No. 22-859

IN THE

# Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

*Petitioner,*

v.

GEORGE R. JARKESY, JR., AND PATRIOT28, L.L.C.

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF OF PHILLIP GOLDSTEIN, NELSON OBUS, MARK CUBAN, ELON MUSK, MANOUCH MOSHAYEDI, AND INVESTOR CHOICE ADVOCATES NETWORK AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

NICOLAS MORGAN
JOSEPH N. MONTOYA
PAUL HASTINGS LLP
515 S. Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071
(213) 683-6181
nicolasmorgan@paulhastings.com

*Attorneys for Amici Phillip Goldstein, Nelson Obus, Mark Cuban, Manouch Moshayedi, and Investor Choice Advocates Network*

(Additional counsel listed on inside cover)

ALEX SPIRO
DEREK L. SHAFFER
WILLIAM A. BURCK
QUINN EMANUEL URQUHART &
SULLIVAN LLP
51 Madison Avenue
Twenty-Second Floor
New York, NY 10010
(212) 849-7000
alexspiro@quinnemanuel.com

*Attorneys for Amicus*
*Elon Musk*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

CASES

**CONSTITUTIONAL POVISIONS**



**STATUTES REGULATIONS AND RULES**



**OTHER AUTHORITIES**

## IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are Phillip Goldstein, Nelson Obus, Mark Cuban, Elon Musk, Manouch Moshayedi, and Investor Choice Advocates Network ("ICAN"). Each of the individual amici is a sophisticated businessperson and investor who has publicly litigated against the United States Securities and Exchange Commission ("SEC"). ICAN is a nonprofit, public interest law firm working to expand access to markets by underrepresented investors and entrepreneurs. Amici have an interest in the outcome of this case because they believe it is important that the SEC not be permitted to pick and choose whether parties are granted their constitutional right to jury trials or are forced to proceed in enforcement proceedings with administrative law judges ("ALJs") immune from proper and meaningful oversight. Unlike defendants in federal court proceedings, respondents in SEC administrative proceedings are not afforded the right to a jury trial or the benefits and protections of the federal rules of evidence and procedure. Instead, when the SEC elects to use an administrative proceeding, whether before an ALJ or the Commissioners of the SEC, the SEC itself is the sole fact finder and determines a respondent's liability and punishment without the involvement of a jury. Such proceedings contravene the protections guaranteed to litigants by the United States

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Constitution, lead to unequal and unjust results, weaken faith in public institutions such as the SEC, and deprive the public and the market of the type of critical information the SEC claims in other contexts must be disclosed.

## SUMMARY OF THE ARGUMENT

The SEC's use of unconstitutionally insulated ALJs, exercise of legislative power in choosing the forum for its litigation without any guiding principles, and refusal to allow SEC enforcement defendants the opportunity to litigate before a jury raise serious concerns in SEC administrative proceedings.[2] Beyond the inherent harm in permitting these constitutional violations, the SEC's use of administrative proceedings—as they are currently structured—results in unequal results for SEC defendants, an erosion of trust in public institutions, and a limitation on the availability of valuable information for the market. In the statutes and regulations the SEC is responsible for enforcing (as well as through its own actions, public statements, and admissions), the SEC demands full transparency and disclosure for the benefit of participants in securities markets. Yet it uses administrative proceedings, without the rigor and deliberation resulting from a jury trial, to litigate against defendants when the SEC could more efficiently and openly litigate in federal court. Accordingly, *amici* join with Respondents and urge this Court to endorse the Fifth Circuit's reasoning to ensure that the SEC is

[2] Respondents address these issues in detail, and so amici will not address each of the questions before the Court.

required to appropriately litigate in all circuits, not just the Fifth Circuit.

## ARGUMENT

### I. The SEC Has Agreed (And Often Insists) Jury Trials Are Appropriate For Claims Like Those Against Respondents

When it suits the SEC, the agency agrees (and sometimes insists) that a jury trial is necessary for the determination of liability—including in enforcement actions like those against Respondents. The Seventh Amendment guarantees all defendants the right to a jury trial on the merits in those actions that "are analogous to '[s]uits at common law[,]'" like civil enforcement actions. *Tull v. United States*, 481 U.S. 412, 417 (1987). And the right to a jury determination of liability for civil penalties has been applied to SEC enforcement actions by several Circuit Courts *often at the SEC's insistence*.[3] Yet the SEC now argues that the Fifth Circuit was incorrect in holding that the SEC's administrative proceedings violate the Seventh Amendment. The SEC's prior positions in other cases—including in the Fifth Circuit—belie this claim.

