No. _____

In the United States Court of Appeals for the Ninth Circuit

IN RE INVESTOR CHOICE ADVOCATES NETWORK

INVESTOR CHOICE ADVOCATES NETWORK,

Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

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CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1)

Investor Choice Advocates Network does not have a parent corporation. No publicly held corporation owns 10 percent or more of the stock of Investor Choice Advocates Network.

Dated: December 12, 2024

Respectfully submitted,

/s/ M. Lance Jasper

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Respondent United States Securities and Exchange Commission's ("SEC" or "Commission") definition of "accredited investor," set forth in Rule 501(a) under the Securities Act of 1933, largely determines which investors have access to private securities offerings. To qualify as an accredited investor under Rule 501(a), an individual must meet certain wealth and income criteria that impose barriers to investing for people of ordinary means. Because of the limitations on investment opportunities that have resulted from these barriers, people significantly underrepresented in the investment industry will remain underrepresented.

Consistent with federal law that requires the SEC to review its definition of accredited investor at least every four years ("Mandatory Quadrennial Review"), Petitioner Investor Choice Advocates Network ("ICAN") filed a rulemaking petition with the SEC more than two years ago—ahead of the mandated review for 2023—to begin the process of ending this inequity and expanding investment opportunities. ICAN's proposed rule would replace the net worth and income requirements of Rule 501(a) with non-financial metrics, which would open the investment industry to people who are now underrepresented by broadening the definition of "accredited investor," while maintaining appropriate safeguards. Such action would have a dramatic economic effect. Specifically, this expansion and diversification of the investor base through the reduction of barriers would lead to improved products,

higher employment, more resilient businesses, and enhanced confidence in capital markets. Despite these substantial benefits, however, and despite acknowledging receipt of ICAN's petition, the SEC failed at its Mandatory Quadrennial Review in 2023 to act on ICAN's rulemaking petition and has continued its failure to act since then.

For these reasons, ICAN requests the issuance of a writ of mandamus that directs the SEC to end its unreasonable delay and act on ICAN's rulemaking petition to further the public interest. Because the factors that guide the Court's analysis in deciding whether to compel a federal agency to act on a rulemaking petition weigh in favor of issuing mandamus relief, ICAN respectfully submits that the Court should grant this petition in its entirety.

RELIEF REQUESTED

ICAN requests the issuance of a writ of mandamus directing the SEC to act on its accredited investor rulemaking petition within 30 calendar days.

ISSUE PRESENTED

Does the SEC's unreasonable delay warrant the issuance of a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), directing the SEC to act on ICAN's accredited investor rulemaking petition within 30 calendar days?

ICAN respectfully submits that the answer to this question is "yes."

JURISDICTION AND VENUE

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court may grant interlocutory relief from "agency inaction" by issuing a writ of mandamus. *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1991). This authority is available to federal appellate courts, including this Court, for use "'in aid of their prospective jurisdiction.'" *Id*. It is well settled that, "[w]hen the prospective jurisdiction over an issue rests exclusively in the court of appeals, the district court necessarily has no power to grant interlocutory relief on that issue under the All Writs Act." *Id*. Consistent with this principle, when an agency has delayed in rulemaking, "[a]ny court that would have jurisdiction to review a final rule has jurisdiction to determine if an agency's delay is unreasonable." *In re A Cmty. Voice*, 878 F.3d 779, 783 (9th Cir. 2017). That is the situation here, where this Court would have "exclusive jurisdiction" to review the final action ultimately taken by the SEC on ICAN's rulemaking petition. *See Clark*, 959 F.2d at 811; *see also Public Utility Comm'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) ("where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review").

Given that this Court would have jurisdiction to review the SEC's final order on ICAN's rulemaking petition pursuant to the Securities Act of 1933, 15 U.S.C.

§ 77i, it necessarily has jurisdiction to issue a writ of mandamus directing the SEC to decide such a petition. Federal law requires this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see also In re Pesticide Action Network N. Am.*, 798 F.3d 809, 813 (9th Cir. 2015) (the Administrative Procedure Act grants federal appellate courts this authority). This Court is the proper venue for this petition because ICAN is a California nonprofit corporation with its principal place of business in Los Angeles, California. *See* 15 U.S.C. § 77i(a) ("[a]ny person aggrieved by an order of the Commission may obtain a review of such order in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business").

