UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK (BROOKLYN)

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **LG CAPITAL FUNDING, LLC, and JOSEPH I. LERMAN,** **Defendants,** **and** **DANIEL GELLMAN, BORUCH GREENBERG, and ELI SAFDIEH,** **Relief Defendants.**	**Case No.: 1:22-cv-03353-WFK-JRC**

MOTION AND MEMORANDUM OF LAW IN SUPPORT OF LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Pursuant to the Court's broad discretion to accept amicus briefs, the Alternative Investment Management Association, Ltd. ("AIMA"), Trading and Markets Project, Inc. ("TMP"), and National Association of Private Fund Managers ("NAPFM") (collectively, "Amici") respectfully seek leave to file the accompanying proposed brief as amici curiae in support of Defendants' motion to dismiss. Defendants consent to Amici filing their proposed brief; Plaintiff the United States Securities and Exchange Commission ("SEC") opposes this motion.

In support of the motion, Amici state as follows:

1. Amici are three trade organizations affiliated with the finance industry and securities markets that have a keen interest in securities regulation and the interpretation of the securities laws.

- AIMA is the global representative of the alternative investment industry. AIMA's members manage over $2 trillion in hedge fund assets and include some of the world's largest, most sophisticated investors.

- TMP is a non-partisan non-profit organization dedicated to enhancing capital markets and ensuring the stability and competitiveness of the financial system. TMP advocates on behalf of entities and individuals focused on securities regulation and the securities markets—including private fund managers, registered investment advisers, investment companies, and others. TMP members include, among others, financial market participants, and former officials from the SEC and the legislative, executive, and judicial branches of government.

- NAPFM represents the legal and economic interests of investment advisers in the private fund management industry, which serve a diverse set of investors including pensions, endowments, and insurers.

2. Amici and their members have a strong interest in how courts and the SEC define the meaning of the term "dealer" under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(5). In a growing number of cases, including this one, the SEC appears to be arguing for the first time for a much broader definition of the term "dealer" than courts have traditionally recognized. The SEC has even argued that *any* person that buys and sells securities as a business is a "dealer," regardless of whether they satisfy the statutory definition as it has historically been understood and applied. *See* Dkt. 28 at 1, 6-7, 9-11. Many of the members of Amici—including investment advisers and managers of private funds and other investment vehicles—have long understood that they are not "dealers" under the Exchange Act based on the language of the statute, the underlying history and context of the Exchange Act, and years of guidance from the SEC. But that understanding is called into question by cases like this one. If the SEC's new view becomes the law, it could cause major consequences and hardship beyond this case—including for capital markets and market participants, such as investment advisers, public and private funds, insurers, family offices, foundations, retirees, individual investors, and others.

3. This Court has "broad discretion" to accept amicus briefs. *See Andersen v. Leavitt*, 2007 WL 2343672, at *2 (E.D.N.Y. Aug. 13, 2007); *C & A Carbone, Inc. v. Cnty. of Rockland*, 2014 WL 1202699, at *3 (S.D.N.Y. Mar. 24, 2014) ("Resolution of a motion for leave to file an *amicus* brief thus lies in the 'firm discretion' of the district court."). Courts routinely permit the filing of amicus briefs in cases where the perspective of amici may be of assistance in understanding the significance of the material issues and provide useful context as the Court considers a particular case. *See Andersen*, 2007 WL 2343672, at *2 ("The primary reason to allow *amicus curiae* briefing is that the *amicus curiae* 'offer insights not available from the parties,' thereby aiding the Court."); *Automobile Club of N.Y. Inc v. Port Authority of N.Y. and N.J.*, 2011 WL 5865296, at *2 (S.D.N.Y. Nov. 22, 2011) ("An *amicus* brief should normally be allowed when … the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.").

4. A district court in the Southern District of New York recently granted a motion by Amici to file a brief in support of a fully briefed motion to dismiss claims asserted by the SEC that are similar to the claims asserted here. *See* Order granting motion for leave to file amicus brief, *SEC v. Morningview Financial, LLC*, No. 22-cv-8142 (S.D.N.Y. July 5, 2023), ECF No. 32.[1]

5. This Court should similarly exercise its discretion to permit Amici to file their proposed brief. Amici have good cause for filing their proposed brief now because they only recently became aware of the status of this case and its relevance to the SEC's broader efforts

[1] In other contexts, appellate courts have likewise found good cause to grant motions by putative amici to file a brief more than 7 days after the filing of the principal brief of the party being supported. *See Cal. Restaurant Ass'n v. City of Berkeley*, No. 21-16728 (9th Cir. Mar. 31, 2022), ECF No. 64 (granting trade association's out-of-time amicus motion); *In re Coinbase Inc.*, No. 23-1779 (3d Cir. May 11, 2023), ECF No. 20 (granting trade association's out-of-time amicus motion).

regarding revising the definition of "dealer." Allowing Amici to file their proposed brief now will not delay the Court's consideration of this case—oral argument on the motion to dismiss has not yet been scheduled and the SEC recently submitted a notice of supplemental authority in support of its position. *See* Dkt. 35.

6. Counsel for the SEC has not articulated any reason why the SEC would be prejudiced by permitting Amici to provide the Court with their considered and unique perspective on the issues in this case. Indeed, other counsel for the SEC litigating similar cases pending elsewhere have not opposed requests by Amici to file a brief expressing their views on a fully briefed motion to dismiss or a fully briefed appeal.[2]

7. On the substance, Amici believe their proposed brief will be helpful to the Court by providing a "unique perspective that may help the Court in its determination of the issues presented by this case," *Andersen*, 2007 WL 2343672 at *6, without being unduly duplicative of arguments advanced by the parties. Specifically, Amici will argue that registered investment advisers and funds operate and are regulated differently from dealers; that statutory text, history, and context show that to be a dealer under the Exchange Act an entity must effectuate orders for customers as "part of a regular business," 15 U.S.C. § 78c(a)(5)(B), rather than merely trade for investment purposes; and that the Court should be guided by the SEC's own factors and guidance about what constitutes dealing. Amici's proposed brief thus offers "insights into the market" at issue, explains how the SEC's new interpretation of the Exchange Act "differs from" its prior

