No. 22-1241

# In the Supreme Court of the United States

JOCELYN M. MURPHY, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION

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

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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**QUESTIONS PRESENTED**

Under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Securities and Exchange Commission (SEC) Rule 10b-5(b), it is "unlawful for any person * * * [t]o make any untrue statement of a material fact * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b). Under Section 15(a) of the Exchange Act, it is "unlawful for any broker"—defined as "any person engaged in the business of effecting transactions in securities for the account of others," 15 U.S.C. 78c(a)(4)(A)—"to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security * * * unless such broker * * * is registered" with the SEC, 15 U.S.C. 78*o*(a)(1), or an exemption applies, 15 U.S.C. 78*o*(a)(2). Section 21(d)(3) of the Exchange Act instructs that "[t]he amount of a civil penalty imposed" for a violation of the Act's provisions "shall be determined by the court in light of the facts and circumstances," except that "the amount of the penalty" "[f ]or each violation" shall not exceed specified statutory maximums. 15 U.S.C. 78u(d)(3)(B) (Supp. III 2021). The questions presented are as follows:

1. Whether the court of appeals correctly affirmed the district court's imposition of a civil penalty for each instance in which petitioner Jocelyn Murphy had knowingly made false or misleading statements, and for each month that petitioners Sean Murphy and Richard Gounaud had engaged in unregistered broker activity.

2. Whether the court of appeals correctly held that petitioners had traded securities "for the account of others," 15 U.S.C. 78c(a)(4)(A), and therefore had acted as brokers, because they had put another person's capital

at risk on every trade they made and had acted as that person's agents.

3. Whether the district court correctly granted summary judgment for the SEC on petitioners' liability, based on the absence of any genuine dispute of material fact requiring a trial, and then properly relied on its own factual findings in determining the appropriate amount of penalties to be imposed on each petitioner.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-43a) is reported at 50 F.4th 832. The orders of the district court (Pet. App. 44a-61a, 62a-76a) are reported at 479 F. Supp. 3d 923 and 553 F. Supp. 3d 820.

## JURISDICTION

The judgment of the court of appeals was entered on October 4, 2022. Petitions for rehearing were denied on January 25, 2023 (Pet. App. 1a-2a, 3a-4a). On April 14, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 23, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) prohibits any person from using or employing, in connection with the purchase or sale of

any security, "any manipulative or deceptive device or contrivance" that is contrary to a rule of the Securities and Exchange Commission (SEC or Commission). 15 U.S.C. 78j(b). Under the SEC's Rule 10b-5(b), it is "unlawful for any person * * * [t]o make any untrue statement of a material fact * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b). Although Rule 10b-5(b) applies to "any person," fraud is "particularly egregious when committed by a securities professional," as "the primary objective of the federal securities laws" is the "protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'" *Bateman, Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 314-315 (1985) (citation omitted).

The Exchange Act defines the term "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. 78c(a)(4)(A). Section 15(a) of the Act makes it "unlawful for any broker * * * to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security * * * unless such broker * * * is registered" with the Commission or an exemption applies. 15 U.S.C. 78*o*(a)(1) and (2). This registration requirement is the "keystone of the entire system of broker-dealer regulation," *Roth* v. *SEC*, 22 F.3d 1108, 1109 (D.C. Cir.), cert. denied, 513 U.S. 1015 (1994) (citation omitted), and is "of the utmost importance in effecting the purposes of the Act," *Regional Props., Inc.* v. *Financial & Real Estate Consulting Co.*, 678 F.2d 552, 561 (5th Cir. 1982) (citation omitted).

Section 21(d)(3) of the Exchange Act authorizes the imposition of a "civil penalty" for a "violation" of the Act's

provisions. 15 U.S.C. 78u(d)(3)(A)(i) (Supp. III 2021).[1] Section 21(d)(3) also states that the "amount" of that civil penalty "shall be determined by the court in light of the facts and circumstances." 15 U.S.C. 78u(d)(3)(B). "For each violation," the court may impose a monetary penalty "not [to] exceed the greater of" a fixed statutory amount or "the gross amount of pecuniary gain to [the] defendant as a result of the violation." *Ibid.*

The Exchange Act establishes three tiers of statutory maximum penalties. A court may impose a Tier 1 penalty "[f]or each violation." 15 U.S.C. 78u(d)(3)(B)(i). A court may impose a Tier 2 penalty "for each such violation" that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. 78u(d)(3)(B)(ii). And a court may impose a Tier 3 penalty for each such violation that "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. 78u(d)(3)(B)(iii)(bb). The statutory maximums are periodically adjusted for inflation. See, *e.g.*, 88 Fed. Reg. 1614, 1615 (Jan. 11, 2023).

Congress authorized courts to impose civil penalties, in addition to other remedies such as injunctions and disgorgement, to "provide a financial disincentive to violations that reflect an unwillingness to incur the cost of full compliance with the securities laws." S. Rep. No. 337, 101st Cong., 2d Sess. 10 (1990) (Senate Report). Congress also intended the civil-penalty framework to "provide * * * the courts * * * with greater flexibility to tailor a remedy to the seriousness of the violation." *Id.* at 11; accord H.R. Rep. No. 616, 101st Cong., 2d

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[1] Unless otherwise indicated, all references to 15 U.S.C. 78u(d)(3) and its subsections are to the 2018 edition of the United States Code with amendments contained in the 2021 Supplement III.