STATEMENT OF RELEVANT FACTS

I. The Petitioner

ICAN is a nonprofit public interest litigation organization committed to serving as legal advocate and voice for small investors and entrepreneurs seeking to enter the capital markets. Through its advocacy efforts, ICAN seeks to draw official attention among the judiciary and regulatory bodies to the serious challenges facing investors and entrepreneurs. ICAN's primary mission is to break down regulatory barriers to entry to capital markets. The subject rulemaking petition is an important example of ICAN's efforts in pursuit of this mission.

II. The Petition for Rulemaking

On November 9, 2022, ICAN formally petitioned the SEC to reduce the barriers for becoming accredited investors by replacing the net worth and income requirements of Rule 501(a) under the Securities Act of 1933 with non-financial metrics. Exh. A at 1 (ICAN's Petition for Rulemaking); *see also* 15 U.S.C. § 77b(a)(15)(ii) (defining "accredited investor" as including "any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe"). The SEC has described the role of accredited investors:

> For companies raising capital, the accredited investor definition largely determines who is in their pool of potential investors, and for investors whether they are eligible to invest in many early-stage companies. Many of the offering exemptions under the federal securities laws limit participation to accredited investors or contain restrictions on participation by non-accredited investors.

Id. (quoting *Accredited Investors: What is the role of accredited investors?*, https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/accredited-investors [hereinafter "*Accredited Investors*"].)

According to the SEC, individuals "may qualify as accredited investors based on wealth and income thresholds, as well as other measures of financial sophistication." *See Accredited Investors*. Individuals lacking a net worth of $1 million or annual income of $200,000 (or $300,000 with a spouse or partner) are

excluded from most private securities offerings. Exh. A at 1; *see also* 17 C.F.R. § 230.501(a)(5) & n.1 to ¶ (a)(5) (definition of "accredited investor"). These financial metrics create barriers to investing that disproportionately impact communities underrepresented in capital markets. *Id*. One commenter concluded, consistent with ICAN's rulemaking petition, the "SEC's rationale for the category is deeply flawed, and many of the components of the category fail to effectuate even the flawed rationale."[1]

ICAN's rulemaking petition addresses the impact of barriers by proposing revisions to the accredited investor definition that would replace current net worth and income requirements with non-financial metrics to expand investment opportunities available to underrepresented and diverse communities. Exh. A at 1. The non-financial metrics considered by ICAN include educational credentials, such as diplomas awarded by high schools, colleges, and universities, and professional certifications. *Id*. at 2. Although minimum net worth and income standards originally served to safeguard individuals with modest means from making financially risky decisions, their unintended consequence has been to deprive such individuals of the opportunity to increase their wealth through investment by preventing them from making their own risk assessments. *Id*.

[1] Andrew N. Vollmer, *Abandon the Concept of Accredited Investors in Private Securities Offerings*, 49 Securities Regulation L.J. 5 (2021), Mercatus Working Paper Series, https://ssrn.com/abstract=3719280.

Certain demographic groups are now significantly underrepresented in the investment industry because of the net worth and income requirements imposed by Rule 501(a). Exh. A at 2. Not only have these criteria limited the investment opportunities available, they have negatively impacted many entrepreneurs seeking investors within their own communities, which is especially detrimental because investors often prefer to invest in people like themselves. *Id*. Enhancing the diversity of investors therefore would benefit businesses targeting consumers from all demographics and promote innovation. *Id*. As ICAN explained in its rulemaking petition, "[t]he sweeping economic benefits of investor-based diversification will result in better products, stronger businesses, more jobs, and greater confidence in the capital markets." *Id*. at 2-3.

Finally, ICAN pointed out that participants in the financial services industry recognize that reducing or eliminating accredited investor net worth and income barriers to private securities offerings would promote opportunity and equity. Exh. A at 3. For example, such participants have observed:

> (1) The accredited investor requirements have unintended adverse consequences, such as limiting opportunities for certain individuals to become early investors of private venture funds and denying entrepreneurs needed capital. *Id*.

(2) The accredited investor requirements prevent ordinary investors from participating in private investments, including commercial real estate projects, because they fail to satisfy financial prerequisites. *Id*.

(3) The accredited investor requirements harm small companies seeking to raise funds and diversify their investor base. *Id*. Diversification benefits issuers and businesses because, when a company has a more expansive capitalization table and investor base, its upper management has more freedom to focus on innovation. *Id*.

