COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13381

ROBINHOOD FINANCIAL LLC,
Plaintiff-Appellee,

v.

WILLIAM F. GALVIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH, AND THE MASSACHUSETTS SECURITIES DIVISION,
Defendants-Appellants.

On Appeal From A Final Judgment Of The Suffolk Superior Court

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BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND GREATER BOSTON CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFF-APPELLEE FOR AFFIRMANCE

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Dated: April 7, 2023

CORPORATE DISCLOSURE STATEMENT

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INTEREST OF THE *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the business community.

The **Greater Boston Chamber of Commerce** ("GBCC") is an independent, non-profit organization that is the convener, voice, and advocate of the Greater Boston business community. The GBCC represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region, including the broker-dealer industry. The GBCC is committed to driving the region's economic growth and prosperity by ensuring that it remains a competitive

[1] Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(5), *amici* declare that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief, nor have *amici* or their counsel represented one of the parties to the present appeal in another proceeding involving similar issues or been a party in a proceeding or legal transaction at issue in this appeal.

place to start, expand, and run a business. One aspect of the Commonwealth's competitiveness is maintaining consistency with federal law and other states on issues that can negatively impact businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Massachusetts consumers saving for retirement, arranging their financial affairs, or investing for profit have depended for decades on the investment advice of financial professionals. They include:

- ***Investment advisers*** provide ongoing portfolio monitoring and management and generally have full discretion over investment decisions. Because this relationship is ongoing, investment advisers are compensated in a fee-based structure, *i.e.*, they charge a periodic fee, usually calculated as a percentage of the amount of the customer's assets under management. Investment advisers typically require customers to maintain a minimum account balance, which puts the engagement of an investment adviser out of reach for many investors with small- or medium-sized accounts.
- ***Broker-dealers*** primarily (i) sell and distribute securities and (ii) execute securities trades. Many brokerage firms also offer transaction-specific investment recommendations incidental to their brokerage services. That is, before buying or selling a security, a customer can seek a

> recommendation about the transaction. Broker-dealers generally are compensated per transaction, with no additional fee for any incidental investment advice they provide. This "pay-as-you-go," transaction-based model allows retail investors with small- to medium-sized account balances to receive investment recommendations on an episodic and cost-effective basis.

Recognizing that investment advisers and broker-dealers offer different services, have a different type of relationship with their clients, and have different compensation models, federal and Massachusetts law have treated them differently for more than 80 years. (*See* pp. 16-29.) Among other things, investment advisers and broker-dealers have been subject to different standards of conduct when providing investment advice: investment advisers are held to a fiduciary standard, while broker-dealers are generally subject to a "suitability" standard. (*Id.*)

After the 2008 financial crisis, however, Congress tasked the Securities and Exchange Commission ("SEC") with studying whether the standard of conduct for broker-dealers ought to be changed, considering the various costs and benefits of doing so. Congress also authorized, but did not require, the SEC to take regulatory action based on the findings of its study. In 2019, following its study[2] and

[2] *See* Sec. & Exch. Comm'n, *Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer*

(cont'd)

significant engagement with relevant stakeholders, the SEC adopted Regulation Best Interest, 17 C.F.R. § 240.15l-1 ("Reg BI"). Reg BI enhanced the standard of conduct for broker-dealers—but stopped short of imposing a fiduciary standard. (*See* pp. 23-24.)

This decision was intentional: based on its research, the SEC was concerned that the costs and burdens of subjecting broker-dealers to a fiduciary standard would be significant. The SEC was also concerned that these increased costs would be passed on to investors—or even worse, would cause many broker-dealers to curtail or abandon altogether their transaction-based, episodic recommendation model. This result, the SEC concluded, would harm retail investors (non-professional investors who invest their own funds). Thus, Reg BI was carefully calibrated to enhance investor protection by raising the broker-dealer standard of conduct to a "best interest" standard while still preserving investor choice and access to transaction-based investment advice. (*See* pp. 31-37.)

