No. 22-____

In the Supreme Court of the United States

JOCELYN M. MURPHY, MICHAEL S. MURPHY, AND RICHARD C. GOUNAUD,

Petitioners,

V.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Securities Exchange Act of 1934 empowers Respondent Securities and Exchange Commission ("SEC") to seek, and district courts to impose, putatively "civil" penalties against securities law violators. As relevant here, the Act caps those penalties at specific dollar amounts "for each violation," but does not define what "each violation" means. Given this void, SEC and courts have adopted a variety of conflicting methodologies for counting the number of violations in any given case, resulting in penalties that vastly exceed the ostensible statutory caps set by Congress.

The district court here used two different methodologies in assessing penalties against the three Petitioners (which were inconsistent with the methodologies the court used in assessing penalties against settling co-defendants). For two Petitioners, the court multiplied the statutory cap by the number of months they were unregistered with SEC as securities brokers, resulting in total penalties more than 40 and 30 times higher, respectively, than the statutory cap. For the third Petitioner, the court imposed no penalty for failing to register as a broker but multiplied the statutory cap for a separate fraud-based violation by the number of times she allegedly submitted misleading information to certain SEC-registered brokers, resulting in total penalties more than 17 times the statutory cap for fraud-based violations. The Ninth Circuit affirmed in all respects.

The questions presented are:

1. Whether the courts below exceeded the statutory penalty caps established by Congress "for each violation" of the securities laws, depriving Petitioners of fair notice of the potential consequences of their business conduct;

2. Whether the courts below, in conflict with other circuits, adopted an overly expansive test to determine who must register with SEC as a securities broker; and

3. Whether the district court deprived Petitioners of their Seventh Amendment jury trial rights by deciding disputed facts against them.

PARTIES TO THE PROCEEDINGS

Petitioners Jocelyn M. Murphy, Michael Sean Murphy (referred to herein as "Sean Murphy"), and Richard C. Gounaud were defendants in the U.S. District Court for the Southern District of California and defendants-appellants in the U.S. Court of Appeals for the Ninth Circuit.

Respondent Securities Exchange Commission was the plaintiff in the district court and the plaintiff-appellee in the Ninth Circuit.

RMR Asset Management Company, Bruce A. Broekhuizen, Douglas J. Derryberry, David R. Frost, Neil P. Kelly, John M. Kirschenbaum, David S. Luttbeg, Timothy J. McAloon, Ralph M. Riccardi, Dewey T. Tran, and Philip A. Weiner were co-defendants to the proceedings in the U.S. District Court for the Southern District of California.

RELATED PROCEEDINGS

SEC v. RMR Asset Mgmt. Co., et al., No. 18 -cv-1895 (S.D. Cal.) Judgment entered February 12, 2021.

SEC v. Murphy, et al., No. 21-55178 (9th Cir.). Judgment entered October 4, 2022.

SEC v. Gounaud, No. 21-55180 (9th Cir.) Judgment entered October 4, 2022.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit is reported at 50 F.4th 832 and is reproduced at 5a-43a. The relevant opinions of the district court are reported at 479 F. Supp. 3d 923 (granting summary judgment) and 553 F. Supp. 3d 820 (assessing penalties) and are reproduced at 62a-76a and 44a-61a, respectively.

JURISDICTION

The Ninth Circuit denied Petitioners' timely motions for rehearing en banc on January 25, 2023. On April 14, 2023, Justice Kagan extended the time to file a petition for a writ of certiorari until June 23, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant constitutional, statutory, regulatory, and procedural provisions are set out in the appendix to this petition. 77a-87a.

INTRODUCTION

This case presents an ideal vehicle for the Court to bring desperately needed consistency, predictability, and discipline to the calculation of putatively "civil" penalties in enforcement cases prosecuted by Respondent SEC. Although Congress has not changed SEC's baseline statutory penalty caps since adopting them in 1990 (other than allowing periodic adjustments for inflation), the magnitude of SEC penalties—which are imposed on a mere preponderance of evidence and often, as here, with no jury trial—has exploded in recent decades to a point where any daylight between those penalties and criminal fines has effectively disappeared.

During its fiscal year ended September 30, 2022, SEC won a staggering $4.2 *billion* in total civil penalties—the agency's "highest on record" and more than triple SEC's average annual penalty totals over its preceding five fiscal years. SEC Press Rel. No. 2022-206 (Nov. 15, 2022). When divided by the approximately 450 "standalone" enforcement cases SEC files in a typical fiscal year, last year's $4.2 billion total works out to roughly $9 million per case. SEC fines of that magnitude—and much higher—are now commonplace, even though the agency was touting its $10 million penalty against Xerox Corporation 21 years ago as "the largest fine ever obtained by the SEC against a public company in a financial fraud case." SEC Press Rel. No. 2002-52 (Apr. 11, 2002).

Today's eye-popping SEC penalties are often impossible to square with the statutory caps legislated by Congress. Even after a succession of

inflation adjustments over the past 30 years, the applicable statutes still cap SEC penalties at just over $10,000 per violation for natural persons in the absence of fraud or investor losses, and at slightly over $100,000 for non-natural persons for such violations. Even in fraud cases with substantial investor losses, the statutes cap SEC penalties at slightly over $200,000 per violation for natural persons and slightly over $1 million per violation for non-natural persons.

All of which raises an obvious question: Given these statutory penalty caps, how does SEC amass billions in penalties each year from a docket of only about 450 cases?