Particularly instructive here is *SEC v. Seghers*,

---

[3] *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017) (accepting the SEC's position that defendant was entitled to a jury determination of liability for aiding and abetting Securities Exchange Act of 1934 ("Exchange Act") section 13(a) violation); *SEC v. Cap. Sols. Monthly Income Fund, LP*, 818 F.3d 346, 354-55 (8th Cir. 2016) (recognizing defendant's right to a jury trial on liability in SEC enforcement action); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (holding defendant was entitled to jury determination of liability).

298 F. App'x 319 (5th Cir. 2008). The SEC originally filed suit against Mr. Seghers in the United States District Court for the Northern District of Texas alleging, among other things, violations of the antifraud provisions of the Investment Advisers Act of 1940 ("Advisers Act"). Compl., *SEC v. Seghers*, No. 3:04-CV-1320-K (N.D. Tex. June 16, 2004), ECF No. 1. A jury found Mr. Seghers liable for fraud because he knowingly caused three hedge funds that he founded to overstate the value of investors' interests in those funds. *Seghers,* 298 F. App'x at 323. After the jury found Mr. Seghers liable, the court ordered him to disgorge fees, imposed a civil monetary penalty against Mr. Seghers, and enjoined him from committing further securities law violations. *Id.* Mr. Seghers and the SEC appealed aspects of the results in District Court, including the jury's findings and the Court's rulings on disgorgement. *Id.* at 324.

On appeal, the Fifth Circuit found that the SEC had presented sufficient evidence for the jury to find Mr. Seghers liable, and no one—not the SEC, Mr. Seghers, or the Fifth Circuit—suggested that the jury was incapable of determining liability, that a jury would be incompatible with the required fact-finding function, or that an SEC administrative law judge would have brought some required level of expertise to bear on such a finding. *Seghers*, 298 F. App'x at 330-36. Indeed, based at least in part on the SEC's own arguments, the Fifth Circuit previously determined that those charged with violating the federal securities laws have a constitutional right to a jury trial on the issue of liability. *Life Partners Holdings*, 854 F.3d at 781-82.

Yet here, the SEC accused Respondents of the

same conduct alleged in *Seghers*—violating the antifraud provisions of the Advisers Act in connection with fund valuation representations—but elected to bring the case in the SEC's own administrative proceeding before one of the SEC's own ALJs. In so doing, the SEC denied Respondents the very same constitutional protection of a right to a jury determination of liability that the SEC conceded was owed to the defendants in *Seghers* and *Life Partners Holdings*. *See Life Partners Holdings*, 854 F.3d at 781. Indeed, if the SEC has its way, Respondents and others similarly situated would never be able to argue their case in front of a panel of their peers. *John Thomas Cap. Mgmt. Grp.*, Initial Decision Release No. 693, 2014 WL 5304908, at *6 (ALJ Oct. 17, 2014) (finding that assigning the fact-finding and initial adjudication to a jury would be "incompatible" with administrative process) (citation omitted). This is not a just—or constitutional—result.

## II. The SEC's Forum Shopping Leads to Unconstitutionally Unequal Protection

Under the scheme the SEC would have this Court bless, the prosecutor in civil enforcement actions—in this case, the SEC—would have complete discretion to choose to prosecute two identical defendants in such disparate ways that one defendant would receive constitutional protections (including the right to a jury trial) and the protections of the federal rules of evidence and procedure,[4] and the other would not.

[4] For instance, as noted by Respondents, SEC administrative proceedings may allow for evidence not permitted before Article III Courts, including hearsay. Brief for the Respondents at 5. Likewise, defendants in SEC administrative proceedings face severe restrictions in their ability to conduct discovery and

Such unfettered discretion will result in disfavored forum shopping and unequal application of the law.