Defendant-Appellant William F. Galvin, in his capacity as Secretary of the Commonwealth and overseer of the Massachusetts Securities Division, however, was openly displeased with the balance struck by the SEC. He adopted his own

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Protection Act (2011), www.sec.gov/news/studies/20111/913studyfinal.pdf ("913 Study").

rule in response. *See* 950 C.M.R. § 12.207 (the "Fiduciary Duty Rule"). Unlike the SEC, he cited no studies or empirical data in the adopting release.[3]

The Fiduciary Duty Rule is a departure from Massachusetts common law. In *Patsos v. First Albany Corporation*, 433 Mass. 323 (2001), this Court synthesized and reiterated decades of jurisprudence holding that broker-dealers do not generally owe fiduciary duties to their customers because they do not generally have a fiduciary relationship with their customers.[4] *See id.* at 333-36. The Fiduciary Duty Rule, however, defies and expressly attempts to override this long-established paradigm by doing exactly what the SEC declined to do: imposing a fiduciary standard upon broker-dealers when they offer investment advice to retail investors. (*See* pp. 25-31.) The Secretary's Brief offers no convincing reason to uproot the law's reasoned and decades-long distinction in its treatment of investment advisers and broker-dealers. Nor does it justify the harms to

[3] *See generally* Adopting Release, Mass. Sec'y of State, Amendments to Standard of Conduct Applicable to Broker-Dealers and Agents – 950 Mass. Code Regs. 12.200 (Feb. 21, 2020),https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/Adopting-Release.pdf

[4] For the same reasons, federal and Massachusetts statutory and regulatory law have likewise not subjected broker-dealers to a fiduciary standard of conduct.

Massachusetts businesses and consumers that a universal fiduciary standard would cause.[5] (*See* pp. 31-37.)

ARGUMENT

I. FEDERAL AND MASSACHUSETTS LAW HAVE LONG RECOGNIZED THAT BROKER-DEALERS FULFILL A DISTINCT ROLE FROM INVESTMENT ADVISERS

A. Broker-Dealers Play An Important Role In Providing Affordable Investment Advice To Retail Investors

Approximately 73% of American adults live in a household that invests in at least one type of investment account. Sec. & Exch. Comm'n, Off. of Investor Advocate, & RAND Corp., *The Retail Market for Investment Advice* 34 (2018) (hereinafter, "OIAD/RAND Report").[6] Of those retail investors owning brokerage, advisory, or similar accounts, about 35% use a broker-dealer or investment adviser to obtain investment advice. *Id.* at 42, 46.[7] These investors typically fare better than those who self-direct their accounts, making fewer investment mistakes,

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[5] *Amici* believe that Plaintiff-Appellee's Brief will address the questions of law surrounding their challenge to the Secretary's authority to adopt the Fiduciary Duty Rule, as well as its other legal infirmities, consistent with Plaintiff-Appellee's arguments in the Superior Court. *Amici* support Plaintiff-Appellee's position and write separately here to provide further historical and legal context.

[6] https://www.sec.gov/files/retail-market-for-investment-advice.pdf

[7] *See also* Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031, 84 Fed. Reg. 33,318, 33,418 & tbl. 8, panel A (July 12, 2019) (to be codified at 17 C.F.R. pt. 240) (23% of those with brokerage accounts use the advice services of broker-dealers; 49% use some sort of "financial planner").

saving more, increasing their tax efficiency, and more efficiently diversifying their portfolios. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031, 84 Fed. Reg. 33,318, 33,425, & nn. 1045-1050 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240) ("BI Final Rule") (collecting studies).

In addition to better overall investment outcomes, retail investors benefit from choosing between fee-based advice from an investment adviser or transaction-based investment advice from a broker-dealer. Studies show that retail investors choose the type of investment advice that best suits their budget, account size, and trading behavior. *See* NERA Econ. Consulting, *Comment on the Department of Labor Proposal and Regulatory Impact Analysis*, at 6-7 (July 17, 2015) ("NERA Report").[8]

For example, only 10% of investors who own brokerage, advisory, or similar accounts have account assets of $500,000 or more, while nearly half—47%—have $50,000 or less. OIAD/RAND Report at 45.[9] Investors with limited assets often

[8] https://www.sifma.org/wp-content/uploads/2017/05/nera-analysis-comment-on-the-department-of-labor-proposal-and-regulatory-impact-analysis.pdf

[9] *See also* Sarah Holder & Daniel Schrass, Inv. Co. Inst., The Role of IRAs in US Households' Saving for Retirement, 2018, ICI Rsch. Persp., Dec. 2018, https://www.ici.org/pdf/per24-10/pdf (finding that 64% of households with IRAs (traditional or Roth) have balances of less than $100,000 in those accounts, and 36% of investors have balances of less than $25,000.)

do not qualify for fee-based advisory accounts because they do not meet account minimums. *See* NERA Report at 9 (finding that if an investment adviser has an account minimum of $25,000 (a conservative figure), 40% of persons who own brokerage accounts would be unable to qualify; if the minimum is $50,000, more than 57% of brokerage account-holders would not qualify). These investors could only obtain investment advice from transaction-based broker-dealers—and often do. One study found, for example, that 95% of households with brokerage or advisory accounts hold commission-based accounts, while only 5% hold fee-based accounts. Oliver Wyman, SIFMA, *Standard of Care Harmonization: Impact Assessment for SEC* at 4 (Oct. 2010).[10]