(4) The accredited investor requirements contribute to the nation's wealth gap by causing a disproportionately negative impact on certain communities. *Id*. at 4. The opportunity to invest is essential for such communities to accumulate wealth. *Id*. Early investors of private companies that go public or are acquired receive windfalls that can change the trajectories of wealth experienced by families and their communities. *Id*.

For these reasons, through its rulemaking petition, ICAN requests that the SEC replace the net worth and income requirements of Rule 501(a) under the Securities Act of 1933 with non-financial metrics. *Id*.

III. The Historical Context

Pursuant to Section 413(b)(2)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-

Frank Act"), the SEC must "undertake a review of the accredited investor definition, in its entirety, as it pertains to natural persons, at least once every four years ("Mandatory Quadrennial Review") to determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy." *See Review of the "Accredited Investor" Definition under the Dodd-Frank Act* (Dec. 14, 2023) ("2023 Staff Report"), at 3, https://www.sec.gov/files/review-definition-accredited-investor-2023.pdf.

The SEC conducted reviews of the accredited investor definition, as required by the Dodd-Frank Act in 2015, 2019, and 2023. *Id*. at 3-4. The 2023 Staff Report, released on December 14, 2023 (more than one year after ICAN's November 2022 rule petition), states the purpose of the most recent review:

> This review is focused on changes in the composition of the accredited investor pool since the definition was adopted; the extent to which accredited investors have the financial sophistication, ability to sustain the risk of loss of investment, and access to information that have traditionally been associated with an ability to fend for themselves; and accredited investor participation in the Regulation D market and the market for exempt offerings more generally.

Id. at 4 (footnote omitted). Although the 2023 Staff Report states that it "examines the current status of the accredited investor pool and concludes with a review of frequently suggested revisions to the accredited investor definition received from a variety of sources," it did not result in any adjustments or modifications to the accredited investor definition. *See SEC Issues Staff Report on Accredited Investor*

Definition (Dec. 15, 2023), https://www.sec.gov/newsroom/press-releases/2023-253. The 2023 Staff Report instead discussed proposals to amend the definition and requested public comments. *See* 2023 Staff Report at 53.

One such proposal was ICAN's then 13-month-old rulemaking petition. *Id*. at 48 & n.174. Citing the petition, and quoting ICAN's requested revision to the accredited investor definition, the 2023 Staff Report observed that "some commenters have raised concerns about possible disparate geographic effects of the current financial thresholds, or that certain groups may be less likely to be eligible to be accredited investors under the current definition, due to systemic inequality and racial discrimination that has negatively impacted the ability of certain groups to build generational wealth, access higher education, pursue certain professions, and be members of certain social networks." *Id*. at 48. Notably, however, the SEC took no action and did not respond directly to ICAN's year-old petition as part of the Mandatory Quadrennial Review, and, one year later, the SEC still has not addressed ICAN's rulemaking petition. Because the SEC has not indicated when it might proceed, it is increasingly apparent that ICAN's rulemaking petition will remain undecided until the Court issues a writ of mandamus directing the SEC to act.

ARGUMENT

I. The Reasons Why the Writ Should Issue

A. Legal Standard for Issuance of the Writ.

The issuance of a writ of mandamus compelling a federal agency to act is an "extraordinary remedy justified only in 'exceptional circumstances.'" *In re Pesticide Action Network N. Am.*, 798 F.3d at 813. "An administrative agency's unreasonable delay presents such a circumstance because it signals the 'breakdown of regulatory processes.'" *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (quoting *Cutler v. Hayes*, 818 F.2d 879, 897 n.156 (D.C. Cir. 1987)). The "primary purpose" of granting mandamus relief when unreasonable delay occurs is to ensure that the agency does not "thwart" the Court's "jurisdiction by withholding a reviewable decision." *Id*. at 419. Common sense dictates that "agencies cannot insulate their decisions from Congressionally mandated judicial review simply by failing to take 'final action.'" *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1124 (9th Cir. 2001) ("mandamus relief may be warranted where agency action has been delayed to such an extent as to frustrate the court's role of providing a forum for review"). To prevent this concern from becoming a reality in this case, the issuance of a writ of mandamus directing the SEC to act on ICAN's accredited investor rulemaking petition is necessary and appropriate at this time.

