

# Wiley *Amicus* Brief Helps Persuade Fifth Circuit to Reject SEC Share-Repurchase Rule

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Washington, DC - Wiley Rein LLP, representing two former U.S. Securities and Exchange Commission (SEC) Chief Economists as *amici*, helped persuade the U.S. Court of Appeals for the Fifth Circuit to nullify the Commission's new share-repurchase rule in *Chamber of Commerce of the United States of America, et al. v. SEC*.

Finding the SEC rule "arbitrary and capricious" in an October 31 decision, the court agreed with arguments advanced by the petitioners, and by Wiley in a July 17 *amicus* brief filed on behalf of economists S.P. Kothari and James Overdahl.

The SEC rule, adopted in May 2023, requires publicly traded companies to disclose more information to investors when the companies repurchase shares of their own stock. The U.S. Chamber of Commerce and two other business groups petitioned the Fifth Circuit to vacate the rule, arguing that the SEC "failed to engage in reasoned decisionmaking."

Kothari and Overdahl's *amicus* brief, filed in support of the petitioners, argued that the SEC had not provided "any credible support" to justify the rule. In addition, the rule would impose "substantial costs" with "no discernable benefits," according to the brief, authored by Wiley partners Megan L. Brown, Thomas M. Johnson, Jr., and Kevin B. Muhlendorf, and special counsel Michael J. Showalter.

The Fifth Circuit echoed those arguments in vacating the SEC rule. The Commission "acted arbitrarily and capriciously" by failing to "conduct a proper cost-benefit analysis," the court said in its decision. "The rule's primary benefit - decreasing investor uncertainty about

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motivations underlying buybacks – is inadequately substantiated,” the court added.

Wiley draws on a wide range of multidisciplinary expertise in securities and appellate matters. Muhlendorf previously served as Assistant Chief in the Fraud Section of the U.S. Department of Justice Criminal Division and as Senior Counsel in the SEC Enforcement Division. He is a key member of the firm’s Securities Enforcement and Litigation Practice, successfully representing clients before the SEC, DOJ, and other regulatory and enforcement agencies. Johnson, former General Counsel at the FCC, co-chairs the Issues and Appeals Practice, which features a deep bench of former judicial clerks and appellate practitioners and often takes the lead for entire industries on critical issues in litigation across the country.

Earlier this year, a Wiley team led by Muhlendorf and Brown – who co-chairs the Privacy, Cyber & Data Governance Practice – filed an *amicus* brief on behalf of the U.S. Chamber of Commerce in *Securities and Exchange Commission v. Covington & Burling LLP*. The brief supported the respondent’s resistance to an SEC subpoena in a case involving high-stakes issues of attorney-client privilege amid the SEC’s shifting approach to cybersecurity.