Similarly, retail investors with brokerage or advisory accounts typically trade infrequently, with 31.5% not engaging in any annual transactions and 33.74% engaging in three or fewer annual transactions. OIAD/RAND Report at 45. This majority of "buy-and-hold" investors are rationally likely to choose transaction-based accounts and pay a one-time fee per trade rather than pay a recurring fee for ongoing management of a static portfolio. NERA Report at 7.[11]

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[10] https://www.sifma.org/wp-content/uploads/2017/05/study-standard-of-care-harmonization-impact-assessment-for-sec.pdf

[11] *See also* BI Final Rule 84 Fed. Reg. at 33,401 ("For example, retail customers who intend to buy and hold a long-term investment on a non-discretionary basis may find that paying a one-time commission to a broker-dealer who recommends such an investment is more cost effective than paying an ongoing advisory fee to

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B. Investment Advisers And Broker-Dealers Are Regulated Extensively—But Differently

Recognizing the distinct roles played by investment advisers and broker-dealers—and the distinct advantages they each provide to consumers—federal and Massachusetts law apply different regulatory approaches to them. The Fiduciary Duty Rule's homogenized fiduciary standard defies this nearly century-old, carefully reasoned legal landscape.

1. Federal Statutory And Regulatory Law Account For The Different Roles Investment Advisers And Broker-Dealers Play In The Financial Markets

While investment advisers and broker-dealers are both subject to some provisions of the Securities Act of 1933, 15 U.S.C. §§ 77a to 77aa, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a to 78rr (the "Exchange Act"), federal regulation of the two otherwise diverges.

Investment advisers are primarily regulated through the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (the "IAA"), the last of the federal securities laws enacted in the wake of the 1929 market crash and Great Depression.

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an investment adviser merely to hold the same investment. Retail customers who would prefer advisory accounts but have not yet accumulated sufficient assets to qualify for investment advisory accounts, which may require customers to have a minimum amount of assets, may similarly benefit from recommendations from broker-dealers. Other retail customers who hold a variety of investments, or prefer different levels of services from financial professionals, may benefit from having access to both brokerage and advisory accounts.").

The IAA and the SEC-promulgated rules under it are extensive, covering nearly all aspects of a registered investment adviser's activities and operations. Relevant here, the IAA imposes a fiduciary standard of conduct on investment advisers. 15 U.S.C. § 80b-6; *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191-92, 194 (1963); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669, 33,670 (July 12, 2019) (describing duties applicable to investment advisers because of Congress' recognition "of the delicate fiduciary nature of an investment advisory relationship" (citation omitted)). Breaches of the IAA's fiduciary duties are enforceable by the SEC and, under limited circumstances, by investors. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-20 (1979).

The IAA explicitly exempts broker-dealers from its application. 15 U.S.C. § 80b-2(a)(11)(C). In particular, the IAA excludes from the definition of "investment adviser" any broker-dealer whose provision of investment recommendations are "solely incidental" to its activities as a broker-dealer and who receives no "special compensation" for providing such advice. *Id.*

In so doing, Congress recognized that broker-dealers sometimes give investment advice to their customers in connection with their brokerage activities, but that "it would be inappropriate to bring them within the scope of the [IAA] merely because of this aspect of their business." Opinion of the General Counsel

Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 2, 1940 WL 975 at *1 (Oct. 28, 1940), *superseded in part on other grounds by* Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, 84 Fed. Reg. 33,681 (July 12, 2019). Excluding broker-dealers from the definition of "investment adviser" also reflects a federal codification of traditional common law fiduciary duty principles. As the SEC explained, unlike with investment advisers, "render[ing] investment advice merely as an incident to . . . broker-dealer activities" does not by itself place broker-dealers "in a position of trust and confidence as to their customers." Arleen W. Hughes, Securities and Exchange Commission, Exchange Act Release No. 4048, 27 S.E.C. 629, 1948 WL 29537 at *7639 (Feb. 18, 1948).

