

No. 23-60255

**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.

Petition for Review of an Order of
the Securities and Exchange Commission
Release Nos. 34-97424; IC-34906

**BRIEF OF INVESTOR CHOICE ADVOCATES NETWORK (ICAN) AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Local Rule 26.1.1, Amicus Investor Choice Advocates Network (ICAN) states that in addition to the persons listed in Petitioners' opening brief (Doc. 40-1) (July 3, 2023) the following persons and entities have an interest in the outcome of this case:

1. ICAN, *Amicus Curiae*;
2. Brown, Angela Laughlin, *Counsel for Amicus ICAN*;
3. Gray Reed & McGraw, LLP, *Counsel for Amicus ICAN*; and
4. Morgan, Nick, *Founder & President of Amicus ICAN*.

Amicus ICAN certifies that it is a not-for-profit corporation that has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

July 17, 2023

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	I
TABLE OF AUTHORITIES	III
IDENTITY AND INTEREST OF AMICUS CURIAE	1
ARGUMENT	4
I. SHARE REPURCHASES PROVIDE INVESTORS GREATER CHOICES.	4
II. INCREASING REGULATORY BURDENS ON SHARE REPURCHASE ACTIVITY WILL REDUCE CHOICES AVAILABLE TO INVESTORS.	6
CONCLUSION	9
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chamber of Commerce U.S. v. SEC</i> , 412 F.3d 133 (D.C. Cir. 2005)	7, 8
Other Authorities	
Business Roundtable, <i>The Facts on Stock Buybacks and Dividends</i> , https://www.businessroundtable.org/the-facts-on-stock-buybacks-and-dividends	6
Craig M. Lewis, Madison S. Wigginton Professor of Finance, Owen Graduate School of Management, Professor of Law, Vanderbilt Law School, Vanderbilt University, and Joshua T. White, Brownlee O. Currey Jr. Dean’s Faculty Fellow, Assistant Professor of Finance, Owen Graduate School of Management, Vanderbilt University, <i>Comment</i> , (Oct. 4, 2022) https://www.sec.gov/comments/s7-21-21/s72121-20145241-310566.pdf	7
Douglas A. Cifu, <i>Comment from Virtu Financial, Inc.</i> (Mar. 29, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20121722-273828.pdf	6
Hester M. Peirce, SEC commissioner: Investors have the right to make their own decisions without regulators standing in the way, CNN (Oct. 11, 2021), https://www.cnn.com/2021/10/11/perspectives/sec-commissioner-investors-regulators/index.html	9
<i>Insider Trading Enforcement in 2022</i> [White Paper] (April 2023) <i>available at</i> https://www.jonesday.com/en/insights/2023/04/insider-trading-enforcement-in-2022	2

Jason Zweig, *Stock Buybacks Aren't Bad. They Aren't Good, Either*, The Wall Street Journal (Feb. 17, 2023 11:00 ET), <https://www.wsj.com/articles/stock-buybacks-arent-bad-they-arent-good-either-6b63356a> 4

Randi Lesnick, et al., *SEC Adopts Final Rules Regarding Share Repurchases and Related Disclosures*, 27 No. 6 Wallstreetlawyer.com: Sec. Elec. Age NL 3 (June 2023) 2

SEC Staff, *Response to Congress: Negative Net Equity Issuance 7* (2020) 3, 5

IDENTITY AND INTEREST OF AMICUS CURIAE¹

Investor Choice Advocates Network (ICAN) is a nonprofit public interest litigation organization committed to serving as legal advocate and voice for small investors and entrepreneurs seeking to enter the capital markets. Through its advocacy efforts, ICAN seeks to draw official attention among the judiciary and regulatory bodies to the serious challenges facing investors and entrepreneurs.

Government overreach creates barriers to participation in the capital markets. In this particular case, respondent the United States Securities and Exchange Commission (SEC) has adopted a rule (the Share Repurchase Rule) that imposes costs on publicly-traded companies engaging in open-market purchases of the companies' own securities. The costs come in the form of greater obligations to collect and disclose information about the shares repurchased and about the companies' securities and internal policies more generally. As a result of the increased compliance and disclosure costs imposed by the Share

¹ All parties consent to the filing of this brief. No party's counsel authored this brief in whole or part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than *Amicus* ICAN made a monetary contribution to the preparation or submission of this brief.

