Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-13381

ROBINHOOD FINANCIAL LLC, Plaintiffs-Appellee,

v.

WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH, in his official capacity, and the MASSACHUSETTS SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF THE COMMONWEALTH
Defendants-Appellants.

Appeal from the Commonwealth of Massachusetts Superior Court Department of the Trial Court, Business Litigation Section Suffolk County
Case No. 2184-CV-21-884-BLS

AMICUS BRIEF OF PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION IN SUPPORT OF DEFENDANTS/APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Public Investors Advocate Bar Association is a not-for-profit corporation, does not have any parent entities, and there are no publicly held companies that own ten percent or more of its stock.

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Identity of *Amicus Curiae*, Public Investors Advocate Bar Association, and Its Interest in the Case

Public Investors Advocate Bar Association ("PIABA") respectfully submits this brief as *amicus curiae* in support of Defendants/Appellants William F. Galvin, Secretary of the Commonwealth ("Secretary"), and the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth on the limited issue of whether federal law preempts 950 C.M.R. 12.207. C.M.R. 12.207 is the regulation enacted by the Secretary imposing a fiduciary duty upon securities broker-dealers and their associated persons, which is the subject of this appeal.

PIABA is an international organization of attorneys who advocate on behalf of and represent retail investors in disputes with their financial professionals. Part of PIABA's mission is to protect public investors and create a level playing field for public investors in securities and commodities disputes. PIABA has appeared as an *amicus curiae* before the United States Supreme Court, Federal Circuit Courts of Appeal, and state supreme courts throughout the nation in cases involving issues important to public investors.

PIABA submits its brief in this case to address the erroneous position taken by Appellee Robinhood Financial LLC, that Regulation Best Interest preempts state securities laws and regulations, including state laws regarding fiduciary duties owed by broker-dealers to their customers. State law fiduciary duties are a vitally important protection for retail investors and a finding that such duties are preempted

by Regulation Best Interest would be directly contrary to the SEC's stated goal of "enhancing retail investor protection."

Rule 17(c)(5) Declaration of Amicus Curiae

No party or party's counsel has participated in the authoring of this brief. No party or party's counsel, or any other person or entity, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief. Neither PIABA nor its counsel represents or has represented any of the parties to the present appeal in another proceeding involving similar issues. Neither PIABA nor its counsel was a party or represented a party in any proceeding or legal transaction that is at issue in the present appeal.

LEGAL DISCUSSION

Public Investors Advocate Bar Association ("PIABA") respectfully submits this brief as *amicus curiae* in support of Defendants/Appellants William F. Galvin, Secretary of the Commonwealth, and the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (collectively, "Appellants") on the limited issue of whether federal law preempts 950 C.M.R. 12.207.

I. States Historically Have Had Broad Authority to Regulate Broker-Dealers.

State securities laws are a vital component of the regulatory scheme governing the securities industry in the United States. They provide investors with important remedies to protect against fraud, negligence, breaches of fiduciary duties, and other misconduct. In 1911, Kansas became the first state to pass a modern "blue sky" law[1] to regulate securities.[2] "[O]ther states were quick to follow suit, and within two years, twenty-three states had passed legislation regulating securities sales."[3] "By

[1] "The term 'blue sky' derives from the fact that such statutes are intended to prevent 'speculative schemes which have no more basis than so many feet of 'blue sky.'" *Sampson v. Invest Am.*, 754 F. Supp. 928, 931 n.8 (D. Mass. 1990).

[2] Christopher R. Lane, *Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators*, 39 New Eng. L. Rev. 317, 321 (2005).

[3] *Id.*

the time Congress passed the first federal securities law in 1933, state legislatures had long assumed a role in securities regulation, some since the mid-19th century."[4]

The United States Supreme Court has recognized that state blue sky laws are a field of "'traditional' state regulation."[5] The Securities and Exchange Commission ("SEC") has recognized that "[w]hile state laws vary, all states require broker-dealers and their agents to register with or be licensed by the securities regulators of the states in which they conduct their business."[6] State requirements regarding registration vary and impose differing requirements on broker-dealers and their registered representatives, both at the registration stage and on an ongoing basis while conducting their securities business in the state.[7] Congress recognized the importance of state regulation when it included a savings clause in the National Securities Markets Improvement Act of 1996 ("NSMIA") providing "the securities commission...of any State shall retain jurisdiction...to investigate and bring

[4] Martin Fojas, *Ay Dios Nsmia! Proof of A Private Offering Exemption Should Not Be A Precondition for Preempting Blue Sky Law Under the National Securities Markets Improvement Act*, 74 Brook. L. Rev. 477, 481 (2009).

