23-60255

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; LONGVIEW CHAMBER OF COMMERCE; TEXAS ASSOCIATION OF BUSINESS,

Petitioners,

—v.—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
UNITED STATES SECURITIES AND EXCHANGE COMMISSION
RELEASE NOS. 34-97424; IC-34906

BRIEF OF SCHOLARS OF LAW, FINANCE AND ECONOMICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND DENYING THE PETITION FOR REVIEW

LAURA H. POSNER
COHEN MILSTEIN SELLERS
& TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
(212) 220-2925

JULIE GOLDSTEIN REISER
Counsel of Record
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Avenue, N.W.
Washington, DC 20005
(202) 408-4600

Attorneys for Amici Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2 and Rule 28.2.1, *amici curiae* make the following supplemental statement of interested parties to fully disclose all those with an interest in this brief.

Amici Curiae

Matthew D. Cain
Alex Edmans
Brian Galle
Vyacheslav (Slava) Fos
Edwin Hu
Robert Jackson
Bradford Lynch
Joshua Mitts
Shivaram Rajgopal
Jonathon Zytnick

/s/ Julie Goldsmith Reiser
Julie Goldsmith Reiser
Counsel for Amici Curiae

TABLE OF CONTENTS

PAGE

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE vii

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE SEC CORRECTLY GAVE LITTLE WEIGHT TO THE CHAMBER'S ADVOCATES' ANALYSIS BECAUSE IT LACKS RIGOR REQUIRED IN CREDIBLE COST-BENEFIT ANALYSIS 5

A. Academic Consensus on Repurchases and Opportunism 5

B. The Chamber's Paper 8

1. Selective literature review 8

2. Vertical axis manipulation 10

II. THE SEC CORRECTLY GAVE LESS WEIGHT TO A CORRELATIONAL STUDY PREPARED BY CHAMBER'S AMICUS THAN TO RIGOROUS, CAUSALLY IDENTIFIED WORK COMING TO CONTRARY CONCLUSIONS................. 14

III. THERE HAS BEEN AMPLE TIME FOR STUDY OF THE ECONOMIC QUESTIONS RAISED BY THE FINAL RULE 17

CONCLUSION 20

CERTIFICATE OF SERVICE 21

CERTIFICATE OF COMPLIANCE.. 22

TABLE OF AUTHORITIES

PAGE(S)

Cases

Business Roundtable v. *SEC*,
647 F.3d 1144 (D.C. Cir. 2011) 16

Statutes

15 U.S.C. §§ 78(c)(f) 16

Regulations

Share Repurchase Disclosure Modernization, Rel. No. 34-97424, 88 Fed. Reg. 36002 (June 1, 2023) ("Final Rule") .... *passim*

Other Authorities

Heitor Almeida, Nuri Ersahin, Vyacheslav Fos, Rustom M. Irani & Mathias Kronlund, *How Do Short-Term Incentives Affect Long-Term Productivity?* (working paper 2022) 17

Heitor Almeida, Vyacheslav Fos & Mathias Kronlund, *The Real Effects of Share Repurchases*, 119 J. FIN. ECON. 168 (2016) 4, 5, 9, 15, 17

Heitor Almeida, Vyacheslav Fos, Po-Hsuan Hsu, Mathias Kronlund & Kevin Tseng, *Innovation Under Pressure* (working paper February 2023) 17

Ilona Babenko, Yuri Tserlukevich & Alexander Vedrashko, *The Credibility of Open Market Share Repurchase Signaling,* 47 J. FIN. & Q. ANAL. 1059 (2012) 5

Alice Bonaime & Michael D. Ryngaert, *Insider Trading and Share Repurchases: Do Insiders and Firms Trade in the Same Direction?* 22 J. CORP. FIN. 35 (2013) 5

Philip Bump, *The Fix*, WASHINGTON POST (Dec. 14, 2015) 12

Commissioner Robert J. Jackson, Jr., *Stock Buybacks and Corporate Cashouts* (2018) 7

PAGE(S)

Dhammika Dharmapala, *Estimating the Compliance Costs of Securities Regulation* (working paper 2016) 12

Ingolf Dittman, Amy Yazhu Li, Stefan Obernberger & Jiaqi Zheng, *Equity-Based Compensation and the Timing of Share Repurchases: The Role of the Corporate Calendar* (working paper 2022) 13, 18

Division of Economic and Risk Analysis, *Supplemental Data and Analysis on Certain Economic Effects of Proposed Amendments Regarding the Reporting of Beneficial Ownership* (April 28, 2023) 19

Alex Edmans, *The Case for Stock Buybacks*, HARV. BUS. REV. (2017) 6

Alex Edmans, Vivian W. Fang & Allen H. Huang, *The Long-Term Consequences of Short-Term Incentives*, 60 J. ACCT. RSCH. 1007 (2021) 5, 6, 9, 17

Jesse M. Fried & Charles C.Y. Wang, *Short-Termism and Capital Flows*, 8 REV. CORP. FIN. STUD. 207 (2018) 6

Jesse M. Fried & Charles C.Y. Wang, *Are Buybacks Really Shortchanging Investment?*, HARV. BUS. REV. (2018) 6

Jesse M. Fried, *Insider Signaling and Insider Trading with Repurchase Tender Offers*, 67 U. CHI. L. REV. 421, 472 (2000) 2

Jesse M. Fried, *Insider Trading Via the Corporation*, 162 U. PA. L. REV. 801 (2014) 2

Jesse M. Fried, *Open Market Repurchases: Signaling or Managerial Opportunism?* 2 THEOR. INQUIRIES IN L. 865 (2001) 6, 9

Nicholas Guest, S.P. Kothari & Parth Venkat, *Share Repurchases on Trial: Large-Sample Evidence on Share Price Performance, Executive Compensation, and Corporate Investment*, 52 FIN. MGMT. 19 (2023) 3, 4, 14, 16

Hrn'g before Subcomm. on Investor Protection of House Comm. on Fin. Servs., *Examining Corporate Priorities: The Impact of Stock Buybacks* (2019) (testimony of Craig Lewis) 3, 18

PAGE(S)

