

Case No. 21-4126

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*In the*  
**United States Court of Appeals**  
*for the*  
**Tenth Circuit**

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IN RE: OVERSTOCK SECURITIES LITIGATION

THE MANGROVE PARTNERS MASTER FUND, LTD.,  
*Plaintiff-Appellant,*

v.

OVERSTOCK.COM, INC.; GREGORY J. IVERSON;  
PATRICK M. BYRNE; DAVID J. NIELSEN,  
*Defendants-Appellees.*

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*Appeal from a Decision of the United States District Court for the District of Utah (Salt Lake City)  
Case No. 2:19-CV-00709-DAK · Honorable Dale A. Kimball, Senior U.S. District Judge*

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**BRIEF OF *AMICI CURIAE* BETTER MARKETS, INC.  
AND CONSUMER FEDERATION OF AMERICA  
IN SUPPORT OF APPELLANT AND REVERSAL**

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DYLAN H. BRUCE, ESQ.  
CONSUMER FEDERATION OF AMERICA  
1620 I Street, NW, Suite 200  
Washington, DC 20006  
Telephone: (202) 387-6121  
dbruce@consumerfed.org

Counsel for *Amicus Curiae*,  
Consumer Federation of America

STEPHEN W. HALL, ESQ.  
BETTER MARKETS, INC.  
1825 K Street, NW, Suite 1080  
Washington, DC 20006  
Telephone: (202) 549-3382  
shall@bettermarkets.org

Counsel for *Amicus Curiae*,  
Better Markets, Inc.

February 2, 2022



## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure (“FRAP”), Better Markets, Inc. (“Better Markets”) states that it has no parent corporation and there is no publicly held corporation that owns any stock in Better Markets.

Also pursuant to FRAP Rules 26.1 and 29(a)(4)(A), the Consumer Federation of America (“CFA”) states that it has no parent corporation and there is no publicly held corporation that owns any stock in CFA.

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<i>GFL Advantage Fund, Ltd. v. Colkitt</i> , 272 F.3d 189 (3d Cir. 2001) .....	6, 8
<i>Gurary v. Winehouse</i> , 190 F.3d 37 (2d Cir. 1999) .....	8, 11
<i>In re Overstock Sec. Litig.</i> , No. 2:19-CV-709-DAK-DAO, 2021 WL 4267920 (D. Utah Sept. 20, 2021).....	6
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<i>Ploss v. Kraft Foods Grp. Inc.</i> , 197 F. Supp. 3d 1037 (N.D. Ill. 2016).....	10
<i>Santa Fe Indus. v. Green</i> , 430 U.S. 462 (1977).....	10
<i>SEC v. Capital Gains Research Bureau</i> , 375 U.S. 180 (1963).....	11
<i>SEC v. Masri</i> , 523 F. Supp. 2d 361 (S.D.N.Y. 2007) .....	10
<i>Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.</i> , 552 U.S. 148 (2008).....	21
<i>Tcherepnin v. Knight</i> , 3 U.S. 332 (1967).....	11

*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,  
551 U.S. 308 (2007).....21

*United States v. Naftalin*,  
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## STATUTES, RULES AND REGULATIONS

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Fed. R. App. P. 29.....1

## OTHER AUTHORITIES

Better Markets Comment Letter on Reporting of Securities Loans (Jan. 7, 2022),  
[https://bettermarkets.org/wp-content/uploads/2022/01/Better\\_Markets\\_Comment\\_Letter\\_Reporting\\_of\\_Securities\\_Loans.pdf](https://bettermarkets.org/wp-content/uploads/2022/01/Better_Markets_Comment_Letter_Reporting_of_Securities_Loans.pdf) .....25

Better Markets, *Reddit, Robinhood, GameStop & Rigged Markets: The Key Issues for Investigation* (Feb. 1, 2021), [https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_Reddit\\_Robinhood\\_Gamestop\\_RiggedMarkets\\_02-01-2021.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_Reddit_Robinhood_Gamestop_RiggedMarkets_02-01-2021.pdf).....15, 23

Better Markets, *Short Selling: 10 Recommendations for Improving the SEC’s Regulatory Framework* (May 4, 2021),  
<https://bettermarkets.org/wp-content/uploads/2021/07/Short-Selling-10-Recommendations-for-Improving-the-SECs-Regulatory-Framework.pdf>.....25

Better Markets, *White Paper: Select Issues Raised by the Speculative Frenzy in GameStop and Other Stocks* (Mar. 26, 2021),  
[https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_White\\_Paper\\_Select\\_Issues\\_Raised\\_GameStop\\_03-26-2021.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_White_Paper_Select_Issues_Raised_GameStop_03-26-2021.pdf).....26

C. Stephen Guyer, *In Short Selling Its Sell High, Buy Low, and Maybe Anger Some*, DENVER BUS. J. (Feb. 3, 2008).....25

Gina-Gail S. Fletcher, *Legitimate Yet Manipulative: The Conundrum of Open-Market Manipulation*, 68 DUKE L.J. 479 (2018) .....3, 4, 12, 19, 22

Helena Stigmark, *Should Short Selling Be Regulated as a Consequence of Wall Street’s Failures? Exploring the New Alternative Uptick Rule*, 30 MICH. BUS. L.J. 32 (2010).....28

