No. 22-14237

In The United States Court Of Appeals For The Eleventh Circuit

SECURITIES AND EXCHANGE COMMISSION,
Plaintiffs – Appellees,

v.

JUSTIN W. KEENER, d/b/a JMJ FINANCIAL,
Defendant -Appellant.

On appeal from the United States District Court, for the Southern District of Florida, Miami Division (Case 1:20-cv-21254-BB)

BRIEF OF INVESTOR CHOICE ADVOCATES NETWORK (ICAN) AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Local Rule 26.1-1, Amicus ICAN states that in addition to the persons listed in Appellant Keener's principal brief (Doc. 26) (May 31, 2023), and Appellee Securities and Exchange Commission's Response to Appellant's Civil Appeal Statement (Doc. 17) (Jan. 6, 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 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.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

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 in accessing capital markets.

Government overreach creates barriers to participation in the capital markets. As a result, some potential market participants will simply not participate in some investment activity out of fear of violating an ambiguous regulatory requirement. Other market participants will incur the expense necessary to register as securities dealers in situations where such registration yields no corresponding benefits. According to the SEC's own 2022 Annual Small Business Capital Formation Report, smaller reporting companies (SRCs) have declined since 2018 due to a lack of capital investment and are suffering a 27% increase in compliance

[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* made a monetary contribution to the preparation or submission of this brief.

costs as compared to 2021.[2] The Report confirms that not having access to capital was the number one barrier to SCRs survival, with 89% of entrepreneurs saying the lack of capital limits their business growth potential.[3]

ICAN publicly litigates against the United States Securities and Exchange Committee (SEC), defending the rights of small investors and entrepreneurs whose efforts are too often impeded by overzealous government regulation and by their own limited ability to effectively challenge those regulations. By pushing back against the overreach of the SEC, ICAN seeks to preserve robust capital markets' role in creating a healthy, vibrant economy, where upward mobility is an opportunity 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. The SEC advocates for an *ex post facto* interpretation of the Securities Exchange Act of 1934 (Exchange Act)—asking this Court to ignore decades of

[2]Off. of the Advoc. for Small Bus. Cap., SEC, *Annual Report Fiscal Year 2022* 42–43 (Off. of the Advoc. for Small Bus. Cap. Formation ed., 2022), *available at* https://www.sec.gov/files/2022-oasb-annual-report.pdf.

[3] *Id.* at 23.

precedent[4] and the Commission's own interpretation of "dealer."[5] The obligations (or the perception of potential obligations) to register beyond what the federal securities laws require is an issue of great importance for small investors and entrepreneurs. Particularly where, as here, the SEC attempts regulation through (selective) litigation rather than through the process of rulemaking and comment.

In the absence of Congressional intervention, the scope of the SEC's regulatory power when it comes to defining who is a dealer under the Exchange Act must be checked by this Court. Dealers do not and should not include entrepreneurs like Appellant because the expansion of the SEC's regulatory power chills the market from willing participants due to unnecessary regulation. As an organization speaking on behalf of underrepresented private investors who desire to finance SCRs through small cap and microcap trading, *Amicus* is strongly interested in whether those investors will be designated dealers by the SEC. If the Court chooses this expansive interpretation and application of the Exchange Act, investors will be chilled from entering the market, and SCRs and

[4] *See* Appellant's Br. (Doc. 26) at 8.

[5] *Id.* at 10-13.

others will suffer due to the lack of capital available in the marketplace. Put simply, accepting the SEC's proposed interpretation of "dealer" would impede small investors and entrepreneurs from participating in capital markets, as they desperately need to do.

QUESTIONS PRESENTED[6]

I. Whether the district court erred in embracing the Securities and Exchange Commission's new interpretation of the Exchange Act's "dealer" definition, 15 U.S.C. § 78c(a)(5), as extending beyond the context of customer-order facilitation.

II. Whether the Due Process Clause independently bars a finding of liability because Appellant lacked fair notice of the Commission's unprecedented interpretation of the securities laws.