Though exempt from the IAA, broker-dealers are subject to other obligations and heavily regulated through other mechanisms. Broker-dealers are required to register with the SEC and join at least one self-regulatory organization ("SRO"), such as the Financial Industry Regulatory Authority ("FINRA"). *See* 15 U.S.C. §§ 78o(a)(1), (b)(8). The SEC actively oversees SROs; for example, SRO rules and rule amendments are subject to approval by the SEC. 15 U.S.C. § 78s(b). SROs are empowered by the Exchange Act to enforce compliance with the Exchange Act, SEC rules, and their own rules through examinations and disciplinary

proceedings. 15 U.S.C. § 78s(g)(1). To that end, SROs are active monitors of the broker-dealer industry. The existence and results of disciplinary actions are made public and easily accessible online, permitting investors to do due diligence on their broker-dealer. *See* FINRA Rule 8313(a) (requiring public release of information on disciplinary actions).[12]

Subject to the jurisdiction of FINRA and the SEC, prior to Reg BI, broker-dealers were subject to a "suitability" standard of conduct. *See* FINRA Rule 2111.[13] Recognizing that the relationship between a broker-dealer and client is more like an arms'-length sales relationship, the suitability standard is "intended to promote ethical sales practices" and "fair dealing." *Id.* cmt. .01. Under the suitability standard, when a transaction is recommended to a customer by a broker-dealer, the broker-dealer must have reasonable grounds to believe that the recommendation is suitable for the customer based on the information, if any, disclosed by the customer as to his/her financial situation and needs. *Id.* cmt. .04.

Aside from the general difference in the standards of conduct applicable to investment advisers and broker-dealers, the scope and duration of the application of duties applicable to each is also different. A key distinguishing characteristic of the broker-dealer's "suitability" standard is that it was assessed only at the time a

[12] https://www.finra.org/rules-guidance/rulebooks/finra-rules/8313

[13] https://www.finra.org/rules-guidance/rulebooks/finra-rules/2111

recommendation is made and imposes no duty of ongoing monitoring, a stark contrast from the ongoing duty imposed on investment advisers.[14] This is yet another recognition that investment advisers and broker-dealers serve fundamentally different functions for their customers. Investment advisers may be responsible, for example, for the continuous management of a customer's portfolio, which may necessitate more familiarity with the customer's financial goals. Broker-dealers, however, are primarily responsible for fulfilling orders placed by customers. As it relates to investment advice, assessing the suitability standard only at the time of the recommendation is only rational and reflects the fundamentally different job a broker-dealer has compared to an investment adviser.

Under Reg BI, in addition to raising the suitability standard to the overall requirement that a broker-dealer act within a customer's best interest when providing an investment recommendation, broker-dealers are subject to four component obligations: Care, Disclosure, Conflict of Interest, and Compliance. *See* BI Final Rule, 84 Fed. Reg. at 33,346. Each of these component obligations

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[14] *See* BI Final Rule, 84 Fed. Reg. at 33,331 ("[A]n investment adviser's duty of care encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client. . . . In contrast, the provision of recommendations in a broker-dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer's account following a recommendation.").

carries with it a set of requirements. For example, the Conflict of Interest and Compliance obligations require broker-dealers to have policies and procedures in place to identify, disclose, and mitigate (or eliminate, in some circumstances) conflicts of interest. *See id.* at 33,385 to 33,398. As described below, the SEC carefully weighed the costs and benefits of changing the broker-dealer standard of conduct in choosing the "best interest" standard for Reg BI in lieu of a fiduciary one. (*See* pp. 31-37, *infra*.)

2. Massachusetts Regulations Prior To The Fiduciary Duty Rule Incorporated The Federal Distinction In Regulation Of Investment Advisers And Broker-Dealers

Prior to the Fiduciary Duty Rule, Massachusetts regulations also treated investment advisers and broker-dealers differently, often relying on the standards and requirements set forth in various SEC and FINRA rules. *See* 950 C.M.R. § 200 *et seq.* (setting forth requirements for broker-dealers and investment advisers, respectively). Notably, Massachusetts regulations, like the IAA, exempted broker-dealers from the definition of "investment adviser," explicitly recognizing the differences between them and cementing that they would obtain different regulatory treatment in the Commonwealth. *See* 950 C.M.R. § 12.205(1)(a); *see also* G. L. c. 110A, § 401(m).

C. Massachusetts Common Law Recognizes That Broker-Dealers Typically Have A Non-Fiduciary Relationship With Customers

1. Broker-Dealers Do Not Inherently Owe General Fiduciary Duties To Customers Under Massachusetts Law

As with its statutory and regulatory counterparts, the common law has also maintained a distinction between its treatment of broker-dealers and investment advisers. In *Patsos*, the Court explicitly recognized that the relationship between a broker-dealer and customer is a *non*-fiduciary, sales relationship—even when the broker makes an investment recommendation to a customer. 433 Mass. at 333 n.15. The Court acknowledged, however, that a broker-dealer *may* become a fiduciary in certain limited circumstances. *Id.* at 331-32.