S.P. Kothari, Eric So & Travis Johnson, *Commission Savings and Execution Quality for Retail Trades* (2021) 14

Letter from BIO to Vanessa Countryman (July 29, 2019) 8

Letter to Hon. Chris van Hollen from Commissioner Robert J. Jackson, Jr. (2019) 13

Letter to SEC from Lawrence A. Cunningham et al. (April 25, 2022) 2

Letter to Vanessa Countryman from Steve Quirk, Chief Brokerage Officer, Robinhood Markets (March 31, 2023) 14

Letter to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n from Dr. Edwin Hu, Professor Robert Jackson & Dr. Jonathon Zytnick (June 27, 2022) 12, 13

Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm. from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (April 1, 2022) .... *passim*

Ltr. to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n from Alex Edmans (May 9, 2022) 6, 7, 14

Craig Lewis & Joshua White, *Corporate Liquidity Provision & Share Repurchase Programs Addendum*, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (March 22, 2022) 3, 18

Craig Lewis & Joshua T. White, *Science or Compliance: Will Section 404(b) Compliance Impede Innovation by Emerging Growth Companies in the Biotech Industry?* (2019) 8

Craig Lewis, *Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting* (April 11, 2022) 19

Craig Lewis, *The Economics of Share Repurchase Programs* 18

Maureen F. McNichols, *Research Design Issues in Earnings Management Studies*, 19 J. ACCT. & PUB. POL'Y 313 (2000) 16

Michael Simkovic, *The Effect of Mandatory Disclosure on Open-Market Stock Repurchases*, 6 BERKELEY BUS. L. J. 98 (2009) 2

PAGE(S)

U.S. Sec. & Exch. Comm'n, *Response to Congress: Negative Net Equity Issuance* (Dec. 23, 2020) 15

INTERESTS OF AMICI CURIAE

Amici are scholars of law and finance whose work emphasizes peer-reviewed, empirical study of markets.[1] *Amici* have served at the U.S. Securities and Exchange Commission (SEC) Division of Economic and Risk Analysis (DERA), as SEC Commissioner and Counsel, and as public commenters on SEC rules:

- Matthew D. Cain served as a financial economist in DERA before becoming Senior Advisor to SEC Commissioner Robert Jackson. Dr. Cain has a Ph.D. in Finance from Purdue University. He is currently a Senior Fellow at the Berkeley Center for Law and Economics.

- Alex Edmans is Professor of Finance at London Business School. Professor Edmans graduated from Oxford University. He earned his Ph.D. in Finance from the MIT Sloan School of Management as a Fulbright Scholar. He joined the faculty of the Wharton School of Business in 2007 and was tenured in 2013 shortly before moving to LBS.

- Brian Galle has served as Senior Fellow in the SEC's Division of Corporation Finance. He is currently Professor of Law at Georgetown University Law Center. Previously, he served as a federal prosecutor.

- Vyacheslav (Slava) Fos is Professor in the Finance Department and coordinator of the Ph.D. in Finance Program at the Boston College Carroll School of Management. He earned his Ph.D. from the Columbia University Graduate School of Business.

- Edwin Hu served as a financial economist in DERA before becoming Senior Advisor to SEC Commissioner Robert Jackson. He is currently a Postdoctoral Fellow at the New York University School of Law Institute for Corporate Governance and Finance. Dr. Hu earned his Ph.D. in Finance from Rice University.

[1] *Amici* write in their individual capacities; institutional affiliations are provided for identification only.

- Robert Jackson is Pierrepont Family Professor of Law and Co-Director of the Institute for Corporate Governance and Finance at the New York University School of Law. In 2017 the President nominated him, and the Senate unanimously confirmed him, to serve as SEC Commissioner.

- Bradford Lynch is Assistant Professor of Accounting at the University of Chicago Booth School of Business. He earned his Ph.D. in Accounting from the Wharton School of Business at the University of Pennsylvania.

- Joshua Mitts is David J. Greenwald Professor of Law at the Columbia Law School. He earned his Ph.D. in Finance from the Columbia University Graduate School of Business.

- Shivaram Rajgopal is Roy Bernard Kester and T.W. Byrnes Professor of Accounting and Auditing and Chair of the Accounting Division at the Columbia University Graduate School of Business. He earned his Ph.D. from the University of Iowa.

- Jonathon Zytnick served as Counsel to SEC Commissioner Robert Jackson. He is Associate Professor of Law at Georgetown University Law Center. He holds a Ph.D. in Economics from Columbia University.

Amici are experts in professional standards for rigor in empirical research.[2] *Amici* share an interest in ensuring that rigorous empirical scholarship, rather than casual analysis prepared on behalf of policy litigants, is used in the federal administrative rulemaking processes that produce market regulation.

All parties consented to the filing of this brief.

---

[2] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici* state that no party's counsel authored this brief, even in part, and that no person contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2). *Amici* are grateful for the research assistance of Victor Simonte and Robyn Stewart of the New York University School of Law.

INTRODUCTION

Amici take no view regarding the First Amendment issues raised by the petition for review in this case (the "Petition"). Instead, *amici* write to offer an academic perspective on the Petition's claims regarding the economic analysis the SEC conducted when enhancing existing SEC rules related to an issuer's purchases of its stock, *Share Repurchase Disclosure Modernization*, Rel. No. 34-97424, 88 Fed. Reg. 36002 (June 1, 2023) (the "Final Rule").

From a scholarly perspective, the SEC appropriately gave little weight to analysis suggested by individuals funded by the U.S. Chamber of Commerce (the "Chamber," and the "Chamber's Advocates"). The SEC also appropriately gave little weight to the work relied upon by one Chamber *amicus* in urging vacatur of the Final Rule, as that correlational study is of less evidentiary value than the causally identified, peer-reviewed scholarship the SEC gave greater weight.[3] Finally, rather than having been rushed by the comment period, the Chamber's Advocates have made their policy arguments, before the SEC and Congress, for years; even if the Chamber's Advocates were given unlimited time, their views would continue to be dictated by their incentives rather than intellectual inquiry.