B. The SEC Has a Duty to Act on ICAN's Rulemaking Petition.

When considering whether to issue a writ of mandamus that compels a federal agency to act on a pending rulemaking petition, the Court must initially find that the agency has a duty to act because an agency "cannot unreasonably delay that which it is not required to do." *In re A Cmty. Voice*, 878 F.3d at 784. The Court need look no further than the plain language of the Securities Act of 1933 and the Administrative Procedure Act ("APA") to conclude that the SEC has such a duty here.

The Securities Act of 1933 grants the SEC authority "to make, amend, and rescind" necessary "rules and regulations." 15 U.S.C. § 77s(a). Consistent with this authority, the SEC's rules of practice provide that "[a]ny person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary." 17 C.F.R. § 201.192(a); *see also* 17 C.F.R. § 201.101(a)(10) (defining "Secretary" as "the Secretary of the Commission"). When the SEC exercises this authority, the APA requires it to "conclude a matter presented to it," such as ICAN's rulemaking petition, "within a reasonable time," which means that it "has a duty to fully respond to matters that are presented to it under its internal processes." *See In re A Cmty. Voice*, 878 F.3d at 784 (quoting 5 U.S.C. § 555(b)).

The SEC accordingly "must enter a final decision subject to judicial review" within a reasonable time and "cannot simply refuse to exercise [its] discretion' to conclude a matter." *See id*. at 785 (quoting *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 n.6 (9th Cir. 1997)). Not only would such a refusal unilaterally abrogate the right of an "interested person" to "petition for the issuance, amendment, or repeal of a rule," as guaranteed by the APA and the SEC's own rules, it would render the SEC "unaccountable." *See id*. at 786; 5 U.S.C. § 553(e); 17 C.F.R. § 201.192(a). On this basis, these fundamental principles necessarily confirm that the SEC has a clear and unmistakable duty to act on ICAN's rulemaking petition within a reasonable time.

C. The SEC Has Unreasonably Delayed Acting on ICAN's Rulemaking Petition Under the Applicable *TRAC* Factors.

In this Circuit, "when there has been an unreasonable delay in rulemaking, courts have power and discretion to enforce compliance within some form of timeline." *See In re A Cmty. Voice*, 878 F.3d at 788. To facilitate the exercise of such power and discretion, the Court has adopted the "six factor balancing test" promulgated by the D.C. Circuit in *Telecomms Research and Action Center v. Fed. Commc'ns Comm'n*, 750 F.2d 70, 75 (D.C. Cir. 1984) (hereinafter "*TRAC*"), for use in deciding a petition for a writ of mandamus that seeks relief from an agency's unreasonable delay. *In re A Cmty. Voice*, 878 F.3d at 783-84. These factors include:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Id. at 786 (quoting *TRAC*, 750 F.2d at 80). Because Congress has not set a "firm deadline" by which the SEC must act on ICAN's rulemaking petition, the Court must balance these factors to ascertain whether the SEC's inaction is the product of unreasonable delay. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). Such balancing here compels the conclusion that the SEC has unreasonably delayed in acting on ICAN's rulemaking petition.

Factor 1: Rule of Reason

The most important *TRAC* factor for evaluating the SEC's delay in acting on ICAN's rulemaking petition is the "rule of reason," which considers "whether the time for agency action has been reasonable." *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1139 (9th Cir. 2020); *see also In re A Cmty. Voice*, 878 F.3d at 786 ("[t]he most important is the first factor, the 'rule of reason,' though it, like the others, is not itself determinative"). The reasonableness of an agency's inaction, such as the SEC's delay here, "necessarily turns on the facts of each particular case." *See*

Midwest Gas Users Ass'n v. FERC, 833 F.2d 341, 359 (D.C. Cir. 1988). "Repeatedly," however, "courts in this and other circuits have concluded that 'a reasonable time for agency action is typically counted in weeks or months, not years.'" *In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1139 (quoting *In re A Cmty. Voice*, 878 F.3d at 787). ICAN nevertheless has been waiting for the SEC to act on its rulemaking petition for more than two years with no apparent end to such delay forthcoming. Given that the SEC failed to act on ICAN's petition in 2023 and is not required to review the accredited investor rule again until 2027, it appears the SEC may have no present intention to address ICAN's petition for nearly three more years, if ever.