The *Patsos* Court did not make new law, nor did it alter existing law. Instead, *Patsos* examined the Court's historical jurisprudence to synthesize and "clarify" the law. *Id.*at 324. Longstanding decisions in Massachusetts have addressed the circumstances under which the ordinary business relationship between a broker-dealer and customer transforms into a fiduciary one, including but not limited to:

- *Birch v. Arnold & Sears*, 288 Mass. 125(1934): focusing on whether a "special relation of trust and confidence exist[ed]," *id.* at 137, the Court found that the ordinary broker-customer business relationship had crossed the line to a fiduciary one where the customer was "densely

ignorant" of investing, entrusted her entire savings to the broker, and exercised "no independent judgment whatever" in her investments. *See id.* at 129-130, 136-37.

- *Snow v. Merchants National Bank of New Bedford*, 309 Mass. 354 (1941): the Court held that there was no fiduciary relationship where the broker first consulted with the customer before each of hundreds of transactions. Examining whether a special relationship existed between the broker and customer, the Court held that although the customer may have placed trust and confidence in the broker, "the existence of the mutual respect and confidence does not make [a business relationship] fiduciary." *Id.* at 360.
- *Berenson v. Nirenstein*, 326 Mass. 285 (1950): the Court overturned a demurrer, finding that the plaintiff-customer's complaint sufficiently alleged facts showing a "full and complete relation of principal" and agent between he and the defendant-broker, which, under traditional trust law, would impose a constructive trust and therefore fiduciary duties. *Id.* at 288-89. The Court distinguished that relationship from one where the broker is "mere[ly] engaged to buy in behalf of another," which does not give rise to fiduciary duties. *Id.* at 288.

- *Vogelaar v. H.L. Robbins & Co., Inc.*, 348 Mass. 787 (1965): the Court held that the plaintiff-customer's complaint failed to set forth facts suggesting that the defendant-broker owed him fiduciary duties because there were no allegations that the broker had discretion to make investment decisions for the customer, even though the broker was alleged to have known that the customer "completely relied" upon him and was inexperienced with the securities business. *Id.* at 787.
- *Broomfield v. Kosow*, 349 Mass. 749 (1965): the Court held that the plaintiff-customer's trust and confidence in the defendant-broker did not alone give rise to fiduciary duties for the broker, but that those duties arose when the broker learned of such trust and confidence and exerted influence over the customer as a result. *See id.* at 757-58.

As the *Patsos* Court recognized, the common thread of these opinions is unmistakable: the nature of the relationship between the broker-dealer, on the one hand, and the customer and customer's account, on the other, determines the scope of the broker-dealer's fiduciary obligations.[15] Again, this is not new law, nor is it

[15] Prior to *Patsos*, federal courts applying Massachusetts law (correctly) interpreted the pre-*Patsos* cases to hold that "a simple stockbroker-customer relationship does not constitute a fiduciary relationship." *McIntyre v. Okurowski*, 717 F. Supp. 10, 11 (D. Mass. 1989) (quoting *Lefkowitz v. Smith Barney, Harris Upham & Co.*, 804 F.2d 154, 155 (1st Cir. 1986)); *see also Cannistraci v. Dean Witter Reynolds, Inc.*, 796 F. Supp. 619, 623 (D. Mass. 1992) (same). These courts, like the *Patsos*

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unique to the context of a broker-dealer and customer. Rather, *Patsos* is consistent with centuries of Massachusetts law on fiduciaries generally. Traditionally, Massachusetts courts examine the facts and circumstances surrounding the relationship between the alleged fiduciary and his client to determine whether it is one of trust and confidence whereby the client "repose[s]" such trust and confidence in the alleged fiduciary, who "possesse[s]" the "influence which naturally grows out of that confidence." *Hawkes v. Lackey*, 207 Mass. 424, 432-33 (1911) (collecting cases "under diverse circumstances and by reason of different relations" where fiduciary duties were found to be owed).

