public interest." 15 U.S.C. § 78f(b)(5).

I. Substantial record evidence supports a link between diversity and non-financial outcomes

Nasdaq presented, and the SEC captured in the record, substantial evidence of a link between board diversity and corporate performance. This link is a key focus of academic literature, producing a variety of studies attempting to understand and explain it. Collectively, this body of work has produced a substantial number of rigorous, high-quality, peer-reviewed studies, finding a positive association between diversity on companies' corporate boards and the performance of those companies on various axes of corporate governance and performance such as risk, innovation, and shareholder protection. Far from there being "no substantial evidence" to support a link between board diversity and the goals of the Exchange Act, *see* AFBR Br. at 62, the research evidence that diversity on corporate boards promotes stronger corporate governance and shareholder protection is very strong.

At its core, the link between board diversity and corporate decision-making is based on the unique role that boards of directors play in the governance process. Unlike senior managers, they do not implement strategic decisions or run the firm on a day-to-day basis. Rather, as Amici Professor Forbes and Professor Milliken have described, boards are "episodic" and "interdependent" groups that "face complex, multifaceted tasks related to strategic-issue processing."[12] Accordingly, "the effectiveness of boards is likely to depend heavily on social-psychological processes, particularly those pertaining to group

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[12] Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 Acad. of Mgmt. Rev. 489, 491–92 (1999) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,479).

participation and interaction, the exchange of information, and critical discussion."[13]

When those group participation dynamics are lacking or unhealthy, boards become less effective contributors to firm governance.[14] Indeed, it is now widely accepted among experts in corporate governance that "groupthink" (the tendency of many directors to refrain from surfacing viewpoints that conflict with those of their colleagues) on corporate boards presents an acute and altogether too common danger to modern firms.[15]

The boards of contemporary corporations also oversee firms that employ highly diverse workforces, sell their products and services to a diverse array of customers and customer segments, and often operate across multiple national and institutional environments. Social psychological research strongly suggests that boards will be better able

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[13] *Id.* at 492.

[14] One widely cited quote from Harvard Business School Professor Myles Mace in 1971 dismissed boards altogether as "ornaments on the corporate Christmas tree" based on the widespread perception at the time that boards tended to be overly docile leaders. *See*, *e.g.*, John Gillespie & David Zweig, *BOOKS: The Failure of Corporate Boards and the Price We All Pay*, Bus. Ethics (Jan. 18, 2010), *available at* https://business-ethics.com/2010/01/18/885/.

[15] *See*, *e.g.*, Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, 80 Harvard Bus. Rev. 106, 106-13 (Sept. 2002).

to process strategic issues on behalf of firms facing such challenges when they themselves possess a diverse range of cognitive resources (e.g., information, experiences, and knowledge) and cognitive structures (e.g., beliefs and perspectives).[16]

Modern corporate governance theory thus posits an economic rationale for gender diversity on corporate boards that focuses on the contributions that women directors make to board discussions and acknowledges that directors often influence firm performance in a “complex and indirect manner.”[17] Indeed, Amici’s interactions with business leaders in the course of their research and teaching, along with recent research conducted by scholars at the London Business School,[18]

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[16] *See*, *e.g.*, Luis L. Martins & Wonbin Sohn, *How does diversity affect team cognitive processes? Understanding the cognitive pathways underlying the diversity dividend in teams*, 16 Acad. Of Mgmt. Annals 134, 137-161 (2022) (reviewing the literature on groups as information processors with a focus on the ways that diverse views add information, knowledge, and varied perspectives to teams to enhance their group cognitive capabilities); Verlin B. Hinsz et al., *The Emerging Conceptualization of Groups as Information Processors*, 121 Psych. Bull. 43, 54 (1997) (noting that minority views in a diverse group lead members to view situations and issues from multiple perspectives).

[17] *See* Barnali Choudhury, *New Rationales for Women on Boards*, 34 Oxford J. of Legal Stud. 511, 513, 523 (2014).