One way is by extracting mega-dollar settlements with deep-pocketed targets desperate to avoid years of unpredictable litigation against their primary federal regulator. According to academic research and anecdotal evidence, SEC reaches settlements in the overwhelming majority of its enforcement cases without ever having to prove its charges or justify the agreed-upon fine. Indeed, most SEC mega-fines come from settlements rather than contested litigation. *See generally* David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 U. Pa. J. Bus. L. 135, 155-63, 179-88 (2019) (hereinafter "Rosenfeld") (noting that the lack of standards, transparency, and consistency in high-dollar SEC settlements, which "often bear little relation to the statutory framework," can lead to "cynicism about the process" and "a generalized sense that the penalty number is wholly arbitrary and disconnected to the actual misconduct").

But even in fully litigated cases, SEC has another effective tactic: arbitrarily slicing violations into multiple (often numerous) component pieces, and then demanding the statutory maximum for each piece. Doing so geometrically inflates total penalties in any given case, effectively negating the penalty caps set by Congress and depriving regulated parties of any semblance of fair notice and predictability of the potential consequences of violating the law. Indeed, in many cases (including this one), SEC and courts even feign magnanimity by suggesting that penalized parties should consider themselves lucky, because with a little more ingenuity SEC could have demanded even higher penalties by slicing the violations even thinner. Particularly troublesome is that the penalty multiplier in any given case, including this one, typically remains unknown until the very end of the case. No wonder SEC enforcement targets settle immediately rather than litigate in the vast majority of cases.

One respected commentator's hypothetical example is instructive. Positing a public company with 50,000 investors that recklessly misstates its financial results in annual and quarterly SEC filings over a two-year period, he illustrates how the SEC could theoretically manipulate the maximum penalty amount to be anywhere from $775,000 to $1.24 *trillion* depending entirely on how SEC slices and multiplies the violations. *See* Jonathan Eisenberg, *How SEC Judges Calculate Civil Monetary Penalties*, Law360 (Jan. 22, 2016); *accord* Samuel N. Liebmann, Note, *Dazed and Confused: Revamping the SEC's Unpredictable Calculation of Civil Penalties in the Technological Era*, 69 Duke L.J. 429, 431 (2019)

(hereinafter "Liebmann") (noting that penalties are "virtually limitless" for high-frequency algorithmic trading firms if each individual trade is separately penalized).

The instant case presents a paradigmatic example of this kind of arbitrary multiplication. In this case, the violations not only were sliced more thinly than the applicable statutes can bear, but the slicing was completely haphazard and inconsistent from defendant to defendant, resulting in egregiously inflated and disproportionate penalties that not only vastly exceed the statutory caps but also violate the Excessive Fines Clause of the Eighth Amendment.

As to two of the Petitioners, the district court's methodology (affirmed by the Ninth Circuit)—multiplying the statutory cap for failing to register with SEC as a securities broker by the number of months each Petitioner was not registered—directly conflicts with a decision of the District of Columbia Circuit. But the circuit split is just the exposed tip of a hidden iceberg of chaos and inconsistency that currently reigns among lower courts, where differing methodologies are routinely applied in similar cases within the same circuit and—as demonstrated here—even among co-defendants *within the same case*. Far too often, the unjust result is wildly inconsistent penalties imposed against materially comparable offenders, as this case exquisitely illustrates.

Apart from adding to this chaos on SEC penalties, the decision below created new uncertainty and conflict among the federal circuits concerning who must register with SEC as securities brokers. The Ninth Circuit largely eschewed the prevailing multi-

factor test it and other circuits had long applied. It instead created a new test that, if upheld, will vastly expand the universe of people required to register with SEC and incur the associated costs and burdens.

The Court should grant certiorari, reverse the Ninth Circuit's judgment, and in the process bring much needed consistency, predictability, and discipline to both the calculation of SEC penalties and the determination of who must register with SEC as a broker.

STATEMENT OF THE CASE

1. For 50 years after its creation in 1934, SEC lacked statutory power to seek or impose monetary penalties. The agency could seek court injunctions and ancillary equitable remedies against wrongdoers, and it could impose securities-industry bars and suspensions administratively, but Congress initially gave the agency no power to penalize. *See generally* Eisenberg, *supra*; *see also* Rosenfeld at 138-39; Liebmann at 435-36.

That changed in 1984, when Congress empowered SEC to seek monetary penalties in federal court for insider trading violations in an amount up to three times the trader's illicit profits or losses avoided. *See* Rosenfeld at 139; Liebmann at 436. Six years later, Congress expanded SEC's punitive powers by allowing the agency to impose penalties administratively against firms and individuals operating within the SEC-regulated securities industry and to seek monetary penalties in court against *any* securities-law violator. *See* Rosenfeld at 140-41; Liebmann at 436-37; Ralph Ferrara, *et al.*, *Hardball! The SEC's New Arsenal of Enforcement*

Weapons, 47 Bus. Law. 33 (1991). Most recently, in 2010, Congress further expanded SEC's power by allowing the agency to impose penalties *administratively* against any securities law violator—not just those operating in the securities industry. *See* Rosenfeld at 141; Liebmann at 435-36.

2. Whether SEC seeks penalties in court or imposes them administratively, the penalties (other than for insider trading) are generally governed by a three-tier statutory framework. Different statutory provisions apply depending on which securities-law provision is violated and whether SEC seeks its penalties in court or imposes them administratively, but with some exceptions not applicable here, the three-tier structure is substantially similar.

As relevant here, the penalty structure works like this: The baseline *maximum* penalty (adjusted for inflation) is now roughly $10,000 per violation for natural persons and roughly $100,000 per violation for non-natural persons; if a violation involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement[,]" the baseline maximum increases to roughly $100,000 for natural persons and $500,000 for non-natural persons; and if the violation *also* "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," the baseline maximum increases further to roughly $200,000 for natural persons and $1 million for non-natural

persons. *See generally* 15 U.S.C. § 78u (d)(3)(B); 17 C.F.R. § 201.1001.[1]

Despite legislating in this area on several occasions, Congress has never delineated how to calculate the number of violations in any given case—a critical input for determining (and limiting) appropriate penalties. Therein lies the rub, as the instant case illustrates.