Sess. 17-19 (1990) (House Report). As reflected in Section 21(d)(3)'s text, Congress "determined that three tiers of maximum penalty amounts were appropriate, and, within each tier, * * * the courts can further tailor the sanctions." Senate Report 12; see House Report 22 (similar).

2. Petitioners violated Section 10(b), Rule 10b-5, and Section 15(a) in connection with municipal bond offerings. "Municipalities issue bonds to raise capital for local projects such as roads, hospitals, and schools." Pet. App. 8a. Usually, "underwriting firms release a 'pricing wire' to potential investors, who then commit to purchasing bonds." *Ibid.* The pricing wire provides details about the bond offering, including the "order priority," which determines how bonds will be allocated among classes of investors. *Id.* at 8a-9a. "The order priority is significant because demand for municipal bond offerings usually outpaces supply." *Id.* at 9a.

Many municipal issuers "reserve the initial order period exclusively for retail investors"—*i.e.*, individual, non-professional investors—so that those investors will not be "crowded out of bond offerings by large, institutional investors such as mutual funds, hedge funds, and insurance companies." Pet. App. 9a. Selling to retail investors lowers the issuer's interest-rate costs because retail investors "rarely resell their bonds on the secondary market, which reduces supply and thus increases the issuer's initial pricing leverage." *Ibid.* And because municipal issuers typically want to give their residents an opportunity to invest in their community, they often give the highest priority to investors residing within the issuer's jurisdiction. *Ibid.* "To verify that an investor is a resident of the jurisdiction, issuers require purchasers to submit their residential zip code." *Ibid.*

3. Petitioners Jocelyn Murphy, Sean Murphy, and Richard Gounaud "have decades of experience in the securities trading industry." Pet. App. 10a. In the late 2000s, petitioners associated with Ralph Riccardi and his company, RMR Asset Management. *Ibid.* RMR's "primary business was to buy and re-sell municipal bonds and other securities." *Id.* at 62a.

Riccardi provided petitioners with the necessary capital to trade, and each of them opened many accounts to "gain access to many different municipal bond offerings." Pet. App. 10a. Although these accounts were in petitioners' own names, they were linked to Riccardi's prime brokerage account, which Riccardi and RMR funded. *Id.* at 10a, 67a. When petitioners bought and sold securities, each transaction was reported to the prime brokerage's clearing agent. *Id.* at 10a. RMR would then affirm the trade, and the funds would settle in RMR's prime brokerage account. *Ibid.* Riccardi then split with petitioners the profits and losses resulting from those trades. *Id.* at 10a-11a.

Riccardi asked petitioners to trade with his capital because "more traders meant more accounts, which in turn meant that RMR could '[i]ncrease the amount of bonds [they] could get on any given issue.'" Pet. App. 11a (first set of brackets in original). Riccardi and petitioners "were so-called 'bond flippers'" who would "purchase new-issue municipal bonds and immediately re-sell those bonds on the secondary market at a profit." *Ibid.* Over the several years they were associated with Riccardi and RMR, petitioners "executed thousands of transactions," including hundreds (or in Jocelyn Murphy's case, thousands) involving new-issue municipal bonds. *Ibid.*

None of the petitioners registered as a broker. Pet. App. 12a. And "on at least 21 occasions" when seeking municipal-bond allotments, "Jocelyn Murphy provided underwriters with false zip codes within the issuer's jurisdiction, despite residing elsewhere, to obtain the highest priority during the retail order period." *Id.* at 11a-12a.

4. In 2018, the SEC filed an enforcement action against RMR, Riccardi, petitioners, and nine other traders. Pet. App. 12a. The Commission alleged that Riccardi, through RMR, "ran a 'long-running fraudulent scheme' to circumvent municipal bond order priority," in which petitioners "'operat[ed] as unregistered brokers' to appear as retail investors and fill orders on behalf of institutional customers." *Ibid.* The Commission alleged that Jocelyn Murphy had violated Section 10(b) and Rule 10b-5 by providing fraudulent zip codes in connection with the purchase of municipal bonds. *Id.* at 13a. The SEC further alleged that each of the petitioners had violated Section 15(a) by "'plac[ing] orders for and purchas[ing] new issue bonds from underwriters at Riccardi's direction and under his supervision,' using Riccardi's capital," *id.* at 12a (brackets in original)—as well as by trading "other securities on behalf of RMR using RMR's capital," C.A. E.R. 826—"without 'register[ing] with the Commission as a broker-dealer.'" Pet. App. 12a (brackets in original).

All of the defendants other than petitioners settled. Pet. App. 13a.

5. a. The district court held each petitioner liable on summary judgment. Pet. App. 62a-76a. The court determined that there was no genuine dispute of material fact that Jocelyn Murphy had violated Section 10(b) and Rule 10b-5 because she had "admitted that without

providing * * * false zip codes, she would not have been in the retail order period," and the SEC had "provided unrebutted expert testimony that local zip codes are important to issuers of new municipal bonds." *Id.* at 72a-73a. The court also found no genuine factual dispute regarding Jocelyn Murphy's scienter, as she "knew that she did not reside in these zip codes" and that "failing to provide a zip code from these jurisdictions would not place her in the highest priority period." *Id.* at 74a.