[18] Mary Akimoto et al., *Board Diversity and Effectiveness in FTSE 350 Companies*, London Bus. Sch. Leadership Ins., SQW, and Fin. Reporting Council 1, 27–41 (July 2021), *available at* https://www.london.edu/-/media/images/leadership-institute-refresh/frc-board-diversity-and-effectiveness-in-ftse-350-companies.pdf.

suggests a widespread belief among directors that diverse boards are valuable for their capacity to improve the range of information and perspectives boards bring to their work.[19]

These links between diversity and corporate decision-making have been explored in a variety of empirical studies that support the notion that diversity of the types encouraged by the Nasdaq Proposal would likely advance corporate governance and shareholder protection.

A recent study of over 6,000 U.S. firms between 2000 and 2010 by Amicus Professor Wahid explored whether gender diversity on corporate boards affects the quality of a firm's financial reporting and the likelihood of financial misconduct.[20] Professor Wahid studied corporate financial restatements,[21] "the ultimate ex-post indication of a

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[19] Significantly, the SEC received a substantial body of comments from the business community emphasizing their belief that diversity on boards of the type encouraged by the Nasdaq Proposal would improve board decision-making, corporate governance, risk mitigation, innovation, investor protection, investor confidence, and corporate culture. *See* SEC Order at 29–30, collecting comments from the Carlyle Group, Goldman Sachs, Mercy Investment Services, Inc., Miller/Howard Investments, International Corporate Governance Network, the Association of Asian-American Investment Managers, AllianceBernstein L.P., Capital Research and Management Company, Lord Abbett, and Hispanic Chamber of Commerce.

[20] Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, 159 J. of Bus. Ethics 705, 705 (Oct. 2019) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478).

[21] A restatement is a re-issuance of a company's financial statement to correct a material error in what was previously disclosed, often the result of accounting

poor financial reporting process and willful financial misconduct."[22] The study found that "boards with female directors have fewer restatements" and specifically "fewer irregularity-type restatements, which tend to be indicative of financial manipulation," and found that these improved outcomes were likely the result of beneficial changes to group decision-making dynamics resulting from diverse boards, rather than any hypothetical differences between male and female directors (such as differences in qualification or effort).[23]

In another study, a group of professors analyzed a sample of 7,597 U.S. company firm-years to assess whether gender-diverse boards (defined as those which include at least one woman, similar to the Nasdaq Proposal) improve transparency.[24] This study found "a positive link between gender diversity in the corporate board and stock price informativeness"—that is, gender-diverse firms are more likely to

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mistakes, noncompliance with generally accepted accounting principles, fraud, misrepresentation, or clerical errors. *See Restatements: the costly result of an error*, Baker Tilly, July 26, 2019, *available at* https://www.bakertilly.com/insights/restatements-costly-result-error.

[22] Wahid, *supra* note 20, at 8.

[23] *Id.* at 23.

[24] Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?* 51 J. of Acct. & Econ. 314, 314 (2011) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478).

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collect and disclose robust information about their performance to prospective investors.[25]

Another paper studied audit reports under Section 404 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, *codified at* 15 U.S.C. § 7262, which mandates auditor evaluations of the quality of companies' internal controls over financial reporting.[26] Weak controls can "lead to poor financial reporting quality, less efficient investments, and insider trading."[27] The authors found that across more than 4,000 firm-years observed between 2004 and 2013, "firms with a greater presence of female board members [were] less likely to report having weak internal controls."[28]

In a recent study co-authored by Amici Curiae Professors Bernile and Yonker, the authors analyzed U.S. firms in the S&P 1500 index from 1996 to 2014 and found, among other things, "strong and consistent support for the notion that greater board diversity *causes*

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[25] *Id.* at 336.

[26] Yu Chen, John Daniel Eshleman, and Jared S. Soileau, *Board Gender Diversity and Internal Control Weaknesses*, 33 Advances in Acct., incorporating Advances in Int'l Acct. 11 (2016) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478).

[27] *Id.* at 12.