[5] *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 374, 135 S. Ct. 1591, 1592, 191 L. Ed. 2d 511 (2015).

[6] Securities & Exchange Commission, *Study on Investment Advisers and Broker–Dealers* (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf, at 54.)

[7] *Id.* at p. 90-91.

enforcement actions...with respect to fraud or deceit, or unlawful conduct by a broker or dealer... in connection with securities or securities transactions."[8]

Along with the long history of state licensing requirements and state regulatory oversight, the application of state common law fiduciary duties to broker-dealers has played an important role in securities enforcement since at least a half a century before the federal government passed its first securities regulations.[9]

Prior to the enactment of 950 C.M.R. 12.207 and Regulation Best Interest,[10] numerous states had expressly recognized that securities broker-dealers and their associated persons owe their clients fiduciary duties in at least some circumstances. The table below is an illustrative example of the many states that impose some form of fiduciary duty on securities broker-dealers:

STATE	LAW
California	"A stockbroker is a fiduciary." *Ashburn v. AIG Financial Advisors, Inc.* 234 Cal. App.4th 79, 100 (2015).
Connecticut	A stockbroker may have a fiduciary duty because "[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of

[8] NSMIA, § 18(d)(1) amending § 18 of the Securities Act of 1933, 15 U.S.C. § 77r(c)(1).

[9] *See e.g. Marvin v. Brooks*, 94 N.Y. 71, 71 (1883).

[10] 17 CFR § 240.15l-1.

STATE	LAW
	the fiduciary or dominent party affords him great opportunity for abuse of the confidence reposed in him." *Daum v. Rare Coin Invs. Portfolios*, 1995 Conn. Super. LEXIS 2442, at *9 (Super. Ct. Aug. 22, 1995).
Delaware	A stockbroker's duties "are comparable to the fiduciary duties of corporate directors, and are limited only by the scope of the agency." *O'Malley v. Boris*, 742 A.2d 845, 849 (Del. 1999).
Florida	"As a broker selling securities, [the defendant-broker] owed his clients fiduciary duties of care and loyalty." *Inv'r Prot. Corp. v. Old Naples Sec., Inc.*, 343 B.R. 310, 321 (Bankr. M.D. Fla. 2006).
Georgia	"[W]e further conclude that the fiduciary duties owed by a broker to a customer with a non-discretionary account are not restricted to the actual execution of transactions." *Holmes v. Grubman*, 286 Ga. 636, 643, 691 S.E.2d 196, 201 (2010).
Illinois	"A fiduciary relationship may also arise as a matter of law, such as between a securities broker and his customer." *Khan v. BDO Seidman*, LLP, 408 Ill. App. 3d 564, 592 (2011).
Indiana	"[I]in some circumstances a broker would stand in a fiduciary relationship to its customer." *Dolatowski v. Merrill Lynch*, 808 N.E.2d 676, 681 (Ind. Ct. App. 2004) (internal citations and quotation marks omitted).
Iowa	"[T]he facts in this case clearly establish the existence" of a "fiduciary relationship between a stockbroker and his customer/client." *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 381 (Iowa Ct. App. 1989).

STATE	LAW
Louisiana	"A broker's duty is fiduciary in nature." *Beckstrom v. Parnell*, No. 97 CA 1200 (La. App. 1 Cir. 1998);730 So. 2d 942.
Missouri	"Stockbrokers owe customers a fiduciary duty." *State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126, 130 (Mo. 1995).
Nevada	Nevada SB 383, 79th Session (Enacted, June 2, 2017) ("AN ACT . . . imposing a fiduciary duty on broker-dealers.").
New Jersey	"Arising in a vast array of factual settings, fiduciary relationships are many [including] securities brokers, to their clients." *Innes v. Marzano-Lesnevich*, 224 N.J. 584, 610, (2016).
Ohio	"A broker-dealer is a fiduciary who owes his customer a high degree of care in transacting his business." *Silverberg v. Thomson McKinnon Sec., Inc.*, 1985 Ohio App. LEXIS 6140, at *10 (Ct. App. Feb. 14, 1985).
Pennsylvania	"[T]he relationship between a stock broker and its clients is one of a fiduciary duty." *Berkowitz v. Mayflower Secur., Inc.*, 455 Pa. 531, 533 n.2 (1974).
Rhode Island	"[I]f the client has requested the broker or advisor to provide investment advice or has given the broker discretion to select his or her investments, the broker or advisor has even been found to assume broad fiduciary obligations that extend beyond the individual transactions." *Sargent v. Sargent*, 2010 R.I. Super. LEXIS 181, at *21-22 (Super. Ct. Nov. 12, 2010) (cleaned up).
South Carolina	"A broker or dealer of securities is an agent of the buyer, and therefore, generally owes the buyer fiduciary