Amici take seriously the SEC's obligation carefully to evaluate the costs and

[3] Br. of Kothari & Overdahl as *Amicus Curiae* in Support of Petitioners, No. 23-60255 (filed July 12, 2023) [hereinafter, *Amicus* Brief].

benefits of rules imposed upon the securities markets. Such care, however, requires distinguishing peer-reviewed empirical scholarship from casual advocacy.

The Chamber and the Chamber's Advocates are entitled to promote their policy views before the SEC. But federal regulators are not required to pretend that paid advocacy is serious social science, and neither should this Court.

SUMMARY OF ARGUMENT

The SEC's rules governing disclosure related to share repurchases were last updated in 2003. For years, scholars of all stripes have urged that those rules be modernized to provide more information about share repurchases to investors.[4] Among the many reasons why is that the previous rules provided investors only with voluntary disclosure of repurchase announcements, limited disclosure of whether announced repurchases actually occurred, and limited information about the degree to which managers themselves traded around the announcement.[5] As the SEC explained in the Final Rule, requiring more granular disclosure on these

[4] Jesse M. Fried, *Insider Trading Via the Corporation*, 162 U. PA. L. REV. 801 (2014); Michael Simkovic, *The Effect of Mandatory Disclosure on Open-Market Stock Repurchases*, 6 BERKELEY BUS. L. J. 98 (2009); Jesse M. Fried, *Insider Signaling and Insider Trading with Repurchase Tender Offers*, 67 U. CHI. L. REV. 421, 472 (2000). These are not scholars solicitous of SEC rulemaking. Professor Fried, for example, is a coauthor of a letter urging that the SEC's proposal to mandate climate-related disclosures "fail[s] to conduct an adequate cost-benefit analysis." Letter to SEC from Lawrence A. Cunningham et al. (April 25, 2022), at 1, 14-15.

[5] The Petition incorrectly claims that the sole purpose of the Final Rule is to "ferret out improperly motivated buybacks," Pet. at 43. In fact the SEC made clear that the Final Rule's benefits were "not limited to instances where share repurchases are not aligned with shareholder value maximization," and that disclosures would help investors "value the issuer's securities more accurately." Final Rule, 88 Fed. Reg. at 36036.

subjects offers a wide range of benefits, from overcoming well-known selection problems in voluntary disclosure practices to facilitating accurate incorporation into stock prices of the firm's decision to repurchase shares.[6]

Rather than engage with this scholarly literature, the Chamber's Advocates produced paid white papers providing a list of policy reasons to oppose disclosure in this area.[7] Those reasons were then recapitulated in six different comment letters the Chamber submitted to the SEC during the rulemaking process.[8] Those letters featured analysis falling far short of academic standards, including a selective assessment of the literature and manipulation of graphical vertical axes. Despite this apparent lack of scholarly rigor, the SEC took the Chamber's arguments seriously, responding in detail to its claims in the Final Rule.

The SEC also gave appropriately little weight to a correlational study of the relationships among repurchases, trading volume, and executive pay.[9] That study's

---

[6] *Id.* (noting that disclosure would help investors price "the extent to which [repurchases] relate to the fundamental value of the issuer's stock").

[7] The Petition omits that one of the Chamber's Advocates first advanced the economic-analysis claims in the Petition in a white paper funded by the Association for Mature American Citizens ("AMAC"). Hrn'g before Subcomm. on Investor Protection of House Comm. on Fin. Servs., *Examining Corporate Priorities: The Impact of Stock Buybacks* (2019) (testimony of Craig Lewis) (citing the 2018 paper).

[8] *See, e.g.*, Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm. from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (April 1, 2022) (citing Craig Lewis & Joshua White (the "Chamber's Advocates"), *Corporate Liquidity Provision & Share Repurchase Programs Addendum*, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (March 22, 2022)) [hereinafter the "Chamber's Paper"].

[9] Nicholas Guest, S.P. Kothari & Parth Venkat, *Share Repurchases on Trial: Large-Sample Evidence on Share Price Performance, Executive Compensation, and Corporate*

findings are in tension with years of causally identified, more rigorous work on these questions arriving at different conclusions, and both scholars and federal regulators should and do weigh the latter evidence more heavily than the former.[10]

Finally, the economic-analysis questions here have been studied for years; the Chamber's Advocates first articulated their views on these ideas in 2018. The Petition's notion that extending the comment period even longer than the SEC did would have led the Chamber's Advocates to study the subject more closely, despite the fact that they are funded by advocates who oppose the rule, seems improbable. And the Chamber's Advocates' disinterest in data the SEC has offered in other rulemakings is inconsistent with academic inquiry and instead reflects advocacy. *Amici*, who focus on publishing scholarly work rather than paid advocacy, think there has been ample study of these questions; the Chamber's real objection lies with the answers.

ARGUMENT

For years before, during, and after the SEC's consideration and adoption of the Final Rule, the SEC provided extensive opportunity for research, comment, and

---

Investment, 52 FIN. MGMT. 19 (2023).

[10] Heitor Almeida, Vyacheslav Fos & Mathias Kronlund, *The Real Effects of Share Repurchases*, 119 J. FIN. ECON. 168 (2016). *Amicus*'s study mentions this convincing, causally identified evidence produced from a regression discontinuity design only in passing, simply asserting that "firms are unlikely to forego valuable investments in favor of repurchases," Guest et al., *supra* note 9, at 24. The more rigorous work, by contrast, provides "evidence suggest[ing] that managers are willing to trade off investments and employment for stock repurchases that allow them to meet analyst EPS forecasts." Almeida, Fos & Kronlund, *supra*, at 168.

response to proposals for additional transparency related to share repurchases. The resulting peer-reviewed literature, spanning decades and scholars of all policy priors, was weighed carefully by the SEC in the promulgation of the Final Rule. The SEC properly gave less weight to advocacy pieces that shed little light on empirical questions relevant to the Final Rule. And the SEC gave researchers interested in those questions ample time to comment on its proposals.

I. THE SEC CORRECTLY GAVE LITTLE WEIGHT TO THE CHAMBER'S ADVOCATES' ANALYSIS BECAUSE IT LACKS RIGOR REQUIRED IN CREDIBLE COST-BENEFIT ANALYSIS.