[28] *Id.* at 15, 18.

lower firm risk," using what is called an instrumental variable in its analysis to attempt to prove causation rather than simple correlation.[29] "[F]irms with greater board diversity adopt less risky financial policies," leading to lower volatility in their returns; further, these firms rely less on debt capital and maintain greater dividend payouts, all while "invest[ing] more aggressively in research and development."[30] As a result, not only did more diverse firms perform better financially and provide more security to investors, but they also saw "greater innovation output (in absolute and per dollar invested) that is more impactful and original, as measured by firms' patenting activity."[31]

Another study used a different methodology to examine the same link between diversity and financial restatements that Professor Wahid examined.[32] This study created 278 pairs of American firms, in which one firm was recorded by the U.S. General Accounting Office as having restated their annual financial statements (either due to error or fraud,

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[29] Gennaro Bernile, Vineet Bhagwat, and Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. of Fin. Econ. 588, 590 (2018) (cited in the SEC Order at 32).

[30] *Id.*

[31] *Id.*

[32] *See* Wahid, *supra* note 20.

in either case demonstrating a failure of internal controls), and the other 278 had not (and were of similar size, date, auditor, and industry).[33] The study found "a significant reduction in the likelihood of financial restatement" in firms governed by boards with at least one female board director.[34]

Amicus Professor Cumming, along with two colleagues, studied 742 pairs of similar companies in China, where one company in each pair had been subject to securities fraud enforcement actions between 2001 and 2010 and the other had not.[35] The study utilized two different econometric tools, known as two-stage estimates and propensity score matching, to seek to show a causal relationship rather than merely a correlation in its data.[36] The authors found "strong evidence of a negative and diminishing effect" of the presence of women on boards

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[33] Lawrence J. Abbott et al., *Female Board Presence and the Likelihood of Financial Restatement*¸ 26 Acct. Horizons 607, 608, 613 (2012) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478).

[34] *Id.* at 626.

[35] Douglas Cumming et al., *Gender Diversity and Securities Fraud*, 58 Acad. of Mgmt. J. 1572, 1576 (Feb. 2015) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478).

[36] *Id.* at 1584. *See also* Jeffrey M. Woolridge, Introductory Econometrics: A Modern Approach 512-51 (South-Western, Cenage Learning, 5th ed. 2013) (explaining two-stage estimates); Shenyang Guo and Mark W. Fraser, Propensity Score Analysis: Statistical Methods and Applications (Sage Publishing, 2d ed. 2014) (explaining propensity score matching).

and on the probability of being the subject of a fraud enforcement action (i.e., the presence of women on boards made such an action less likely), and that the presence of women on boards "reduce[d] the severity of fraud" (in terms of the magnitude of negative share price reaction experienced by the company from the disclosure of enforcement) within the sample of companies studied.[37]

Two studies of Spanish firms made similar findings. In one study of 920 firm-years of observations of non-financial firms listed on the Madrid Stock Exchange, the authors concluded that "having a high proportion of female directors and independent female directors" on corporate boards' audit committees, and "having an [audit committee] chairperson who is a female" have the effect of "enhanc[ing] financial reporting quality."[38] Those results support the conclusion that "gender diversity in corporate governance is likely to be useful in creating value … by improving the reliability of financial reporting."[39]

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[37] Cumming, *supra* note 35, at 1573, 1589. These findings were mirrored in a recent study of U.S. firms, see *infra* Section IV.

[38] María Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information*, 25 Bus. Ethics: A European Rev. 363, 364 (Oct. 2016) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478).