[2] *See* Unopposed Letter Mot. for Leave to File Brief as Amici Curiae, *SEC v. Morningview Fin.*, No. 22-cv-08142 (S.D.N.Y. June 30, 2023), ECF No. 29; Unopposed Mot. of TMP for Leave to File Amicus Curiae Brief Supporting Defendants-Appellants and Reversal, *SEC v. Almagarby*, No. 21-13755 (11th Cir. July 13, 2023), ECF No. 60-1; *see also* Brief of AIMA as Amicus Curiae Supporting Defendant-Appellant and Reversal at 1 n.1, *SEC v. Keener*, No. 22-14237 (11th Cir. June 7, 2023), ECF No. 36 (noting SEC consent to the filing of the amicus brief).

views and disregards historical context, and "helps ensure that there has been 'a complete and plenary presentation of difficult issues so that the court may reach a proper decision."' *C & A Carbone*, 2014 WL 1202699, at *3-4.

8. Amici certify that no party's counsel authored the proposed brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person—other than amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

9. Given their substantial interest in this case, Amici respectfully move for leave to file the attached proposed brief as amici curiae.

Date: July 13, 2023

Respectfully submitted,

/s/ Gabriel K. Gillett

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CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on July 13, 2023, I caused the attached **Notice of Motion** and **Motion and Memorandum of Law in Support of Leave to File Amici Curiae Brief in Support of Defendants' Motion to Dismiss** to be electronically filed with the clerk of the Court for the United States District Court, Eastern District of New York using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Gabriel K. Gillett
Gabriel K. Gillett

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK (BROOKLYN)

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **LG CAPITAL FUNDING, LLC, and JOSEPH I. LERMAN,** **Defendants,** **and** **DANIEL GELLMAN, BORUCH GREENBERG, and ELI SAFDIEH,** **Relief Defendants.**	**Case No.: 1:22-cv-03353-WFK-JRC**

BRIEF OF ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION, LTD., TRADING AND MARKETS PROJECT, INC., AND NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS AND DISMISSAL

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INTEREST OF AMICI CURIAE[1]

The Alternative Investment Management Association, Ltd. ("AIMA") is the global representative of the alternative investment industry. AIMA's members manage over $2 trillion in hedge fund assets and include some of the world's largest, most sophisticated investors.

Trading and Markets Project, Inc. ("TMP") is a non-partisan non-profit organization dedicated to enhancing capital markets and ensuring the stability and competitiveness of the financial system. TMP advocates on behalf of entities and individuals focused on securities regulation and the securities markets—including private fund managers, registered investment advisers, investment companies, and others. TMP members include, among others, financial market participants, and former officials from the Securities and Exchange Commission ("SEC") and the legislative, executive, and judicial branches of government.

The National Association of Private Fund Managers ("NAPFM") represents the legal and economic interests of investment advisers in the private fund management industry, which serve a diverse set of investors including pensions, endowments, and insurers.

Amici and their members have a strong interest in how courts and the SEC define the meaning of the term "dealer" under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(5). Many members of Amici—including investment advisers and managers of private funds and other investment vehicles—have long understood that they are not "dealers" under the Exchange Act based on the language of the statute, the underlying history and context of that Act, and years of guidance from the SEC. But in recent cases like this one, the SEC has argued for a much broader definition of "dealer" than courts have traditionally recognized. The

[1] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief, and no person other than amicus or its members or counsel contributed money intended to fund preparing or submitting the brief. *Cf.* Fed. R. App. P. 29.

SEC has even argued that *any* person that buys and sells securities as a business is a "dealer," regardless of whether they satisfy the statutory definition as it has historically been understood and applied. *See* Dkt. 28 ("SEC Opp.") at 1, 6-7, 9-11.

Defendants correctly explain that the SEC is wrong to contend they are dealers. Amici write separately to support Defendants' position on the law and to amplify why the SEC's arguments could have serious negative consequences beyond this case—including for capital markets and many market participants—and why the Court should consider that in its ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises important issues of statutory interpretation because the SEC proposes breaking with nearly a century of precedent and reinterpreting the securities laws contrary to their long-understood meaning. The Exchange Act defines a "dealer" as "any person engaged in the business of buying and selling securities … for such person's own account," 15 U.S.C. § 78c(a)(5)(A), and includes an express exemption for persons buying and selling securities "not as a part of a regular business," *id.* § 78c(a)(5)(B). That language historically has been understood—and was understood by Congress when passing the Exchange Act in 1934—as limiting "dealer" status to a narrow category of entities that buy and sell securities to execute *customer* orders.

Here, however, the SEC suggests that *anyone* who is "engaged in the business of buying and selling securities" for their own account may be a dealer. *See* SEC Opp. at 1, 6-7, 9-11. That reading contravenes the Exchange Act's text, conflicts with the long-settled understanding of its meaning, and contradicts the SEC's own prior guidance and holdings. The "dealer" definition was never intended to cast such a wide net. It was meant to be limited to those who transact in their own account with or for *customers* as part of a "regular business"—not to reach other market participants like investment advisers or private funds that transact for investment purposes.

The SEC's theory should be rejected. Serious consequences could result if the SEC could state a claim by alleging any business buying or selling securities is a "dealer"—regardless of whether the transactions were part of a "regular business" for executing customer orders, or the presence of other factors the SEC and market participants have traditionally relied on. Under the SEC's view, almost any professional adviser or investor could arguably be deemed a dealer. This could obligate mutual funds, private funds, pension funds, insurers, family offices, foundations, individuals, and others to register as dealers—ensnaring them in a thicket of burdensome and ill-fitting regulation that has nothing to do with their businesses and does not aid regulators or markets, and risking major sanctions for ordinary investments that no one thought constituted dealing at the time. Adhering to the well-settled meaning of "dealer" the SEC has used for ~ninety years, however, is both textually and historically correct and also avoids these harmful consequences.