A. Academic Consensus on Repurchases and Opportunism.

The decades-long debate about the costs and benefits of public-company share repurchases has produced a long empirical literature in law and finance. One of the most-straightforward, least-contested findings in that literature is that repurchases can serve as a signal about insiders' view regarding the firm's value.[11] It is also well-known, however, that the meaning of the signal depends on how insiders trade their own shares at the time of the repurchase.[12] Serious scholars can favor facilitating repurchases and raise opportunism concerns at the same time.

[11] *See, e.g.*, Almeida, Fos & Kronlund, *supra* note 10; Ilona Babenko, Yuri Tserlukevich & Alexander Vedrashko, *The Credibility of Open Market Share Repurchase Signaling,* 47 J. FIN. & Q. ANAL. 1059 (2012); Alex Edmans, Vivian W. Fang & Allen H. Huang, *The Long-Term Consequences of Short-Term Incentives*, 60 J. ACCT. RSCH. 1007 (2021).

[12] *See, e.g.*, Alice Bonaime & Michael D. Ryngaert, *Insider Trading and Share Repurchases: Do Insiders and Firms Trade in the Same Direction?*, 22 J. CORP. FIN. 35 (2013); Edmans, Fang & Huang, *supra* note 11.

In fact, many do. One scholar, for example, has written that evidence does not suggest that share repurchases leave companies bereft of capital they need to function.[13] But he has also argued that evidence regarding share repurchases can best be explained in part by managerial opportunism:

> [T]he signaling theory [of repurchases] is . . . inconsistent with much of the empirical evidence. [I] put forward an alternative explanation for managers' use of [repurchases more consistent with the evidence]: the managerial-opportunism theory. . . . When managers wish to sell a large portion of their shares, they announce a [repurchase] to boost the stock price before selling their shares.[14]

Or consider the scholarship of *amicus* Alex Edmans. Professor Edmans has written that "the evidence suggests buybacks in general add value" for investors. But in the same article he explained that "*some* buybacks indeed might be short-termist."[15] Indeed, in peer-reviewed work Professor Edmans has found:

> [Our] results are inconsistent with CEOs buying underpriced stock or companies to maximize long-run shareholder value, but consistent with these actions being used to boost the short-term stock price and thus equity sale proceeds. CEOs sell their own stock shortly after using company money to buy the firm's stock, also inconsistent with repurchases being motivated by undervaluation.[16]

Drawing on prior work like this, in 2018 SEC Commissioner Robert Jackson

---

[13] Jesse M. Fried & Charles C.Y. Wang, *Short-Termism and Capital Flows*, 8 REV. CORP. FIN. STUD. 207 (2018); Jesse M. Fried & Charles C.Y. Wang, *Are Buybacks Really Shortchanging Investment?*, HARV. BUS. REV. (2018).

[14] Jesse M. Fried, *Open Market Repurchases: Signaling or Managerial Opportunism?*, 2 THEOR. INQUIRIES IN L. 865 (2001).

[15] Alex Edmans, *The Case for Stock Buybacks*, HARV. BUS. REV. (2017).

[16] Edmans, Fang & Huang, *supra* note 11; *see also* Ltr. to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n from Alex Edmans (May 9, 2022), at 2.

released empirical work showing that in some cases "executives personally capture the benefit of the" "stock-price pop created by the buyback announcement."[17] The study documents, in the figure below and an accompanying dataset, the well-known increase in insider sales that occurs when a repurchase is announced:

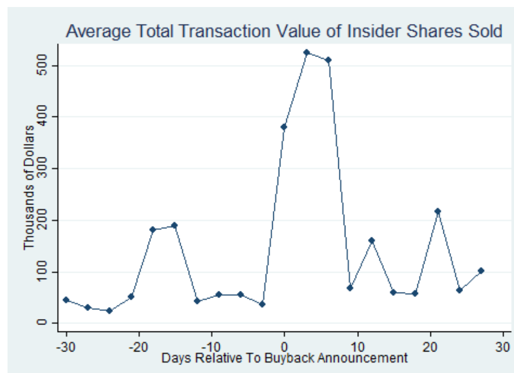

FIGURE 1. FIGURE FROM COMMISSIONER JACKSON'S STUDY.

Two years later, Professor Edmans published peer-reviewed work examining the causal relationship between insiders' incentives and repurchase decisions. As he wrote to the SEC:

> To study whether CEOs benefit from the short-term stock price increase associated with buyback announcements, we explore whether CEOs concentrate their equity sales shortly after repurchases in months in which they have equity vesting. We find that CEOs sell significantly more equity shortly after repurchase announcements than before, consistent with independent analysis by former SEC Commissioner Robert Jackson.[18]

In light of, among other things, the fact that the SEC had not updated its repurchase-related rules in decades, evidence that voluntary disclosures related to

---

[17] Commissioner Robert J. Jackson, Jr., *Stock Buybacks and Corporate Cashouts* (2018).
[18] Ltr. to Vanessa Countryman, *supra* note 16, at 2.

repurchases were inconsistent and inadequate to inform investors about the completion of voluntarily announced repurchases, evidence that repurchase-related signaling could be clarified, and hence more fully priced into shares, and evidence of the possibility of insider opportunism, in 2021 the SEC proposed rules requiring further repurchase-related disclosure (the "Proposal"). The Proposal generated extensive public comment, including from several *amici*.

B. The Chamber's Paper.

Among the Chamber's six comment letters was the Chamber's Paper,[19] claiming that the Proposal was inconsistent with the economic literature and purporting to identify "empirical flaws" in Commissioner Jackson's 2018 study. For two reasons, the SEC correctly gave little weight to these claims.