3. SEC filed its complaint against the three Petitioners and eleven co-defendants in August 2018. The complaint charged all 14 defendants with failing to register with SEC as securities brokers in violation of Exchange Act section 15(a)(1), 15 U.S.C. § 78*o*(a)(1). It also charged eleven of the defendants (including one of the three Petitioners here) with, *inter alia*, providing inaccurate zip code information to certain municipal bond securities brokers in violation of Exchange Act section 10(b), *id.* § 78j(b), and SEC Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. All eleven of Petitioners' co-defendants settled the case upon its filing, paying monetary penalties ranging from a low of $7,500 to a high of $150,000. 12a-13a.

Threatened with potential governmental fines, injunctions, and career-ending securities industry debarments, Petitioners demanded a trial by jury. But that trial never occurred. In August 2020 the

[1] Where, as here, SEC seeks penalties in federal court rather than imposing them administratively, the statute alternatively allows the court to impose a penalty up to the gross amount of the defendant's pecuniary gain. SEC did not request that alternative penalty calculation here and the district court did not consider it.

district court granted SEC's motion for summary judgment as to liability, 62a, and in February 2021 the court granted in substantial part SEC's motion for remedies without conducting any evidentiary hearing, 44a.

4. In granting SEC's motion for summary judgment, the court rejected Petitioners' declarations and sworn affidavits as "self-serving" and inconsistent with the weight of other evidence; found "no question of material fact;" and concluded as a matter of law that all three Petitioners acted as unregistered securities brokers even though all trades were made in their own brokerage accounts custodied at SEC-registered brokerage firms. 66a-71a. And despite Petitioner Jocelyn Murphy's contentions that the inaccurate zip code information she provided to certain securities brokers was not material, that the information did not deceive the securities brokers, and that she did not act with the level of scienter required to establish liability under Exchange Act section 10(b) and SEC Rule 10b-5—that is, with a "mental state embracing intent to deceive, manipulate or defraud," 73a (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976))—the court found no genuine factual dispute as to those issues and held her liable under those provisions as a matter of law. 72a-75a.

5. At the remedies stage, the court imposed monetary penalties against each of the Petitioners that dwarfed those it had previously imposed against their settling co-defendants. 61a. The court also enjoined two of the Petitioners (Jocelyn and Sean Murphy) from violating the relevant provisions of the Exchange Act. *Id*.

As to Petitioners Sean Murphy and Richard Gounaud—who were charged and found liable only for failing to register with SEC as securities brokers—the court assessed penalties of approximately $419,000 and $309,000, respectively. *Id*. In arriving at these totals, the court agreed with SEC's request to multiply the statutory cap by the number of months that SEC contended these two Petitioners had remained unregistered (65 months for Murphy and 46 months for Gounaud), then discounted the resulting penalty amounts by 20 percent. 47a-54a. As to Petitioner Jocelyn Murphy, the court imposed no monetary penalty for her failure to register as a securities broker, but it imposed a penalty of nearly $1.8 million for the fraud violation, arrived at by multiplying the applicable statutory cap by the number of times (21) that SEC contended—for the first time at the penalty stage—that she had included inaccurate zip code information in communications with securities brokers. 57a-60a.

6. The Ninth Circuit affirmed the district court's judgment in all respects. 7a. Although the case involved no allegations or findings concerning penny stocks, boiler room sales tactics, or brokerage commissions, the court's opinion began with ominous references to the "smooth-talking brokers" featured in the movie *The Wolf of Wall Street*, who "pressur[ed] clients into buying and selling worthless penny stocks so that they can bank massive commissions." *Id*.

Turning to the merits, the court agreed with the district court's conclusion that Petitioners acted as unregistered securities brokers as a matter of law because on some trades they took direction and trading capital from one of their settling co-

defendants and then shared any resulting trading profits or losses with that co-defendant. 20a-21a. Rejecting Petitioners' contention that their respective profit-sharing relationships with the co-defendant were partnerships rather than broker-customer relationships, the court concluded that Petitioners "ha[d] not proved that a partnership in fact existed." 22a-24a. The court also rejected Petitioner Jocelyn Murphy's contention that the zip code information she provided to securities brokers was not material, and thus affirmed the district court's conclusion that she was liable for committing fraud as a matter of law. 26a-28a.

In affirming the district court's penalties against Petitioners, the court acknowledged that "it appears no individual investor suffered financial harm." 8a. It further noted that the Exchange Act does not define how "each violation" should be counted, and it cited two district court decisions illustrating the numerous different ways lower courts have done so. 31a. That lack of a statutory definition, in the court's view, gives district courts discretion to define what each violation means in any given case. *Id*. The court held it was within the district court's discretion to count as a separate violation each month in which Petitioners Sean Murphy and Richard Gounaud remained unregistered as securities brokers, 31a-32a, even though the resulting penalty from this methodology was nearly 56 times higher for Murphy, and more than 41 times higher for Gounaud, than the penalty imposed against the only other similarly situated co-defendant *in the same case*, *see* Order Granting Consent Judgment, *SEC v. RMR Asset Mgmt. Co.*, No. 18-cv-01895 (S.D. Cal. Aug. 17, 2018), ECF No. 18.

The court similarly found permissible discretion in the district court's use of a different penalty multiplier against Jocelyn Murphy—multiplying her statutory penalty cap by the number of times she provided inaccurate zip code information to a securities broker, 29a-30a—even though the resulting penalty was nearly 12 times higher than the highest penalty imposed against any of the settling co-defendants who were charged with comparable—and worse—violations. 33a.