III. Whether the district court erred in awarding a civil penalty, disgorgement, permanent injunction, penny-stock bar, and prejudgment interest.

[6] The questions presented are adopted from Appellant's Civil Appeal Statement (Doc. 11).

ARGUMENT

I. UNCHECKED EXPANSION OF THE DEFINITION OF DEALER WILL HINDER THE ABILITY OF SMALL BUSINESSES TO ACCESS CAPITAL.

Numerous small businesses navigate a delicate balance of operating their company and securing equity. Securing investment capital holds the power to determine whether a small business thrives and expands or faces extinction. Small businesses are indispensable to the U.S. economy, serving as the backbone that fuels innovation, drives job creation, and fosters economic resilience. Recognizing and supporting the pivotal role of small businesses is crucial for fostering sustained economic prosperity and a thriving entrepreneurial landscape in the U.S.

Currently small businesses compose a substantial portion of the U.S. economy[7]:

- representing 99.7% of all employer firms, and employ approximately 46.4% of all private sector employees (roughly 61.7 million employees);[8]
- paying more than 39% of US payrolls[9];

[7] A business with less than 500 employees.

[8] U.S. Small Bus. Admin., Frequently Asked Questions, *available at* https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023/

[9] *Id.*

- comprising 97.3% of exporters (as of 2023)[10]; and
- comprising 43.5% of gross domestic product in the U.S.[11]

The SEC is making it harder for investors like Appellant to bridge the gap between small business owners and the equity they desperately need.[12] And when it comes to the financing and growth of small businesses—

- Angel investors provide 90% of outside equity raised by start-ups and are usually their only source of seed funding;
- 75% to 80% are self-financed through savings and personal loans, or borrowings from family and friends; and
- 50% fail within five years, with the most common reason being a lack of capital.[13]

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[10] *Id.*

[11] *Id.*

[12] The QuickLoan program consisted of Defendant Keener purchasing convertible notes from microcap companies (issuers) in need of "quick" cash. (Statement of Material Facts by SEC) (Dkt.67-9.at.13); (Dkt.67-24.at.9); (Dkt.67-1.at.208:8-15); (Statement of Materials Facts by Keener) (Dkt.72-2.at.25:1-22). The convertible notes were contracts in which the issuer of the note promised to pay JMJ a designated sum of principal and potentially interest within a designated time frame. The convertible notes also gave JMJ the option to demand that sums owed under the notes be paid in the form of the issuer's stock at a discount to the market price. *See* (Dkt.67-3.at.36:7-37:13); (Dkt.67-4.at.108:21-109:22).

[13] Gilbert J. Bradshaw et. al., *Finders but Not Keepers: The Regulation of Unlicensed Finders in Small Private Capital Raises*, 19 N.Y.U.J.L. & BUS. 137, 141 (2022).

The U.S. Small Business Administration (SBA) reported that an astonishing 25% of start-ups have no capital whatsoever.[14] An additional 20% have insufficient capital, which is commonly reported as the main roadblock to their growth and success.[15] Statistics for start-up capital sources reveal that 64% of startups used personal or family savings as capital; only 18% succeeded in obtaining financing from banks or other lending institutions.[16]

It is common knowledge that small businesses struggle to attract capital—mostly during their early phases of growth. The launch phase of a small business is when the highest need for capital dovetails with the lowest level of competence when it comes to capital raising, and most start-ups fail. Thus, many start-ups must engage with investors willing to consider small, early-stage ventures. Without their involvement, an

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[14]Concept Release on Harmonization of Securities Offering Exemptions, 84 Fed. Reg. 30460 at 155 *available at* https://www.sec.gov/rules/concept/2019/33-10649.pdf; Michelle Schimpp, U.S. Small Business Administration, discussion at SEC-NYU Dialogue on Securities Crowdfunding, February 28, 2017, *available at* https://www.sec.gov/files/Highlights%20from%20the%20SEC-NYU%20Dialogue%20on%20Securities-Based%20Crowdfunding.pdf.