Jeran Wittenstein & Sarah Ponczek, <i>How Patrick Byrne’s Final Act at Overstock Crushed Short Sellers</i> , Bloomberg (Sept. 16, 2019), <a href="https://www.bloomberg.com/news/articles/2019-09-16/overstock-soars-amid-flurry-of-short-covering-as-dividend-looms?sref=mtQ4hc2k">https://www.bloomberg.com/news/articles/2019-09-16/overstock-soars-amid-flurry-of-short-covering-as-dividend-looms?sref=mtQ4hc2k</a> .....	13
Josh Kosman, <i>Ex-Overstock CEO Planned Crypto Dividend to Thwart Short Sellers</i> , N.Y. Post (Sept. 17, 2019), <a href="https://nypost.com/2019/09/17/ex-overstock-ceo-planned-crypto-dividend-to-thwart-short-sellers">https://nypost.com/2019/09/17/ex-overstock-ceo-planned-crypto-dividend-to-thwart-short-sellers</a> .....	13
Macrotrends, <i>Overstock Historical Market Capitalization, September 1, 2019 to September 30, 2019</i> (last accessed Jan. 25, 2022), <a href="https://www.macrotrends.net/stocks/charts/OSTK/overstock/market-cap">https://www.macrotrends.net/stocks/charts/OSTK/overstock/market-cap</a> .....	18, 19
Matt Levine, <i>Money Stuff: Why Exchanges Like Speed Bumps</i> , Bloomberg (Aug. 1, 2019), <a href="https://www.bloomberg.com/opinion/newsletters/2019-08-01/money-stuff-why-exchanges-like-speed-bumps?sref=mtQ4hc2k">https://www.bloomberg.com/opinion/newsletters/2019-08-01/money-stuff-why-exchanges-like-speed-bumps?sref=mtQ4hc2k</a> .....	25, 26
Reid Stimpson, <i>Short Sellers: Market Traitors or Balance Keepers</i> , MCGILL BUS. REV. (Nov. 30, 2020), <a href="https://mcgillbusinessreview.com/articles/short-sellers-market-traitors-or-balance-keepers">https://mcgillbusinessreview.com/articles/short-sellers-market-traitors-or-balance-keepers</a> .....	24, 25, 27, 28
SEC Commissioner Elisse B. Walter, <i>Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program</i> (Nov. 8, 2011), <a href="https://www.sec.gov/news/speech/2011/spch110811ebw.htm">https://www.sec.gov/news/speech/2011/spch110811ebw.htm</a> .....	20
SEC, <i>Staff Report on Equity and Options Market Structure Conditions in Early 2021</i> (Oct. 14, 2021), <a href="https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf">https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf</a> .....	26, 27
Tenth Circuit Practitioner’s Guide (11th ed. Jan. 2021).....	16
Tyler A. O'Reilly, <i>Reconstructing Short Selling Regulatory Regimes</i> , 59 WAYNE L. REV. 53 (2013) .....	27
<i>What Constitutes Manipulative Conduct?—Manipulation Defined</i> , 3 Law Sec. Reg § 12.3 .....	11

*Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide: Hearing Before the House Financial Services Committee,*  
<https://bettermarkets.org/sites/default/files/Kelleher%20HFSC%20Testimony%20GameStop%20Hearing%203-17-2021%20FINAL%20%282%29.pdf>.....15, 16

Yahoo! Finance, Overstock Historical Price, July 15, 2019 to September 30, 2019 (last accessed Jan. 25, 2022), <https://finance.yahoo.com/quote/OSTK/history?period1=1563148800&period2=1569715200&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true> ....17, 18, 19



## **IDENTITY AND INTEREST OF AMICI**<sup>1</sup>

Better Markets is a nonprofit, non-partisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights to make our financial system more stable and more fair; to better protect investors from fraud and other forms of abuse; and to increase the economic opportunity and prosperity of all Americans. Better Markets has supported a wide range of reforms to address structural flaws in the financial markets, including those exposed during the GameStop trading frenzy a year ago, which involved short selling, a short squeeze, and potential market manipulation. Better Markets has also fought for tougher enforcement of the securities laws, not only by regulators and prosecutors but also by private plaintiffs, as class actions are the most effective, and often the only, mechanism that can provide full relief to injured investors. *See generally* [www.bettermarkets.org](http://www.bettermarkets.org) (including archive of comment letters, briefs, and reports).

CFA is an association of non-profit consumer organizations, established in 1968 to advance consumer interests through research, advocacy, and education.

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<sup>1</sup> In accordance with FRAP 29(a)(4)(E), *Amici* state that (i) no counsel for any party authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person—other than Better Markets, CFA, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

Today, 250 of these groups participate in the federation and govern it through representation on CFA's Board of Directors. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. CFA's interest in investor protection is based upon the fundamental premise that all participants deserve fair treatment in the marketplace. To this end, CFA advocates for strong investor protection laws and regulation, encourages enforcement of existing protections, works to ensure clear and accurate disclosures to investors, and, principally, supports investors' ability to obtain redress, through the court system or other processes, when they have been wronged.

The *Amici* have an interest in this case because a ruling in favor of defendant Overstock.com, Inc. ("Overstock") and its principals would leave injured investors without a remedy, unduly narrow the anti-manipulation provisions in the securities laws, and ultimately undermine the fairness and integrity of the financial markets—along with the investor confidence in those markets that is essential if they are to remain the world's leading engines of capital formation, business growth, and wealth creation.<sup>2</sup>

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<sup>2</sup> All parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The district court committed error when it ruled that false statements or other forms of deception are necessary elements of a claim for market manipulation under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(a) and (c) thereunder. That ruling should be reversed on at least three legal and policy grounds, and this meritorious action should be allowed to proceed.

As a matter of law, the plain language, judicial interpretations, and underlying purposes of the statutory and regulatory provisions at issue show that the market manipulation provisions of the federal securities laws were written to prohibit a wide variety of abusive conduct in the securities markets, expressly including not only misrepresentations and omissions but also, as a separate and distinct category, “any manipulative” device or contrivance. *See* 15 U.S.C. § 78j(b); *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019). Those provisions are focused on preventing the harm that market participants, and the markets themselves, suffer when prices no longer bear a rational relationship to the fundamental value of a security. This harm arises regardless of whether the manipulative scheme is carried out with the aid of deceptive statements or acts. As a prominent scholar on the subject has recently explained, “[a] trader who deliberately executes facially legitimate transactions that negatively affect the markets is as responsible for her actions as someone who issues a fraudulent statement to affect the price of an asset.” *See* Gina-Gail S. Fletcher,

*Legitimate Yet Manipulative: The Conundrum of Open-Market Manipulation*, 68 DUKE L.J. 479, 519 (2018) (“Fletcher Analysis”).