Courts have long voiced concerns over both private litigants' and the government's use of impermissible forum shopping. *See, e.g.*, *Commodity Futures Trading Comm'n v. First Nat'l Monetary Corp.*, 565 F. Supp. 30, 33 (N.D. Ill. 1983) (noting that the government should be held to the same standard as private litigants and should not be allowed to choose a forum based merely on its convenience). While it is not necessarily impermissible for a party to seek a forum it believes may be more sympathetic to its case, when a government agency unilaterally selects a forum that deprives—with no rational basis—a defendant of constitutional protections afforded to other similarly situated defendants, such disparate outcomes are not permissible under the Equal Protection Clause of the Constitution. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513-14 (S.D.N.Y. 2011) (denying SEC's motion to dismiss Equal Protection challenge to SEC administrative

---

defend themselves, including in their inability to serve requests for admission or interrogatories against the SEC, or their limitation to conduct a maximum of five depositions (and only after SEC Commission approval). *Compare* 17 C.F.R. 201.233 (limiting SEC administrative proceeding respondents to three depositions as a matter of right and two additional depositions after approval), *with* Fed. R. Civ. P. 30 (permitting ten depositions for each party by right without stipulation between parties or leave of court). The SEC should not have unlimited discretion to determine when two defendants, facing identical charges, are permitted the tools to obtain relevant evidence in defending themselves.

proceeding).[5]

In *Gupta*, the SEC brought an administrative proceeding against one individual despite having filed federal court actions against other individuals and entities based on related allegations. In denying the SEC's motion to dismiss Mr. Gupta's complaint challenging the administrative proceedings on Equal Protection grounds, the court observed, "[a] funny thing happened on the way to this forum. On March 1, 2011, the Securities and Exchange Commission . . . decided it preferred its home turf." *Gupta*, 796 F. Supp. 2d at 506. The court further noted that the complaint "alleges that the SEC intentionally, irrationally, and illegally singled Gupta out for unequal treatment" and that "[t]hese allegations . . . would state a claim even if Gupta were entirely guilty of the charges made against him . . . [and] even if the SEC were acting within its discretion when it imposed disparate treatment on Gupta, that would not necessarily exculpate it from a claim of unequal protection if the unequal treatment was still arbitrary and irrational." *Id.* at 513 (citing *Olech*, 528 U.S. 564–66).

The court denied the SEC's motion to dismiss Mr. Gupta's Equal Protection claim, finding that "the selective prosecution/equal protection claim will turn

---

[5] While the Supreme Court has noted that discretionary decisions by agencies regarding similarly situated individuals do not inherently violate the Equal Protection Clause, *see Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601-02 (2008), where, as here, there is "no rational basis for the difference in treatment," such decisions violate the Equal Protection Clause. *See Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000).

entirely on extrinsic evidence of whether the SEC's decision to treat Gupta differently from the other Galleon-related defendants was irrational, arbitrary, and discriminatory." *Gupta*, 796 F. Supp. 2d at 514. The SEC would have to overcome the fact that Gupta was "being treated substantially disparately from 28 essentially identical defendants, with not even a hint from the SEC, even in their instant papers, as to why this should be so." *Id.*

As was the situation in *Gupta*, so it is here. There is no principled reason for the SEC to deny Respondents a jury trial when Mr. Seghers received one when facing similar claims. Forum shopping by itself may not be impermissible. But forum shopping by the federal government to pursue the same claims and penalties against similarly situated individuals, so that one individual has access to a jury and the other does not, violates the Equal Protection Clause of the Constitution.

## III. The SEC's Forum Shopping Undermines Its Credibility and Public Trust

The unequal application of constitutional principles made possible by the SEC's unfettered forum shopping discretion erodes faith in public institutions at a time of new lows in confidence in these institutions.[6] The SEC's conduct undermines the appearance of fairness that any prosecutor, including the Commission, should strive for in

---

[6] *See, e.g.*, Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP NEWS (July 5, 2022), https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx.

litigating its cases. Such conduct is against public policy.

As it stands, the SEC can unilaterally decide both the forum for its litigation *and* the rules of evidence and procedure governing this litigation. And as implicitly acknowledged by the SEC, no rules or guidelines govern its choice on whether to proceed before its own ALJs or an appointed federal judge. Rather, the SEC is free to pick and choose the judicial forum and arbiter based on what it views as an exercise of prosecutorial discretion. *See* Brief for Petitioner at 14-15, 34-35 (SEC not contesting that Congress provided no guidance on choosing litigation in either administrative proceedings or federal court, but instead arguing the SEC's ability to choose is similar to prosecutorial discretion and is not a legislative power). Without appropriate restrictions or guidance on this "discretion," the SEC's funneling of select cases to its own administrative proceedings and away from federal courts creates the perception of selective prosecution and deck-stacking that undermines faith in public institutions.[7]