[39] *Id.*

Another study of over 500 firms in Spain found that gender diversity on corporate boards was associated with reduced "information asymmetry"—that is, the trading behavior of informed vs. uninformed traders was more similar for companies whose boards were more gender diverse.[40] This finding suggests that firms with more diverse boards were either more transparent in their disclosures to the public or were less prone to insider trading, because less sophisticated traders were more able to arrive at similar evaluations of firm value as more sophisticated ones.[41]

In sum, a substantial body of research on the links between corporate board diversity and various firm outcomes exists and was considered by Nasdaq and the SEC, particularly with regard to gender diversity. The results of this research strongly suggest that diversity enhances corporate board decision-making in ways that advance the goals of the Exchange Act, by promoting transparency, protecting investors, and reducing fraud. *See* 15 U.S.C. § 78f(b)(5). Taken together, these findings are consistent with, and to some extent may help explain,

[40] David Abad et al., *Does gender diversity on corporate boards reduce information asymmetry in equity markets?*, 20 Bus. Rsh. Q. 192, 193 (Apr. 2017) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,478–79).

[41] *Id.* at 193, 201–02.

the broader linkages identified by studies in the following section—i.e., that diversity enhances firm performance. But they also stand independently as demonstrating meaningful board- and firm-level outcomes of diversity consistent with the Exchange Act's purpose.

II. Substantial record evidence supports a link between diversity and firm financial performance

In addition to the record evidence captured above showing strong linkages between board diversity and broad outcomes of corporate governance, Nasdaq presented, and the SEC captured in its record, substantial evidence of a link between board diversity and narrower financial measures of corporate performance and shareholder returns.

For instance, in one recent "meta-analysis" attempting to aggregate and interpret the varying results of 140 different studies of gender diversity on corporate boards, the authors concluded that "firms with greater female board representation tend to have higher accounting returns," (i.e., profitability) and that those effects were more pronounced "in countries with stronger shareholder protections" like the United States.[42] The same study concluded that in countries with

[42] Corinne Post & Kris Byron, *Women on Boards and Firm Financial Performance: A Meta Analysis*, 58 Acad. of Mgmt. J. 1546, 1552, 1555, 1557 (Oct. 2015) (cited in Nasdaq Proposal, 85 Fed. Reg. at 80,476–77.)

higher levels of societal gender parity, like the United States, "female board representation is positively related to market performance."[43]

Another study in 2010 examined approximately 5,500 directors on boards of S&P 500 firms to study the effects of both gender and racial diversity and found "a positive and significant relationship between both the number of women on the board and the number of ethnic minorities on the board and the [Return on Assets]" of a firm,[44] although it also noted that the relationship it found was a correlation rather than a causal relationship.[45] The study also found "no evidence of a negative link between board diversity and financial performance."[46]

In the recent study of U.S. firms in the S&P 1500 index by Amici Curiae Professors Bernile and Yonker discussed in the prior section, the

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[43] *Id.* at 1558. Gender parity was estimated using the World Economic Forum's Global Gender Gap score, "a measure of each country's gender equality in terms of economic participation, educational attainment, health and survival, and political empowerment." *Id.* at 1556.

[44] David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 Corp. Governance: An Int'l. Rev. 396, 401, 410 (2010) (cited in the SEC Order at 32; cited in Nasdaq Proposal, 85 Fed. Reg. at 80,477).

[45] *Id.* at 412. Because director selection is correlated with many other firm-level characteristics, identifying a causal relationship of board composition on firm outcomes is notoriously difficult.

[46] *Id.* at 411.

authors found that "on average, both operating performance and asset valuation multiples increase with board diversity" and that the relationship between diversity and these performance metrics was causal.[47]

The conclusions of these empirically rigorous studies, published in highly selective, peer-reviewed academic journals, are also echoed by a wide variety of studies undertaken by financial and management firms and industry research organizations that have found positive links between firm financial performance and board diversity.[48]

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[47] Bernile et al., *supra* note 29, at 590.