The district court further determined that there was no genuine dispute of material fact that petitioners had violated Section 15(a). Pet. App. 65a-71a. To determine whether petitioners had acted as "broker[s]" within the meaning of the Exchange Act, the court applied a "'totality of the circumstances approach,'" examining "conduct-based factors" known as the *Hansen* factors, based on *SEC* v. *Hansen*, No. 83-Civ-3692, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984). Pet. App. 65a-66a (quoting *U.S. SEC* v. *Feng*, 935 F.3d 721, 731 (9th Cir. 2019)).[2] The court found no dispute that petitioners had regularly participated in securities transactions "for RMR," noting petitioners' admission that "Riccardi and RMR directed [them] to link their brokerage accounts to RMR's prime broker account so [petitioners] could use RMR's capital to purchase new issue municipal bonds

[2] The *Hansen* court identified six nonexclusive factors as "relevant" to the determination of "broker" status: whether the person (1) is an employee of the issuer; (2) received commissions as opposed to a salary; (3) is selling, or previously sold, the securities of other issuers; (4) is involved in negotiations between the issuer and the investor; (5) makes valuations as to the merits of the investment or gives advice; and (6) is an active rather than passive finder of investors. 1984 WL 2413, at *10; see Pet. App. 65a-66a; see also *Feng*, 935 F.3d at 731-732 (noting that courts treat the list as nonexclusive).

and other securities." *Id.* at 66a-67a. The court also found that petitioners had indisputably "received transaction-based compensation for their trading activities on behalf of RMR" because they had "admitted that if they failed to complete a profitable trade in a measuring time period, they received no payments for this activity." *Id.* at 70a.

b. Following the district court's decision on liability, the SEC moved for the imposition of remedies, which the court granted in part and denied in part. Pet. App. 44a-61a. The court issued injunctions against Jocelyn and Sean Murphy (but not Gounaud) and imposed civil penalties against all three petitioners. *Id.* at 54a-56a, 60a.

The district court determined that Section 21(d)(3) authorized it to impose "Tier 2 'per violation' fraud penalties" of up to $80,000 to $96,384 (depending on the time of the violation) "for the twenty-one municipal securities offerings in which" Jocelyn Murphy had "fraudulently provided false zip codes." Pet. App. 57a. The court concluded that the maximum Tier 2 penalty for each of those violations of Section 10(b) and Rule 10b-5—for a total of $1,761,920—was appropriate because, among other things, Jocelyn Murphy had acted with "a high degree of scienter"; her misconduct was "recurrent" and took place while she was also "engaged in unregistered broker activity"; she had demonstrated "less-than-full appreciation of the wrongfulness of her conduct"; and she had failed to "substantiate[] * * * claims of financial hardship with any objective evidence." *Id.* at 58a-59a. The SEC did not request, and the court did not impose, separate monetary penalties for Jocelyn Murphy's violations of Section 15(a) because

"the requested fraud penalties sufficiently encompass the entirety of her misconduct." *Id.* at 57a.

The district court determined that Section 21(d)(3) authorized it to impose a Tier 1 civil penalty of up to $7500 to $9639 for each of the thousands of securities transactions Gounaud and Sean Murphy had performed as unregistered brokers, which would have resulted in statutory maximum penalties of millions of dollars for each defendant. Pet. App. 47a, 50a. The court agreed with the SEC, however, that imposing a penalty "for each month during which" those petitioners had "violated Section 15(a)," *id.* at 47a—46 months for Gounaud, and 65 months for Sean Murphy—was "a reasonable starting place" that "sufficiently account[ed] for the long-term nature of Mr. Gounaud's and Mr. Murphy's violations," *id.* at 50a. Although the court found that several factors weighed in favor of imposing a maximum Tier 1 penalty for each of those months, the court reduced the amount by 20%, based on the absence of proof of scienter for those defendants or a history of securities-law violations. *Id.* at 51a-54a. In total, the court imposed $308,512 in civil penalties on Gounaud and $419,090 on Sean Murphy. *Id.* at 54a.

None of the petitioners disputed the number of Exchange Act violations at issue. They argued, however, that the SEC's requested penalties were "unjust and inequitable when compared to their gross pecuniary gain and the sanctions imposed on other defendants in this action, and violative of the Excessive Fines Clause of the Eighth Amendment." Pet. App. 47a-48a; see *id.* at 57a. The district court rejected those arguments. *Id.* at 48a-50a, 57a.

6. The court of appeals affirmed. Pet. App. 5a-43a.

a. The court of appeals agreed with the district court that there was no genuine dispute of material fact regarding whether Jocelyn Murphy had violated Section 10(b) and Rule 10b-5. Pet. App. 26a-28a. On appeal, Murphy contested only the materiality element, arguing that the bond underwriters could have discovered her true zip codes by consulting other documents, and that there was no evidence the underwriters had submitted the false zip codes to issuers. *Id.* at 27a-28a & n.7. In rejecting those arguments as a matter of law, the court of appeals explained, *inter alia*, that "the SEC, unlike private parties, need not prove reliance when bringing a § 10(b) enforcement action." *Id.* at 28a (citing *Lorenzo* v. *SEC*, 139 S. Ct. 1094, 1104 (2019)).