STATE	LAW
	duties." *Cowburn v. Leventis*, 366 S.C. 20, 37 (Ct. App. 2005).
South Dakota	"[A] fiduciary relationship does exist between securities brokers and their clients…" *Dinsmore v. Piper Jaffray, Inc.*, 1999 S.D. 56, ¶ 20, 593 N.W.2d 41, 46. .
Tennessee	"[S]tock brokers and financial advisors providing investment advice also owe fiduciary duties to their clients." *Commissioners v. Util. Mgmt. Review Bd.*, 427 S.W.3d 375, 388-89 (Tenn. Ct. App. 2013).
Texas	"[W]hile a broker owes his investor-client a fiduciary duty, that duty varies in scope with the nature of their relationship, and determining that nature requires a fact-based analysis." *Lampkin v. UBS Painewebber, Inc.*, 238 F. Supp. 3d 799, 843 (S.D. Tex. 2017).

The foregoing states include some of the most populous in the country, such as California, Texas, and Florida. The states that have expressly stated that there are no fiduciary duties between securities broker-dealers and their customers are outliers. Only a few such states, such as Arkansas, Hawaii, Montana, and Washington, have made any such finding.[11] By contrast, the majority of states impose either an express fiduciary duty upon broker-dealers and their associated persons in all circumstances, or find that a fiduciary duty may arise in certain types

[11] Michael Finke & Thomas P. Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice,* July 2012 Journal of Financial Planning, 32

of factual settings.[12] Consequently, Massachusetts is not treading on new ground by enacting a statute which expands the scope of a broker's fiduciary duty beyond that which already exists under its common law.

In that regard, federal courts have recognized that "state common law breach of fiduciary duty actions provide an important remedy [for investors] not available under federal law."[13] Federal courts have further explained that "[s]ince not every instance of financial unfairness or breach of fiduciary duty will constitute a fraudulent activity under § 10(b) or Rule 10b–5, federal courts should be wary of foreclosing common law breach of fiduciary duty actions which supplement existing federal or state statutes."[14]

In short, there is a long-standing tradition of: a) the states regulating securities; b) the United States Supreme Court recognizing the importance of states retaining their own jurisdiction to regulate and enforce securities matters within that state; and

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[12] *Id.* (Identifying 36 states that impose either an express fiduciary duty upon broker-dealers in all circumstances, or a fiduciary duty in certain types of situations). Based on the authorities cited in the table above, PIABA believes that the Finke & Langdon study under-counts the number of states which have found that broker-dealers and their associated persons owe a fiduciary duty to their customers.

[13] *Roland v. Green*, 675 F.3d 503, 518 (5th Cir. 2012), *aff'd sub nom. Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 134 S. Ct. 1058, 188 L. Ed. 2d 88 (2014)(citing *See* Securities & Exchange Commission, *Study on Investment Advisers and Broker–Dealers* (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf, at p. 54.)

[14] *Id.* (quoting *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir.1987)).

c) States imposing a common law fiduciary duty upon securities brokers and broker-dealers. The foregoing demonstrates that states have the authority to regulate broker-dealers and have exercised that authority for many decades.

II. Congress Knows How to Preempt States Securities Laws, but Decided Not to Do so in This Case.

Congress is well aware of how it can preempt state laws, particularly in the field of securities. It has expressly done so in the past, such as when it enacted the Securities Litigation Uniform Standards Act ("SLUSA")[15] and the National Securities Markets Improvement Act ("NSMIA").[16] Moreover, when Congress expressly preempted state securities laws, such preemption generally has been limited to publicly traded securities trading on national markets, and Congress expressed its intent to preserve important state law remedies and enforcement mechanisms. Here, the Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 1376, pursuant to which Regulation Best Interest was promulgated, contains no express or implied preemption provisions.

[15] SLUSA expressly preempts certain "covered class actions" brought exclusively under state law in which a plaintiff alleges an untrue statement or omission of a material fact in connection with the purchase or sale of a "covered security." 14 U.S.C. § 77p(b) and 15 U.S.C. § 78bb(f).

[16] NSMIA preempts certain state law registration requirements for "covered securities." 15 U.S.C. § 77r.