In any event, the SEC is in the wrong forum to assert its unprecedented view about what it means to be a dealer under the Exchange Act and restructure its regulatory regime. The SEC does not dispute that Defendants complied with its rules. If the SEC believes those rules are insufficient, it should change them via proper notice-and-comment rulemaking. If the SEC believes the statutory "dealer" definition is too narrow, it should ask Congress to amend it. But the SEC cannot use this case to target activity it may now dislike by advancing a new interpretation of "dealer" that conflicts with statutory text, historical context, and settled understandings.

ARGUMENT

I. Registered Investment Advisers And Funds Operate And Are Regulated Differently From Dealers.

A. Registered Investment Advisers And Funds Seek Returns For Investors.

Investors have a range of investments and investment vehicles available to achieve their financial goals. Many rely on the expertise of investment advisers, who are "paid for providing

advice about securities to their clients." FINRA, *Investment Advisers*, https://tinyurl.com/2vch7fx8 (visited July 11, 2023).

Private investment funds are one type of vehicle that can provide competitive, diversified, uncorrelated risk-adjusted returns, as well as downside protection and flexibility. *See* AIMA, FAQs, https://tinyurl.com/34vwwur9 (visited July 11, 2023); *Goldstein v. SEC*, 451 F.3d 873, 876 (D.C. Cir. 2006). They are "usually structured as limited partnerships" to achieve "maximum separation of ownership and management," where "the general partner manages the fund (or several funds) for a fixed fee and a percentage of the [fund's] gross profits" and "[t]he limited partners are passive investors and generally take no part in management activities." *Goldstein*, 451 F.3d at 876; *see* AIMA, FAQs, *supra*. In managing the fund, the general partner typically hires an adviser that may have discretion to invest and trade for the fund's own account. *See* FINRA, *supra*.

Investors may also utilize other investment vehicles, including private equity funds, registered investment companies, pension funds (public or private), and family offices. Collectively, their impact is substantial. In 2021, U.S. pension plans held over $27 trillion in assets. *See* Cong. Rsch. Serv., *U.S. Retirement Assets: Amount in Pensions and IRAs* (2022). In 2022, mutual funds were owned by 115.3 million investors and 52.3% of U.S. households. Investment Co. Inst., Mutual Funds Are Key to Building Wealth for Majority of US Households (Oct. 31, 2022).

Among instruments available to investors are convertible notes or bonds, which typically have periodic interest payments but also include "the option to convert [the security] into shares of the underlying company at a later date, often at a discounted rate." *See* Tim Stobierski, Harv. Bus. Sch. Online, *What is Arbitrage?* (July 20, 2021). Convertible bonds are attractive to companies looking to reduce their cost of capital and provide those with low or no credit ratings access to funding when they may lack other options. *See* Elizabeth Howcroft, Reuters, *RPT-Convertible*

Bond Issues Surge in Coronavirus-Hit Market (July 6, 2020). Convertible bonds offer investors upside if the company's common stock appreciates and afford "a degree of indexation to rising consumer prices." The Economist, *Why Convertible Bonds Are the Asset Class for the Times* (July 10, 2021). They are thus "well-suited to fast-changing conditions." *Id.* Since 2021, over $270 billion in convertible bonds have been issued. *See ECM Highlights: FY22*, dealogic (Dec. 19, 2022).

Advisers, funds, and investors ultimately seek returns on investment rather than to profit from market-making. Investment opportunities may come from an SEC-registered broker or dealer engaged by an issuer looking for investors. Opportunities also come from a fund or adviser contacting a registered broker or dealer, seeking investments that meet particular criteria. Typically, investments are made through or with the assistance of a broker or dealer intermediary, not through a structure that positions the issuer as the customer. And typically the adviser, fund, or investor does not hold itself out as predominantly being in the business of matching buyers and sellers or of financing companies by underwriting new securities offerings.

B. Registered Investment Advisers And Funds Are Subject To Oversight By The SEC And Others.

Investment advisers to private funds with assets under management over $150 million must register with the SEC—and are thus subject to SEC oversight and regulation. SEC, *Private Fund Adviser Overview* (Oct. 21, 2016), https://tinyurl.com/2s3udjsd. For example, advisers must file reports with the SEC and are examined for compliance. SEC, *Information for Newly-Registered Investment Advisors* (rev. Mar. 31, 2017), https://tinyurl.com/y5dwcs7m; *see generally* Investment Advisers Act, 15 U.S.C. § 80b-1 *et seq.*

Private funds that hire registered investment advisers are also within the SEC's purview. Registered investment advisers must disclose detailed information about the private funds they manage, including "fund size, use of borrowings and derivatives, strategy, and types of investors."

SEC, Annual Staff Report Relating to the Use of Form PF Data (Dec. 9, 2022), https://ti-nyurl.com/2p8vpwzr. Private funds are also subject to securities laws when they raise money from investors. *See* 17 C.F.R. § 230.500 *et seq.* In addition, mutual funds and other entities are subject to the Investment Company Act of 1940, 15 U.S.C. § 80a-3, while pension funds may come under SEC scrutiny as well, *see* 17 C.F.R. § 245.101.

C. Registered Investment Advisers And Funds Are Different From Dealers And Are Regulated Differently.

Registered investment advisers and the private funds they manage are very different from dealers. They are subject to different regulatory frameworks, "have different types of relationships with investors, offer different services, and have different compensation models when providing investment recommendations or investment advisory services to customers." *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33,318, 33,319 (July 12, 2019).

Dealers typically hold themselves out as willing to make two-way markets by buying and selling securities. They typically advertise and solicit buyers and sellers, or issuers, who would be a dealer's customer or counterparty. Dealers hold inventory (often acquired in bulk) to pair together those who wish to buy and sell a particular security at different times. "A broker-dealer's recommendations may include recommending transactions where the broker-dealer is buying securities from or selling securities to retail customers on a principal basis or recommending proprietary products." *Id*; *see XY Plan. Network, LLC v. SEC*, 963 F.3d 244, 248 (2d Cir. 2020) ("[B]roker-dealers often provide advice and make recommendations about securities transactions and investment strategies."). "Investment advisers, on the other hand, typically provide ongoing, regular advice and services in the context of broad investment portfolio management." *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. at 33,319.