The SEC's failure to act on ICAN's rulemaking petition is inexplicable given the Dodd-Frank Act's mandate that it review the accredited investor definition at least every four years, the Mandatory Quadrennial Review. Upon its receipt of ICAN's petition, the SEC's Secretary should have referred it immediately "to the appropriate division or office for consideration and recommendation." *See* 17 C.F.R. § 201.192(a). That recommendation then should have been "transmitted with the petition to the Commission for such action as the Commission deems appropriate" followed by notification to ICAN "of the action taken by the Commission." *Id*. Given that ICAN filed its petition in November 2022, the SEC had sufficient time to complete this process before conducting its most recent review of the accredited

investor definition more than a year later. The 2023 Staff Report published in December 2023 as a result of that review even mentioned the amendments to the accredited investor definition proposed by ICAN's petition. *See* 2023 Staff Report at 48 & n.174. Yet, to date, the SEC has remained silent on the status of ICAN's petition.

ICAN recognizes that the Court ordinarily grants mandamus relief when agency inaction on rulemaking petitions has been longer than two years. *See, e.g., In re A Cmty. Voice*, 878 F.3d at 787; *In re Pesticide Action Network N. Am.*, 798 F.3d at 813. However, the Dodd-Frank Act's requirement that the SEC review the accredited investor definition at least every four years reflects Congress's intent that rulemaking petitions on this issue should not languish indefinitely, but rather should receive prompt consideration. With more than two years having passed since ICAN filed its rulemaking petition and the most recent Mandatory Quadrennial Review having been completed, the SEC has given no indication when, or even whether, it will consider ICAN's petition despite essentially acknowledging the relevance of ICAN's proposed amendments to the accredited investor definition through its reference in the 2023 Staff Report. The Mandatory Quadrennial Review of that definition would be meaningless if rulemaking petitions directly on point, such as ICAN's, are allowed to remain unaddressed by the SEC. ICAN therefore submits that the SEC's delay in acting on its rulemaking petition is patently unreasonable

under the particular circumstances of this case and warrants the issuance of mandamus relief.

Factor 2: Congressional Timetable

While the second *TRAC* factor does not directly apply here because Congress has not adopted a timetable by which the SEC must act on rulemaking petitions, the APA "instructs agencies to complete their work 'within a reasonable time.'" *In re Pesticide Action Network N. Am.*, 798 F.3d at 813 (quoting 5 U.S.C. § 555(b)); *see also Vaz v. Neal*, 33 F.4th 1131, 1138 n.6 (9th Cir. 2022) (pointing out that the second *TRAC* factor is "inapplicable" where the "regulations provide no timetable"). Even without a "*per se* rule as to how long is too long," it is incontrovertible that "inordinate agency delay would frustrate congressional intent by forcing a breakdown of regulatory processes." *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (quoting *Cutler*, 818 F.2d at 897 n.156). Such delay could, among other things, "undermine the statutory scheme" and "collide with the right to judicial review." *See Cutler*, 818 F.2d at 897. That is the situation here.

Under the Dodd-Frank Act, the SEC must conduct its Mandatory Quadrennial Review. *See* 2023 Staff Report at 3. By imposing this requirement, Congress conferred on the SEC administrative responsibility for achieving its statutory goals of protecting investors, promoting the public interest, and addressing related economic concerns. *See id*. The Mandatory Quadrennial Review required by the

Dodd-Frank Act therefore can only fulfill this congressional intent if the SEC promptly acts on rulemaking petitions directed to the accredited investor definition. Otherwise, the SEC would engage in unfair and uninformed decision making without appropriate input from the public in contravention of Congress's mandate. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative [decision-making] require that agency decisions be made only after affording interested persons notice and an opportunity to comment."). Because more than two years have already passed since ICAN filed its rulemaking petition (and a year has passed since the most recent Mandatory Quadrennial Review), there is no indication that the SEC will act on that petition before undertaking its next review of the accredited investor definition. Because such inaction is plainly unreasonable, mandamus relief is justified to ensure proper consideration of ICAN's rulemaking petition before that review process commences.