There are no persuasive legal or policy considerations that justify a contrary view. While some cases reflect the implausible concern that unless deception is a necessary element of manipulation, some legitimate trading may be inhibited, that fear certainly played no role in this case. Moreover, as a general proposition, it is apparent that market participants, and courts as well, can readily differentiate between schemes that are intended to effect market manipulation and trading strategies that are not. The facts of this case leave no doubt about the unlawful and manipulative intentions of defendant Patrick M. Byrne (“Byrne”); it is far from a “borderline” case.

As a policy matter, the adverse consequences of affirmance are serious, both immediately and over the long term. Clearly, absent reversal, the plaintiffs will lose any realistic chance of recovery for what appear to be substantial losses. The prospects of an SEC enforcement action are unclear at best, and in any event, the disgorgement remedy at the agency’s disposal rarely provides full compensation for the damage done. This case powerfully illustrates the maxim that private actions are an “essential complement” to SEC enforcement. More broadly, the district court’s mistaken view of the law will weaken the role of Section 10(b) as a deterrent against a broad range of market manipulation schemes. With the district court’s erroneous

test in hand, unscrupulous market participants will readily devise schemes that inflict enormous harm on other investors and companies but evade application of the law. Over time and in increments, such schemes will inevitably contribute to a loss of confidence in the integrity of our public securities markets, markets that are already under siege as structurally unfair and rigged.

Finally, to do justice, the Court must have the benefit of a clear-eyed and balanced understanding of short sellers, often painted as market villains. In reality, short sellers usually engage in short-selling for legitimate purposes, and they can play a constructive role in the markets by promoting accurate share pricing, helping prevent dangerous asset bubbles, and facilitating risk management for institutional investors, some of which are managing the pension funds of everyday American retirement savers. Efforts to indiscriminately punish the legitimate activities of short sellers through market manipulation schemes, as in this case, are not only unlawful but unjust, both to the short sellers and to other investors in the markets. Law-abiding short sellers are fully entitled to the protections of the securities laws, along with all other market participants, and their claims in this case should be restored and heard.

## ARGUMENT

### **I. DECEPTION IS NOT A REQUIRED ELEMENT OF A MARKET MANIPULATION CLAIM**

The district court rejected the plaintiff’s manipulation claim under Section 10(b) and Rule 10b-5(a) and (c) based on its insistence that the plaintiff had failed to allege what the court regarded as a necessary element of manipulation, namely “some form of deception,” “false statements,” or “deceptive trading techniques.” *In re Overstock Sec. Litig.*, No. 2:19-CV-709-DAK-DAO, 2021 WL 4267920, at \* 2 (D. Utah Sept. 20, 2021) (quoting *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001)). That ruling was erroneous for at least two reasons. First, the plaintiff has clearly alleged that defendant Byrne’s manipulative scheme *did* involve deception, in the form of a failure to disclose material information about the true nature and purpose of the locked-up dividend. *See* Consol. Compl. ¶¶ 106-118; JA4\_900-03.<sup>3</sup> The pleadings thus satisfy the district court’s own formulation of the legal standard for manipulation.

The district court’s second and more fundamental error—and the *Amici*’s principal focus here—stems from the fact that a claim for market manipulation under Section 10(b) and Rule 10b-5(a) and (c) does not actually require any proof of misrepresentations or similar forms of deception. This reading of the law follows

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<sup>3</sup> Citations to the Joint Appendix are abbreviated “JA” and include the volume number of the Appendix (*e.g.* “JA1” refers to the first volume).

from its plain language, the weight of the better-reasoned cases, scholarly analysis, and perhaps most importantly, the underlying rationale for the prohibition against market manipulation. The anti-manipulation provisions were intended to prevent artificial distortions in the prices of securities, which in turn victimize investors and undermine the integrity of the markets. Manipulation schemes inflict these harms regardless of whether or not they are effectuated through misstatements or other traditional forms of deception. In either case, such conduct should be, and is, actionable under Section 10(b) and Rule 10b-5.

- A. The plain language of the law and the rule prohibits manipulation regardless of whether it is carried out through deceptive acts.

The plain language of Section 10(b) by its terms prohibits the use of “any manipulative *or* deceptive device or contrivance” in connection with the purchase or sale of a security. 15 U.S.C. § 78j(b) (emphasis added). The intent behind this use of the disjunctive “or” is clear. Congress deliberately chose to prohibit two distinct activities: deception on the one hand, manipulation on the other. That drafting choice cannot reasonably be read to mean that deception, separately prohibited, is somehow also a required element of a manipulation claim. On this basis, some courts have explicitly recognized that deception is not an element of a market manipulation claim. *See Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001) (“we cannot find the Commission’s interpretation to be unreasonable in light of what appears to be Congress’s determination that ‘manipulation’ can be illegal solely

because of the actor’s purpose”); *but see GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001) (holding deception is an element of manipulation).

Like the statute, Rule 10b-5(a) and (c) were also broadly framed and were clearly intended to prohibit far more than just the false statements and omissions encompassed by Rule 10b-5(b). By their terms, subsections (a) and (c) apply to all manner of devices or schemes to defraud, including “any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (repeated use of the word “any” in Rule 10b-5 was “obviously meant to be inclusive”). These provisions nowhere state or imply that to be covered by the rule, the scheme, act, or practice must involve the use of fraudulent statements or omissions. The language in the rule reinforces the point by incorporating the concepts of fraud or deceit only as the operative *effect* of the scheme, act, or practice, not the method by which it is achieved. With respect to successful market manipulation, the effect or outcome will be a form of deceit insofar as the market price has been artificially distorted so that it deviates—either up or down—from the real price of the underlying security as determined by fundamental economic factors. *See Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999) (“The gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.”). But



that does not imply that manipulation is only actionable if perpetrated through acts that are themselves deceptive.