1. Selective literature review. First, the Chamber's Paper features selective citations that do not accurately portray the state of the academic literature. For example, the Chamber's Paper relies on a "comprehensive study" that is actually a survey of 44 corporate directors. The Chamber's Paper quotes the study

[19] The Chamber's Advocates have before worked with lobbyists to write papers consistent with the lobbyist's preferred regulatory outcome, which are then cited heavily in the lobbyist's comment letters to the SEC. In one, for example, the Chamber's Advocates conducted a literature review and survey to reach the remarkable conclusion, on behalf of the Biotechnology Innovation Organization ("BIO"), that certain securities regulation was causally interfering with the production of scientific research. *Compare* Craig Lewis & Joshua T. White, *Science or Compliance: Will Section 404(b) Compliance Impede Innovation by Emerging Growth Companies in the Biotech Industry?* (2019) *with* Letter from BIO to Vanessa Countryman (July 29, 2019), at 5 n.13 (describing that paper as a "study" and citing the authors' academic appointments but not their funding).

for the proposition that those directors told interviewers that they "are aware" that repurchases may result in opportunism and make "deliberate, informed choices" to address it.[20] While describing this informal survey evidence at length, the Chamber's Paper makes no mention of the many peer-reviewed studies providing evidence to the contrary.[21]

One, published by *amicus* Professor Slava Fos and his coauthors in the *Journal of Financial Economics*, offers evidence "suggest[ing] that managers are willing to trade off investments and employment for stock repurchases that allow them to meet analyst EPS forecasts";[22] another, by *amicus* Professor Alex Edmans in the *Journal of Accounting Research*, concludes that "CEOs sell their own stock shortly after using company money to buy the firm's stock" in a share repurchase.[23] These studies observe insiders' actual decisions across thousands of public companies rather than self-reported corporate directors' claims.

The SEC's decision to rely on extensive peer-reviewed literature rather than informal surveys was more than reasonable. It is the approach that serious scholars

---

[20] Chamber's Paper, *supra* note 8, at 10 (quoting IRRC Institute & Tapestry Networks, *Buybacks and the Board* (August 2016)).

[21] The Chamber's Paper includes an Appendix that includes citations to the scholarly literature referred to here, but only to list "Studies Cited in [the SEC's] Proposal" rather than actually to consider the substantive evidence. *Id.* at 20 at Appx. A.

[22] Almeida, Fos & Kronlund, *supra* note 10; *see also id.* at 178 ("[T]he firms that mention EPS or Earnings Per Share in their proxy statements [disclosing CEO compensation] display a much stronger discontinuous jump in the probability of executing a share repurchase around the zero surprise threshold.").

[23] Edmans, Fang & Huang, *supra* note 11, at 1008.

should want federal regulators to take when considering market interventions.

2. ***Vertical axis manipulation.*** Second, the little original research offered in the Chamber's Paper employs vertical-axis manipulation. Commissioner Jackson invited comment on his 2018 study, making public the data on which Figure 1, *supra*, was based. Using those data, the Chamber's Paper argued that the analysis suffered from "bias" "created by a small number of outlier observations." "[R]emov[ing] 11 observations" they deemed, for unreported reasons, to be outliers, the Chamber's Paper compares a figure drawn from the SEC's work (presented on the left below) with a new figure (on the right below), declaring the difference to be "visually striking":

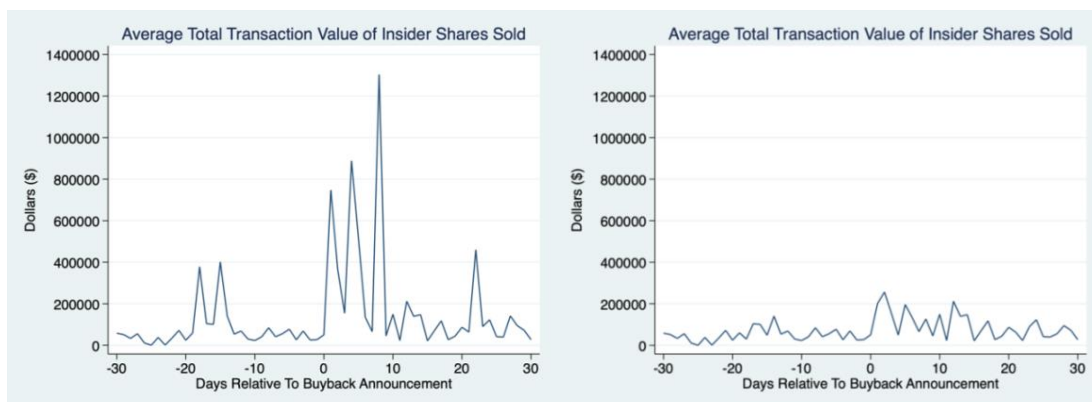

FIGURE 2. FIGURES FROM THE CHAMBER'S PAPER.

Visually comparing these two pictures, the Chamber's Advocates told federal regulators "that one of the key analyses underlying the Proposal" "contains empirical flaws." For two reasons, serious scholars would not make such a claim; the SEC did not weigh this work heavily, and neither should the Court.

First, the visual difference in Figure 2 comes from manipulation of vertical axes.[24] The chart on the left has a vertical axis with a maximum value of $1,400,000, scaled to accommodate all observations; the one on the right retains that axis while removing the largest observations. Figure 3 below shows the same figure, with the same omitted observations, on the left as the Chamber's Paper did and on the right with an appropriate vertical axis:

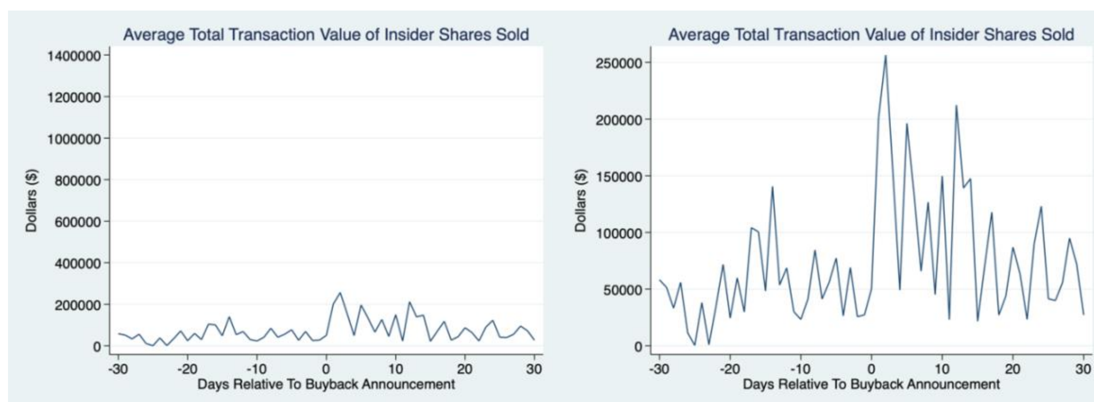

FIGURE 3. FIGURES FROM THE CHAMBER'S PAPER.