Dealers "effect securities transactions for customers, for which they typically charge a commission or other transaction-based fee," *XY Plan.*, 963 F.3d at 248 (citing 15 U.S.C. § 78c(a)(5)(A)). Advisers, on the other hand, receive compensation based on the advice they provide and the results they achieve. And private funds, which are "created to pool money from multiple investors … to make investments on behalf of the fund," have investors who are the fund's equity owners and benefit from its returns. SEC, Private Fund, https://tinyurl.com/2p8kxmmp (visited July 11, 2023). Funds, unlike dealers, do not have clients or customers. A fund is the adviser's client. A fund's investors do not transact as a counterparty of the fund. And a fund is not in a customer relationship with the companies in which it invests.

Because they raise different types of public policy concerns, registered investment advisers and funds are regulated differently from dealers. Dealers are governed by the Exchange Act, not the Investment Advisers Act or the Investment Company Act. *See* 15 U.S.C. § 80a-1(b)(2) (distinguishing investment advisers from dealers); *id.* § 80a-3(a) (defining investment companies). Among other things, dealers must: maintain minimum net capital levels to satisfy customer claims (17 C.F.R. § 240.15c3-1); possess or control certain margin securities carried for a customer's accounts (17 C.F.R. § 240.15c3-3); join a fund to insure customer accounts (*see* 15 U.S.C. § 78fff-4(c)); and implement safeguards to control risks associated with direct access to securities markets (17 C.F.R. § 240.15c3-5). These rules are designed to protect broker-dealers' customers. But they have no utility for traders or funds that have no customers. And these rules may harm fund investors by imposing unnecessary compliance costs and burdens without a corresponding benefit to investors, markets, or regulators.

II. This Court Should Hold, Consistent With The Text And History Of The Exchange Act, That A "Dealer" Executes Customer Orders As "Part Of A Regular Business."

The SEC urges this Court to read the term "dealer" in the Exchange Act to reach anyone "engaged in the business" of "buying and selling securities." *See* SEC Opp. at 1, 6, 9-12, 18, 23-24. According to the SEC, an entity with "no customers" may still be a dealer under the Exchange Act. *Id*. at 22 n.21. That expansive interpretation eschews bedrock principles of statutory construction in favor of a hyper-literal, myopic reading that contradicts the statutory text, historical context, and the SEC's own longstanding view of what constitutes "dealing." This Court should reject it.

A. The SEC's Interpretation Of "Dealer" Contravenes The Statutory Text, Its Own Guidance, And Well-Established Understandings.

The SEC concedes that courts may not "add to, remodel, update, or detract from old statutory terms" when interpreting their meaning. *See* SEC Opp. 18-19. But the SEC's proposed interpretation of "dealer" contradicts the historical evidence about what Congress understood a "dealer" to be, flouts multiple rules of statutory interpretation, and lacks a limiting principle.

1. Dealers, Like Brokers, Effectuate Orders For Customers.

Today, as when the Exchange Act was passed in 1934, there are only two methods of effectuating customer orders. A firm can trade "solely for the account of the customer," as an agent or "broker." Or a firm can trade *with* the customer, on the opposite side of the transaction—as a principal or "dealer"—"and not as agent for the customer." SEC, Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker, at XIV (1936), https://tinyurl.com/y6h3a4ts; *see also XY Plan.*, 963 F.3d at 248.

Prominent treatises when the Exchange Act was adopted are full of own-account/others'-account references that distinguish the two ways of effectuating customer orders. *See, e.g.*, Charles F. Hodges, *Wall Street* 361 (1930) ("A dealer sells to and buys from a client whereas a broker buys

and sells for the account of a client."); Charles Harrison Meyer, *The Law of Stockbrokers and Stock Exchanges and of Commodity Brokers and Commodity Exchanges* 32-33 (cumulative suppl. 1933) (noting that what "distinguished" the "dealer. . . from a broker" is that the dealer buys from or "sells to his customers … securities which he has purchased for his own account elsewhere").

The SEC itself used similar references in the same way. *See, e.g., G.L. Ohrstrom & Co.*, 1938 WL 33306, at *7 (SEC Dec. 16, 1938) (broker traded "for [the customer's] account," dealer traded "for [its] own account"); *E.H. Rollins & Sons, Inc.*, 1945 WL 73020, at *6 (SEC Feb. 22, 1945) (explaining "for the account of" was "characteristic of agency"). Early SEC rules reflected this distinction, requiring brokers and dealers to "disclose to [their] customer … whether [they] [were] acting as a dealer for [their] own account," or "a broker" for the customer's account. Rules for the Regulation of Over-the-Counter Markets, 1936 WL 31460, at *6 (SEC Jan. 20, 1936). And the SEC acknowledged that although investment companies and investment advisers have a business model based on the purchase and sale of securities, they were not governed by rules that applied to "'brokers and dealers' only," 2 H.R. Doc. No. 76-279, at 1523 n.434 (1939), and "[f]ederal regulation" of investment advisers did "not exist," H.R. Doc. No. 76-477, at 31 (1939)—reflecting the understanding that brokers and dealers execute *customer* orders.

Case law from the era confirms this understanding. *E.g., Donander Co. v. Comm'r*, 29 B.T.A. 312, 314-15 (1933) (dealer applies only "to a merchant who holds himself out to sell to customers"); *Harriman Nat'l Bank v. Comm'r*, 43 F.2d 950, 952 (2d Cir. 1930) (dealer "purchased securities to fill specific orders" and "h[eld] them for customers"). The common law meaning—which Congress presumptively retained, *Universal Health Services, Inc. v. United States*, 579 U.S. 176, 187 n.2 (2016)—distinguished between means of effectuating customer orders. *See Johnson v. Winslow*, 279 N.Y.S. 147, 156 (N.Y. Sup. Ct. 1935); *Weisbrod v. Lowitz*, 282 Ill. App. 252, 255

(1935); William O. Douglas et al., *Stock "Brokers" as Agents and Dealers*, 43 Yale L.J. 46, 60-61 (1933) (detailing factors distinguishing brokers and dealers, presupposing customer orders).