This view finds support in the Supreme Court’s recent and broad reading of Rule 10b-5(a) and (c) in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). There the Court rejected the argument that the dissemination of false statements to investors could *only* be reached under subsection (b), dealing with misrepresentations, and not under subsections (a) or (c), dealing with a broader array of schemes that can be used to take other peoples’ money. In rejecting that contention, the Court emphasized the facially broad terms used in subsections (a) and (c), which cover a “wide range of conduct.” *Id.* at 1101. The Court further made clear that each subsection of the rule was intended to “cover additional kinds of illegalities—not to narrow the reach of the prior sections.” *Id.* at 1102 (quoting *United States v. Naftalin*, 441 U.S. 768, 774 (1979)). Thus, the Court explained, to serve the purposes of the securities laws and reach all of the “countless and variable schemes” devised by those who seek to profit at the expense of others, the provisions of Rule 10b-5 must be read as overlapping, not restrictive. *Id.* at 1102-03. The district court’s ruling in this action conflicts with the broad interpretation of Rule 10b-5 in *Lorenzo* because it would “narrow the reach” of subsections (a) and (c) by insisting that they incorporate, as a *necessary* element, the fraudulent statements or omissions covered by subsection (b).

While the Supreme Court has not recently grappled specifically with the pleading requirements for a market manipulation claim, its characterizations of manipulation consistently reflect the fundamental distinction under Rule 10b-5 between schemes involving fraud and those involving manipulation. They also reflect an emphasis on the impact of manipulation, not necessarily the means of its execution. For example, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976), the Court explained that manipulation “connotes intentional or willful conduct designed to deceive or defraud investors by *controlling or artificially affecting the price of securities*” (emphasis added.) And in *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977), the Court consistently referred to “manipulation *or* deception,” carefully using the disjunctive, and it framed manipulation in terms of trading practices intended to mislead investors by “*artificially affecting market activity*” (emphasis added). This language supports the view that manipulation and deception are fundamentally separate concepts, and it further indicates that deception inheres in market manipulation insofar as it results in deceptive or artificial prices, not because it is necessarily achieved through deceptive means.<sup>4</sup>

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<sup>4</sup> Other federal courts have held that deception is not an element of manipulation under Rule 10b-5(a) or (c). See *SEC v. Masri*, 523 F. Supp. 2d 361, 371 (S.D.N.Y. 2007); *Ploss v. Kraft Foods Grp. Inc.*, 197 F. Supp. 3d 1037, 1054 (N.D. Ill. 2016).

B. The underlying purposes of Section 10(b) and Rule 10b-5(a) and (c) weigh heavily against the district court's narrow interpretation.

Beyond the textual analysis, the district court's ruling conflicts with the protective purposes of the securities laws. As remedial legislation, *Tcherepnin v. Knight*, 3 U.S. 332, 336 (1967), securities law should be construed “not technically and restrictively, but flexibly to effectuate its remedial purposes.” *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). Manipulation, whether or not implemented through deceptive statements, is a highly predatory and damaging form of market misconduct and there is no reason why it should escape the broad, remedial reach of the law.

In the context of manipulation, Section 10(b) of the Exchange Act is aimed at assuring investors that the “prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.” *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999). As one treatise has explained, “anti-manipulation prohibitions are designed to preclude artificial interferences with the market process.” *What Constitutes Manipulative Conduct?—Manipulation Defined*, 3 LAW SEC. REG. § 12:3. In other words, those provisions are focused on preventing the harm to markets and market participants inflicted when prices do not bear a rational relationship to the fundamental value of a security.

And this harm arises regardless of whether the manipulative scheme is carried out with the aid of deceptive acts. As another prominent scholar has explained in an analysis of open market manipulation, the “[k]ey to understanding how open-market trades can create an artificial price is disabusing oneself of the notion that price artificiality requires illegal conduct. To equate artificiality with illegality is to needlessly circumscribe the types of behavior that distort the market.” *See Fletcher Analysis*, 68 Duke L.J. at 521. Professor Fletcher adds that “[a] trader who deliberately executes facially legitimate transactions that negatively affect the markets is as responsible for her actions as someone who issues a fraudulent statement to affect the price of an asset.” *Id.* at 519.

Concerns that a broad manipulation rule might inhibit legitimate trading activity should not sway this Court. *See Markowski v. SEC*, 274 F.3d 525, 528 (D.C. Cir. 2001) (noting commentators’ concern that imposing liability may chill some legitimate trading). As a threshold matter, the balance of harms favors a broad reading of Rule 10b-5: The potential drawbacks from allowing open market manipulation to go unpunished far exceed whatever harm accrues from discouraging legitimate trading activity that *might* be perceived as manipulative. More to the point, a broad reading of the rule is eminently workable without impeding legitimate trading activity. By focusing on the intent of the parties, and the impact of their activities, courts can and do manage the challenge.