In that regard, the United States Supreme Court has repeatedly explained that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[17] Here, Congress and the SEC were each aware of the widespread operation of state law in the field of broker-dealer regulation when Congress enacted the Dodd-Frank Act. Nonetheless, neither Congress nor the SEC took any steps to preempt state law.

Specifically, Congress was aware that state fiduciary standards similar to Massachusetts' regulation 950 C.M.R. 12.207, have been widespread for over a century before the Dodd-Frank Act was enacted and subsequently Regulation Best Interest promulgated, but chose not to preempt them. Section 913 of Dodd-Frank expressly recognizes state laws concerning broker-dealer conduct,[18] and instructs the SEC to consider "the existing legal or regulatory standards of state securities regulators and other regulators intended to protect retail customers."[19] Likewise, the SEC, in its study pursuant to the Dodd-Frank Act, discussed state-law breach of

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[17] *Wyeth v. Levine,* 555 U.S. 555, 575, 129 S. Ct. 1187, 1200, 173 L. Ed. 2d 51 (2009)(quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 166–167, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989)).

[18] § 913(b)(1), 124 Stat. 1376, 1824 (2010).

[19] § 913(c)(8), 124 Stat. 1376, 1826 (2010).

fiduciary duty remedies,[20] as well as the prevalence of reliance on such remedies in FINRA arbitration.[21] Far from preempting such standards, the SEC staff recommended adopting such standards at the federal level.[22] There is clear evidence that Congress and the SEC were aware of and even respectful of state common law fiduciary duties on broker-dealers. The lack of express preemption language in either Dodd-Frank or Regulation Best Interest, and the long-standing interpretative schema of the United States Supreme Court to disfavor federal preemption in the securities laws absent express language of Congressional intent, strongly indicate that Robin Hood's preemption arguments are erroneous and should not be adopted by this court.

III. There Is No Conflict Preemption in This Instance. Rather, the Primary Goal of Regulation Best Interest – Investor Protection – Aligns with State Law Recognizing Fiduciary Standards.

There is "a strong presumption against implied federal preemption of state law. That presumption is strongest "in fields of traditional state regulation," and it applies whether preemption is alleged to be explicit, implied, or a result of

[20] Securities & Exchange Commission, *Study on Investment Advisers and Broker–Dealers* (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf, at p. 82 ("Customers also may bring actions against broker-dealers for claims arising under state law, including those arising from breaches of fiduciary duties under state law.")

[21] *Id.* at p. 81.

[22] *Id.* at ii.

conflict."[23] The United States Supreme Court has recognized that state blue sky laws are a field of "traditional' state regulation."[24] "The burden is on the party seeking to displace the State action to show preemption with hard evidence of conflict based on the record."[25]

Robinhood's argument for conflict preemption hinges almost entirely on its assertion that "a significant objective of [Regulation Best Interest] was to preserve a choice in brokerage services."[26] However, a review of the Regulation Best Interest Adopting Release makes clear that preserving choice was a secondary objective that took a back seat to investor protection. Specifically, the SEC states:

> Regulation Best Interest…balances the concerns of the various commenters in a way that will best achieve the Commission's important goals of enhancing retail investor protection and decision making, while preserving, *to the extent possible*, retail investor access (in terms of choice

[23] *ACA Connects - Am.'s Commc'ns Ass'n v. Frey*, 471 F. Supp. 3d 318, 325 (D. Me. 2020)(citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)); *see also Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 315, 553 N.E.2d 894, 896 (1990)("Preemption ... is not favored, and State laws should be upheld unless a conflict with Federal law is clear.").

[24] *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 374, 135 S. Ct. 1591, 1592, 191 L. Ed. 2d 511 (2015).

[25] *Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 315, 553 N.E.2d 894, 896 (1990).

[26] Robinhood's Memorandum in Support of Cross-Motion for partial Judgment on the Pleadings at p. 21.

> and cost) to differing types of investment services and products.[27]

(emphasis added).

The SEC's statement makes it clear that "enhancing retail investor protection and decision making" is the *primary* goal. Preserving choice is a secondary goal to be accomplished only "to the extent possible" while achieving the primary goal of enhancing investor protection. In other words, the SEC expressly acknowledges that brokerage service choice *may* be reduced, not increased, by Regulation Best Interest.

In contrast, Robinhood's proposed elimination of state law fiduciary duties focuses solely on increasing investor choice at the expense of investor protection – the opposite of the SEC's goal. In effect, Robinhood wrongfully suggests that an act focused on "enhancing retail investor protection" should instead eliminate one of the primary means of investor protection: the imposition of high fiduciary standards upon financial professionals who conduct securities business in Massachusetts and the corresponding common law remedies for breach of fiduciary duty that enable retail investors to obtain damages awards for recoverable losses caused by those professionals.[28] This would turn the purpose of the Dodd-Frank Act, the most

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[27] Regulation Best Interest Adopting Release at 33323.