Dismissing Petitioner Gounaud's contention that "[e]lapsed time is not a violation," the court found the district court's per-month multiplier "especially reasonable—and favorable to Gounaud—because the district court could have found thousands of violations if it had relied on the number of transactions Gounaud made as an unregistered broker." 30a-32a. Dismissing the Murphy Petitioners' objection to the geometrical disparity between the penalties imposed against them and those imposed against their comparable settling co-defendants, the court determined that such comparisons would be "apples to oranges" and "inappropriate because 'the circumstances vary so widely.'" 32a-33a (quoting *Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir. 2001)).

Judge Lee filed a concurring opinion, joined by Judge Fitzwater (sitting by designation). 41a. The concurring judges agreed that Petitioners were required to register with SEC as securities brokers, but they wrote separately "to highlight the perils of relying on multifactor tests" and to "recommend jettisoning" a test the Ninth Circuit and other courts have previously used in a broker-registration case. *Id.*

7. The Ninth Circuit subsequently denied Petitioners' timely petitions for rehearing en banc. 1a-4a.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS' ARBITRARY AND INCONSISTENT COUNTING OF VIOLATIONS TO EXCEED STATUTORY PENALTY CAPS WARRANTS REVIEW

By affirming the multiplier used by the district court to assess penalties against Petitioners Sean Murphy and Richard Gounaud—*i.e.*, multiplying the statutory penalty cap by a unit of time (here, each month they remained unregistered with SEC)—the Ninth Circuit created a circuit split with the District of Columbia Circuit. The Ninth Circuit also affirmed the district court's use of a completely different multiplication approach in assessing the penalty against Petitioner Jocelyn Murphy, which differed still from the district court's decision not to use any multipliers against eleven settling co-defendants *in the same case*.

On a broader scale, however, this case is just a microcosm of the inconsistency and unpredictability that currently reigns throughout the lower courts, where penalties in SEC cases often vastly exceed the ostensible per-violation caps established by Congress, and regulated parties have no way of knowing in advance the potential financial consequences they face if they run afoul of federal securities laws and regulations, or their maximum financial exposure if they later choose to defend themselves against SEC charges. The practical results of this chaos and unpredictability are that: (i) SEC's statutory penalty

caps have effectively become illusory; (ii) few SEC targets can afford to risk potentially limitless penalty assessments; (iii) SEC exerts overwhelming leverage in demanding settlements; and (iv) most cases settle without any meaningful judicial scrutiny.

The Court's review is urgently needed to bring discipline, fairness, consistency, and predictability to this recurring and consequential issue in SEC enforcement cases. *Cf. Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (rejecting government's attempt to multiply a single reporting failure under the Bank Secrecy Act into "a cascade of such penalties calculated on a per-account basis").

A. The Decision Below Creates a Circuit Split, Furthering Broader, Cross-Circuit Inconsistency and Unpredictability in Assessing Penalties

The decision below, affirming multiplication of the Exchange Act's statutory penalty cap by a unit of time (here, multiplication per month), conflicts with the decision of the District of Columbia Circuit in *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012), a case decided on deferential review from an administrative SEC adjudication. The court in *Rapoport* described SEC's multiplication of the maximum statutory penalty by a factor of five—one for each year (not month) during which a violation persisted—as "a faulty formula" that resulted in "calculations [that] do not follow the formula set by the statute." *Id.* at 107-08. The court further described SEC's per-year penalty analysis as "not just superficial; it was nonexistent." *Id.* at 108. *But see SEC v. Lek Secs. Corp.*, 612 F. Supp. 3d 287 (S.D.N.Y. 2020)

(characterizing SEC's requested per-month penalty calculation as "a reasonable intermediate metric" although nevertheless assessing penalties below SEC's requested amount), *aff'd sub nom., SEC v. Vali Mgmt. Partners*, No. 21-453, 2022 WL 2155094 (2d Cir. June 15, 2022).

This circuit split, however, is just the visibly exposed tip of a hidden iceberg of inconsistent and unpredictable penalty outcomes across the circuits. As the decisions below acknowledged, SEC and the courts have conjured up nearly limitless ways to slice up violations and then multiply SEC's statutory penalty caps, often geometrically and often resulting in astronomical penalties.

For example, some courts have acceded to SEC demands to multiply statutory caps by the number of individual trades made by a defendant. *See, e.g.*, *SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 470, 503 (S.D.N.Y. 2009), *aff'd*, 381 Fed. Appx. 27 (2d Cir. 2010); *SEC v. Baker*, No. 1:19-cv-02565-LMM, 2021 WL 9385893 (N.D. Ga. Nov. 8, 2021); *SEC v. Dang*, No. 3:20-cv-01353 JAM, 2021 WL 1550593 (D. Conn. Apr. 19, 2021). Other courts have declined to use per-trade multipliers. *See also SEC v. CMKM Diamonds, Inc.*, 635 F. Supp. 2d 1185, 1192-93 (D. Nev. 2009) (characterizing as "unhelpful," "excessive," and "unjust and inequitable" SEC demands to use per-transaction multiplier, and imposing single penalty instead).

Some courts have acceded to SEC demands to multiply statutory caps by the number of investors or other victims affected by a defendant's conduct. *See, e.g.*, *SEC v. Fowler*, 440 F. Supp. 3d 284

(S.D.N.Y. 2020), *aff'd as modified*, 6 F.4th 255 (2d Cir. 2021); *SEC v. Duncan*, No. 3:19-cv-11735-KAR, 2022 WL 952266 (D. Mass. Mar. 30, 2022); *SEC v. Gilman*, No. 3:18-cv-1421-L, 2021 WL 4125195 (N.D. Tex. Sept. 9, 2021); *SEC v. Brookstreet Secs. Corp.*, No. SACV 09-1431-DOC ANx, 2014 WL 12689999 (C.D. Cal. Dec. 18, 2014), *aff'd*, 664 Fed. Appx. 654 (9th Cir. 2016). Other courts have rejected similar SEC demands for per-investor or per-victim multipliers. *See, e.g.*, *SEC v. Complete Bus. Sols. Grp. Inc.*, No. 20-cv-81205-RAR, 2022 WL 17243360 (S.D. Fla. Nov. 22, 2022) (rejecting SEC demand to multiply penalty by number of potential investors who attended misleading presentations, opting instead to multiply by the smaller number of investors who actually held the relevant security); *CMKM Diamonds,* 635 F. Supp. 2d at 1193.