[15] *See* 84 Fed. Reg. 30460 at 155 *available at* https://www.sec.gov/rules/concept/2019/33-10649.pdf.

[16] *Id.*

even greater percentage of small businesses would never be successful in raising enough capital to stay in business.[17]

Additional regulatory requirements—forcing small businesses like Appellant's to register as a dealer—bring additional costs.[18] Increasing the breadth of the meaning of dealer would also impose these costs on investors.[19] In sum, small businesses need capital to grow. If adopted by this court, the definition of "dealer" put forth by the SEC, would add unnecessary layers of regulation with no corresponding benefit. The Court should reject the invitation to read the Exchange Act so broadly.

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[17] The Task Force on Private Placement Broker-Dealers, ABA Section of Business & Law, Report and Recommendations of the Task Force on Private Placement Broker-Dealers,60 Bus. Law. 959 (2005).

[18] Appellant advanced evidence of the costs associated with becoming a dealer, including the SEC's registration costs and the costs of registering as a dealer, becoming a member of a national securities association, and complying with the association regulation. Based on the evidence Defendant advanced, these costs would amount to approximately $545,000.00 for the initial registration and first-year fees and $240,000 every year thereafter. (Response) (Dkt.124.at.11). *See also* Mahoney, Paul G., *The Economics of Securities Regulation: A Survey*, University of Virginia School of Law, Law and Economics Research Paper Series 2021-14 at 2.3 (August 2021).

[19] Securities Industry Association, *The Costs of Compliance In the U.S. Securities Industry* (Feb. 2006) at 12 ("Perhaps the most significant costs are . . . the opportunity costs borne by firms and their impact on investors, who may end up paying either higher prices or who may perceive a reduction in the choices available to them.") *available at* https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf.

II. REQUIRING DISGORGEMENT UNTETHERED TO INVESTOR HARM IS AGAINST PUBLIC POLICY AND MAY CHILL LEGITIMATE MARKET CONDUCT.

Identifying harmed investors in this case was not merely infeasible; it was impossible because Appellant's conduct did not harm investors. If Appellant's conduct caused no investor harm, what impact did Appellant's conduct have on investors? Appellant's alleged failure to register as a dealer merely enabled investors to purchase or sell shares on public markets that investors wanted to purchase or sell. The SEC presented no evidence from investors who regretted purchasing or selling shares or who regretted purchasing or selling shares from an unregistered dealer. As this Court has repeatedly recognized, registration violations do not cause investor harm. *See Alvarez v. United States*, 862 F.3d 1297, 1302 (11th Cir. 2017).

Even without identifiable "victims," the SEC sought—and the district court imposed—significant seven-figure civil penalties against Appellant. (Final Judgment) (Dkt.147.at.2) ("Keener is liable for disgorgement of $7,786,639.00, representing net profits gained as a result of the conduct alleged in the Complaint, plus $1,425,266.43 in prejudgment interest for the period of February 1, 2018 through January

21, 2022, plus a civil penalty in the amount of $1,030,000.00, for a total of $10,241,905.43.").

But even the Commission admits that had Appellant registered, he could've done exactly what he did here. *See* (Order Adopting R&R in Part) (Dkt.145.at.16). Chilling legal conduct is of course against public policy. If the SEC were successful in chilling Appellant's legal business model, investors may be deprived of the opportunity to purchase or sell the securities of their choice. Depriving investors of the opportunity to participate in legal investing activity (even if disfavored by the SEC) would harm investors – unlike Appellant's conduct here.[20]

CONCLUSION

For the reasons stated in this brief and Appellant's opening brief, ICAN respectfully urges this Court to reverse the judgment below and direct entry of judgment in Appellant's favor.

[20] *See Chamber of Commerce of the 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).

June 7, 2023

Respectfully submitted,

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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 1,892 words.

/s/ Angela Laughlin Brown
Angela Laughlin Brown

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will cause it to be served on all parties and counsel of record.

/s/ Angela Laughlin Brown
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