That is certainly true in this case, one that is hardly “borderline,” *Lorenzo*, 139 S. Ct. at 1101. The consolidated complaint contains detailed, supported, and thoroughly plausible allegations that Overstock’s locked-up digital dividend scheme was deliberately engineered to create an artificially high price; that it succeeded; and that investors suffered significant financial harm as a result. Recall just a few of the relevant allegations:

- Defendant Byrne harbored a deep-seated animus against short sellers, Consol. Compl. at ¶¶ 34-44; JA4\_875-79;
- Overstock issued a dividend deliberately designed to force short sellers to cover their positions by heavily purchasing its stock, driving up the price, *id.* at ¶¶ 97-121; JA\_897-905;<sup>5</sup>
- Over less than two weeks, as the record date for the dividend approached, the price of Overstock shot up nearly 100%, despite the

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<sup>5</sup> The manipulation in this case was certainly unusual, garnering significant media attention that generally depicted the manipulation as a scheme designed to attack short sellers. See Jeran Wittenstein & Sarah Ponczek, *How Patrick Byrne’s Final Act at Overstock Crushed Short Sellers*, BLOOMBERG (Sept. 16, 2019), <https://www.bloomberg.com/news/articles/2019-09-16/overstock-soars-amid-flurry-of-short-covering-as-dividend-looms?sref=mtQ4hc2k>; Josh Kosman, *Ex-Overstock CEO Planned Crypto Dividend to Thwart Short Sellers*, N.Y. POST (Sept. 17, 2019) (explaining that Overstock used a “bizarre plan” that “was devised by Byrne . . . to thwart Overstock’s short sellers”), <https://nypost.com/2019/09/17/ex-overstock-ceo-planned-crypto-dividend-to-thwart-short-sellers/>. However, these public reports in no way sanitized the scheme or rendered it ineffective. In spite of the coverage, many traders, such as short sellers, still suffered damage arising from the artificially inflated price for Overstock (precisely as defendant Byrne intended).

absence of any fundamental change in Overstock’s business outlook, inflicting significant losses on short sellers and others, *id.* at ¶ 11; JA4\_868;

- Defendant Byrne acknowledged that the restricted dividend scheme was “designed . . . carefully” to put “legitimate short sellers in a bind,” *id.* at ¶ 203; JA4\_928-29;
- After learning that the short squeeze was about to abate, defendant Byrne ordered his accountant to sell all of his Overstock shares to profit from the artificial price the squeeze created, *id.* at ¶¶ 147-55; JA4\_914-17.

These allegations and others show clearly that this was a case of intentional, successful, and harmful market manipulation, undertaken for personal gain, which is prohibited by Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c).

**II. UNLESS REVERSED, THE DISTRICT COURT’S RULING WILL DEPRIVE INJURED INVESTORS OF A REMEDY, WEAKEN DETERRENCE, AND FOSTER MARKET MANIPULATION SCHEMES THAT BROADLY UNDERMINE THE INTEGRITY OF OUR SECURITIES MARKETS**

The district court’s decision substantially narrows the scope of Section 10(b) and Rule 10b-5(a) and (c), the bedrock anti-manipulation provisions in the securities laws. It thereby threatens multiple adverse consequences. In this case, dismissal of the action deprives the plaintiff class members of any realistic chance of recovery

for what appear to be substantial losses. More broadly, the lower court’s misapprehension about the required elements of manipulation—namely, its insistence that deceptive statements are required—threatens a more far-reaching harm. It will, if left intact, weaken the role of Section 10(b) as a critical deterrent against a broad range of market manipulation schemes. With the lower court’s erroneous test in hand, unscrupulous market participants will readily devise schemes that inflict enormous harm on other investors and issuers but evade application of the law and hence accountability.

Over time and in increments, that will inevitably contribute to a loss of confidence in the integrity of our public securities markets, markets that are already under siege as structurally unfair and rigged for the benefit of the few. *See Better Markets, Reddit, Robinhood, GameStop & Rigged Markets: The Key Issues for Investigation* (Feb. 1, 2021) (“Rigged markets and a general awareness that they are rigged—including by policymakers, regulators, and prosecutors—are not new”), [https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_Reddit\\_Robinhood\\_Gamestop\\_RiggedMarkets\\_02-01-2021.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_Reddit_Robinhood_Gamestop_RiggedMarkets_02-01-2021.pdf).

The long-term implications are clear: As investor confidence ebbs away, participation in the markets will become more wary and these extraordinary engines of capital formation and wealth creation will become more anemic. *See, e.g., Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide:*

*Hearing Before the House Financial Services Committee* at 8 (hereinafter “Kelleher Testimony”),

<https://bettermarkets.org/sites/default/files/Kelleher%20HFSC%20Testimony%20GameStop%20Hearing%203-17-2021%20FINAL%20%282%29.pdf>. (“The

longer-term consequences arising from a lack of confidence in the markets, however, could be that investors simply forgo investing in securities. That result would simultaneously diminish an already too-limited avenue for wealth creation and a critical source of business funding.”). Accordingly, the district court’s decision should be reversed, not only to correct a damaging legal error but also to achieve substantial justice, promote strong oversight of the capital markets, and maintain the vitality of those markets.<sup>6</sup>

A. Absent reversal, the plaintiffs will be deprived of meaningful recourse, and the defendants will evade accountability.

The scope of the harm that the market manipulation alleged in this case inflicted on investors is as yet unknown, but it is bound to be prodigious based on a number of factors. The short sellers clearly suffered substantial losses, all of which will come to light in detail if the case is permitted to proceed. But even some crude estimates suggest that the damage they sustained was substantial. On July 15, just

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<sup>6</sup> See 10th Circuit Practitioner’s Guide, at 44 (11th ed. Jan. 2021) (stressing the Court’s duty to seek “substantial justice” and the parties’ need to address “sound public policy” concerns).



two weeks before announcement of the restricted dividend scheme, and when the short interest in Overstock constituted some 17.8 million shares, *see* Consol. Compl. ¶ 39; JA4\_877, Overstock’s share price closed at \$17.22, *see* Yahoo! Finance, Overstock Historical Price, July 15, 2019 to September 30, 2019 (last accessed Jan. 25, 2022),