Some courts—including the courts below as to Petitioner Jocelyn Murphy—have acceded to SEC demands to multiply statutory caps by the number of individual acts or omissions that comprised a violation. *See also SEC v. Alpine Secs. Corp.*, 413 F. Supp. 3d 235 (S.D.N.Y. 2019) (multiplying penalty by number of unfiled suspicious activity report and unproduced support files to reach $12 million penalty), *aff'd*, 982 F.3d 68 (2d Cir. 2020), *cert. denied* 142 S. Ct. 461 (2021). Other courts have rejected similar SEC demands. *See, e.g.*, *SEC v. E-Smart Techs., Inc.*, 139 F. Supp. 3d 170, 191-92 (D.D.C. 2015).

Some courts have multiplied statutory caps by the number of statutory provisions that SEC proves the defendant violated. *See, e.g.*, *SEC v. Grenda Grp., LLC*, 621 F. Supp. 3d 406 (W.D.N.Y. 2022); *SEC v.*

Kelley, No. 14-2827 (SRC), 2019 WL 3941056 (D.N.J. Aug. 21, 2019). Still others look to whether violations of multiple statutory provisions were really just one overall course of conduct or a series of separate, discrete courses of conduct. *See, e.g.*, *SEC v. Johnston*, 368 F. Supp. 3d 247, 254-55 (D. Mass. 2019) (concluding that violation of multiple statutes and rules was a single scheme deserving of no penalty multiplier); *SEC v. Guzman*, No. 3:17-cv-00276-GCM, 2018 WL 2292535 (W.D.N.C. May 18, 2018) (similar); *SEC v. StratoComm Corp.*, 89 F. Supp. 3d 357. 372-73 (N.D.N.Y. 2015) (similar).

In surveying the cases, the only consistent and predictable feature is that case outcomes are inconsistent and unpredictable. Essentially anything goes, limited only by the ingenuity of SEC prosecutors and the willingness (or unwillingness) of federal courts to go along in any given case.

But even this chaos in fully litigated outcomes vastly understates the problem, because—with the leverage SEC enjoys from the above-described unpredictability in how high the penalties might rise at the end of any given case—the vast majority of SEC prosecution targets settle early on, and relatively few cases ever reach a litigated penalty phase. In settled cases (other than insider trading cases, which are governed by a different penalty structure), SEC rarely offers any public explanation of how the penalty was calculated or how it ties back to the statutory caps set by Congress. By way of example, SEC has recently settled several cases based on non-fraud charges that an accused company violated one or more of the Exchange Act's requirements for recordkeeping, internal accounting controls, or employee

supervision, the inflation-adjusted statutory penalty cap for which is currently $111,614 for each violation. Despite this cap, and despite alleging only a small number of violations in these settled cases, SEC was able to extract penalties from each settling company ranging from $4 million to $15 million. *In re Scotia Capital (USA) Inc.*, SEC Exchange Act Rel. No. 97477 (May 11, 2023) ($7.5 million); *In re HSBC Secs. (USA) Inc.*, SEC Exchange Act Rel. No. 97476 (May 11, 2023) ($15 million); *In re Rio Tinto PLC*, SEC Exchange Act Rel. No. 97049 (Mar. 6, 2023) ($15 million); *In re Flutter Enter. plc*, SEC Exchange Act Rel. No. 97044 (Mar. 6, 2023) ($4 million). The multipliers used in settlements imposing even higher penalties are likewise rarely discernible and almost never explicitly disclosed. *See, e.g.*, *JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges*, SEC Press Rel. No. 2021-262 (Dec. 17, 2021) ($125 million penalty assessed in settlement identifying violation of one non-fraud statute and one non-fraud SEC rule).

Today's haphazard SEC penalty environment deprives regulated parties of any semblance of fair notice or predictability, and it allows SEC to routinely override the statutory penalty caps set by Congress. This case presents an ideal vehicle for this Court to bring needed predictability and discipline to this recurring issue in securities law.

B. The Arbitrarily Calculated Penalties in This Case Vastly Exceed the Statutory Caps Set by Congress

The penalties in this case were governed by Exchange Act section 21(d)(3), 15 U.S.C. § 78u(d)(3).

For Petitioners Sean Murphy and Richard Gounaud, who were charged only with failing to register with SEC as securities brokers, the statute at the time authorized penalties of approximately $7,500 "[f]or each violation." *Id.* § 78u(d)(3)(B)(i). In the absence of a statutory definition of what "each violation" means, the courts below accepted SEC's argument that, at least as applied to these two Petitioners, "each violation" should be defined as each month they remained unregistered.

That approach had no textual or logical basis. A random unit of time cannot plausibly be considered a separate violation of the broker-registration requirement of the securities laws. When Congress wants penalties imposed based on units of time, it knows how to do so and does so explicitly—typically on a per-day basis. *See, e.g.*, 12 U.S.C. § 504; *id.* § 5565(c)(2); 33 U.S.C. § 1319(c),(d); 42 U.S.C. § 7413(d); 49 U.S.C. § 5123(a). Indeed, elsewhere the very penalty statute at issue in this case explicitly singles out a unique class of violations not relevant here—violations of SEC cease-and-desist orders—for per-day penalty treatment, 15 U.S.C. § 78u(d)(3)(D), thus negating any plausible argument that Congress intended SEC or the courts to apply a different (or any) unit-of-time multiplier for other types of violations covered by the same statute.