The interplay between "broker" and "dealer" in the securities laws confirms that both definitions referred to different means of effectuating customer orders. The terms "broker" and "dealer" are linked throughout the Exchange Act (*see, e.g.*, 48 Stat. at 882-897 §§ 3(a)(3), 7(c), 9(a)(3)-(5), 11(d)-(e), 12(a), 14(b), 17(a)-(b)), indicating that they have a related meaning, Antonin Scalia et al., *Reading Law: The Interpretation of Legal Texts* 198 (2012) (explaining canon that words are known by the company they keep). The SEC itself does not distinguish between the two, requiring registration "as a broker-dealer," not as one or the other. 17 C.F.R. § 249.501(a); SEC Form BD, item 2.A, https://tinyurl.com/2p82stzb (visited July 11, 2023). The two definitions are also used specifically to impose customer protection requirements. For example, section 11(d) requires a broker or dealer to "disclose[] to [the] customer in writing… whether he is acting as a dealer for his own account" or "as a broker for [the] customer." 48 Stat. at 892, 15 U.S.C. § 78k(d).

Congress's re-enactment of the "dealer" definition in 1999 (*see* SEC Opp. 24) illustrates that Amici's interpretation is correct. At that time, Congress amended the bank exemption from the Exchange Act's definition of dealer and simultaneously amended the corresponding definitions in the Investment Company Act and the Investment Advisers Act to track the new Exchange Act definition. Pub. L. No. 106–102, §§ 202, 216, 219, 113 Stat 1338 (Nov. 12, 1999). But Congress did not change the substantive language of the Exchange Act's definition or the "regular business" exemption. *See id.* And Congress neither disturbed settled precedent that dealers buy and sell securities to execute customer orders, nor adopted a position like the SEC now advances. *See id.* That change further undermines the SEC's position. *See Aetna Life Ins. Co. v. Big Y Foods, Inc.*, 52 F.4th 66, 75 (2d Cir. 2022) ("Congress is presumed to be aware of an administrative or judicial

interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Here, the SEC asserts that an entity can be a dealer even if it has "no customers … because the dealer definition encompasses: 'any person in the business of buying and selling securities … *for such person's own account*.'" SEC Opp. 22 n.21 (quoting 15 U.S.C. § 78c(a)(5)(A)). That blinkered approach fails to recognize the *customer*-focused meaning of "broker" and "dealer." Contrary to the original limited meaning, the SEC's new near-limitless reading could make a dealer out of many if not all investment advisers, funds, and other market participants—potentially subjecting thousands of entities and individuals to rules like costly capital requirements and customer protection regulations that make no sense for businesses that lack customers. That result cannot be squared with the historical context in which Congress enacted the Exchange Act in 1934, so it is not a permissible way to interpret the meaning of "dealer" under the Exchange Act today. *See Sackett v. EPA*, 143 S.Ct. 1322, 1338 (2023) ("The meaning of a word 'may only become evident when placed in context.'"); *accord* SEC Opp. 18-19 (noting courts may not "add to, remodel, update, or detract from old statutory terms").[2]

[2] Tacitly recognizing that historical context shows "dealer" status under the Exchange Act requires evidence of executing customer orders, in other cases the SEC has suggested that issuers are a defendant's customers. *See, e.g.*, SEC Sur-Reply 4, *SEC v. Amalgarby*, No. 21-13755 (11th Cir. Dec. 12, 2022), ECF No. 51-2 ("SEC *Almagarby* Sur-Reply"); SEC Opp. to MTD 8-9, *SEC v. Morningview Financial, LLC*, No. 22-cv-08142 (S.D.N.Y. May 19, 2023), ECF No. 23. The SEC does not make that assertion here, and its allegations would not support it in any event. The SEC does not allege Defendants were intermediaries pairing issuers selling with investors buying or compensated through commissions or based on a spread. Rather, the SEC alleges Defendants made investments on favorable terms, accepted the risk those investments might fail, and then profited on investments that did not. *See, e.g.*, Dkt. 1 (Complaint) ¶ 35. That is trading, not dealing. Market realities also undermine the SEC's position. Traders frequently purchase newly issued securities (including convertible securities) from issuers as part of a broader trading strategy—which makes that activity fit squarely within the "regular business" exemption and insufficient to trigger "dealer" status.

2. The Statutory Exemption Provides That Traders And Entities That Do Not Have Customers Are Not "Dealers."

The Exchange Act's exemption for activity "not as a part of a regular business," 15 U.S.C. § 78c(a)(5)(B), also makes clear that traders and investors (who do not have customers) cannot be characterized as dealers. Elsewhere, the SEC has conceded that the exemption applies if traders accept risk, regardless of how frequently they trade. *See* SEC *Almagarby* Sur-Reply 4-6; *Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer*, SEC Release No. 34-94524, 87 Fed. Reg. 23,054, 23,058-59, 23,059 nn.53-56 (proposed Apr. 18, 2022) ("*Proposed Rule*"). Read in context, the "regular business" exemption thus shows a "dealer" includes only those that trade for their own account to fill *customer* orders.

When the Exchange Act was adopted in 1934, "many" tax-related court rulings interpreted the phrase "not in the course of an established business," which appeared in the regulatory definition of "dealers in securities," to mean that traders who did not have an established place of business to serve customers could not be dealers—regardless of the frequency of their trading and whether the trading was for an entity. *Schafer v. Helvering*, 299 U.S. 171, 173-74 & n.1 (1936) ("The meaning of 'dealer in securities'. … is limited to one who, as a merchant, buys and sells securities to customers."); *see Sec. Allied Corp. v. Comm'r*, 95 F.2d 384, 386 (2d Cir. 1938) (company not a dealer when "[i]t had no place of business to which customers could come to buy"); *Wilson v. Comm'r*, 76 F.2d 476, 478 (10th Cir. 1935) (similar).

