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October 4, 2023

Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: *Chamber of Commerce of U.S. v. SEC*, No. 23-60255

Dear Mr. Cayce:

Pursuant to Fed. R. App. P. 28(j), I write on behalf of Petitioners to notify the Court that last week, the Supreme Court granted review of *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022). Notably, the Supreme Court will address the constitutionality of the individualized-explanation requirement in a Texas law that the SEC analogizes to the Buyback Rule. *NetChoice, LLC v. Paxton*, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023); see U.S. Br. at i (U.S. Aug. 2023), 2023 WL 5280330; SEC. Br. 3, 18-20, 24.

Petitioners maintain that this Court's holding in *NetChoice* does not foreclose their First Amendment challenge to the Rule. But if the Court wishes, it can reserve the constitutional question in light of the Supreme Court's grant in *NetChoice* and vacate the Rule based on one or more of the Administrative Procedure Act ("APA") grounds advanced by Petitioners. Given the impending irreparable injury threatened by the Rule, Petitioners respectfully request that the Court do so as soon as possible. Dkt. 72.

Alternatively, if this Court does not rule in Petitioners' favor on their APA claims, it could hold this case in abeyance pending the Supreme Court's decision in *NetChoice* in order to avoid the possibility of

Lyle W. Case, Clerk of Court
October 4, 2023
Page 2

issuing a judgment that might be vacated and remanded in light of that decision. *See, e.g., United States v. Davila*, 738 F. App'x 257, 258 (5th Cir. 2018); *Villatoro-Avila v. Holder*, 622 F. App'x 451, 452 (5th Cir. 2015). If this Court holds this case in abeyance, however, it should prevent irreparable harm in the interim, *see* Dkt. 72 at 4-6, by staying the effect of the Buyback Rule “*sua sponte*,” *NAM v. SEC*, 748 F.3d 359, 376 (D.C. Cir. 2014) (Srinivasan, J., concurring in the judgment in part and dissenting in part). At a minimum, this Court “could invite submissions from the parties on the desirability of a stay or order the SEC to show cause why one should not be granted.” *Id.*

Respectfully submitted,

/s/ Noel J. Francisco
Noel J. Francisco
Counsel for Petitioners

cc: Counsel of Record via CM/ECF

Lyle W. Case, Clerk of Court
October 4, 2023
Page 3

CERTIFICATION

I hereby certify that the body of this Letter pursuant to Fed. R. App. P. 28(j), beginning with the first word after the salutation and ending with the last word before the complimentary close, contains 328 words according to the word-processing software used to prepare this Letter. I also certify that on October 2, 2023, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: October 4, 2023

/s/ Noel J. Francisco
Noel J. Francisco

Attachment

2023 WL 6319650

September 29, 2023

2023 WL 6319650

Only the Westlaw citation is currently available.
Supreme Court of the United States.

NETCHOICE, LLC, ET AL.

v.

PAXTON, ATT'Y GEN. OF TX

22-555

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Opinion

The petition for writ of certiorari is granted limited to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as *amicus curiae*.

All Citations

--- S.Ct. ----, 2023 WL 6319650 (Mem)

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