In the absence of express statutory direction, there is no limiting principle to the unit-of-time approach. Here the multiplier was per-month, but the decisions below, by logical extension, embolden SEC to demand other unit-of-time multipliers, such as per-year, per-week, or per-day—especially in administrative settlements that require no judicial review or

approval—rendering potential penalties almost limitless. As the D.C. Circuit recognized in *Rapoport*, the unit-of-time approach is "faulty" and "superficial," and it results in "calculations [that] do not follow the formula set by the statute." 682 F.3d at 107-08.

In the context of a violation for failure to register with SEC as a broker, the most natural reading of "each violation" is a *singular* violation. That violation does not become a separate violation with each passing day, or month, or year that the defendant remains unregistered. Tellingly, SEC's complaint pleaded it as a single violation, *see* Complaint for Injunctive and Other Relief, *SEC v. RMR Asset Mgmt. Co.*, No. 18-cv-01895, ¶¶ 118-120 (S.D. Cal. Aug. 14, 2018), ECF No. 1 ("Complaint"), and that is how SEC and the district court applied the statute when penalizing a settling co-defendant facing only this charge, *see* Order Granting Consent Judgment, *SEC v. RMR Asset Mgmt. Co.*, No. 18-cv-01895 (S.D. Cal., Aug. 17, 2018), ECF No. 18.

The multiplier used against Petitioner Jocelyn Murphy—counting as a separate violation each time, according to SEC, she submitted inaccurate zip code information to a securities broker—was equally arbitrary, unmoored from statutory text, and devoid of any limiting principle. The statutory cap at the time for the type of securities fraud violation for which she was penalized was approximately $80,000. Here too, SEC pleaded its securities fraud charge against Murphy as only a single violation, *see* Complaint ¶¶ 107-09, and it obtained summary judgment on that violation by citing only three instances of inaccurate zip code information, waiting

until the penalty phase to unveil its theory that she actually committed 21 separate violations. 29a-30a.

Courts often apply no penalty multiplier for comparable fraud violations, particularly where, as here, the underlying acts and omissions were part of a single course of conduct. *See, e.g.*, *Johnston*, 368 F. Supp. 3d at 254-55; *Guzman*, 2018 WL 2292535; *StratoComm Corp.*, 89 F. Supp. 3d at 372-73. A multiplier based on the number of underlying acts or omissions defies the most natural reading of the penalty statute, especially when read *in pari materia* with a nearby provision of the same statute, both provisions having been enacted simultaneously as part of the Securities Enforcement Reform and Penny Stock Act of 1990, Pub. L. 101-429, 104 Stat. 931 (Oct. 15, 1990) (the "Remedies Act"). Specifically, whereas Remedies Act section 201 (applicable in this case and all other SEC enforcement cases litigated in federal courts, and codified at 15 U.S.C. § 78u) authorizes penalties for "each violation," the *very next section of the same legislation* (applicable in SEC enforcement cases litigated administratively, codified at 15 U.S.C. § 78u-3) authorizes penalties "for each act or omission." The courts below effectively read this linguistic distinction out of the statute.

Petitioner Jocelyn Murphy was penalized for a single count of securities fraud, and the statutory penalty cap should not have been multiplied.

C. The Arbitrarily Calculated Penalties in This Case Are Excessive Under the Eighth Amendment

If the penalties in this case were permissible under the statute, this Court should set them aside as

violative of the Excessive Fines Clause of the Eighth Amendment. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In *Bajakajian*, this Court held a government fine violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense." *Id*. *See also SEC v. Brookstreet Secs. Corp.*, 664 Fed. App'x 654, 656 (9th Cir. 2016) (analyzing SEC penalty under Excessive Fines Clause). Here, the fines levied against Petitioners were grossly disproportionate to the gravity of their alleged offenses, as demonstrated, *inter alia*, by the fines imposed against Petitioners' settling co-defendants for materially similar offenses.

In overruling Petitioners' Eighth Amendment objections, the Ninth Circuit gave "substantial deference" to the district court's penalty assessment in large part because the penalty amount was "within the bounds set by the penalty statute." 33a (quoting *Bajakajian*, 524 U.S. at 336). But *Bajakajian* said exactly the opposite: This Court held that "substantial deference" goes to the *legislature*, adding that courts of appeals must review district court proportionality assessments *de novo*. 524 U.S. at 336 & n.10. Moreover, *Bajakajian* created no presumption of proportionality whenever a penalty does not exceed a statutory cap. Reading such a presumption into *Bajakajian* would effectively read the Excessive Fines Clause out of the Eighth

Amendment whenever a statute includes any express penalty cap, however astronomical.

In any event, the Ninth Circuit's novel presumption—when coupled with its permissive approach to penalty-cap multipliers—creates a tautology by which virtually *any* SEC penalty would survive Eighth Amendment scrutiny. With enough ingenuity, SEC and the courts can nearly always contrive *some* statutory-cap multiplier approach that would render the resulting penalty "within the bounds set by the penalty statute." This case is a perfect example. Both the district court and the Ninth Circuit went out of their way to note that SEC *could have* sliced the Petitioners' violations even thinner to create an even greater multiplier effect, with resulting penalties that *could have* vastly exceeded the penalties that were imposed. 34a (Ninth Circuit warning that a per-trade multiplier against Petitioners Sean Murphy and Richard Gounaud could have resulted in "multimillion-dollar penalties" against each for non-scienter offenses that "may not have caused direct financial harm to any individuals"); 50a (district court warning that "[h]ad the SEC elected a 'per violation' calculation, Mr. Gounaud and Mr. Murphy would have been subjected to millions of dollars in penalties").