---

[7] *See, e.g.*, *United States v. Pearson*, 302 F.3d 1243, 1264 (10th Cir. 2000) ("[A] system that allows prosecutorial judge-shopping arguably lacks 'the appearance of impartiality that is required to obtain the confidence of the public and the accused in the system.'"); *Boehmer v. Essex (In re Boehmer)*, 240 B.R. 837, 842 (Bankr. E.D. Pa. 1999) (noting that contrary decisions led to potential for forum shopping that threatened to "erode already shaky public confidence in the consumer bankruptcy system"); *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 811 (1987) (noting that appointment of interested prosecutor "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general."); *Antoniu v. SEC*, 877 F.2d 721, 722-26 (8th Cir. 1989) (nullifying SEC

The SEC did not always steer its difficult cases away from federal court juries and toward its administrative proceedings. Indeed, in 2010, when the Dodd-Frank Wall Street Reform and Consumer Protection Act enabled the SEC to seek a broader range of penalties in administrative proceedings, the SEC did not immediately run away from federal court. However, in late 2013 and early 2014, the SEC suffered a series of jury trial losses in insider trading cases. These SEC losses included jury trials involving amici (and others): on October 16, 2013, a federal court jury exonerated amicus Mark Cuban; on May 30, 2014, a different federal court jury exonerated amicus Nelson Obus; and on June 6, 2014, a third federal jury returned a verdict in favor of amicus Manouch Moshayedi.[8]

After these federal court juries returned verdicts unfavorable to the SEC, it was broadly reported the SEC "expects to start filing some insider-trading cases in an in-house court rather than federal court." Lynch, *supra* note 8. The widely perceived and reported motivation for the move away from juries—the SEC's inability to prevail in such settings—drew a denial from the SEC's Director of Enforcement. But his denial revealed a different and more troubling motivation: the massive leverage created by the

---

administrative proceeding and remanding because SEC Commissioner had prejudged matter and petitioner's guilt, which did not "comport[] with the appearance of justice.").

[8] Sarah N. Lynch, *SEC to file some insider-trading cases in its in-house court*, REUTERS (June 11, 2014, 1:17 PM), https://www.reuters.com/article/us-sec-insidertrading/sec-to-file-some-insider-trading-cases-in-its-in-house-court-idUSKBN0EM2DI20140611.

threat of litigating in administrative proceedings. Specifically, the Enforcement Director said the shift away from federal court was:

> not a reaction to recent losses . . . [b]ut he conceded that even the threat of bringing cases in-house has had an impact. "There have been a number of cases in recent months where we had threatened administrative proceeding . . . and they settled," he said, referring to defendants.

Lynch, *supra* note 8. Regardless of the SEC's motivation for moving away from federal court, the public perception remains that the administrative process is unfair and biased compared to results in federal jury trials.[9] The SEC's high victory percentage for administrative action appeals—decided by its own commissioners—only compounds this perception.[10] Indeed, as noted by Respondents, the SEC's appellate decisions are afforded substantial deference by law for any future appeals, thus adding

---

[9] *See, e.g.*, Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803; Tyler L. Spunaugle, *The SEC's Increased Use of Administrative Proceedings: Increased Efficiency or Unconstitutional Expansion of Agency Power?*, 34 REV. BANKING & FIN. L. 406 (Spring 2015); Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, LAW360 (June 11, 2014, 6:53 PM EDT), https://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-in-house.

[10] Eaglesham, *supra* note 9 (noting that SEC commissioners had decided 53 out of 56 appeals in the SEC's favor from January 2010 to March 2015).

an additional deterrent to litigating against the SEC before its own ALJs. Brief for the Respondents at 6; *see also Katz v. SEC*, 647 F.3d 1156, 1161 (D.C. Cir. 2011) (noting that standard of review for SEC decisions is deferential, that Commission's finding of facts, if supported by substantial evidence, are conclusive, and that Commission's other conclusions are only set aside if arbitrary, capricious, constitute abuses of discretion, or are otherwise not in accordance with the law). Compound this perception of unfairness with the high costs and lengthy timelines in litigating against the SEC and parties face extraordinary deterrence from ever challenging the SEC in its home court.[11] With these factors in mind, the SEC's unfettered discretion to select a forum that denies its opponents the right to a jury undermines the SEC's credibility and the public's trust in the SEC.