<https://finance.yahoo.com/quote/OSTK/history?period1=1563148800&period2=1569715200&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true>

e. On September 12, 2019, as the date to cover ahead of the record date for the restricted dividend approached, the short interest had fallen to just 11.6 million shares (signifying extensive covering by short sellers), and Overstock’s price had risen to \$26.72. *Id.* In other words, a person who had shorted 1,000 shares on July 15, 2019, and covered on September 12, 2019, would have lost \$9,500, over *half* their initial investment. And as noted above, after the restricted dividend scheme was no longer artificially propping up the share price, the share price had, as of September 27, fallen further to \$11.23, nearly \$6 less than the price on July 15, 2019—tending to confirm that the short sellers’ basic assessments about Overstock’s lackluster prospects were accurate. In other words, as a result of the manipulation, investors who shorted the stock on July 15, 2019, and who covered on September 12, 2019, would have lost over half of their investment *despite their apparently correct judgment that the company was overvalued.*

Quite apart from the short sellers, the victims of the manipulation alleged here include the “longs” who purchased shares as the price for Overstock rose to its manipulated heights only to fall back down. In fact, every upward market manipulation inflicts collateral damage on investors who buy into an artificially inflated market and fail to sell before the squeeze subsides and the stock price reverts to its true or normal level. At this point, it is also difficult to assess the magnitude of the harm done to long investors as a result of the false price created by Overstock and its return to pre-manipulation levels (and even lower). But here too, the rough calculations are sobering. On September 12, when Overstock’s share price closed at \$26.72, *see* Yahoo! Finance, Overstock Historical Price, July 15, 2019 to September 30, 2019 (last accessed Jan. 25, 2022), <https://finance.yahoo.com/quote/OSTK/history?period1=1563148800&period2=1569715200&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true>, it had a market capitalization of approximately \$940 million, *see* Macrotrends, Overstock Historical Market Capitalization, September 1, 2019 to September 30, 2019 (last accessed Jan. 25, 2022), <https://www.macrotrends.net/stocks/charts/OSTK/overstock/market-cap>. By September 27, when the short squeeze had abated and Overstock’s share price had fallen to \$11.23, *see* Yahoo! Finance, Overstock Historical Price, July 15, 2019 to September 30, 2019 (last accessed Jan. 25, 2022),

<https://finance.yahoo.com/quote/OSTK/history?period1=1563148800&period2=1569715200&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true>

e, its market capitalization had dropped by over 50% to approximately \$400 million, see Macrotrends, Overstock Historical Market Capitalization, September 1, 2019 to September 30, 2019 (last accessed Jan. 25, 2022), <https://www.macrotrends.net/stocks/charts/OSTK/overstock/market-cap>. In other words, the correction from the false price allegedly created by Overstock wiped out over half a billion dollars in shareholder value over the course of just two weeks.

The unseemly flipside to all of the investor harm in this case is the amount of money defendant Byrne pulled out of the market and put into his own pocket by selling his shares at the artificially bloated price for Overstock that he created. His take is alleged to be \$10 million from his initial scheme, involving the issuance of inflated revenue projections, Consol. Compl. ¶ 5; JA4\_865-66, and \$90 million from the more elaborate short squeeze perpetrated through deployment of the locked-up dividend, Consol. Compl. ¶ 12; JA4\_868-69. These profits correlate with harm to other investors, as explained by Professor Fletcher: “Most insidiously, open-market manipulation undermines market integrity because traders use the markets’ structure and interconnectedness to effectuate their manipulative schemes. *Trading in the financial markets is a zero-sum game—each trader’s gain comes at the cost of another’s loss.*” Fletcher Analysis, 68 DUKE L.J. at 530 (emphasis added).

Without the opportunity to prove their case in federal court, the plaintiff and members of the class will likely be left without meaningful recourse for their losses or the opportunity to hold defendant Byrne accountable for his ill-gotten gains. The prospects for a successful SEC enforcement action are speculative for a number of reasons. It is not clear that the SEC has the resources for such an undertaking, given the heavy demands on the Enforcement Division. If the agency were to initiate a case, it too would have to surmount the legal hurdles posed by the district court’s ruling. And any resulting disgorgement order would be unlikely to make the victims whole. *See, e.g.,* SEC Commissioner Elisse B. Walter, *Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program*, at 6 (Nov. 8, 2011) (explaining that the SEC cannot seek damages from violators and disgorgement does not necessarily make victims whole), <https://www.sec.gov/news/speech/2011/spch110811ebw.htm>; *Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020) (holding that the SEC’s disgorgement remedy is limited to wrongdoer’s “net profits”).

On the other hand, defendant Byrne and his co-defendants—those who are alleged to be directly and willfully responsible for millions of dollars in investor losses—will avoid liability and accountability. The likely outcome is the spectacle of a brazen market manipulator who postures himself as a crusader, intentionally

bleeds investors out of tens of millions of dollars, and then proudly marches away to a foreign country with his ill-gotten gains—all with the blessings of the law.

All of this serves as a fresh reminder that private actions for violations of the securities laws are indeed a “necessary supplement” to the SEC’s enforcement program. For decades, the Supreme Court, the SEC itself, and Congress have advanced this now familiar proposition. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions); *Stoneridge Investment Partners, LLC v. ScientificAtlanta, Inc.*, 552 U.S. 148, 174 n.10 (2008) (J. Stevens dissenting) (canvassing sources affirming the importance of private actions in providing for investor recovery, deterrence, and market integrity). Unfortunately, the district court’s ruling threatens to prove the validity of this axiom by showcasing the harm that follows when private actions are *foreclosed*. This Court can and should revive the plaintiff’s claims and allow them to proceed in the interest of fairness and accountability.

B. The district court’s ruling threatens a proliferation in market manipulation, to the detriment of countless investors and the integrity of the markets.