Factor 3: Human Health and Welfare at Stake

The SEC's delay in acting on ICAN's rulemaking petition does not raise an issue of human health, but rather jeopardizes the welfare of potential investors adversely impacted by the barriers to attaining accredited investor status created by the existing net worth and income requirements. Further delay by the SEC in acting on ICAN's petition will only prolong the negative effects of these barriers, which

impair the ability of individuals with modest means, including people of color, to make their own risk assessments regarding potential investments that could result in their accrual of greater wealth for themselves and their families. The ongoing underrepresentation of such individuals in the investment industry will have enduring economic, social, and political consequences. Accordingly, the SEC's failure to act on ICAN's petition reflects indifference to the welfare of individuals whose interests Congress expects it to promote and protect.

Factors 4 and 5: Competing Agency Priorities and Prejudice from Delay

A writ of mandamus compelling the SEC to act on ICAN's rulemaking petition would advance, rather than undermine, an important agency priority. *See In re Nat. Res. Def. Council, Inc.*, 956 F.3d at 1141. Although the SEC may have other priorities, Congress has dictated that the accredited investor definition must remain an ongoing agency priority by ordering a review of its status at least every four years. Requiring SEC action on ICAN's petition therefore would not infringe on the "deference traditionally accorded an agency to develop its own schedule" or otherwise conflict with competing agency priorities. *See Cutler*, 818 F.2d at 898. Not only would this mandate be consistent with and promote SEC priorities, the "consequence[]" of the SEC's inaction confirms the propriety of such relief because deference to an agency "is sharply reduced when injury likely will result from avoidable delay." *See id*. Individuals unable to participate in the private capital

markets because of their exclusion from accredited investor status will continue to suffer injury as they are denied opportunities to gain wealth. Because mandamus relief will facilitate action on a congressionally-imposed SEC priority and bring the prejudice resulting from the SEC's delay to an end, the issuance of the requested writ is necessary and appropriate at this time.

Factor 6: Agency Impropriety

Even though the Court need not find that the SEC's inaction on ICAN's rulemaking petition was the result of impropriety, the SEC's delay demonstrates a lack of good faith because it is inconsistent with its duty to review the accredited investor definition pursuant to the Dodd-Frank Act as part of its Mandatory Quadrennial Review. It is well settled that, "'[i]f the court determines that the agency [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable.'" *See Indep. Mining Co.*, 105 F.3d at 510 (insertions in original, quoting *Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1367 (D. Nev. 1995)). Given that the SEC's delay prevents the meaningful amendments to the accredited investor definition proposed by ICAN and prevents any necessary judicial review of its final action on ICAN's petition, it is axiomatic that the SEC is acting unreasonably in failing to act.

On these grounds, each *TRAC* factor weighs in favor of issuing the requested writ of mandamus. Regardless of how the Court balances these factors, they inevitably lead to the conclusion that the SEC has unreasonably delayed in acting on

ICAN's rulemaking petition. Nonetheless, even assuming that the SEC "has numerous competing priorities under the fourth factor and has acted in good faith under the sixth factor, the clear balance of the *TRAC* factors favors issuance of the writ." *See In re A Cmty. Voice*, 878 F.3d at 787. The application of the *TRAC* factors to the circumstances presented here establish that the SEC's unreasonable delay will likely continue without judicial intervention. Accordingly, the Court should grant this petition in its entirety.

CONCLUSION

For the foregoing reasons, Petitioner Investor Choice Advocates Network respectfully requests that the Court grant this petition in its entirety and issue a writ of mandamus directing the SEC to act on its accredited investor rulemaking petition within 30 calendar days.

Dated: December 12, 2024

Respectfully submitted,

/s/ M. Lance Jasper

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Counsel for Petitioner

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. 21(d) AND CIRCUIT RULE 21-2

Pursuant to Federal Rule Appellate Procedure 21(d) and Circuit Rule 21-2, I certify that this document, Petition for Writ of Mandamus to the United States Securities and Exchange Commission, complies with the word and length limits of Fed. R. App. P. 21(d)(1) and Circuit Rule 21-2(c) because, excluding the parts of the document exempted by Fed. R. App. P. 21(a)(2)(C) and Fed. R. App. P. 32(f), this document contains 4769 words and does not exceed 30 pages, and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point font size and Times New Roman type style.