As the graph on the right shows, simply rescaling the vertical axis produces a figure making the same point as Commissioner Jackson's: upon a repurchase announcement, there is a jump in insider sales. By leaving the original axis in place but removing data it once accommodated, the Chamber's Paper compares large insider sales to removed, even larger sales, making the former look small.

---

[24] The graph on the left side of Figure 2, which is reproduced here directly from the Chamber's Paper, was not in fact directly drawn from Commissioner Jackson's analysis but rather reproduces a figure in that without smoothing the data over time. The choice not to smooth the data allows the Chamber's Advocates to increase the maximum value on the y-axis from $500,000 to $1,400,000; retaining that maximum axis value produces their manipulated figure.

Manipulation of vertical axes is well-known to produce misleading results. Consider the figures below, describing our Nation's historical debt, with an appropriate vertical axis on the left and a manipulated one on the right:

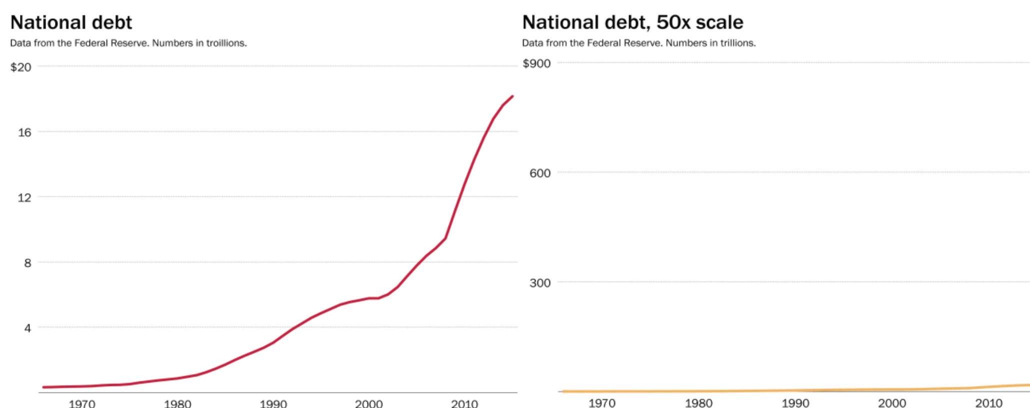

FIGURE 4. HISTORICAL NATIONAL DEBT USING METHODS IN THE CHAMBER'S PAPER.

As Figure 4 shows, the approach in the Chamber's Paper leads one to the incorrect inference that the Nation's debt has not meaningfully increased since 1970.[25] That is why serious scholars and federal rulemaking proceedings do not and should not rely upon the methods used by the Chamber's Advocates.

Second, economists do not assess empirical differences by eyeballing graphs and drawing their preferred conclusions.[26] Instead, we use statistics. There is a

---

[25] Figure 4 is drawn from Philip Bump, *The Fix*, WASHINGTON POST (Dec. 14, 2015). *See* Letter to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n from Dr. Edwin Hu, Professor Robert Jackson & Dr. Jonathon Zytnick (June 27, 2022), 4 n.7.

[26] When one Chamber *amicus* directed the SEC's Division of Economic and Risk Analysis during the Trump Administration, DERA took that approach to adopting deregulation urged by the Chamber's Advocates on behalf of their client, the Biotechnology Innovation Organization ("BIO"), *see supra* note 19; U.S. Sec. & Exch. Comm'n, Final Rule, *Accelerated Filer and Large Accelerated Filer Definitions*, Rel. No. 34-88365 (April 27, 2020), at 96 fig. 6 (identifying a "pattern" in figures rather than conducting the statistical analysis requested by commenters); *compare* Dhammika Dharmapala, *Estimating the Compliance Costs of Securities*

rigorous way to tell whether an analysis is sensitive to claimed outliers: analyzing the outcome statistically while excluding the observations. The reason the Chamber's Paper does not do so is that the evidence shows that, even excluding the Chamber's chosen observations, the statistical results Commissioner Jackson reported are unchanged.[27] In sum, the claims in the Chamber's Paper do not reflect scholarly standards; the SEC correctly gave little weight to its claims, relying on rigorous, peer-reviewed empirical evidence rather than selective citation and data manipulation that would not be taken seriously by financial-markets scholars.[28]

Regulation (working paper 2016), at 23 (declining to rely on "visual evidence" and noting that an appropriate "methodology is based on the formal estimation of a counterfactual density").

[27] Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n from Dr. Edwin Hu, Professor Robert Jackson & Dr. Jonathon Zytnick (June 27, 2022), at 5 fig. 4 (showing that even removing the 11 insider sales selected by the Chamber's Paper, there is still a statistically significant and economically meaningful spike in insider sales at the time of repurchase announcements).

[28] The Chamber's Paper separately speculates that "insider sales [around repurchases] are mechanically driven by issuer blackout periods." Chamber's Paper, *supra* note 8, at 8 n.5 (citing Ingolf Dittman, Amy Yazhu Li, Stefan Obernberger & Jiaqi Zheng, *Equity-Based Compensation and the Timing of Share Repurchases: The Role of the Corporate Calendar* (working paper 2022)). Among this unpublished paper's limitations is that it does not acknowledge, let alone address, empirical analysis coming to the opposite conclusion, see Letter to Hon. Chris van Hollen from Commissioner Robert J. Jackson, Jr. (2019). In any event, as Professor Edmans explained in his letter to the SEC:

> [O]ur analysis explicitly recognizes the existence of blackout windows; indeed, such periods are the motivation for our analysis of the timing of stock sales. If the repurchases occurred during blackout periods, then the CEO would not be able to sell equity shortly afterwards, and we would not find that equity sales are concentrated in a short window after the repurchase announcement. The fact that we do find concentration suggests that the repurchase announcements are timed (either intentionally or unintentionally) on dates when the CEO is able to cash out afterwards . . . .