As to broker-dealers, this fact-specific inquiry focuses primarily on the degree of discretion and control the broker-dealer has over the customer's account and investment decisions. *Patsos*, 433 Mass. at 332, 336; *see also Snow*, 309 Mass. at 360 (factual question whether parties were in a fiduciary, rather than sales, relationship). Consistent with general principles of fiduciary law, when the customer entrusts the broker-dealer to make investment decisions on the customer's behalf and control the customer's account, fiduciary duties arise. Conversely, where the customer retains control over investment decisions, they do

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Court, noted that additional facts—beyond that the customer had minimal investment knowledge and always took the broker's advice—are necessary to transform the sales relationship between a broker and customer into a fiduciary one. *E.g.*, *McIntyre*, 717 F. Supp. at 11.

not. *Patsos*, 433 Mass. at 333-34. The sophistication of the customer and the existence of social/personal ties between the broker-dealer and customer may also be considered. *Id.* at 332-36.[16] The mere fact that a customer may place trust and confidence in the broker-dealer or is unsophisticated with respect to investing does *not*, without more, transform the broker-dealer into a fiduciary. *Id.*

2. The Fiduciary Duty Rule Departs Significantly From Massachusetts Common Law

The Fiduciary Duty Rule purports to upend this long-established common law paradigm by making two key changes to the holding of *Patsos*.

First, the Fiduciary Duty Rule alters the criteria used to define when a broker-dealer becomes a fiduciary. The Fiduciary Duty Rule foists fiduciary duties upon broker-dealers "when providing investment advice or recommending an

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[16] The law of other states is in accord. *See*, *e.g.*, *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940-41 (2d Cir. 1998) (under New York law, there is "no general fiduciary duty inherent in an ordinary broker/customer relationship"; such a duty arises when broker has discretion to make investment decisions); *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 518-19 (Colo. 1986) (under Colorado law, whether a broker owes a customer fiduciary duties is determined on a case-by-case basis and turns on whether the broker exercises control over the customer's account); *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Boeck*, 377 N.W.2d 605, 608-10 (Wis. 1985) (under Wisconsin law, broker "does not have a fiduciary duty to a customer with a non-discretionary account absent an express contract placing a greater obligation on the broker or other special circumstances"); *Greenwood v. Dittmer*, 776 F.2d 785, 788 (8th Cir. 1985) (under Arkansas law, broker has no fiduciary duty to customer for non-discretionary account); *Lieb v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 956-57 (E.D. Mich. 1978) (same in Michigan), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

investment strategy." 950 C.M.R. § 12-207(3). A broker-dealer, under the rule, becomes a fiduciary based on his/her engagement in certain *activities* without any regard for the nature of his/her *relationship* with the customer. *Id.* *Second*, the Fiduciary Duty Rule applies automatically and universally when a broker-dealer participates in the specified activities. *Id.*

Taken together, these two features of the Fiduciary Duty Rule make it the antithesis of the Court's holding in *Patsos*. In *Patsos*, the Court struck a balance between two "competing considerations: the need to protect customers who relinquish control of their brokerage accounts, and the need to ensure that securities brokers—particularly those who merely execute purchase and sell orders for customers—do not become insurers of their customers' investments." 433 Mass. at 336. As the Court explained, "[a]ssigning general fiduciary duties only to those stockbrokers who have the ability to, and in fact do, make most if not all of the investment decisions for their customers properly provides appropriate protection only for those customers who are particularly vulnerable to a broker's wrongful activities." *Id.* By removing the fact-specific relationship-based inquiry and focusing solely on one aspect of a broker's conduct, the Fiduciary Duty Rule topples the carefully crafted balance established by the *Patsos* Court.

Consider an example. Assume an individual investor, who makes all his own investment decisions, calls his broker to place a purchase order for his

account. During their conversation, the broker tells the investor "you would really like my company's new mutual fund." Under *Patsos*, the broker is allowed to make that pitch without becoming a general fiduciary to the investor. Under the Secretary's Fiduciary Duty Rule, however, that lone sentence potentially transforms the broker into a fiduciary, even though the investor retains total control over investment decisions and irrespective of whether the investor maintains a relationship of trust or confidence with the broker. The Fiduciary Duty Rule does not define "providing," "investment advice," "investment strategy," or "recommending," leaving open for interpretation what constitutes a recommendation or advice. By venturing to speak beyond merely repeating or confirming a customer's instruction, virtually every stockbroker in the Commonwealth risks becoming a fiduciary under the Secretary's regulatory scheme—a result *Patsos* specifically sought to prevent.

II. A UNIFORM STANDARD OF CONDUCT WILL HARM MASSACHUSETTS CONSUMERS AND BUSINESSES

Eliminating the well-established differences between the regulation of investment advisers and broker-dealers (*see* Sections I.B, I.C, *supra*), as the Fiduciary Duty Rule does, will harm Massachusetts businesses and consumers.