Repurchase Rule, some publicly traded companies will simply not engage in share repurchase activity to avoid incurring the expense or out of fear of violating an ambiguous regulatory requirement. Further, in light of the perceived abuses highlighted in the adopting release and the heightened liability standards accompanying “filed” disclosure issuers and individuals should expect to see continued enforcement attention and litigation in this area.²

ICAN publicly litigates against the SEC in appropriate cases, defending the rights of small investors and entrepreneurs whose efforts are too often impeded by overzealous government regulation and by the general public’s own limited ability to effectively challenge those regulations. By pushing back against the overreach of the SEC, ICAN seeks to preserve the role robust capital markets play in creating a healthy, vibrant economy, where upward mobility is an opportunity

² Randi Lesnick, et al., *SEC Adopts Final Rules Regarding Share Repurchases and Related Disclosures*, 27 No. 6 Wallstreetlawyer.com: Sec. Elec. Age NL 3 (June 2023); *See also Insider Trading Enforcement in 2022* [White Paper] (April 2023) available at <https://www.jonesday.com/en/insights/2023/04/insider-trading-enforcement-in-2022>.

available to all. ICAN files and joins amicus briefs that are consistent with its mission and goals.

In this case, the SEC's overreach is front and center. Petitioners, commenters on the rule proposal, and the SEC's own staff have articulated many of the legal and public policy shortcomings of imposing increased regulation of share repurchases.³

However, in addition to the reasons set forth in Petitioners' Opening Brief, the Share Repurchase Rule is also against public policy because it will decrease choices available to investors without any compelling justification. For this reason, ICAN submits this amicus brief to urge the Court to grant Petitioners' petition and vacate the Share Repurchase Rule.

³ See SEC Staff, *Response to Congress: Negative Net Equity Issuance 7* (2020) (SEC Staff Response).

ARGUMENT

I. SHARE REPURCHASES PROVIDE INVESTORS GREATER CHOICES.

Share repurchases (commonly known as buybacks) are a simple method for publicly-traded companies to distribute cash back to shareholders who elect to participate.⁴ A buyback can be beneficial for both the company and the stockholder.

In a buyback, a company uses cash to repurchase some of its shares, typically at the market price, from stockholders who choose to sell. The company ends up with less cash and fewer shares outstanding; investors who participate end up with more cash and a smaller stake in the company. . . . Buybacks give investors a free option: You can sell your shares back to the company, or you can keep them. They won't make you rich, but they might help prevent CEOs from making you poor.⁵

An important, and often overlooked, aspect of share repurchases is this “free option” provided to investors. As the SEC Staff acknowledged in analyzing stock repurchases, “Stock price reactions to announcements of new repurchase programs are higher for cash-rich companies,

⁴ *See id.* at 3.

⁵ Jason Zweig, *Stock Buybacks Aren't Bad. They Aren't Good, Either*, The Wall Street Journal (Feb. 17, 2023 11:00 ET) available at <https://www.wsj.com/articles/stock-buybacks-arent-bad-they-arent-good-either-6b63356a>.

suggesting managers create value when they remove their discretion over how to invest excess cash and provide that cash to investors to redeploy as they see fit.”⁶

Too often, the discussion about the Share Repurchase Rule has overlooked this important investor choice benefit and centered instead on a false dichotomy suggesting that companies and shareholders have antagonistic interests over share repurchases. During the public comment period for the Share Repurchase Rule, one submission countered this false dichotomy by pointing out how share repurchases provide an opportunity for investors to decide for themselves how best to pursue their own objectives by electing to sell their shares and deploy the company’s funds:

Critics contend that share repurchases only serve to benefit issuers. But let us not forget who owns the issuers – shareholders with varying backgrounds and objectives. These shareholders include workers who participate in union pension plans, company pension and 401k plans, and traditionally underserved retail investors who are for the first time getting access to the capital markets through no account minimum, no fee, fractional share offerings. They are all

⁶ *SEC Staff Response supra* note 3 at 28 *citing* Gustavo Grullon & Roni Michaely, *The Information Content Of Share Repurchase Programs*, 59 J. FIN. 651 (2004).

shareholders too, and share buybacks allow them to participate in the fruits of an issuer's economic activities.⁷

The Share Repurchase Rule will impact an enormous number of people directly and indirectly. According to Federal Reserve and IRS data, “a majority of U.S. households have direct or indirect ownership of stock via pensions, 401(k)s, or investment accounts[.] Seniors are among the biggest beneficiaries.”⁸ Given the enormous number of investors affected by the Share Repurchase Rule, the Court should give great weight to the adverse, disenfranchising impact the rule will have on investors as against public policy.