The district court’s unduly narrow interpretation of market manipulation is bound to foster more manipulation. The likely result will be schemes that are carefully designed to avoid affirmative misrepresentations (or the duty to disclose

material information) but nevertheless create artificial securities prices that victimize countless innocent investors and undermine the important pricing and capital allocation functions of the markets. Fletcher Analysis, 68 DUKE L.J. at 520-21.

The securities markets serve a variety of critical functions in the economy, from efficiently raising and allocating capital to building wealth and signaling investment value. *See* Kelleher Testimony at 7-8. If the markets are to perform these functions, investors must be able to rely on share prices that fairly reflect prevailing market information and sentiment about the current and future value of companies. Investors cannot expect to profit—and indeed face substantial losses—if they cannot trust that either the share price today or in the future will bear a rational relationship to a company’s prospects. Yet that is the result of manipulation, which sends prices in unpredictable directions, often wildly so, based on the schemes of manipulators motivated by greed, personal vendettas, or both. From the perspective of investors, then, “investing” in the stock market becomes indistinguishable from investing in a lottery. And if investors no longer view the stock market as a reliable or at least rational way to build wealth, they will be increasingly reluctant to invest. Eventually, if manipulation is not adequately deterred, investors will seek alternatives and the markets will suffer, becoming less robust, less liquid, and more volatile. *See id.* at 8-9. Capital formation and capital allocation will then also suffer, with broader economic effects over the long term.

These consequences will intensify an already growing perception that the securities markets are fundamentally unfair. From the outrageous preferential access to trading data enjoyed by a handful of high-frequency traders, to the powerful conflicts of interest that compromise brokers' order routing practices at the expense of everyday investors, there is already good reason to view the markets as untrustworthy. *Better Markets, Reddit, Robinhood, GameStop & Rigged Markets: The Key Issues for Investigation* (Feb. 1, 2021), [https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_Reddit\\_Robinhood\\_Gamestop\\_RiggedMarkets\\_02-01-2021.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_Reddit_Robinhood_Gamestop_RiggedMarkets_02-01-2021.pdf). This Court has the opportunity to help restrain if not reverse this trend and to help ensure that the law appropriately condemns all forms of market manipulation that harm investors and undermine the markets.

**III. ALTHOUGH SHORT SELLERS HAVE DRAWN CRITICISM, THEY CAN PLAY A CONSTRUCTIVE ROLE IN OUR MARKETS AND THEY ARE FULLY ENTITLED TO THE PROTECTIONS OF THE SECURITIES LAWS**

Many have come to view short sellers as opportunistic predators in the markets. For this reason, a clear-eyed and balanced understanding of short sellers is an important perspective to bring to the resolution of the plaintiff's claims. The fact is that short sellers usually engage in the practice of short selling for legitimate reasons, and they can play a valuable role in the capital markets, one that is not widely understood or appreciated. It is certainly true that the short selling process, and the securities lending activities that go with it, lack sufficient regulatory transparency. And some short selling is undoubtedly unlawful or abusive and should

be addressed, like any other market manipulation. But efforts to indiscriminately punish the lawful activities of short sellers through market manipulation schemes, as in this case, are not only unlawful but also unjust, both to the short sellers and to the other investors in the markets.

Moreover, the suppression of short selling through means outside the bounds of the law threatens harm to the markets, as short sellers promote accurate share pricing, help prevent dangerous asset bubbles, and facilitate risk management for institutional investors, some of which are managing the pension funds of everyday American retirement savers. *Cf.* Kelleher Testimony at 29 (urging Congress to address potential manipulative behavior related to a short squeeze in GameStop stock). Affording relief to the plaintiff and the class members who suffered harm from defendant Byrne's manipulative scheme will not only serve the ends of justice and deterrence but also help preserve the benefits that short sellers bring to the markets.

- A. The hostility toward short sellers has grown in recent years, along with legitimate calls for more transparency and oversight.

The reputation of short sellers has suffered for a number of reasons. *See generally* Reid Stimpson, *Short Sellers: Market Traitors or Balance Keepers*, MCGILL BUS. REV. (Nov. 30, 2020), <https://mcgillbusinessreview.com/articles/short-sellers-market-traitors-or-balance-keepers>. For example, short sellers bet on, and profit from, a company's failure



rather than its success. C. Stephen Guyer, *In Short Selling Its Sell High, Buy Low, and Maybe Anger Some*, DENVER BUS. J. (Feb. 3, 2008) (“Just as people who bet against the dice at the craps tables aren't very popular, short sellers often are regarded with disdain and distrust.”). Similarly, the fact that short sellers “tend to profit while other investors struggle” is apt to generate negative views. Reid Stimpson, *Short Sellers: Market Traitors or Balance Keepers*, MCGILL BUS. REV. (Nov. 30, 2020), <https://mcgillbusinessreview.com/articles/short-sellers-market-traitors-or-balance-keepers>.<sup>7</sup>

The jaundiced view of short selling comes from several quarters, some institutional and some populist. The impulse to punish them is sometimes associated with new companies that may be targets of short sellers and corporate managers whose compensation may depend on a rising, not falling, share price. Cf. Matt Levine, *Money Stuff: Why Exchanges Like Speed Bumps*, BLOOMBERG (Aug. 1, 2019) (“But as a pure tactic to deter and punish short sellers it is rather nifty. It makes

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<sup>7</sup> The push for regulatory reform in the short-selling marketplace is underway. It focuses on increasing transparency and enhancing certain operational aspects of those markets, not eliminating the practice, given its acknowledged benefits. See, e.g., Better Markets, *Short Selling: 10 Recommendations for Improving the SEC's Regulatory Framework* (May 4, 2021), <https://bettermarkets.org/wp-content/uploads/2021/07/Short-Selling-10-Recommendations-for-Improving-the-SECs-Regulatory-Framework.pdf>; Better Markets Comment Letter on Reporting of Securities Loans (Jan. 7, 2022), [https://bettermarkets.org/wp-content/uploads/2022/01/Better\\_Markets\\_Comment\\_Letter\\_Reporting\\_of\\_Securities\\_Loans.pdf](https://bettermarkets.org/wp-content/uploads/2022/01/Better_Markets_Comment_Letter_Reporting_of_Securities_Loans.pdf).