Congress had these settled interpretations in mind when it paraphrased that language in the Exchange Act's "regular business" exemption. *See* Scalia et al., *supra* (describing "Prior-Construction Canon"). The legislative history reflects that the Exchange Act "excludes from the definitions of a broker and dealer a man who just buys securities for his own account and is not in the business of making a profit by *merchandising* them, like an ordinary dealer." *Comm. on Interstate*

and Foreign Com., The Exchange Act of 1934: Hearings on H.R. 7852 and H.R. 8720, 73rd Cong. 687 (1934) (statement of Rep. Corcoran) (emphasis added), https://tinyurl.com/2mbsmcur.

That historical context is critical to understanding the Exchange Act. *See Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018) (statutory terms "should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute'"). In modern times, a professional business that seeks investment profits by buying and selling securities might seem like a "regular business." But that is not what Congress thought in 1934—the key time period. In the wake of the 1929 market crash, investors were seen as speculators that did not operate a "regular business" for purposes of the Exchange Act definition, whereas dealers operated a "regular business" that earned profits through commissions, fees, or the spread when executing customer orders.

The SEC notes that: "When Congress wanted to exempt certain categories" of participants from the Exchange Act's "broker-dealer registration requirements, it did so expressly through the Exchange Act's dealer definition." SEC Opp. 23-24. That is precisely the point. By using 1934's contemporaneous terminology in the "regular business" exemption, Congress made clear that speculative investors and traders are not "dealers" under the Exchange Act. Failing to account for that exemption as it was historically understood is further reason to reject the SEC's interpretation.

3. The SEC Relies On Inapposite Out-Of-Circuit Cases That Ignore Key Differences Between The Securities Act And The Exchange Act.

The SEC repeatedly claims its position here is supported by district court decisions elsewhere. *See* SEC Opp. 11, 19-21 & n.19; Dkt. 35 ("SEC Suppl. Auth.").[3] Those non-binding decisions, which have not been subject to appellate review, are flawed and should not be followed.

[3] Appeals are currently pending before the Eleventh Circuit Court of Appeals in *SEC v. Keener* (No. 22-14237), and *SEC v. Almagarby* (No. 21-13755); Amici have filed amicus briefs in both appeals.

Among other reasons, those decisions relied directly or indirectly on *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786 (11th Cir. 2015). But *Big Apple* is inapposite and does not control here. It interpreted "dealer" under Securities Act § 5, not Exchange Act § 15—the operative provision here—and no court in the Second Circuit has followed it.

That distinction is critical. The Securities Act, enacted in 1933, does not address the registration of dealers and has no exemption that limits the definition of "dealer"—it explicitly includes "trading" and lumps together both brokers and dealers in a single, catch-all definition. *See* 15 U.S.C. § 77b(a)(12). By contrast, when Congress addressed the registration of dealers in 1934, it crafted a more nuanced definition in the Exchange Act—defining "broker" and "dealer" separately, using language that in context referred to customers, eliminating reference to "trading," and exempting investors, speculators, and other traders transacting "not as a part of a regular business," 15 U.S.C. § 78c(a)(5)(B). Disregarding those important textual differences and equating the definition of "dealer" under the Securities Act with the definition in the Exchange Act ignores that "[w]here the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Burrus v. Vegliante*, 336 F.3d 82, 89 (2d Cir. 2003); *see Wis. Cent.*, 138 S.Ct. at 2071 (noting "differences in language" between companion statutes "convey differences in meaning").

There are also important structural reasons why the definition of "dealer" in the Exchange Act is narrower than the corresponding definition in the Securities Act. As a general matter, the Securities Act is concerned with the registration and oversight of securities and securities offerings, rather than secondary trading through brokers, dealers or exchanges, which are the purview of the Exchange Act. *See Slack Techs., LLC v. Pirani*, 143 S.Ct. 1433, 1437-38 (2023). "Dealers" under the Securities Act (analyzed in *Big Apple*) are merely obligated to ensure the securities they

are selling into the market for the first time are registered with the SEC or exempt from registration, *see id.*; distributing unregistered shares into the market is ordinarily illegal, and the Securities Act's broad definition of "dealer" ensures that basic requirement cannot be evaded. By contrast, "dealer" status under the Exchange Act requires SEC registration and triggers a range of ongoing regulatory burdens (including customer-protection rules, *see supra* at I.C), which Congress intended to impose only on those broker-dealers who serve customers. Applying these rules to entities that lack customers would thus increase burdens without providing any corresponding benefit.[4]

In all events, this Court should independently scrutinize the SEC's legal theory. "Without legal limitations," the Supreme Court has warned, "market participants [would be] forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous." *Dirks v. SEC*, 463 U.S. 646, 664 n.24 (1983). Indeed, the Supreme Court—in unanimous or near-unanimous opinions—has repeatedly recognized the importance of carefully examining SEC actions and blocking SEC overreach.[5] The SEC cannot "assert[] highly consequential power beyond what Congress could reasonably be understood to have granted" based on "a merely plausible textual basis"—especially when the agency's "newly uncovered" authority has "conveniently enabled it" to pursue a previously unsupported theory. *W. Va. v. EPA*, 142 S.Ct. 2587, 2609, 2614 (2022).

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[4] Although *Big Apple* noted in a footnote that the "dealer" definition in the Securities Act and the Exchange Act are "similar," that was *dicta* that this Court should not rely on in the face of the meaningful textual and structural differences between the statutes. In addition, the defendant there "abandoned" a challenge to its "dealer" status under the Exchange Act so the parties did not brief the issue. 783 F.3d at 806, 809 n.11.

[5] *See Axon Enter., Inc. v. FTC*, 143 S.Ct. 890, 900 (2023) (unanimously affirming *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021), allowing court challenges to SEC in-house proceedings before they concluded); *see also Lucia v. SEC*, 138 S.Ct. 2044, 2053-54 (2018) (7-2, invalidating SEC in-house adjudications); *Liu v. SEC*, 140 S.Ct. 1936, 1946 (2020) (8-1, limiting SEC's disgorgement power); *Kokesh v. SEC*, 581 U.S. 455, 465-67 (2017) (unanimously rejecting SEC's view that statute of limitations did not apply to disgorgement); *accord Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (unanimously rejecting discovery rule in SEC actions); *cf. Jarkesy v. SEC*, 34 F.4th 446, 465-66 (5th Cir. 2022) (holding SEC in-house proceeding violated jury trial right), *cert. granted* (U.S. June 30, 2023) (No. 22-859).