This Court's review is warranted not only to correct the Ninth Circuit's grievous misinterpretation of *Bajakajian* but also to guide lower courts more generally in applying *Bajakajian*'s Eighth Amendment approach to putatively "civil" regulatory enforcement cases, where "extravagant" punishments are "routinely imposed and are routinely graver than those associated with misdemeanor crimes—and

often harsher than the punishment for felonies." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J. dissenting).

II. THE NINTH CIRCUIT'S UNPRECEDENTED EXPANSION OF WHO MUST REGISTER WITH SEC AS A BROKER CREATES A CIRCUIT CONFLICT AND WARRANTS REVIEW

The Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," 15 U.S.C. § 78c(4)(A). Falling within this definition is no small matter, especially for individuals like Petitioners who trade through their own brokerage accounts custodied at SEC-registered brokerage firms, do not act on behalf of any issuers of the securities they trade, have no brokerage "customers" in any conventional sense of that term, and are not paid commissions on their trades. Nonetheless being deemed a "broker" means not only having to register as such with SEC, 15 U.S.C. § 78*o*(a)(1), but also having to become a member of a "securities association" such as the Financial Industry Regulatory Authority (commonly known as "FINRA") and/or a national securities exchange, *id*. § 78*o*(b)(8). Such registration and membership then subject brokers to, among other things, a bevy of costly and burdensome fees, regulatory requirements, and periodic inspections. *See generally* Sec. Industry Ass'n, Survey Report, *The Costs of Compliance in the U.S. Securities Industry* (Feb. 2006); Alexander R. Tiktin, *Broker-Dealer Law Reform: Financial Intermediaries in a State of Limbo*, 81 Brook. L. Rev. 1205, 1209-10, 1225-26 (2016).

For nearly 90 years, SEC has failed to promulgate any formal rules or regulations to provide notice concerning what activities in the securities markets constitute engaging "in the business of effecting transactions in securities for the account of others" and, therefore, require registration with SEC as a broker. With that void, federal courts have developed a multi-factor test, first set out in *SEC v. Hansen*, No. 83 CIV. 3692, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984), that assesses liability for failing to register as a broker based on a "totality of the circumstances" approach. *See SEC v. Collyard*, 861 F.3d 760, 766 (8th Cir. 2017) (adopting *Hansen* non-exclusive factors); *SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005) (citing *Hansen*, 1984 WL 2413, at *10); *see also SEC v. Imperiali, Inc.*, 594 Fed. App'x 957, 961 (11th Cir. 2014) (quoting *George*, 426 F.3d at 797); *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334–35 (M.D. Fla. 2011) ("Because the Exchange Act defines neither 'effecting transactions' nor 'engag[ing] in the business,' an array of factors determines whether a person qualifies as a broker under section 15(a).") (citing cases); *Cf. SEC v. M&A West, Inc.*, No. C-01-3376 VRW, 2005 WL 1514101, at *1 (N.D. Cal. 2005) (granting summary judgment, *sua sponte*, to the defendants after finding the Exchange Act's definition of "broker" to be "somewhat opaque").

Prior to this case, even the Ninth Circuit had applied the "totality of the circumstances" approach and the *Hansen* factors for determining liability under section 15(a). *SEC v. Feng*, 935 F.3d 721, 726, 731-33 (9th Cir. 2019). In applying the *Hansen* factors, moreover, neither the Ninth Circuit nor any other court had found broker status based on facts

analogous to this case. In all prior cases applying the *Hansen* factors, those deemed brokers had sold securities to investors on behalf of securities issuers. None of those cases found traders, like Petitioners, who bought and sold securities in their own accounts with their own risk of loss on every trade, to be brokers simply because they occasionally took direction and financing from, and shared profits and losses with, another person.

Instead of applying the prevailing multi-factor test, the Ninth Circuit here said that "when someone places another's capital at risk by trading securities as his or her agent, he or she is trading securities 'for the account of others,' and is a 'broker' subject to section 15(a)'s registration requirements." 24a. It thereby ignored this Court's direction that statutory interpretations be based on "ordinary, contemporary, common meaning," *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *accord Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them" (citations omitted)). The Ninth Circuit based its new definition of broker, in part, on modern online dictionary definitions of the terms "account" and "agent," and the fact that a settling co-defendant had agreed to provide financing for certain trades executed in Petitioners' accounts in exchange for a share of the profits (and losses) from those trades. 19a-21a.[2]

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[2] After sustaining the finding of section 15(a) liability based on its new definition, the court noted that "some" of the *Hansen* factors—at most two of eight—also supported a finding of

This new definition of "broker" conflicts with how that term was defined at the time Congress enacted the Exchange Act. *See Broker*, Websters New Int'l Dictionary (3d ed. 1934) ("one who for a commission or fee, brings parties together and assists in negotiating contracts between them"). In 1934, the common understanding of the term "broker" simply did not include a business arrangement in which the profits and losses from securities trades were shared by the person placing the trades and the person financing the trades.