II. INCREASING REGULATORY BURDENS ON SHARE REPURCHASE ACTIVITY WILL REDUCE CHOICES AVAILABLE TO INVESTORS.

Unfortunately, the Share Repurchase Rule will discourage some companies from pursuing share repurchases and thereby disenfranchise

⁷ Douglas A. Cifu, *Comment from Virtu Financial, Inc.* (Mar. 29, 2022), available at <https://www.sec.gov/comments/s7-21-21/s72121-20121722-273828.pdf>.

⁸ Business Roundtable, *The Facts on Stock Buybacks and Dividends*, <https://www.businessroundtable.org/the-facts-on-stock-buybacks-and-dividends> (citing Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin (Sep. 2017) Vol. 103, No. 3, and Internal Revenue Service, *Individual Income Tax Returns 2020 Complete Report* available at <https://www.irs.gov/pub/irs-pdf/p1304.pdf>).

the investors in those companies. For every company that foregoes a share repurchase program because of the greater regulatory burden created by the Share Repurchase Rule, investors will have been deprived of the opportunity to deploy the company's cash in pursuit of the investors' own objectives. To state the obvious, depriving investors of the opportunity to make investing decisions is harmful. *See Chamber of Com. U.S. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (loss of opportunity to purchase mutual fund shares constituted a legally cognizable injury).

The connection between imposing regulatory burdens on companies and reducing the choices available to investors in those companies is not always readily apparent. However, at least one submission from two professors of law and finance commenting on the Share Repurchase Rule made that connection, concluding that the rule

will generate direct and indirect costs that substantially outweigh the purported benefits. These costs are paramount to issuers and investors[.] Overly burdensome and unnecessary regulation ultimately harms investors by reducing their opportunity set of investments that offer a reasonable rate of return. The net effect is fewer investor choices, slower economic growth, and a less competitive economy.⁹

⁹ Comment from Craig M. Lewis, Madison S. Wigginton Professor of Finance, Owen Graduate School of Management, Professor of Law, Vanderbilt Law School, Vanderbilt University, and Joshua T. White,

Here, the purported benefit to investors is the greater amount of information about share repurchases compelled by the rule, but that information is of little value to investors.¹⁰ Worse, the disclosures required by the Share Repurchase Rule may provide a trading advantage to sophisticated, institutional investors over individual, retail investors.¹¹ These outcomes are against public policy.

The Share Repurchase Rule purports to protect investors. Unfortunately, the rule merely deprives investors of certain investing choices behind the illusory appearance of investor protection. Several years ago in a different context, SEC Commissioner Hester Peirce addressed the difference between investor protection and investor disenfranchisement –

Brownlee O. Currey Jr. Dean's Faculty Fellow, Assistant Professor of Finance, Owen Graduate School of Management, Vanderbilt University, (Oct. 4, 2022) *available at* <https://www.sec.gov/comments/s7-21-21/s72121-20145241-310566.pdf>.

¹⁰ *Id.* at 9 (“Indeed, academic studies of jurisdictions that require daily repurchase disclosures argue that the flood of immaterial information on buybacks is provided too frequently, is unhelpful, and leads to information overload for investors”).

¹¹ *Id.* at 14 (“The net effect is that the Repurchase Proposal will create trading advantages for sophisticated investors while retail and other ordinary investors will be overwhelmed by the volume of these disclosures”).

[i]Investor protection means enforcing antifraud and disclosure rules, but it also means protecting an investor’s right to make investment decisions for herself, to take risks and to use the latest technology to trade and invest. As in other areas of life, people want to be able to make choices about their finances, even if others might question those choices or choose differently for themselves.” Equally important, she added that “regulators have a role to play, but that role should always be carried out with humility and a realization that investors have a right to make their own decisions.”¹²

Unfortunately, the Share Repurchase Rule under the guise of s to protect investors, instead fails to respect the ability of investors to make their own choices, and is against public policy.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners’ Opening Brief, the Court should grant Petitioners’ petition and vacate the Share Repurchase Rule.

¹² Hester M. Peirce, SEC commissioner: Investors have the right to make their own decisions without regulators standing in the way, CNN (Oct. 11, 2021) *available at* <https://www.cnn.com/2021/10/11/perspectives/sec-commissioner-investors-regulators/index.html>.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(a) because, excluding parts of the documents that are exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,080 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will cause it to be served on all parties and counsel of record.

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