[48] *See*, *e.g.*, Nasdaq Proposal, 85 Fed. Reg. at 80,475–76 (collecting private sector analyses showing financial benefits to shareholders from diverse boards, citing Jason M. Thomas and Megan Starr, *Global Insights: From Impact Investing to Investing for Impact*, The Carlyle Group 5 (Feb. 24, 2020), *available at https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf)*; FCLTGlobal, *The Long-term Habits of a Highly Effective Corporate Board* 11 (Mar. 2019), *available at* https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effective-corporate-boards.pdf; Vivian Hunt et al., *Diversity Matters*, McKinsey & Company (Feb. 2, 2015), *available at* https://www.mckinsey.com/insights/organization/~/media/2497d4ae4b534ee89d929cc6e3aea485.ashx; Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), *available at* https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/the-cs-gender-3000-women-in-senior-management.pdf; Meggin Thwing Eastman et al., *The tipping point: Women on boards and financial performance*, MSCI 3 (Dec. 2016), *available at* https://www.msci.com/documents/%2010199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb; Credit Suisse ESG Research, *LGBT: The value of diversity* 1 (Apr. 15, 2016), *available at* https://research-doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&docu

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Petitioners place substantial weight on Nasdaq's and the SEC's acknowledgment that there are both studies that support and studies that call into question a link between board diversity and financial performance. *See* AFBR Br. at 55–56 (describing the SEC's evaluation of the evidence); Nasdaq Proposal, 85 Fed. Reg. at 80,476–77 (collecting and acknowledging "studies drawing different conclusions" from the one Nasdaq reached). Amici agree with the SEC that there is "reasonable debate among researchers about the value of board diversity," SEC Br. at 29 (internal quotation omitted), particularly with regards to the link between board diversity and narrow measures of firm financial performance.[49] But the studies that support such a link, summarized

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[49] *See*, *e.g.*, Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact of Firm Valuation of Mandated Female Board Representation*, 127 Q. J. Econ. 137, 137-97 (2012) (cited in SEC Order at 33, note 123) (finding that Norway's 2003 board gender quota law negatively affected firm performance); *but see* B. Espen Eckbo et al., *Valuation Effects of Norway's Board Gender-Quota Law*, Mgmt. Sci, at 1-23 (Aug. 2021) (finding no negative effect on firm performance from the gender quota). Norway's board diversity requirement has been a subject of extensive study, with mixed conclusions about the effects on firm performance. Notably, Norway's law required 40% of board directors to be female, requiring larger changes to existing boards than would be expected from the Nasdaq Proposal for boards to either include one female director or provide an explanation for why that target is impractical for a given firm. *See also* Vicki L. Bogan, Katya

above, are high-quality, robust works linking board diversity to financial performance, and they belie Petitioners' contention that there was "no substantial evidence" for Nasdaq or the SEC to find such a link. *See* AFBR Br. at 60. This body of work provides ample basis to reasonably conclude that strengthened board diversity could improve firm financial performance.

Further, as described more fully in the previous section, despite Petitioners' attempts to focus scrutiny of the Nasdaq Proposal on "quantitative considerations like profit, loss, and revenue," AFBR Br. at 60–61 (internal quotations and citations omitted), a narrow focus on these financial indicators ignores other important aspects of the rule, including expected effects of board diversity on corporate governance, where the evidence is even stronger and the expected effects would clearly advance the Exchange Act's goals. Petitioners' limited focus also ignores the benefits of a disclosure-based regime, as discussed further below.

Potemkina, and Scott Yonker, *What Drives Racial Diversity on U.S. Corporate Boards?*, Harvard L. Sch. F. on Corp. Governance (Oct. 29, 2021), *available at* https://ssrn.com/abstract=3952897 (recent study by Amicus Scott Yonker and others showing that 82% of Nasdaq firms already had at least one woman on their board prior to the announcement of the Nasdaq Proposal).