Yet that is what the SEC is attempting to do here. Nearly ninety years after the Exchange Act's passage—and after years of not requiring investment advisers, funds, and others to register as dealers—the SEC now sees "dealer" in a new light. Its long-running failure to advance the position it now asserts is strong proof that the position lacks merit. *Cf. id.* at 2610-14; *see also SEC v. Federated Alliance Grp., Inc.*, 1996 WL 484036, at *5 (W.D.N.Y. Aug. 21, 1996) (rejecting SEC's "excessively broad definition of a dealer" that "would embrace as a dealer every securities trader who makes money through buying and selling of securities"); *Goldstein*, 451 F.3d at 878-83 (rejecting SEC's attempt to redefine the term "client" in the Investment Advisers Act when the SEC could not "justify departing from its own prior interpretation" and sought to impose new registration requirements as a "hook [for] more comprehensive regulation of hedge funds").

B. The SEC Cannot Use This Case As A Backdoor To Revise Rule 144. It Must Go To Congress Or Issue A Rule That Can Withstand Judicial Review.

Convertible transactions are not new. For years, with the SEC's blessing, companies have issued convertible debt to investors, who converted the debt into stock at a discount and resold it at an advantageous time. If the SEC now wishes to root out specific practices by specific types of market participants, it has multiple ways to attempt to do so. Bringing ad hoc enforcement actions based on a newly devised interpretation of what it means to be a "dealer" is not one of them.

The SEC's real concern in this case is that Defendants were able to distribute securities into the market without registering as an underwriter or dealer. *See* SEC Opp. 3-4, 8 & n.7, 10. But that was possible because of how the SEC has chosen to write and amend its own Rule 144. *See Revisions to Rules 144 and 145*, 72 Fed. Reg. 71,546, 71,561-62 (Dec. 17, 2007) (adopting six-month safe harbor after concluding the prior twelve-month safe harbor made it too difficult for small issuers to raise capital). If the SEC now believes Rule 144 is insufficient, it should pursue notice-and-comment rulemaking. *See Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). If

instead the SEC believes that the statutory definition of "dealer" is insufficient, it should ask Congress—which is uniquely situated to amend the securities laws—to change the meaning of "dealer" or to expand the SEC's reach. *Slack Techs.*, 143 S.Ct. at 1442; *see W. Va.*, 142 S.Ct. at 2609, 2613. And if the SEC believes fraud is underfoot, or that an issuer's choice to finance itself using convertible bonds is problematic, it can wield existing antifraud authority.

The SEC has chosen a different path—to pursue simultaneously cases like this one *and* a rulemaking adopting a new vision of the meaning of "dealer." *See Proposed Rule*, *supra*. That effort might be appropriate *if* the SEC were clarifying ambiguities in the statutory language, within the scope of its delegated authority and in compliance with applicable rules—such as properly balancing costs and benefits and accounting for stakeholder perspectives. *See W. Va*, 142 S.Ct. at 2608-09; 5 U.S.C. § 706(2)(A); 15 U.S.C. §§ 78c(f) (requiring the SEC to consider "whether the action will promote efficiency, competition, and capital formation"), 78w(a)(2) (similar).

But there are many reasons why the SEC's putative regulatory efforts regarding the "dealer" definition fail those requirements. For one, the SEC has endorsed the view that the "statutory language" is "clear" (SEC Suppl. Auth.), which "precludes the Commission from more expansively interpreting that term," *Digital Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 782 (2018) (rejecting SEC rule). In addition, the newfound authority the SEC asserts after almost a century, and the "economic and political significance of that assertion," strongly suggest the SEC lacks authority to interpret "dealer" to suddenly cover wide swaths of the financial industry. *See W. Va.*, 142 S.Ct. at 2608-09. Plus, the record before the SEC reflects that the proposed rule will impose many costs but yield few (if any) benefits. *See, e.g.*, AIMA Comment Letter, File No. S7-12-22 (May 27, 2022), https://tinyurl.com/5n7486j5; *see also* Craig Lewis, *The SEC's Proposed Rules for Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and*

Government Securities Dealer (Dec. 2022), https://tinyurl.com/38w2s4hj (former SEC Chief Economist and Director of the Division of Economic and Risk Analysis highlighting flaws in proposed rule and harm it may cause to markets and investors). That casts a dark cloud over the SEC's questionable choice to sidestep Congress while simultaneously pursuing enforcement actions advancing an expansive and novel interpretation of what it means to be a "dealer."

Whether the SEC advances its view through legislation or proper rulemaking, the result would be better than ad hoc enforcement actions based on an unprecedented reinterpretation of nearly century-old language. On the front end, decisionmakers "can conduct factual investigations, can consult with affected parties, [and] can consider how their experts have handled similar issues over the long course of administering a regulatory program." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2413 (2019); *see Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167-68 (2007). On the back end, the result should (in theory) provide clarity about the rule and how to follow it. And if the resulting rule is defective, judicial review and political accountability are available. *See Kisor*, 139 S.Ct. at 2413; *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991).

But cherry-picked enforcement actions create a risk that markets and market participants will be whipsawed by the SEC's arbitrary discretion, subjected to a patchwork of inconsistent interpretations of federal law, and beset with uncertainty and unpredictability. Congress prefers that interpretive issues related to complex regulatory schemes not be resolved "piecemeal by litigation." *Kisor*, 139 S.Ct. at 2413-14. That is yet another reason for this Court to reject the SEC's attempt to resolve perceived issues around the meaning of "dealer" through this action.

Whatever the vehicle, the SEC may not misconstrue the text, history, and settled understanding of the Exchange Act or exceed its own authority to target activity it may dislike. It may not force a square peg into a round hole in the name of investor protection (*see* SEC Opp. 24) by

redefining "dealer" to capture activity that does not satisfy the statutory definition. And it may not use this case to advance a newly devised interpretation of the term "dealer" that transforms market participants relying in good-faith on settled understandings of the law into lawbreakers.