A more recent revelation by the SEC further demonstrates how the SEC's use of its administrative proceedings undermines its credibility. The SEC recently admitted that its enforcement personnel had improper access to privileged memoranda meant to be accessible to the Commissioners but inaccessible to

---

[11] *See, e.g.*, CTR. FOR CAP. MKTS., EXAMINING U.S. SEC ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES & PRACTICES, 39-40 (July 2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf (noting that average cost in 2014-2015 of surveyed companies for legal counsel in informal SEC investigation was $127,098 and $3,358,750 in formal investigations, with 20% of surveyed companies reporting total costs in formal investigations of $10-20 million).

enforcement staff in administrative proceedings. As a result of this "control deficiency" the SEC dismissed 42 enforcement matters.[12] The SEC conceded that the control deficiency was a direct result of the fact that "the law assigns the Commission both investigatory and adjudicatory responsibilities."[13] In other words, such a "deficiency" was only possible because the prosecutor and judge sit under the same roof at the SEC, a literal manifestation of a separation of powers failure. Whether intentional or merely negligent, the SEC's "control deficiency" and the circumstances that permitted it to happen contribute to the public perception that the SEC has unfair advantages when litigating in its home court.

This perception of unfair advantage runs contrary to the SEC's stated assurance to pursue "fairness" in pursuit of its "mission of protecting

---

[12] SEC, *Commission Statement Relating to Certain Administrative Adjudications* (April 5, 2022) [hereinafter *Commission Statement*], https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications; SEC, *Second Commission Statement Relating to Certain Administrative Adjudications* (June 2, 2023), https://www.sec.gov/news/statement/second-commission-statement-relating-certain-administrative-adjudications; Pete Schroeder, *US SEC to dismiss 42 enforcement cases after internal data mishap*, REUTERS (June 2, 2023, 12:12 PM EDT), https://www.reuters.com/world/us/us-sec-dismiss-roughly-40-enforcement-cases-after-internal-data-mishap-2023-06-02/; *see also* Publius, *Opinion: How the SEC's Internal Failures Undermine Investor Trust*, THE DI WIRE (Sept. 22, 2023), https://thediwire.com/opinion-how-the-secs-internal-failures-undermine-investor-trust.

[13] Commission Statement, *supra* note 12.

investors."[14] To retain the investing public's trust and to maintain its own credibility, the SEC should employ fair procedures. Unfettered discretion to select a tribunal that deprives defendants of the constitutional right to a jury and fails to separate the executive and adjudicatory functions is unfair, undermines the public's trust in the SEC, and is against public policy.

## IV. The SEC's Use of Administrative Proceedings Conceals Information from the Market

The SEC plays an important role in the "marketplace of ideas," and holds itself out as striving "to promote a market environment that is . . . characterized by transparency[.]"[15] In pursuit of transparency, the SEC regularly insists that market participants provide "full disclosure" and not remain silent when to do so would "make the statements made, in light of the circumstances under which they were made, not misleading[.]" *Lorenzo v. SEC*, 139 S. Ct. 1094, 1103, 1105 (2019).

In a recent speech, SEC Chair Gary Gensler tied the need for transparency to "lowering costs of intermediation for those who use capital – issuers – and those who own capital – investors. . . . If we can use our authorities to bring greater transparency and competition into that market, that helps . . . issuers

---

[14] SEC Mission Statement, https://www.sec.gov/about/mission (modified Aug. 29, 2023) (last visited Oct. 17, 2023).

[15] SEC, AGENCY & MISSION INFORMATION 9 (2014), https://www.sec.gov/about/reports/sec-fy2014-agency-mission-information.pdf.

and investors."[16] Likewise, roughly a decade ago, former SEC Chair Mary Jo White lauded the value of trials, which "[s]imply put, [] put our system of justice – the best in the world – on display for all to see."[17]

"Full disclosure" from market participants includes information derived from and about litigation, which the SEC views as an important source of information for investors. *See, e.g.*, *SEC v. Yuen*, No. CV 03-4376MRP (PLAX), 2006 WL 1390828 (C.D. Cal. Mar. 16, 2006) (charging public company CEO with securities fraud for failure to sufficiently disclose details of litigation). The SEC regularly brings enforcement actions against individuals and companies based, at least in part, on their failure to provide the investing public with sufficient information about their litigation.[18] The SEC does this because litigation can create important information for the markets.