II. THE SEC CORRECTLY GAVE LESS WEIGHT TO A CORRELATIONAL STUDY PREPARED BY CHAMBER'S AMICUS THAN TO RIGOROUS, CAUSALLY IDENTIFIED WORK COMING TO CONTRARY CONCLUSIONS.

In addition to the analysis proposed by the Chamber's Advocates, the *Amicus* Brief refers to a recently published empirical paper claiming to "refute" "alarming claims" from the "court of public opinion and the halls of Washington DC" related to share repurchases.[29] The SEC correctly gave this paper less weight than the extensive peer-reviewed work coming to contrary conclusions.[30]

The study presents cross-sectional data examining correlations among variables related to corporate characteristics and repurchases. Its findings include the facts that repurchasing firms do not have unusual trading volume, that CEOs of

---

> [In any event, i]t *does not matter* if the equity sales are "mechanical" due to occurring at the end of a blackout period, or "voluntary." If the CEO knows that she will be able to sell equity . . . this may still influence her buyback decision.

Letter from Alex Edmans, *supra* note 16, at 3-4.

[29] Guest et al., *supra* note 9, at 19. Like the Chamber's Advocates, an author of this paper, has before accepted pay from regulated entities to write "papers" that are then cited heavily in the entity's comment letters to the SEC. *Compare* S.P. Kothari, Eric So & Travis Johnson, *Commission Savings and Execution Quality for Retail Trades* (2021), at 1 n.1 (disclosing that the "authors have a financial relationship with Robinhood") *with* Letter to Vanessa Countryman, from Steve Quirck, Chief Brokerage Officer, Robinhood Markets (March 31, 2023), at 10 n.16, 33 n.88 (describing the study as "evidence" that "especially Robinhood's customers" benefit from certain regulatory choices while not disclosing the authors' financial relationship with Robinhood).

[30] Final Rule, 88 Fed. Reg. 36006 n.39 (noting that the Chamber's Advocates "cite Guest [et al., *supra* note 9]" to claim that research "undermines the premise that executives undertake repurchases to boost their compensation," and concluding that, "[t]o the extent that opposing commenters interpret this research to mean that opportunism or self-interest cannot be a significant motivating factor for share repurchases, we disagree with their assessment of the underlying evidence").

firms that conduct repurchases do not receive "excess pay," and that firms that repurchase shares are also profitable. This evidence, *amicus* says, "refutes critics' alarming claims." In light of the causally identified peer-reviewed work to the contrary, we do not think serious scholars would agree with that assessment of this evidence, and we think the SEC appropriately gave it little weight.[31]

The reason is that the peer-reviewed contrary evidence is more convincing. For example, *amicus* Professor Slava Fos has published a causally identified study of the relationship between earnings-per-share targets in compensation arrangements and repurchases. Using the discontinuity present when a repurchase results in firms "just beating" earnings-per-share forecasts, the authors rigorously consider effects of those repurchases. They find:

> The probability of share repurchases that increase earnings per share (EPS) is sharply higher for firms that would have just missed the EPS forecast in the absence of the repurchase, when compared with firms that "just beat" the EPS forecast. We use this discontinuity to show that EPS-motivated repurchases are associated with reductions in employment and investment, and a decrease in cash holdings. Our evidence suggests that managers are willing to trade off investments and employment for stock repurchases that allow them to meet analyst EPS forecasts.[32]

---

[31] In light of the Chamber's reliance on a DERA Report on repurchases produced at the end of the Trump Administration, *see, e.g.*, Pet. 43 (describing the report as a font of a "wealth" of evidence (citing U.S. Sec. & Exch. Comm'n, *Response to Congress: Negative Net Equity Issuance* (Dec. 23, 2020)), we note that the report relegates to footnotes peer-reviewed contrary evidence like that produced by *amicus* Professor Fos, *see id.* at 41 n.101, relying instead on surveys of securities disclosures where corporate directors claim to "consider" earnings when making decisions, *see id.* at 41 tbl.2. As explained above, serious academics should, and do, weigh peer-reviewed study of facts more heavily than the self-interested reporting of corporate directors. *See supra* Part I.

[32] Almeida, Fos & Kronlund, *supra* note 10.

The paper relied upon by *amicus* notes this study only to say that its design is "limited" to "just miss" firms, and "cannot inform on whether this effect would exist for the broader set of firms."[33] That's true, but the "broader set of firms" would have little incentive to change their repurchasing behavior to achieve EPS goals, which is why rigorous study of the research question has focused on firms that *do* have those incentives.[34] The SEC correctly gave more weight to causally identified study of the effect of interest than to a correlational study of observations less relevant to the research question.[35]

Nor does this paper acknowledge recent, high-quality work from *amicus* Slava Fos and his coauthors on the same subject. One such paper, using plant-level Census data, shows that "incentives to engage in 'EPS-motivated buybacks'

---

[33] Guest et al., *supra* note 9, at 26. To give the Court a sense of the proximity between this paper and the Trump Administration's SEC report on this subject, *compare id.* with U.S. Sec. & Exch. Comm'n, *supra* note 37, at 41 n.101 (using nearly identical language).

[34] This is why the accounting literature on earnings management has understood for decades that "progress in [that] literature is more likely to come from application of specific accrual and distribution-based tests than from aggregate accruals tests." Maureen F. McNichols, *Research Design Issues in Earnings Management Studies*, 19 J. ACCT. & PUB. POL'Y 313 (2000).

[35] We note, too, that this paper's assertions extend far beyond the authors' expertise. The Court might, for example, compare the paper's assertion that rulemaking in this area is only "justif[ied]" if any "drawbacks of repurchases [are] widespread and readily observable in public," Guest et al. *supra* note 9, at 26, with the legal test governing review of SEC rulemaking, *Business Roundtable* v. *SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (noting the SEC's "obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation,'" 15 U.S.C. §§ 78(c)(f), rather than requiring an effect to be "widespread").

decrease future productivity both at the plant- and firm-levels."[36] Another "shows that firms become more efficient at innovation activities when they face pressure to meet [EPS] targets using stock repurchases."[37] Both papers use methodologies, such as regression discontinuity, that are accepted among academics as a rigorous means of studying the papers' research questions.