III. The Court Should At Minimum Ground Any Decision In The SEC's Factors That Distinguish "Dealers" From Registered Investment Advisers And Funds.

Defendants highlight how the SEC's new interpretation of a "dealer" is inconsistent with the SEC's longstanding position, as expressed in the agency's own statements. *See* Dkt. 27 ("LG Capital Br.") at 17-22. In response, the SEC accepts that its guidance is designed to "help people … determine whether registration may be necessary." SEC Opp. 21; SEC Suppl. Auth. 2 (similar).

Amici agree. If this Court finds the SEC has stated a claim, at a minimum this Court should anchor its decision in the SEC's own factors that it concedes: "Courts and the SEC have, over time, applied … to distinguish dealers from traders." SEC Opp. 19, *SEC v. Morningview Financial, LLC*, No. 22-cv-08142 (S.D.N.Y. May 19, 2023), ECF No. 23; *see* SEC, *Guide to Broker-Dealer Registration* (rev. Dec. 12, 2016), https://tinyurl.com/4kym57cy (visited July 11, 2023) (outlining factors to determine "Who is a 'Dealer'"). Allowing the SEC to state a claim by alleging a defendant's "business model is to buy and sell securities" with some regularity and volume (SEC Opp. 10) would be inconsistent with the New York courts that hold that "[w]hether an individual falls within [the Exchange Act's dealer] definition … requires analysis of a variety of factors." *Dervan v. Gordian Grp. LLC*, 2017 WL 819494, at *10 (S.D.N.Y. Feb. 28, 2017).[6] And declining to endorse the SEC's overbroad view would help avoid major consequences for market participants whose activities differ from what the SEC alleges makes Defendants a "dealer." For example:

[6] *See also EMA Fin., LLC v. AppTech Corp.*, 2022 WL 4237144, at *5 (S.D.N.Y. Sept. 13, 2022); *Federated Alliance Grp.*, 1996 WL 484036, at *4-5. *Accord Rhee v. SHVMS, LLC*, 2023 WL 3319532, at *8 (S.D.N.Y. May 8, 2023) (applying factors from *SEC v. Hansen*, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984)).

1. Registered investment advisers and funds typically do not advertise, have customers, or "actively" seek business by "cold-call[ing] penny stock issuers" in bulk while '"[holding] itself out' as a dealer." SEC Opp. 2-3, 21; *see also EMA Fin.*, 2022 WL 4237144, at *5. While they may attend conferences and express a general interest in investments, those vanilla facts cannot be enough to trigger the weighty burdens that come with dealer status.

2. Although buying and selling convertible notes is a component of the business model used by some registered investment advisers, their entire business model is not typically predicated on purchasing convertible notes from penny stock issuers. converting them into shares of the issuer, and profiting by quickly selling those shares into the public markets. *See* SEC Opp. 1. Nor do they aim to provide liquidity to the market by pairing buyers and sellers.

3. Registered investment advisers and funds do not typically focus on underwriting securities of issuers they have solicited as customers, as opposed to investing through intermediaries. *See Hansen*, 1984 WL 2413, at *10 (providing that a "relevant" factor is "selling" "securities of other issuers"). Investment advisers' clients are the funds they advise, and the funds have investors but do not have clients or customers at all. *See supra* at I.C.

4. Registered investment advisers and funds do not serve as intermediaries between issuers and investors, do not have customers, and do not operate in the business of buying and selling securities to or from their customers. They most often trade through registered broker-dealer intermediaries. *See supra* at I.C.

5. Registered investment advisers and funds are already subject to SEC oversight and investment advisers are already required to, among other things, disclose detailed information about funds they manage. *See supra* at I.B.[7]

This Court's decision should thus be grounded in the specific allegations of the Complaint and the factors the SEC has itself relied on—not categorically label a business buying and selling securities as a "dealer"—to avoid chaos from upending long-settled expectations.[8]

[7] The SEC highlights facts that provide no meaningful basis for determining dealer status. *See, e.g.*, SEC Opp. 2, 4. Fixed or variable pricing does not matter: convertible securities use both. Issuing shares at a discount does not matter: some investments like secondary offerings are always discounted. Selling at the earliest opportunity does not matter: "flipping, alone, is not prohibited under the federal securities laws." SEC, Investor Bulletin: Investing in an IPO 5, https://tinyurl.com/y6neb23x (visited July 11, 2023). And the SEC does not dispute that Defendants sold only after expiration of Rule 144's six-month holding period.

[8] If the Court does not dismiss the Complaint, Amici note that disgorgement is improper because the SEC does not allege Defendants' failure to register as a dealer defrauded investors, boosted Defendants' profits,

CONCLUSION

For the foregoing reasons, Amici urge this Court to grant Defendants' motion to dismiss and issue a narrow opinion that avoids causing harm to markets and market participants.

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Respectfully submitted,

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or facilitated transactions that would not have happened otherwise. *See Liu*, 140 S.Ct. at 1941-42, 1947-49 (tying disgorgement to "ill-gotten gains" and harm to victims); *SEC v. Hallam*, 42 F.4th 316, 329 & n.32 (5th Cir. 2022) (disgorgement aims to reclaim "a reasonable approximation of profits causally connected to the violation"); *Alvarez v. United States*, 862 F.3d 1297, 1302 (11th Cir. 2017) (registration failure "had no effect" on investors).

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Local Civil Rule 5.2, Local Civil Rule 7.1, and Rule III.F of the Individual Motion Practices and Rules of Judge William F. Kuntz II.

Date: July 13, 2023

/s/Gabriel K. Gillett
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on July 13, 2023, I caused the attached **Brief of Alternative Investment Management Association, Ltd., Trading and Markets Project, Inc., and National Association of Private Fund Managers as Amici Curiae in Support of Defendants and Dismissal** to be electronically filed with the clerk of the Court for the United States District Court, Eastern District of New York using the CM/ECF system. I certify that all participants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Gabriel K. Gillett
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