The court of appeals also agreed that there was no genuine dispute of material fact regarding whether petitioners had violated Section 15(a). Pet. App. 18a-26a. Petitioners argued that they had not engaged in transactions "for the account of others" within the meaning of the Exchange Act's "broker" definition. *Id.* at 19a (quoting 15 U.S.C. 78c(a)(4)(A)). Based on the dictionary definition of "account" and the word's usage elsewhere in the Exchange Act, the court concluded that a person acts for the account of another when the second person "assumes the risk for the actions." *Id.* at 19a-20a. The court further reasoned, based on the ordinary meaning of the word "for," that a person acts "for" another when he acts as the second person's "agent[]." *Id.* at 21a. The court accordingly determined that petitioners had "made trades for 'the account of [Riccardi]' " because they had "put Riccardi's capital at risk on every trade they made," *id.* at 19a (citation omitted; brackets in original), and had "acted as his 'agents,' " *id.* at 21a. While observing that its analysis did "not rely on the

*Hansen* factors," the court explained that "several" of those factors "support[ed] [its] decision." *Id.* at 25a; see *id.* at 25a-26a.

b. The court of appeals next held that the district court had acted within its discretion in imposing remedies. Pet. App. 29a-39a. As to the number of violations, the court of appeals rejected Jocelyn Murphy's argument —raised for the first time on appeal—that "the record does not support the finding that she committed 21 violations" because the district court's summary-judgment ruling "turned on only three fraudulent transactions." *Id*. at 29a. The court of appeals explained that, "at the remedies stage," the district court "could consider more evidence to assess the full extent of Jocelyn's misconduct so long as the new evidence did not conflict with its liability findings." *Id*. at 30a. The court of appeals found that the district court's assessment of penalties for 21 misrepresentations had ample support in the record because "the SEC submitted evidence of 21 conversations in which Jocelyn provided underwriters with false zip codes," and she had "admit[ted] to communicating 21 false zip codes." *Ibid.*

Gounaud argued "that it was an abuse of discretion to define 'each violation' as 'each month' he traded as an unregistered broker." Pet. App. 30a. The court of appeals rejected that argument, explaining that each of the thousands of trades Gounaud had made as an unregistered broker could have given rise to a separate "violation," and thus a separate statutory penalty. *Id.* at 31a. The court concluded that it therefore was both permissible under Section 21(d)(3) and "especially reasonable —and favorable to Gounaud"—for the district court to "exercise[ ] its discretion" to instead assess penalties

"based on the number of months he engaged in unregistered broker activity." *Ibid.*

The court of appeals likewise rejected petitioners' argument that the penalties imposed on them are unconstitutionally excessive. Pet. App. 33a-36a. The court noted this Court's instruction that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 33a (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998)). The court of appeals observed that the penalties in this case are "substantially lower" than the maximum authorized by Congress, because the district court had declined to order any Section 15(a) penalties against Jocelyn Murphy and had declined to impose penalties against Sean Murphy and Gounaud on a per-transaction basis. *Id.* at 34a. The court also determined that petitioners' "violations were serious enough to warrant the penalties imposed." *Ibid.*

c. In a separate concurrence, two members of the panel "recommend[ed]" that, "in a future case," the court of appeals should "jettison[ ] the *Hansen* factors" for determining "broker" status. Pet. App. 41a (Lee, J., concurring).

**ARGUMENT**

The court of appeals correctly affirmed the district court's civil-penalty award against petitioners. The court also correctly held that petitioners had acted as "brokers" within the meaning of the Exchange Act. And the court properly affirmed the district court's grant of summary judgment on liability under Federal Rule of Civil Procedure 56. The fact-bound decision below contains no error, does not conflict with any decision of this Court or another court of appeals, and does not

present any issue of national importance. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the district court had acted "well within" its broad discretion under the Exchange Act, Pet. App. 34a, when it imposed a civil penalty for each instance in which petitioner Jocelyn Murphy had knowingly provided false zip codes to obtain high-priority municipal-bond allocations, *id.* at 29a, and for each month that petitioners Sean Murphy and Gounaud had acted as unregistered brokers, *id.* at 31a.

a. Section 21(d)(3)(A) of the Exchange Act provides that, "[w]henever it shall appear to the Commission that any person has violated any provision of" the Act, "the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to * * * impose, * * * a civil penalty to be paid by the person who committed such violation." 15 U.S.C. 78u(d)(3)(A)(i). Section 21(d)(3)(B) addresses the "amount of a civil penalty imposed under subparagraph (A)(i)," 15 U.S.C. 78u(d)(3)(B)(i), and specifies three relevant factors. First, the amount "shall be determined by the court in light of the facts and circumstances." *Ibid.* Second, the court may impose a penalty "[f]or each violation." *Ibid.* And third, "the amount of the penalty" for each violation "shall not exceed the greater of" a fixed statutory amount that increases based on the nature of the violation, or "the gross amount of pecuniary gain to [the] defendant as a result of the violation." *Ibid.*; see 15 U.S.C. 78u(d)(3)(B)(ii) and (iii); see also p. 3, *supra*.

Petitioners' challenge to the penalties in this case centers on "what 'each violation' means" in Section 21(d)(3)(B). Pet. 19. That provision does not define the

term "violation." But in similar circumstances, this Court has looked to the statute that "delineates an individual's legal duties" to determine when "a violation occurs." *Bittner* v. *United States*, 143 S. Ct. 713, 719-720 (2023). In *Bittner*, the Court concluded that, because the statute at issue "require[s] certain persons" to "'file reports'" that "'shall contain'" certain information, *id.* at 719 (citation omitted), "a violation occurs when an individual fails to file a report consistent with the statute's commands," *id.* at 720. Because the relevant penalty provision authorized "a civil penalty of up to $10,000 for 'any violation,'" the Court concluded that "multiple deficient reports may yield multiple $10,000 penalties." *Ibid.* (citation omitted).