[28] *See* Securities & Exchange Commission, *Study on Investment Advisers and Broker–Dealers* (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf, at 81 (explaining that breach of fiduciary duty was the most common claim asserted in FINRA.)

important post-financial crisis financial reform act, on its head. Instead of advancing investor protection, Regulation Best Interest, as interpreted by Robinhood, would eliminate vital protections that have been in place for more than a century.

If the SEC had intended to make such a drastic change to the existing law in numerous states, it would have done so expressly. Applying conflict preemption in this instance would subvert the SEC's intent and eviscerate investor remedies under state law that have long been recognized as a crucial element of the securities enforcement regime. State-law fiduciary duties are not in conflict with the SEC's intent; rather, they are harmonious with the goal of protecting retail investors. Moreover, state law fiduciary standards clearly do not impede investor choice or the financial ability of broker-dealers to operate, as such standards have existed for decades in many of this country's most populous and prosperous states.

IV. Claims of Breach of Fiduciary Duty Under State Law Provide Critical Remedies to Investors.

State law breach of fiduciary duty claims are of vital importance to investor protection. In its study commissioned by the Dodd-Frank Act, the SEC found that of 7,137 arbitration cases filed with the Financial Industry Regulatory Authority ("FINRA") in 2009, 4,206 involved claims for breach of fiduciary duty.[29] Federal

[29] *See* Securities & Exchange Commission, *Study on Investment Advisers and Broker–Dealers* (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf, at p. 81(It should be noted that these figures are likely understated insofar as FINRA's

securities laws do not provide for the common law remedy of breach of fiduciary duty, yet it has long existed in harmony with the federal securities statutes.

Indeed, a study published in the Journal of Financial Planning found that "[e]mpirical results provide no evidence that the broker-dealer industry is affected significantly by the imposition of a stricter legal fiduciary standard on the conduct of registered representatives," and yet "agency costs that exist when brokers are regulated according to suitability [rather than as fiduciaries] are significant."[30] In other words, a fiduciary standard protects retail investors without significantly or adversely affecting the broker-dealer industry. This is borne out by the fact that the broker-dealer industry is alive, well, and thriving in California, Texas, Florida, and the many other states which have imposed a fiduciary standard upon securities broker-dealers and their associated persons for decades.

V. Conclusion

Many states have long recognized and upheld state common law that broker-dealers owe fiduciary duties to their customers. Such laws pre-date Regulation Best Interest and 950 C.M.R. 12.207 by decades. If Congress and the SEC intended to

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rules do not require claimants to assert defined causes of action and therefore many do not).

[30] Michael Finke & Thomas P. Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, July 2012 Journal of Financial Planning at 36.

preempt such state laws, they would have done so expressly. The primary purpose of Dodd-Frank and Regulation Best Interest was to *enhance* investor protections, *not* reduce them. This primary purpose is in harmony with the purpose of states imposing fiduciary standards on broker-dealers. Robinhood's attempt to erase a century of state-law protections and corresponding remedies turns the purpose of Regulation Best Interest on its head and eliminates vital sources of investor protection. This is directly contrary to the purpose and intent of Dodd-Frank and Regulation Best Interest. The Court should reject Robinhood's arguments regarding conflict preemption and preserve essential, long-standing investor protections respected by Congress and the United States Supreme Court for over a century. The Court should find for Appellants that Regulation Best Interest does not preempt 950 C.M.R. 12.207, and reverse and remand the lower court's decision.

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs including Mass. R. App. P. 17 and Mass. R. App. P. 20. I further certify that the foregoing brief complies with the length limits of Mass. R. App. P. 20(a)(3)(E), because it is printed in proportional spaced font, Times New Roman, at sized 14 point, and contains 4, 867 words in the sections required by Mass. R. App. P. 16(a)(5)-(11), and was prepared in Microsoft Word.

/s/ Timothy Cornell

Certificate of Service

I hereby certify that on the Ninth Day of April 2023, I served the foregoing brief filed by Amicus Curiae, Public Investor Advocate Bar Association, in the Supreme Judicial Court for the Commonwealth of Massachusetts in the matter styled *Robinhood Financial, LLC v. Williams F. Galvin, Secretary of the Commonwealth et al.* via electronic mail and the Massachusetts electronic filing system upon all parties to this appeal, including:

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