As described above, *Patsos* struck a balance between protecting investors and permitting broker-dealers to continue to operate without fear of becoming the *de facto* insurers of their customers' investments. (*See* pp. 30-31, *supra*.) In

rejecting a fiduciary standard of care for broker-dealers in Reg BI, the SEC did the same, recognizing that additional burdens on broker-dealers "would risk reducing [retail] investor choice and access" to investment advice, as well as increase costs for brokerage firms that would likely be passed on to investors. BI Final Rule, 84 Fed. Reg. at 33,322.

A. Empirical Data Shows That Imposition Of A Uniform Fiduciary Standard Would Reduce Retail Investor Access To Investment Advice, Particularly For Investors With Small Account Balances

The SEC's concerns were "not theoretical." *Id.* The now-invalidated Department of Labor ("DOL") fiduciary rule offered a chance to study the effects an expansion of fiduciary duties to broker-dealers (among other industry participants) would have on both brokerage firms and retail investors. In April 2016, DOL adopted a new definition of "fiduciary" treating persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan subject to the Employee Retirement Income Security Act of 1974 or individual retirement account as fiduciaries in a wider array of advice relationships than under the previous regulations. During the transition period for implementation of the new rule, it was vacated by the United States Court of Appeals for the Fifth Circuit. *Chamber of Com. of US v. U.S. Dep't of Labor*, 885 F.3d 360, 663 (5th Cir. 2018). Though it was ultimately vacated, many firms had already begun preparation in order to comply with the rule.

As an initial matter, imposing a fiduciary standard upon broker-dealers would create additional costs to those firms, including compliance costs and costs associated with the increased risk of liability—whether via litigation with customers or proceedings with regulators—stemming from a higher standard of conduct. *See* BI Final Rule, 84 Fed. Reg. at 33,422-23, 33,462-67. Nearly 2,400 brokerage firms are based in Massachusetts—including one of the largest retail brokerage firms in the United States, Fidelity Investments—and undoubtedly do business with Massachusetts consumers. Each of these Massachusetts businesses will be forced to bear the added burden and cost of the Fiduciary Duty Rule. Thousands more firms operate in the Commonwealth and serve its residents.

These costs will be significant. In response to the DOL rule, commenters estimated compliance costs of 12% of net capital for a smaller broker-dealer. BI Final Rule, 84 Fed. Reg. at 33,484. For larger firms, start-up compliance costs were estimated to be in the tens of millions with ongoing annual compliance costs of $3 million or more. *Id.* at 33,423; *see also* Deloitte, *The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors*, 18-19 (2017) ("Deloitte Study").[17] All together, the total start-up costs for all broker-dealers from the DOL rule was estimated to be $4.7

[17] https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf

billion, with ongoing costs estimated as high as $700 million annually. *Id.* at 19. *Amicus*'s members can attest that Reg BI, which stopped short of a fiduciary standard for broker-dealers, affected nearly every aspect of a broker-dealer's operations, including business and product strategy, legal, compliance, risk, HR, marketing, and finance—at significant cost. Further changes to the standard of conduct applicable to broker-dealers would impose even more cost than has already been incurred. Among other things, the Fiduciary Duty Rule creates a newfound patchwork of regulations across jurisdictions that firms operating in Massachusetts will be required to track and comply with in order to avoid liability.

To mitigate the effects of the increase in their costs and potential liability under the DOL fiduciary rule, brokerage firms announced various changes to their product and service offerings. *See* Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule,'* Wall St. J., Feb. 6, 2017.[18] These changes included "reduced product choice, a move to [fee]-based arrangements that may be more costly for buy-and-hold investors, and an increase in account minimums for [transaction]-based accounts." Letter from Dorothy M. Donohue, Gen. Counsel, Inv. Co. Inst., to the Hon. Jay Clayton, Chairman, Sec. & Exch.

[18] https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule1486413491.

Comm'n, at 4 (Aug. 7, 2017) ("ICI August 2017 Letter");[19] *see also* 913 Study at 146-55 (describing potential changes to offerings and impact on retail investors, including conversion of brokerage accounts to higher-priced advisory accounts).

Empirical data corroborated this reporting. In one study, 53% of firms had reduced or eliminated access to transaction-based brokerage advice services (or planned to), and 95% of firms reduced the type of products offered to retail investors (or planned to). Deloitte Study at 5; *see also id.* at 13-14 & fig. 3.3 (86% reduced the number of mutual funds and 48% reduced the number of annuities). More than half of firms reported that they would likely pass on their increased compliance costs to their clients through higher costs and fees. *See* Letter from Richard Foster, Fin. Servs. Roundtable, to Jay Clayton, U.S. Sec. & Exch. Comm'n, App. B, at 77 & tbl. 1 (Oct. 17, 2017) ("FSR Study") (Key Poll Findings—National Survey of Financial Professionals (July 17, 2017)).[20] And nearly half—46%—reported that they were likely to take on fewer clients as a whole. *Id.*

Investors with small account balances are almost ten times more likely to be affected by these changes than those with larger account balances. *See* Am.