Here, the duties imposed by the laws that petitioners violated support the lower courts' rulings. Under Exchange Act Section 10(b) and Rule 10b-5(b), it is "unlawful for any person * * * [t]o make any untrue statement of a material fact * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b); see 15 U.S.C. 78j(b). A "violation" therefore occurs each time that a person, with scienter, see *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980), makes an untrue statement of material fact in connection with a securities transaction. Because the SEC identified 21 instances in which Jocelyn Murphy had "knowingly provided false zip codes to underwriters to obtain the highest retail priority" in municipal-bond offerings, Pet. App. 26a, the district court had discretion to impose 21 Tier 2 penalties. *Id.* at 29a-30a.

As for the penalties imposed on Sean Murphy and Gounaud, Exchange Act Section 15(a) makes it "unlawful for any broker * * * to effect any transactions in * * * any security * * * unless such broker * * * is

registered" with the Commission or an exemption applies. 15 U.S.C. 78*o*(a)(1) and (2). A violation of Section 15(a) therefore occurs when a broker effects a securities transaction while unregistered. Because Sean Murphy and Gounaud each had engaged in "thousands" of transactions "as * * * unregistered broker[s]," Pet. App. 31a, the district court could have imposed thousands of Tier 1 civil penalties on each of them, *id.* at 34a. But the court instead exercised its discretion, "in light of the facts and circumstances," 15 U.S.C. 78u(d)(3)(B)(i), to impose 65 penalties on Sean Murphy and 46 penalties on Gounaud—using, as a proxy, the number of months in which each had "engaged in unregistered broker activity," Pet. App. 31a—and to "appl[y] 'a modest twenty percent reduction'" from the maximum for each of those penalties, *id*. at 16a. The court of appeals correctly found that this approach was both permissible under Section 21(d)(3) and "favorable" to petitioners. *Id.* at 31a.

b. Petitioners contend that the penalties imposed "vastly exceed the statutory caps set by Congress." Pet. 18 (capitalization altered). During the proceedings below, however, petitioners did not dispute that each fraudulent misrepresentation constitutes a separate violation of Section 10(b) and Rule 10b-5, or that each securities transaction effected by an unregistered broker constitutes a separate violation of Section 15(a). Petitioners therefore cannot contest those propositions in this Court. See *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37 (2015) (argument that "was never presented to any lower court" is "forfeited"). In any event, petitioners are wrong in arguing that the court of appeals "arbitrarily calculated penalties" in this case. Pet. 18-21 (capitalization omitted).

Although petitioners characterize the court of appeals' determinations as "unmoored from statutory text," Pet. 20, they do not articulate any competing test for determining when a "violation" of the relevant securities laws occurs. They assert that the "fraud violations" at issue here "were part of a single course of conduct," Pet. 21, which they suggest gives rise to only a "*singular* violation," Pet. 20. But petitioners identify no language in Section 10(b), Rule 10b-5, or Section 15(a) suggesting that they committed only a single violation of one or more of those provisions when they effected thousands of transactions as unregistered brokers (Sean Murphy and Gounaud) and made fraudulent misstatements in connection with 21 transactions (Jocelyn Murphy).

Instead, petitioners largely treat the issue as one of pleading, contending that the "SEC's complaint pleaded * * * a single violation" of Section 15(a), Pet. 20, and "a single count of securities fraud," Pet. 21. But Section 21(d)(3) directs district courts to assess penalties "in light of the facts and circumstances," 15 U.S.C. 78u(d)(3)(B)(i), not in light of the allegations in the complaint. The Commission was required to include in its complaint a "demand for the relief sought," Fed. R. Civ. P. 8(a)(3), and it accordingly urged the district court to "[o]rder [petitioners] to pay civil penalties under" Section 21(d)(3), C.A. E.R. 847. Petitioners cite no authority that requires a complaint to include detailed factual allegations regarding remedies. Cf. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007) ("detailed factual allegations" are unnecessary). Indeed, except in the case of a default judgment, Federal Rule of Civil Procedure 54(c) directs courts to "grant the relief to which each party is entitled, even if the party has not demanded

that relief in its pleadings." In any event, to the extent such allegations were necessary, the complaint sufficiently alleged that petitioners had committed multiple violations of the relevant securities laws.[3]

Based on a comparison with another Exchange Act provision, Section 21B(b), petitioners suggest (Pet. 21) that Section 21(d)(3)'s "each violation" language must be construed narrowly. Section 21B(b) authorizes the SEC in administrative proceedings to impose a penalty "for each act or omission described in" a prior subsection. 15 U.S.C. 78u-2(b)(1). Based on that "linguistic distinction" between Section 21(d)(3) and Section 21B(b), petitioners posit that "each violation" must mean something other than "each act or omission" that violates the Exchange Act. Pet. 21.