---

[16] Gary Gensler, Chairperson, SEC, Prepared Remarks Before the Exchequer Club of Washington, D.C., *Dynamic Regulation for a Dynamic Society* (Jan. 19, 2022), https://www.sec.gov/news/speech/gensler-dynamic-regulation-20220119.

[17] Mary Jo White, Chairperson, SEC, 5th Annual Judge Thomas A. Flannery Lecture, Washington, D.C., *The Importance of Trials to the Law & Public Accountability* (Nov. 14, 2013), https://www.sec.gov/news/speech/2013-spch111413mjw.

[18] *See, e.g.*, *SEC v. RPM Int'l, Inc.*, 282 F. Supp. 3d 1, 28 (D.D.C. 2017) (failing to disclose submission of settlement offer); *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1303 (M.D. Fla. 2007) (failing to disclose litigation history); *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 73 (D.C. Cir. 1980) (failing to provide sufficient detail regarding litigation).

However, the SEC's requirement of transparency and full disclosure for the benefit of market participants and its appreciation of trials has at least one glaring exception highlighted by this case. When it suits the SEC, it denies parties—and the investing public—the unique scrutiny only available in open proceedings in federal court and, in particular, in jury trials.[19]

Yet juries, acting as fact-finders, are one aspect of litigation widely recognized as particularly important as a source of information. As this Court has noted, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (citation omitted).

Juries act as fact-finders in ways that judges (and certainly administrative law judges employed by the SEC) cannot. As one commenter noted in relation to SEC actions in particular, "The jury's voice is significant because neither a court, a lawyer, nor a legislator can engage in the dialogue or discourse of

---

[19] Although jury trials are a central issue in this matter, the information needed for "transparency" for investors is of course broader than that found only in jury trials. For instance, federal courts allow for public comment and discourse on issues affecting investors through *amici* briefs.[20] Erica Clements, *The Seventh Amendment Right to Jury Trial in Civil Penalties Actions: A Post-Tull Examination of the Insider Trading Sanctions Act of 1984*, 43 U. MIAMI L. REV. 361, 365 (1988) (citing Green, *Juries and Justice – The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152, 157).

adjudication without responding to the pointed and potent arguments that the jury's decision projects. Only when it understands that the jury's dialogue is central to the question of adjudication can society begin to construct a regulatory vision that is no longer myopic."[20] Jury verdicts communicate information to the public and "exert a regulating influence in the legal system by disseminating information[.]"[21] The loss of jury trials reduces the space for effective speech and eliminates "an important vehicle for citizen self-governance."[22]

In essence, the SEC insists on shielding some (but not all) of its enforcement proceedings from exposure to members of the public who serve on juries. To be sure, depriving respondents of access to juries violates respondents' rights. However, by shielding its enforcement actions from the scrutiny of juries, the SEC also prevents the investing public from learning important information that would never come to light in an administrative proceeding. The SEC's insistence on administrative proceedings when federal court juries are readily available runs contrary

---

[20] Erica Clements, *The Seventh Amendment Right to Jury Trial in Civil Penalties Actions: A Post-Tull Examination of the Insider Trading Sanctions Act of 1984*, 43 U. MIAMI L. REV. 361, 365 (1988) (citing Green, *Juries and Justice – The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152, 157).

[21] Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 163 (2009).

[22] Robert P. Burns, *What Will We Lose if the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575, 588-89 (2011).

to the SEC's mission and harms the very investors and markets the SEC is charged with protecting.

## CONCLUSION

Amici urge the Court to affirm the Fifth Circuit's decision but reverse its order of remand to the Commission.

October 18, 2023

Respectfully Submitted,

NICOLAS MORGAN
JOSEPH N. MONTOYA
PAUL HASTINGS LLP
515 S. Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071
(213) 683-6181
nicolasmorgan@paulhastings.com

*Attorneys for Amici Mark Cuban, Phillip Goldstein, Nelson Obus, Manouch Moshayedi, and Investor Choice Advocates Network*

ALEX SPIRO
DEREK L. SHAFFER
WILLIAM A. BURCK
QUINN EMANUEL URQUHART & & SULLIVAN LLP
51 Madison Avenue
Twenty-Second Floor
New York, NY 10010

(212) 849-7000
alexspiro@quinnemanuel.com
*Attorneys for Amici Elon Musk*