III. The Nasdaq Proposal has the added benefit of facilitating transparency and further rigorous study of board dynamics and effects

In its approval, the SEC noted that the design of the Nasdaq Proposal as a disclosure-based regime would need to be evaluated differently from if it were a set of mandatory diversity requirements,[50] and that the transparency into corporate boards facilitated by the Nasdaq Proposal may be an additional benefit in itself. *See* SEC Order at 34–35 (noting the various paths to compliance by companies on Nasdaq's exchange and emphasizing "the disclosure benefits that the Board Diversity Proposal would provide").[51]

Amici note that such disclosure is also likely to facilitate even more robust analyses of the effects of board diversity in the future. As experts seeking to undertake empirical research in this area, one of the most substantial challenges is collecting and preparing a uniform data

[50] Indeed, while some studies have suggested a *negative* link between gender diversity and shareholder wealth, it is worth noting that these were studies of the effects of mandatory policies and did not allow companies to continue to tailor the makeup of their boards and simply provide transparency into their boards' makeups. *See* SEC Order at 33 note 123, note 124 (collecting studies linking diversity to declining shareholder wealth after the implementation of mandatory quota policies in Norway and California).

[51] As the SEC noted, there is some evidence to suggest that disclosure-based regimes have uniquely positive effects. *See* Larry Fauver et al., *Board Reforms and Firm Value: Worldwide Evidence*, 125 J. Fin. Econ. 120, 121 (2017) (cited in SEC Order at 34).

set concerning board diversity; indeed, Amici believe that data availability is one of the reasons that research into the effects of gender diversity on corporate boards is more extensive than into other forms of diversity, such as racial or sexual orientation diversity. Implementation of the Nasdaq Proposal will be of tremendous value in facilitating the rigorous study of corporate performance and allow investors to make more informed decisions, both through the provision of thorough and uniform disclosures, as well as by providing an opportunity to evaluate changes in the performance of firms listed on the Nasdaq exchange measured against firms listed on other exchanges that have not implemented policies similar to the Nasdaq Proposal.

IV. Further evidence continues to emerge since the Nasdaq Proposal, reinforcing the positive links between diversity and performance

As Amici noted above, the study of corporate board composition and its effects on corporate performance is dynamic and ongoing, and it has continued to produce compelling research even after the Nasdaq Proposal and subsequent SEC Order.

For example, a recent working paper examined the link between the racial diversity of the boards of regional Federal Reserve Banks and the Community Reinvestment Act (CRA) scores of the member banks that those boards supervise.[52] The study found that the presence of Black and Hispanic directors on regional Federal Reserve Boards correlated positively with the CRA scores of the member banks they supervised, meaning that those banks were achieving superior results in reaching underbanked communities, even when comparing Reserve Boards that served the same states.[53]

Additionally, a recent, as-yet-unpublished paper by Amicus Professor Yonker and two other colleagues examined recent trends in increasing racial diversity on corporate boards.[54] Among other things, they found that the nationwide introspection concerning racism in America triggered by the George Floyd murder in 2020 appeared to trigger substantial increases in Black representation on corporate boards, and, notably, that the qualifications of these newly appointed directors were similar to those who had previously been serving on boards. These findings suggest that lower levels of Black representation on boards prior to 2020 were not driven by a lack of a qualified

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[52] Brian Feinstein at al., *Board Diversity Matters: An Empirical Assessment of Community Lending at Federal Reserve-Regulated Banks* (Jan. 5, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4000110.

[53] *Id.* at 12–13, 25.

[54] Bogan, Potemkina, and Yonker, *supra* note 49.

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candidate pool and call into question the degree to which current board composition should be presumed to simply be the outcome of efficient labor market forces.[55]

Another recent study analyzed firms that face securities litigation, which often results in substantial settlement costs and can directly impact a firm's finances (by affecting things like liquidity, investment policies, or credit-worthiness) as well as extract "hidden" costs by damaging a firm's image and harming its relationships with suppliers and customers.[56] The authors studied securities litigation data from S&P 1500 firms between 1998 and 2017, and found that "the presence of female independent directors on a firm's board reduces the risk of securities litigation," and that this effect held true even after using a variety of econometric methods designed to better identify causal relationships.[57]

Another as-yet-unpublished study examined board diversity policies across seven European countries to understand the effects of

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[55] *Id.* at 8–9, 21–22.

[56] Mohammad Hashemi Joo et al., *Securities litigation risk and board gender diversity*, 71 J. Corp. Fin. 102102, 102102 (2021).

[57] *Id.* at 102104.