By contrast, the paper relied upon by the *Amicus* Brief uses methods that provide far less compelling evidence on the research questions it claims to study. From an academic perspective, we think it clear that the SEC correctly gave rigorous, causally identified evidence greater weight than *amicus*'s study in determining whether to adopt the Final Rule.[38]

III. THERE HAS BEEN AMPLE TIME FOR STUDY OF THE ECONOMIC QUESTIONS RAISED BY THE FINAL RULE.

The Petition includes an affidavit from one of the Chamber's Advocates stating that, "[h]ad the [SEC] provided more time to comment on the [Proposal], we would have been able to provide more comprehensive analyses and data to help

---

[36] Heitor Almeida, Nuri Ersahin, Vyacheslav Fos, Rustom M. Irani & Mathias Kronlund, *How Do Short-Term Incentives Affect Long-Term Productivity?* (working paper 2022) (revise and resubmit, REV. FIN. STUD.).

[37] Heitor Almeida, Vyacheslav Fos, Po-Hsuan Hsu, Mathias Kronlund & Kevin Tseng, *Innovation Under Pressure* (working paper February 2023).

[38] *Compare* Final Rule, 88 Fed. Reg. at 36006 n.34 (citing Edmans, Fang & Huang, *supra* note 11, and Final Rule, 88 Fed Reg. at 36006 n.33 (citing Almeida, Fos & Kronlund, *supra* 10) *with* Final Rule, 88 Fed. Reg. at 36022 n.286 (responding to the Chamber's Paper by noting that commentators, including *amici*, provided "their own analysis" "refuting" that work).

inform the SEC's consideration."[39] This affidavit states that the SEC's decision to "add[] additional data analysis to the public comment file" for certain other SEC rulemakings . . . is a poor substitute for thorough initial analysis of the proposed rule's economic effects." The Petition argues that the Chamber's Advocates "would have conducted more quantitative analysis that would have helped the agency weigh the [Proposal's] costs and benefits" if the comment period had been longer. For three reasons, the Court should give these claims little weight.

First, the Petition omits that the Chamber's Advocates first articulated their opposition to rules in this area in a paid white paper produced five years ago.[40] That paper raised many of the same claims the Chamber's Advocates later made before the SEC in the Chamber's Paper; the Chamber's Advocates have had ample time to press their case before Congress and the SEC.[41]

Second, the fact that the Chamber's Advocates chose to use the comment periods the SEC provided to produce misleading advocacy rather than serious work deserving close consideration indicates that there is little reason to expect that

[39] Pet. Exh. C at ¶¶ 3-5.

[40] *See* Lewis, *The Economics of Share Repurchase Programs* (described in Congressional testimony as a "white paper commissioned by the Association of Mature American Citizens"). The Chamber's Paper has the same title. See Lewis & White, *supra* note 8.

[41] *Compare* Lewis Testimony, *supra* note 7, at 6 n.12 ("the period immediately following the announcement of a buyback is likely to be a time when an insider has a clear window within which to sell shares") *with* Chamber's Paper, *supra* note 8, at 5 (claiming that "the timing of both buyback programs and insider sales is largely determined by . . . blackout periods" and citing an unpublished working paper, Dittman et al., *supra* note 32, for that proposition).

more time would make a difference. The peer-reviewed academic literature in this area is extensive and detailed; the Chamber's Advocates chose to ignore that literature and invest time manipulating vertical axes, *see supra* Part I, a decision for which neither the SEC nor the investors it serves are responsible.

Third, the Chamber's Advocates' criticism of the SEC's decision to give additional data to researchers and market participants for analysis in connection with rulemakings is consistent with their interest in advocacy rather than study.[42] Empirical scholars interested in understanding markets invite regulators to provide evidence that might shed light on that understanding. Those who have made up their minds declare new evidence inadequate before analyzing it. We think the SEC's choice to provide further evidence for study before proceeding with rulemaking should be welcomed, not criticized in litigation.

As academics, we favor extensive study of contested empirical questions. Here, though, that study has occurred, and the SEC engaged seriously with the evidence it produced. Perhaps a future case will give the Court reason to accept the Chamber's invitation to declare the length of a regulatory comment period "simply

---

[42] Indeed, some evidence offered by the SEC's Division of Economic and Risk Analysis and criticized in the Petition was provided in response to other for-hire critiques made by one the Chamber's Advocates. Pet. Exh. C at ¶ 9 n.1. (declaring a "poor substitute" U.S. Sec. & Exch. Comm'n, Division of Economic and Risk Analysis, *Supplemental Data and Analysis on Certain Economic Effects of Proposed Amendments Regarding the Reporting of Beneficial Ownership* (April 28, 2023)); *see id.* at 9 n.29 (responding to Craig Lewis, *Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting* (April 11, 2022), at 1 n.1 ("This comment letter was commissioned by Elliott Investment Management L.P.")).

not enough," Pet. 66. But this case, where Petitioner used the time the agency provided for unscholarly advocacy rather than serious engagement with longstanding empirical evidence, is not the occasion.

CONCLUSION

The SEC appropriately gave more weight to rigorous, peer-reviewed empirical study of the economic questions raised by the Final Rule than to the Chamber's Paper or the paper relied upon in the Amicus Brief.

August 16, 2023.

Respectfully submitted.

/s/ Julie Goldsmith Reiser
JULIE GOLDSMITH REISER
Counsel of Record
Cohen Milstein Sellers & Toll PLLC
1110 New York Avenue, NW
Washington, D.C. 20005
(202) 408-4600
jreiser@cohenmilstein.com

LAURA H. POSNER
Cohen Milstein Sellers & Toll PLLC
88 Pine Street, Fourteenth Floor
New York, New York 10005
(212) 838-7797
lposner@cohenmilstein.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on August 16, 2023, I served a copy of the foregoing on all counsel of record by CM/ECF.

/s/ Julie Goldsmith Reiser
Julie Goldsmith Reiser

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) & (7)(B), and Fifth Circuit Rules 32.1 & 32.2. Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the brief contains 5,996 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: August 16, 2023.

/s/ Julie Goldsmith Reiser
Julie Goldsmith Reiser