December 12, 2024

/s/ M. Lance Jasper
M. Lance Jasper

Counsel for Petitioner

STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 21-3

Petitioner Investor Choice Advocates Network states that it is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on December 11, 2024 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I certify that I caused a true and correct copy of the foregoing to be served on the following by overnight mail:

United States Securities and Exchange Commission
c/o Vanessa A. Countryman, Secretary
100 F Street, N.E.
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December 12, 2024

/s/ M. Lance Jasper
M. Lance Jasper

Counsel for *Petitioner*

Exhibit A

ICAN
If ICAN, You Can

November 9, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Petition for Rulemaking – Replacing Net Worth and Income Requirements Under Rule 501(a) to Reduce DEI Barriers

Dear Ms. Countryman:

Investor Choice Advocates Network ("ICAN") submits this petition with the U.S. Securities and Exchange Commission ("Commission" or "SEC") to request that the Commission reduce the diversity, equity, and inclusion ("DEI") barriers for "accredited investors" by replacing the net worth and income requirements of Rule 501(a) under the Securities Act of 1933 with non-financial metrics.[1]

We recommend readers of this petition, including the Commission and Commission staff, view the video statements available here in connection with this petition.

As explained by the SEC, "For companies raising capital, the accredited investor definition largely determines who is in their pool of potential investors, and for investors whether they are eligible to invest in many early-stage companies. Many of the offering exemptions under the federal securities laws limit participation to accredited investors or contain restrictions on participation by non-accredited investors."[2] Generally, people who do not have a net worth of $1 million or annual income of $200,000 (or $300,000 with a spouse or partner) are simply excluded from most private securities offerings. These financial metrics create DEI barriers to investing that have a disproportionate impact on communities underrepresented in capital markets.

Although in 2020, the Commission began allowing individuals with certain securities broker licenses to become "accredited investors,"[3] this has not meaningfully reduced the DEI barriers to entry for investors. The Commission should replace the current net worth and income requirements with non-financial metrics so that investment opportunities in private share offerings may include more underrepresented and diverse communities. The non-financial metrics could include education attainment certifications such as a high school diploma or

[1] See 17 C.F.R. 201.192(a).
[2] https://www.sec.gov/education/capitalraising/building-blocks/accredited-investor
[3] See Lydia Beyoud, *SEC 'Accredited Investor' Definition Tweak Faces Equity Concerns* (February 23, 2022), https://news.bloomberglaw.com/securities-law/sec-accredited-investor-definition-tweak-faces-equity-concerns.

equivalent, associate, bachelors, masters, or doctor of philosophy degrees or professional certifications such as those required for certified public accountants, attorneys, chartered financial analysts, certified financial planners, securities brokers, or registered investment advisors. Similarly, evidence that an investor is working with a registered investment advisor would better empower currently non-accredited investors than current prohibitions.

While the net worth and income restrictions may have been originally rooted in the desire to protect individuals of modest means from making financially risky decisions, the rules have had the negative effect of preventing such individuals, and particularly communities of color, from being able to make their own risk assessments and attempting to accrue wealth at a high level. Indeed, Rule 501(a)'s net worth and income requirements have led to the underrepresentation of people of color in the investment industry more broadly.

According to a June 2019 report published by the National Venture Capital Association ("NVCA") and Deloitte & Touche LLP, 76% of investment professionals identified as white, 17% as Asian or Pacific Islander, 5% as Latino, and just 3% as Black.[4] To compile the report, the NVCA and Deloitte surveyed 2,700 employees at 203 venture capital firms with a total of $149.4 billion in assets under management in 2018.[5] The SEC's net worth and income requirements have also negatively-impacted entrepreneurs of color who might seek investors within their own communities as sources of venture capital. According to a 2019 report from the Ewing Marion Kauffman Foundation, in the United States, 22% of Black entrepreneurs, 15% of Latino entrepreneurs, and 13% of Asian entrepreneurs said an inability to obtain capital hurt their company's profitability, compared to just 9% of white entrepreneurs.[6] The report also noted that Black-owned businesses start with about three times less capital — an average of $35,205 — than their white-owned counterparts.[7] Businesses targeting consumers of color would likely be able to receive more money if investors were more diverse, according to Mariah Lichtenstern, the founding partner and managing director of investment firm DiverseCity Ventures.[8] "There are a multitude of studies that show that investors tend to invest in people like themselves," explains Lichtenstern.[9]

Investor-base diversification in early stage companies will also benefit the companies and foster innovation, generally. Start-up companies with a small number of homogenous investors can result in constraints on management that may not be present with a larger, more diverse investor base. Additionally, financial technology is making the 38-year old "accredited investor" rule obsolete. Today, technology has made it both simple and economically feasible for issuers to accommodate a sizeable number of micro-shareholders, enabling smaller investment amounts with correspondingly lower risk for investors. The sweeping economic benefits of investor-

[4] See Sierra Jackson, *SEC Rule Tweak A Partial Fix For Underrepresented Founders* (September 18, 2020), https://www.law360.com/articles/1298097/sec-rule-tweak-a-partial-fix-for-underrepresented-founders.
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.

based diversification will result in better products, stronger businesses, more jobs, and greater confidence in the capital markets.