As the Second Circuit explained with respect to a similar securities-law provision that uses "each act or omission" language, 15 U.S.C. 80a-9(d)(2), petitioners' argument "compares statutory apples to statutory oranges." *SEC* v. *Fowler*, 6 F.4th 255, 266, cert. denied, 142 S. Ct. 590 (2021). Unlike Section 21(d)(3)(A), Section 21B(a) authorizes the Commission to impose a penalty *both* for a direct "violat[ion]" of the relevant securities laws *and* for "aid[ing]" or "abett[ing]" "such a violation by any other person." 15 U.S.C. 78u-2(a)(1)(A)

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[3] The complaint alleged that Jocelyn Murphy, "with scienter, made untrue statements of a material fact" in connection with securities transactions, C.A. E.R. 844, by "repeatedly misrepresent[ing] her zip code when placing orders for new issue bonds during retail order periods," *id.* at 836; see *id.* at 836-837. The complaint further alleged that Sean Murphy and Gounaud had "effect[ed] transactions in * * * securities, without being registered as brokers," *id.* at 845-846, by "execut[ing] numerous securities transactions on behalf of RMR," *id.* at 825; and the complaint estimated the number of transactions for each, *id.* at 825-826.

and (B). Section 21B(b)'s use of "act or omission" therefore "makes clear that the SEC can impose penalties specifically for each act of aiding or abetting." *Fowler*, 6 F.4th at 266. That language does not call into question district courts' authority to penalize, as a separate "violation" under Section 21(d)(3), each act or omission that violates the Exchange Act. Petitioners' atextual (and largely unexplained) "singular violation" theory (Pet. 20) (emphasis omitted) suggests that someone who engages in a single trade as an unregistered broker, or who makes a single fraudulent misrepresentation in connection with a securities transaction, is subject to the same maximum penalty as someone who engages in such misconduct dozens (or thousands) of times. That approach would limit the district court's "flexibility to tailor a remedy to the seriousness of the violation," Senate Report 11, and its ability to impose penalties that "provide a financial disincentive to violations that reflect an unwillingness to incur the cost of full compliance with the securities laws," *id.* at 10.

Petitioners also argue that, even if each trade Sean Murphy and Gounaud executed as unregistered brokers constitutes a separate violation of Section 15(a), "[a] random unit of time" does not. Pet. 19. But the court of appeals held that the district court could permissibly "exercise[] its discretion" by calculating penalties based on the number of months that petitioners had "engaged in unregistered broker activity," even though the number of transactions was much higher. Pet. App. 31a; see *id.* at 34a. The court of appeals thus recognized that the district court could tailor an appropriate remedy "in light of the facts and circumstances," 15 U.S.C. 78u(d)(3)(B)(i), so long as the total penalty amount does not exceed per-violation statutory caps. The district

court's exercise of discretion here was particularly appropriate because Section 21(d)(3) establishes maximum but not minimum per-violation penalties. The court therefore could have imposed the same total penalties by treating each trade as a separate violation but choosing much lower per-violation penalty amounts.

c. Contrary to petitioners' contention (Pet. 14-15), the decision below does not conflict with any decision of another court of appeals regarding the Exchange Act's civil-penalty provisions.

Petitioners identify no appellate decision that diverges from the decision below on any principle of law. They briefly mention (Pet. 14-15) the D.C. Circuit's decision in *Rapoport* v. *SEC*, 682 F.3d 98 (2012). But *Rapoport* involved Section 21B of the Exchange Act—which (as noted) concerns penalties imposed by the Commission in administrative proceedings—rather than Section 21(d)(3). See *id.* at 101-102. And even in discussing the penalty-calculation issue under Section 21B(b), the D.C. Circuit did not hold that the SEC lacked legal authority to impose a penalty "for each year the alleged [unlawful] solicitations" had "occurred." *Id.* at 108. The court merely held, based on the record in that case, that the Commission had not determined "how many violations occurred and how many violations [we]re attributable to each" respondent; the court remanded to allow the agency to provide that explanation. *Ibid.*; see *id.* at 102.

Petitioners' claim of a conflict therefore rests primarily on district court decisions. See Pet. 15-17. But this Court ordinarily does "not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the

same circuit or another circuit." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.8, at 257 (10th ed. 2013). Regardless, the cited decisions do not demonstrate a disagreement "across the circuits" (Pet. 15) on any point of law. Rather, courts in cases involving different "facts and circumstances," 15 U.S.C. 78u(d)(3)(B)(i), including different provisions of the securities laws, have imposed different penalties. The resulting variation among individual awards does not represent "chaos" (Pet. 17) requiring this Court's intervention.

2. Petitioners argue that, "[i]f 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." Pet. 21-22. Because that constitutional claim is not "fairly encompassed" within any of petitioners' questions presented, the Court should decline to consider it. *Fry* v. *Pliler*, 551 U.S. 112, 120 (2007); see Sup. Ct. R. 14.1(a).

In any event, the court of appeals correctly rejected petitioners' Eighth Amendment argument on the ground that the penalties imposed were "substantially lower" than the maximum amount and properly reflected the gravity of petitioners' violations. Pet. App. 34a-36a; see *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998) ("[U]nder the Excessive Fines Clause," the amount of a penalty "must bear some relationship to the gravity of the offense that it is designed to punish."). Petitioners' violations caused "systemic harm" by "undermin[ing] the retail bond market, which relies on retail priority," and by "undermin[ing] [an] important system of government oversight in the securities industry." Pet. App. 35a.

Petitioners do not address the court of appeals' explanation of why their "violations were serious enough

to warrant the penalties imposed." Pet. App. 34a. In asserting (Pet. 22) that the penalties in this case "were grossly disproportionate to the gravity of their * * * offenses," petitioners note that the fines imposed against their "settling co-defendants" were lower. But as the court recognized, a comparison between petitioners and settling defendants was inapt. Pet. App. 32a. Those settlement amounts primarily reflect the parties' assessment of their litigation risk before the full development of the record and the presentation of that record to a court, not a court's subsequent assessment of the gravity of petitioners' violations.