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[19] https://www.ici.org/system/files/attachments/17_conduct_sec_clayton_ltr.pdf

[20] Available attached beginning as page 92 of the electronic version of Financial Services Roundtable, Letter to The Hon. Jay Clayton (Oct. 17, 2017), https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2641320-161289.pdf

Bankers Ass'n, *ABA Survey: Department of Labor Fiduciary Rule* (July 20, 2017).[21] Indeed, 68% of firms reported that they were less likely to provide transaction-based advisory services to smaller accounts. FSR Study at 77 & tbl. 1. And at least 29% of firms planned to move clients with low account balances, *i.e.*, less than $25,000, to robo-advisers. *Id.* at tbl. 2. While automated advice may be adequate in some cases, it may not be in all cases. For example, "[i]nvestors may benefit significantly from human advice on issues such as whether to stay the course or shift investments to cash in time of market downturns or stress, whether to take a withdrawal . . ., or whether to keep assets in a plan versus rolling them over to an [individual retirement account]." ICI August 2017 Letter at 5.

Removing access to transaction-based advisory services for small-account investors virtually ensures that a significant portion are pushed out of the market for investment advice entirely, because they do not meet account minimums or cannot afford the higher fees generally associated with fee-based accounts. *See* Deloitte Study at 12 (average fee-based accounts cost up to more than twice the amount of annual fees paid by the average transaction-based account); pp. 17-18, *supra*. Of the firms reporting that they had reduced or eliminated retail investor access to transaction-based advice in response to the DOL rule, 63% responded

[21] www.aba.com/Advocacy/Issues/Documents/dol-fiduciary-rule-survey-summary-report.pdf

that at least some of their customers chose to self-direct their investments by declining to convert their accounts to fee-based advisory accounts. *Id.* at 13. Highlighting the critical role transaction-based advisory services play to retail investors seeking cost-effective advice, these customers cited reasons such as "did not meet the account minimums" and "not in . . . investor's best interest" for declining to use a fee-based account. *Id.*

B. The Fiduciary Duty Rule Will Have <u>The Same Effects As Already Shown In The Data</u>

While these findings were made in the context of the DOL's fiduciary rule, and not the Secretary's Fiduciary Duty Rule in front of this Court, the parallels between them are obvious: at least in part, both purport to expand the scope of the application of fiduciary duties to broker-dealers. Just as the SEC found that the DOL rule-related studies were informative when considering Reg BI, so too are they here with respect to the Secretary's Fiduciary Duty Rule. There is no reason to believe that the impact on broker-dealers and investors of the Fiduciary Duty Rule will be different than that of the DOL rule—nor does the Secretary suggest that there is. Simply put, empirical evidence suggests that, were the Fiduciary Duty Rule not struck down, Massachusetts consumers will lose "access and choice" with respect to investment advice, pay more for investment advice when they can get it, and lose investment options. BI Final Rule, 84 Fed. Reg. at 33,401.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Superior Court.

Dated: April 7, 2023
Boston, Massachusetts

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Marley Ann Brumme, hereby certify that this brief complies with the rules of court that pertain to the filing of *amicus* briefs, including, but not limited to: Rule 16(e) (references to the record); Rule 20 (form and length of briefs); and Rule 21 (redaction).

I further certify that this brief complies with the applicable length limit of Mass. R. App. P. 20(a)(2)(C) for an *amicus curiae* brief produced in a proportionally spaced font because it was prepared in 14-point Times New Roman font using Microsoft Word (2010) and, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D), it contains 6,096 words.

/s/ Marley Ann Brumme
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13381

ROBINHOOD FINANCIAL LLC
Plaintiff-Appellee,
v.
WILLIAM F. GALVIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH, AND THE MASSACHUSETTS SECURITIES DIVISION,
Defendants-Appellants.

CERTIFICATE OF SERVICE

I, Eben P. Colby, hereby certify that on April 7, 2023, a true copy of the Brief Of Amici Curiae The Chamber Of Commerce Of The United States Of America And Greater Boston Chamber Of Commerce In Support Of Plaintiff-Appellee Supporting Affirmance was served by the E-Filing System upon counsel of record as follows:

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