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In connection with this petition, numerous participants in the financial-services industry have pointed out how the SEC would foster opportunity and equity by reducing or eliminating the accreditor investor net worth and income barriers to private-securities offerings, as detailed below and in the accompanying video statements.[10]

A. Brittany Davis, General Partner at Backstage Capital, comments on unintended consequences of "accredited investor" financial requirements

Although the "accredited investor" financial requirements originated from a desire to protect less wealthy investors, they have resulted in limiting many individuals from being early investors of private venture funds, as well as limiting entrepreneurs from obtaining much-needed capital. In their early stages of funding, many founders' only potential sources of funding are their immediate friends and families. However, these friends and families are often unable to meet the SEC's stringent "accredited investor" qualifications, thereby preventing numerous entrepreneurs from receiving their first $100,000 or even $25,000 of capital to get started.

B. Ryo Ishida, Managing Partner and Co-founder at Rainbow Capital Partners, worries that "accredited investor" requirements prevent ordinary investors from participating in private investments

Rainbow Capital Partners invests in underfunded entrepreneurs of commercial real estate and underfunded markets, with a primary focus on people of color, the LGBTQ+ community, and female entrepreneurs. One of its main social missions is to lower barriers for ordinary investors to access commercial real estate investments, but the "accredited investor" requirements prevent individuals from investing in projects. Specifically, for each deal it engages in, Rainbow Capital Partners has always practiced saving a several-million dollar tranche for ordinary investors to invest. However, they are forced to limit their acceptance of investors to those who are "accredited," even if there are long waitlists of individuals who do not meet the financial requirements and yet are still interested in these projects.

C. Dara Albright, Founder of DWealth Education, points out that "accredited investor" requirements harm small companies trying to raise funds and diversify their investment base

Not only does broadening access to more investment opportunities positively impact investors' portfolios, diversification also positively affects issuers and businesses themselves.

[10] See ICAN, "Net Worth and Income Components of the Accredited Investor Rule Exclude Underrepresented Communities, https://www.youtube.com/watch?v=lqlDqGbxYpk.

When a company has a more expansive capitalization table and investor base, this provides the company's upper management with more freedom to focus on innovating.

D. Ramona Ortega, CEO and Founder of My Money My Future, explains how the "accredited investor" financial requirements contribute to the nation's wealth gap:

My Money My Future emphasizes financial education and financial inclusion. The current "accredited investor" rules have a disproportionately negative impact on communities of color, particularly given the existing racial wealth gap. To illustrate, there is approximately a $100,000 difference in net worth between white families and families of color. Thus, the requirement of a million dollars in net worth, or even $200,000 dollars in annual salary, has a disparate impact on communities of color, even if they are financially mobile and actively seeking to build long-term wealth. It is crucial that all communities receive opportunities to accumulate wealth through investing – indeed, in the U.S., most wealth has been created through investing in or building businesses. For example, in the Silicon Valley "ecosystem," the observed pattern has been that early investors of private companies that eventually go public or are acquired are the ones who receive windfalls of capital that can completely change the trajectories of wealth for their families and communities.

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For the foregoing reasons, the Commission should replace the net worth and income requirements of Rule 501(a) under the Securities Act with non-financial metrics. We would be pleased to answer any questions the Commission or its Staff may have regarding our petition. We appreciate the Commission's continuing attention to this important matter and for allowing us an opportunity to present our views.

Sincerely,

Nicolas Morgan
Founder and President
ICAN

cc: Hon. Gary Gensler, Chair
Hon. Hester Peirce, Commissioner
Hon. Caroline Crenshaw, Commissioner
Hon. Mark Uyeda, Commissioner
Hon. Jaime Lizárraga, Commissioner