short sellers' lives hard, not by doing anything to increase the long-term value of the stock and thus make their thesis wrong, but purely by adding technical difficulties to maintaining the short.”), <https://www.bloomberg.com/opinion/newsletters/2019-08-01/money-stuff-why-exchanges-like-speed-bumps?sref=mtQ4hc2k>. And a new generation of younger investors, exemplified by participants in the Reddit group known as WallStreetBets, have become increasingly involved in calls to oppose and reform short selling, and even to punish short sellers. See Better Markets, *White Paper: Select Issues Raised by the Speculative Frenzy in GameStop and Other Stocks* (Mar. 26, 2021), [https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_White\\_Paper\\_Select\\_Issues\\_Raised\\_GameStop\\_03-26-2021.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_White_Paper_Select_Issues_Raised_GameStop_03-26-2021.pdf); see also SEC, *Staff Report on Equity and Options Market Structure Conditions in Early 2021*, at 44 (Oct. 14, 2021) (noting the complexity of short selling dynamics and calling for increased reporting of short sales) (“SEC, *Staff Report*”), <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf>. But whatever the motive in opposing short selling, resort to unlawful manipulation as part of a crusade against them cannot be justified, especially in a case such as this where the record contains no evidence that the plaintiff short sellers deserve condemnation for any of their own market practices.

- B. Short sellers can play a constructive role and they should be protected from illegal, retributive schemes along with all other market participants.

Short sellers confer a number of important benefits on the securities markets. *See generally* SEC, *Staff Report*, at 24 n.74. One of their primary constructive roles is enhancing the price discovery process. If share prices are to accurately reflect the value of a security, they must reflect all views and inputs, including those of the short sellers who believe a security is overvalued. Unduly curtailing short selling will hamper their ability to balance assessments of share value, leading to more frequent instances of price inflation or overvaluation. *See* Tyler A. O'Reilly, *Reconstructing Short Selling Regulatory Regimes*, 59 WAYNE L. REV. 53, 65 (2013) (“This is rooted in the fact that short sellers have a powerful financial incentive to identify overpriced stocks and to trade in a manner that drives the price downward to a level that more accurately reflects fundamental value.”).

The downward pressure short sellers exert on prices can be an especially important mitigant against harmful speculative bubbles. *Id.* Moreover, short sellers’ incentive to identify companies that are overvalued can lead to revelations about significant shortcomings in the management of companies, including gross mismanagement or even fraud. Prominent examples include the short sellers’ role in exposing problems at Valeant Pharmaceuticals and electric car company Nikola. Reid Stimpson, *Short Sellers: Market Traitors or Balance Keepers*, MCGILL BUS.

REV. (Nov. 30, 2020), <https://mcgillbusinessreview.com/articles/short-sellers-market-traitors-or-balance-keepers>).

In addition, short sales are often used as a valuable hedging tool by institutional investors with long positions. Helena Stigmark, *Should Short Selling Be Regulated as a Consequence of Wall Street's Failures? Exploring the New Alternative Uptick Rule*, 30 MICH. BUS. L.J. 32 (2010). Investors with long exposure to a particular stock or industry (*i.e.*, those who own a stock and stand to profit when its price rises and lose when its price falls) can use short sales to manage the risk of that exposure. In other words, many short sellers are not seeking to profit from failure but are using short sales to offset the inherent risk associated with their bets on success.

Attempts to punish or curtail short selling through market manipulation schemes like the one alleged in this case should not be countenanced, as short sellers represent an important group of market participants that often benefit the markets. Short sellers that abide by the law and engage in legitimate short selling activity are no less deserving of the protections against unlawful manipulation than any other class of investors. Accordingly, the claims in this case, which are well-aligned with the legal requirements and policy goals at the heart of the securities laws, should be restored and heard by the district court.

## CONCLUSION

For the foregoing reasons, the district court's ruling should be reversed.

Respectfully submitted,

/s/ Stephen W. Hall

Stephen W. Hall  
Better Markets, Inc.  
1825 K Street, NW, Suite 1080  
Washington, DC 20006  
Telephone: 202-549-3382  
[shall@bettermarkets.org](mailto:shall@bettermarkets.org)

/s/ Dylan H. Bruce

Dylan H. Bruce  
Consumer Federation of  
America  
1620 I Street, NW, Suite 200  
Washington, DC 20006  
Telephone: 202-387-6121  
[dbruce@consumerfed.org](mailto:dbruce@consumerfed.org)

Dated: February 2, 2022

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because it contains 6,401 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the font size requirement in 10th Cir. R. 32(A), because this brief has been prepared in Times New Roman 14-point font in Microsoft Word 2016, which is a proportionally spaced typeface that includes serifs.

/s/ Stephen W. Hall

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Stephen W. Hall

**CERTIFICATE OF DIGITAL SUBMISSION**

Counsel for *Amici Curiae* hereby certify that all required privacy redactions have been made, which complies with the requirements of Federal Rules of Appellate Procedure 25(a)(5).

Counsel also certifies that the hard copies submitted to the Court are exact copies of the ECF filing of February 2, 2022.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 12.2.8079; Definitions version 98814 – 7.91071 [February 1, 2022]; Vipre engine version 5.6.7.7 – 3.0), and according to the program, is free of viruses.

/s/ Stephen W. Hall  
Stephen W. Hall

**CERTIFICATE OF SERVICE**

I hereby certify that on February 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Stephen W. Hall