The decision below greatly expands the universe of persons required to register as brokers under Exchange Act section 15(a), 15 U.S.C. § 78*o*(a), but only in the Ninth Circuit. For example, investment clubs pool the capital of numerous people to trade securities for their mutual benefit, but typically one or more club members are designated to place the trades on behalf of the club. Likewise, one family member may borrow from another to fund securities trading activities, thereby putting the lending family member's capital at risk. And SEC-registered investment advisers frequently receive powers-of-attorney to place trades in clients' brokerage accounts. Under the Ninth Circuit's new definition of

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liability. 12a. Because other *Hansen* factors supported a finding of "no liability," it was plain error for the District Court to grant summary judgment in favor of liability based on the *Hansen* factors and the totality of the circumstances test. In a concurring opinion, two members of the panel discussed the adjudicatory problems with multi-factor tests. Contrary to the approach the Ninth Circuit took, the solution to the problem of a section 15(a) multi-factor test was not to invent a new definition of "broker" but to deny summary judgment.

broker—"plac[ing] another's capital at risk by trading securities as his or her agent," 24a—all of these activities presumably would cause the trader to be deemed a broker required to assume the cost, burden, and ongoing obligations associated with SEC registration and inspection. Such a vast expansion of the scope of section 15(a) should occur only through legislative amendment by Congress or, at a bare minimum, through SEC rulemaking after notice and comment.

III. THE LOWER COURTS' DEPRIVATION OF PETITIONERS' JURY TRIAL RIGHTS WARRANTS REVIEW

The Seventh Amendment guarantees the right to trial by jury in civil cases in federal court. At the time of the adoption of the Bill of Rights, James Madison considered trial by jury in civil cases to be "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature." Kathleen M. O'Malley, *Trial by Jury: Why It Works and Why It Matters*, 68 Am. U. L. Rev. 1095, 1098 (2019). Mr. Elbridge Gerry, before becoming governor of Massachusetts, warned at the founding that a "tribunal without juries would be a Star Chamber in civil cases." 13 The Documentary History of the Ratification of the Constitution 197, 199 (John P. Kaminski et al. eds., 1981).

The Federal Rules of Civil Procedure permit courts to grant summary judgment on a claim or defense, and thereby deprive the nonmoving party the right to a jury trial, only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(a). This Court has held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge … ruling on a motion for summary judgment . . . ." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). To ensure that Rule 56 does not infringe Seventh Amendment rights, on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed," evidence must viewed in the light most favorable to the nonmovant, and "all justifiable inferences are to be drawn in favor [of the nonmovant]." *Id.*; *accord Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

Here, the decisions below deprived Petitioners of the jury trial they had demanded by failing to heed this Court's precedent for analyzing summary judgment motions.[3] Both lower courts: (a) made credibility determinations against Petitioners;[4] (b) weighed the evidence presented against

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[3] The Ninth Circuit opinion omitted any reference to controlling precedent or the standard by which a motion for summary judgment should be determined.

[4] *See, e.g.,* 22a ("Appellants have provided no evidence that they ever declined to purchase a bond requested by Riccardi, which belies *their claim* of complete discretion.") (emphasis added, with "claim" referring to Petitioners' declarations and sworn affidavits); 23a ("Appellants changed their tune at their 2019 depositions …"); 33a (Petitioners "provided less-than-convincing assurances against future violations"); 49a ("[A]lthough Defendants are entitled to litigate their case, they did so by presenting arguments without credible evidentiary support").

Petitioners;[5] (c) made factual findings contrary to the evidence presented by Petitioners;[6] and (d) held that Petitioners had not "proven" their case even though they did not bear any burden of proof, especially on SEC's motion for summary judgment.[7] In doing so, the lower courts profoundly violated Petitioners' Seventh Amendment right to a jury trial in both the determination of liability and the determination of remedies. *See SEC v. Husain*, No. 21-55859, 2023 WL 3961136 (9th Cir. June 13, 2023) (split decision citing the instant case but reversing summary judgment

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[5] *See, e.g.,* 14a ("While the Appellants technically controlled their accounts, there were 'several exhibits that contain emails establishing that [certain co-defendants] directed [Appellants] to purchase securities'"); 22a ("Although Appellants made *some* trades independent of [a co-defendant], this does not negate that when [the co-defendant] directed Appellants to place a trade, they complied") (emphasis added; *but see* 11a ("Sean [Murphy] executed 10,179 trades, including 399 involving new-issue municipal bonds," with no indication of how many of those 399 new-issue bond trades were directed by the co-defendant)); 53a ("The sincerity of their assurances, however, are weakened by their failure to completely recognize the wrongfulness of their past conduct").

[6] *See, e.g.,* 20a ("Of course, Appellants also bore a portion of the risk on each trade. So, they also made trades for their own accounts, so to speak. But there is no requirement in section 15(a) that a 'broker' must trade *exclusively* for the account of others."); 70a ("Thus, there is overwhelming evidence that Defendants' relationship with [a co-defendant] was not a partnership, and there is no evidence other than self-serving affidavits to support that this relationship was a partnership").

[7] *See, e.g.,* 22a-23a ("Appellants have not proved that a partnership in fact existed").

awarding penalties due to disputed issues concerning pecuniary gain, scienter, and lack of contrition).

Over the past 60 years, the number of jury trials in federal courts has declined precipitously.[8] If the approach to summary judgment taken by the courts below becomes the norm, the Seventh Amendment right to a jury trial would become illusory, even in governmental enforcement cases seeking severe penal sanctions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] *See* Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials,"* 62 DePaul L. Rev. 415, 438 (2013) ("It is clear that the number of jury trials declined in many, perhaps most, jurisdictions in the United States over the last fifty years."); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 461 (2004) (showing that the rate of civil trials by jury in 2002 "was less than one-sixth of what it was in 1962"); *see also* Civil Jury Project at NYU School of Law, https://civiljuryproject.law.nyu.edu/about/ (last visited June 22, 2023) ("[I]t is beyond dispute that the civil jury trial is a vanishing feature of the American legal landscape. In 2018, for example, 0.5 percent of federal civil cases were tried before juries—down from 5.5 percent in 1962. This amounted to an average of 2 civil jury trials per authorized federal judgeship in 2018—down from 10 in 1962.").

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June 23, 2023