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expanded female representation on boards on corporate performance in the context of mandatory diversity requirements. It found "positive effects on the value of the firm" from growing shares of women, and importantly also "no negative effect on value, and boards do not become any less competent with more women on boards."[58]

A recent study of misconduct fines issued to European banks by U.S. financial regulators between 2008 and 2018 found that "a greater presence of women on the board of directors is associated with fewer misconduct fines, and the effect is economically significant," with the benefits of greater gender diversity estimated as "equivalent to saving approximately $7.48 million per year" in fines alone.[59] These findings in many ways echo, in an American regulatory context, the findings of Amicus Professor Cumming's work, cited in the Nasdaq Proposal, which found a link between board gender diversity and reduced incidence of fraud among Chinese firms.[60]

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[58] Olga Kuzmina & Valentina Melentyeva, *Gender diversity in corporate boards: Evidence from quota-implied discontinuities* 1, 37–38 (Nov. 1, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3976227 (earlier version cited in SEC Order at 32, note 119).

[59] F. Arnaboldi et al., *Gender diversity and bank misconduct,* 71 J. Corp. Fin. 101834, 101835 (2021).

[60] *See* Cumming et al., *supra* note 35.

Another body of literature emphasizes the role that "good" or "quality shareholders" have to play in firm performance.[61] It argues that investments by quality shareholders (those investors who make concentrated investments of their portfolio in companies that are intended to be long-term investments rather than short-term profit opportunities) are beneficial to firms because they provide firm managers longer-term stability to execute strategy, cast more informed shareholder votes, and engage with managers in ways that are productive and patient and can provide an additional "brain trust" for managers to draw upon.[62] In studying the tools companies have available to attract quality shareholders, one recent study found that quality shareholders were more common in firms with more racially and gender-diverse boards, positing that "[c]ompared to the short-term view of transient shareholders, [quality shareholders] benefit more from the multiple viewpoints on boards that come from diversity."[63]

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[61] *See*, *e.g.*, Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 Cornell L. Rev. 849 (2012).

[62] Lawrence A. Cunningham, *Lessons from Quality Shareholders on Corporate Governance Practice, Research and Scholarship*, 5 George Washington Bus. & Fin. L. Rev. 1, 5–10 (2021).

[63] *Id.* at 42.

CONCLUSION

Taken as a whole, the record contained substantial evidence supporting the proposition that the Nasdaq Proposal is designed to advance the goals of the Exchange Act, and the SEC's Order rested on a solid foundation of empirical research.

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APPENDIX: LIST OF AMICI NONPARTISAN GROUP OF ACADEMICS AND PRACTITIONERS IN THE FIELD OF CORPORATE GOVERNANCE

Amici are listed in alphabetical order below. Institutional affiliations are provided for identification purposes only. The views expressed in this brief are those of individual amici and do not represent the views or positions of their affiliated institutions.

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CERTIFICATE OF SERVICE

I, Jeffrey Dubner, counsel for Proposed Amici¸ certify that all counsel of record who have consented to electronic service are being served today with a copy of the foregoing brief via filing with the Clerk of the Court through the appellate CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

<u>*/s/ Jeffrey Dubner*</u>
JEFFREY DUBNER

March 2, 2022

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limit, Typeface Requirements,
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I certify that this filing complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,587 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Jeffrey Dubner
JEFFREY DUBNER

February 25, 2022

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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February 28, 2022

Mr. Jeffrey B. Dubner
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043

No. 21-60626 Alliance for Fair Board Recruitment v. SEC
Agency No. 34-92590

Dear Mr. Dubner,

The following pertains to your brief electronically filed on February 25, 2022.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

Table of authorities must list cases (**alphabetically arranged**), statutes, and other authorities, with references to the pages of the brief where they are cited, see FED. R. APP. P. 28(a)(3).

Table of contents must include the table of authorities with page references is required, see FED. R. APP. P. 28(a)(2).

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

By: Majella A. Sutton

Majella A. Sutton, Deputy Clerk
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