Petitioners additionally claim that the court of appeals "misinterpret[ed]" *Bajakajian* by creating a "novel presumption" of proportionality "whenever a penalty does not exceed a statutory cap." Pet. 22-23. In fact, the court merely recognized, consistent with *Bajakajian*, that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." Pet. App. 33a (quoting *Bajakajian*, 524 U.S. at 336). Congress specified the maximum penalties for different categories of Exchange Act violations, and it gave courts broad discretion to decide individual cases within those limits. See pp. 3-4, *supra*. The court accordingly considered it relevant, in assessing proportionality, that the penalties imposed on petitioners are "substantially lower" than the limits Congress established. Pet. App. 34a. The court further explained that petitioners' "violations were serious enough to warrant the penalties imposed." *Ibid.*; see *id.* at 33a. *Bajakajian* mandates precisely that analysis. See 524 U.S. at 336.

3. The court of appeals also correctly held, based on the undisputed record, that petitioners were liable under Section 15(a) for trading securities as unregistered brokers. Pet. App. 18a-24a.

a. The court of appeals appropriately "beg[a]n [its] analysis with the statutory text." Pet. App. 18a. Exchange Act Section 3(a)(4) defines the term "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. 78c(a)(4)(A). Petitioners indisputably were engaged in the business of effecting transactions in securities. See Pet. App. 11a. The only question before the court of appeals was whether petitioners had engaged in those transactions "for the account of others." *Id.* at 19a.

The court of appeals correctly answered that question in the affirmative, based on the ordinary meaning of the statutory phrase and the undisputed facts before the court. The court first explained that, "[w]hen someone acts 'on one's own account,' he or she acts at 'at one's own risk.'" Pet. App. 19a (quoting a dictionary definition of "account") (citation omitted). The court found additional support for this interpretation of "account" in an "analogous" Exchange Act provision, Section 11(a), which "prohibits a stock exchange floor broker from making transactions on the exchange 'for its own account.'" *Id.* at 20a (quoting 15 U.S.C. 78k(a)(1)). The court noted its sister circuit's holding that "a floor broker trades for his/her own account when he/she 'shares in the economic risks of trades,' or, in other words, has a 'compensation arrangement that results in [the broker] sharing in the trading performance.'" *Ibid.* (quoting *Levine* v. *SEC*, 407 F.3d 178, 183-184 (3d Cir. 2005)) (brackets in original). Based on those understandings of what it means to trade for one's "own account," the

court determined that when someone "acts 'on the account of *others*,' another person assumes the risk for the actions." *Id.* at 19a-20a. The court accordingly concluded that, "when [petitioners] traded securities and shared a portion of the profits and losses with Riccardi, they traded for his account because another person—Riccardi—bore some risk of a loss." *Id.* at 20a.

The court of appeals further observed that an "agent" is "'one who is authorized to act *for* . . . another.'" Pet. App. 21a (quoting dictionary definition of "agent") (citation omitted). Explaining that brokers are thus "typically equated with agents," the court determined that petitioners had acted as Riccardi's agents because "Riccardi authorized [petitioners] to trade securities on his behalf and with his capital." *Ibid.*; see *ibid.* ("The record brims with examples of Riccardi directing [petitioners] to buy certain bonds and [petitioners] complying.").

b. Petitioners' attacks on that reasoning (Pet. 26-28) lack merit. They first claim that the court of appeals adopted a "new definition of 'broker.'" Pet. 27. But the court relied (Pet. App. 18a) on the Exchange Act's definition, 15 U.S.C. 78c(a)(4)(A), which supplants the dictionary definition that petitioners invoke (Pet. 27). See *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 776 (2018) ("'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning.") (citation omitted). The court accordingly looked to that statutory definition in considering what it means to trade securities "for the account of others." See Pet. App. 19a-21a.

Petitioners do not identify any *alternative* understanding of what it means to trade "for the account of others." And the court of appeals had no reason to (and

did not) opine on the additional statutory requirements—engagement in "the business" of "effecting transactions in securities"—that a person must satisfy to be an Exchange Act "broker." 15 U.S.C. 78c(a)(4)(A). The decision below therefore does not, as petitioners claim (Pet. 27), "greatly expand[] the universe of persons required to register as brokers" by categorically including investment "club members * * * designated to place * * * trades on behalf of the club," or "one family member" who "borrow[s] from another to fund securities trading activities." Even if such a person is trading securities "for the account of others," he or she is not necessarily in "the business" of doing so. 15 U.S.C. 78c(a)(4)(A).

c. The decision below does not conflict with any decision of another court of appeals regarding the test for determining "broker" status. Petitioners fault the court of appeals for its primary reliance on the plain meaning of the statutory definition rather than on the *Hansen* factors, which petitioners claim comprise "the prevailing multi-factor test" for determining liability under Section 15(a). Pet. 25-26. But those factors, which derive from the Southern District of New York's decision in *SEC* v. *Hansen*, No. 83-Civ-3692, 1984 WL 2413 (Apr. 6, 1984), do not establish a uniform, dispositive test. Cf. Pet. 25 (characterizing the *Hansen* factors as "non-exclusive" and acknowledging that they represent "a 'totality of the circumstances' approach") (citation omitted); Pet. App. 65a-66a (same). To prepare its initial list, the *Hansen* court consulted "scholarly literature," which had identified six "relevant" factors. 1984 WL 2413, at *10. Courts since have revised and added to the list based on circumstances identified in other cases.

See *U.S. SEC* v. *Feng*, 935 F.3d 721, 732 (9th Cir. 2019), cert. denied, 141 S. Ct. 1387 (2021).

As a summary of circumstances in which persons have been found to have acted as brokers, the *Hansen* factors provide courts with helpful guidance in deciding cases involving similar facts. See Pet. App. 19a. But while courts (including the Ninth Circuit) therefore *permit* consideration of the *Hansen* factors, petitioners have identified no court of appeals decision *requiring* that analysis. See *ibid.* Petitioners likewise cite no decision suggesting that courts should prioritize application of the *Hansen* factors over a "straightforward" analysis of the statutory text. *Id.* at 18a.

While two members of the panel "recommend[ed] jettisoning the *Hansen* factors in a future case," Pet. App. 41a (Lee, J., concurring), the court of appeals did not take that step. The court noted that several *Hansen* factors—including petitioners' receipt of "transaction-based compensation" in the form of "trading profits," and their "regular[] participat[ion] 'in securities transactions at key points in the chain of distribution' "—"support [the court's] decision." *Id.* at 25a-26a (citation omitted); see Pet. 26 n.2. The district court also found that petitioners qualified as brokers under the *Hansen* factors. Pet. App. 65a-71a. Because the result in this case would be the same even under petitioners' preferred mode of analysis, it is a poor vehicle for considering their second question presented.

4. The court of appeals correctly held that a trial on liability was unnecessary because the record presents "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); see Pet. App. 18a-28a. The purported fact disputes that petitioners identify regarding their liabil-

ity under Section 15(a) either were not genuine disputes, were immaterial, or both. For example, petitioners contend that their declarations describing their supposed "partnership" with Riccardi are sufficient to require a trial on whether they acted as his agents. Pet. 29-30 nn.4, 6-7. But the court correctly held that, "[e]ven if a partnership existed," petitioners "traded securities as agents of the partnership—an entity distinction from [petitioners]—and thus traded 'for the account of [the partnership].'" Pet. App. 22a (citation omitted; second set of brackets in original). The court also correctly explained, in the alternative, that petitioners' conclusory declarations—which were unsupported by any other evidence and contradicted their own prior sworn statements —are insufficient to require a trial on that issue. *Id.* at 22a-24a; see *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of" Rule 56 "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.").

Similarly, petitioners point to purported fact disputes regarding whether they had trading discretion and had traded for their own accounts. Pet. 29-30 nn.4-5. But the court of appeals fully accepted petitioners' and Riccardi's testimony that petitioners "had complete discretion to trade as they pleased" and had "made some trades independent of Riccardi." Pet. App. 22a. The court also accepted that petitioners had "made trades for their own accounts" because they "bore a portion of the risk on each trade." *Id.* at 20a. The court merely found these facts legally insufficient to negate the conclusion that petitioners had *also* traded for Riccardi's account in each transaction, because petitioners had "complied" whenever "Riccardi directed [them] to

place a trade," *id.* at 22a, and had "put Riccardi's capital at risk on every trade they made," *id.* at 19a.

Petitioners additionally assert (Pet. 29-30 & nn.4-5) that the courts below deprived them of their Seventh Amendment right to a jury trial by making credibility determinations and weighing the evidence against them. Once again, petitioners forfeited that argument by failing to raise it in their briefing below. But to the extent those arguments are directed at the lower courts' liability analyses, petitioners' Seventh Amendment claims add nothing to their assertion that the courts below erred in granting and affirming summary judgment on liability for the SEC. See, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979) (citing *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-321 (1902), for the proposition that "summary judgment does not violate the Seventh Amendment").

Petitioners also newly suggest (Pet. 30) that the courts below violated their Seventh Amendment rights in "the determination of remedies." In *Tull* v. *United States*, 481 U.S. 412 (1987), this Court held that the defendant in a Clean Water Act suit for civil penalties has a Seventh Amendment right to jury trial on the issue of *liability*. *Id.* at 418-425. The Court further held, however, that Congress could permissibly authorize the district court rather than the jury to determine the appropriate *amount* of penalties in a particular case. *Id.* at 425-427. Subsequent lower-court decisions have applied that holding to penalties under the Exchange Act. See, *e.g.*, *SEC* v. *Life Partners Holdings, Inc.*, 854 F.3d 765, 781 (5th Cir. 2017). District courts in Exchange Act cases therefore "may make factual findings and rely on such findings in assessing the amount of civil penalties so long as the court's findings do not conflict with the

jury's findings as to liability." *Id.* at 782; see Pet. App. 30a.

Thus, once the district court properly granted summary judgment for the SEC on liability, petitioners had no Seventh Amendment right to a jury trial in the subsequent proceedings to determine the amount of penalties that should be imposed. And unlike in *U.S. SEC* v. *Husain*, 70 F.4th 1173 (9th Cir. 2023) (cited at Pet. 30), the court's remedies decision was not made on summary judgment. See Pet. App. 45a-46a. The district court accordingly was the finder of fact, *id.* at 30a, and the court of appeals correctly reviewed "the district court's remedies decision for an abuse of discretion," *id.* at 17a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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