WD84470

IN THE MISSOURI COURT OF APPEALS

Western District

SEAN A. BRADY,

Relator/Respondent

v.

JOHN R. ASHCROFT, MISSOURI SECRETARY OF STATE, and DAVID M. MINNICK, MISSOURI SECURITIES COMMISSIONER,

Respondents/Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA's members are responsible for administering state securities laws, including by: qualifying and registering broker-dealers, investment advisers, and their agents and representatives; conducting routine and for-cause examinations and audits; and enforcing the securities laws in criminal, civil, and administrative enforcement actions. NASAA supports its members in carrying out their investor protection and regulatory duties, *inter alia*, by promulgating model rules and statutes, coordinating examination sweeps and multi-state enforcement actions,

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[1] Pursuant to Western District Special Rule 26, all parties have consented to the filing of this brief by *amicus curiae* North American Securities Administrators Association, Inc.

and commenting on legislative and rulemaking processes. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws.

NASAA and its members have a strong interest in the outcome of this case. In its ruling below, the Circuit Court of Cole County misconstrues the nature and significance of securities regulatory enforcement actions and the intended scope of enforcement jurisdiction under the Missouri Securities Act. The Missouri provisions are virtually identical to those in the Uniform Securities Act of 2002 and the corresponding statutory provisions in the many states that have modeled their securities regulatory regimes on this uniform statute. Allowing the Circuit Court's erroneous ruling to stand could undermine uniformity among state securities laws and could negatively affect the ability of other jurisdictions to enforce their securities laws.

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SUMMARY OF ARGUMENT

State and federal securities laws exist to protect investors, ensure the integrity of the securities industry, and maintain investor confidence in the markets. In order to achieve these goals, it is imperative that wrongdoers be held accountable for their misconduct. Pursuant to MO. REV. STAT. § 409.6-604, the Missouri Securities Division (the "Division") sought to hold Sean A. Brady accountable for a serious pattern of unethical or dishonest conduct in the securities business, in violation of MO. REV. STAT. § 409.4-412(d), and for fraudulent conduct in the provision of investment advice, in violation of MO. REV. STAT. § 409.5-502 (the "Enforcement Action").

In its Findings of Fact, Conclusions of Law, Final Judgment and Order in Prohibition (Mar. 28, 2021) (the "Order in Prohibition"), the Circuit Court below ordered the Missouri Commissioner of Securities (the "Commissioner") to take no further action against Brady other than to dismiss the entire Enforcement Action with prejudice. In doing so, the Circuit Court erroneously prohibited the Division from exercising its clearly established prerogative to protect Missouri investors by

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enforcing the Missouri Securities Act (the "Act"), MO. REV. STAT. §§ 409.1-101 *et seq*.

The Circuit Court's decision rests on two erroneous conclusions: (1) that the Division loses subject matter jurisdiction to enforce the Act against a formerly registered person after he or she terminates or withdraws from registration with the state, and (2) that the Division cannot seek statutorily authorized remedies for violations of the Act if the victims pursued and settled their own private claims against the wrongdoers.

The Circuit Court's decision should be reversed and the Enforcement Action should be allowed to proceed for three primary reasons.

First, the Circuit Court erred when it concluded that the Division lacks jurisdiction to enforce the Act against a former registrant for misconduct that occurred while he was registered. To the contrary, the Division has broad jurisdiction to enforce the Act against any person for any violation, regardless of the wrongdoer's registration status. Securities regulators and the public share a strong interest in enforcement of the securities laws and deterrence of misconduct,

including the maintenance of high standards of professional ethics in the industry. To achieve these goals, state securities laws are intended to capture all violations, regardless of the wrongdoer's registration status. However, the Order in Prohibition undermines the Division's ability to protect investors by making it easy for a registered person to evade accountability under the Act by terminating or withdrawing his registration.

Second, the Circuit Court erred in concluding that a private litigation settlement bars the Division from seeking relief authorized under the Act. Settlements of private securities litigation cannot unilaterally restrict a securities regulator's authority to perform its statutory duties or seek statutorily authorized remedies. Regulatory enforcement actions and private securities litigation serve different interests and objectives. While private plaintiffs generally seek only to recoup their own economic losses, regulatory enforcement actions are intended to deter misconduct and maintain high professional standards in the securities industry for the benefit of all investors. Although the victims of Brady's misconduct pursued and settled private claims against Brady and his former employer, the Division's broader interests

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were not raised, litigated, or resolved by these settlements. Furthermore, the Division is not bound by the terms of the private settlement agreements between the victims, Brady, and his former employer, First Allied Securities, Inc. ("FASI"), because it was not a party to those settlements, nor is it a "representative" of any of the individual victims.

Third, the Circuit Court's interference in the administrative process was premature and inappropriate. The General Assembly established an administrative enforcement process under the Act and a comprehensive statutory scheme for judicial review of the Commissioner's final order. The Order in Prohibition allowed Brady to circumvent this process and failed to accord proper deference to the Commissioner's interpretation and construction of the Act. Further, administrative adjudication of securities violations provides significant benefits to the public, including administrative and judicial efficiency, as well as appropriate and consistent application of the Act by expert fact finders. The Circuit Court's reasoning in the Order of Prohibition undermines the appropriate functioning of this administrative process.

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For the foregoing reasons, this Court should reverse the Order in Prohibition and allow the Enforcement Action to proceed.

ARGUMENT

I. The Division has broad jurisdiction to enforce the Missouri Securities Act against any person for any violation, regardless of the wrongdoer's registration status.

a. Securities regulators and the public share a strong interest in enforcement of the securities laws and deterrence of misconduct.

State and federal securities laws are remedial statutes designed to protect the investing public from fraudulent, abusive, and otherwise harmful practices in the securities industry. *See*, *e.g.*, *Fin. Solutions & Assocs. v. Carnahan*, 316 S.W.3d 518, 527 (Mo. Ct. App. W.D. 2010).[2] State securities laws achieve these goals in a number of ways, including registration of broker-dealers, agents, investment advisers, and investment adviser representatives, *see* MO. REV. STAT. §§ 409-4.401 through 409.4-404; registration of securities, *see* MO. REV. STAT. § 409.3-301; and the prohibition of fraudulent and deceptive conduct and

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2 As such, the securities laws must be liberally construed to maximize protection of the public. *See id.*; *see also Moses v. Carnahan*, 186 S.W.3d 889, 902 (Mo. Ct. App. W.D. 2006); *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151 (1972).

statements in connection with the offer, purchase, or sale of securities and the provision of investment advice, *see* MO. REV. STAT. §§ 409.5-501, 409.5-502.

In addition to these generally applicable registration, antifraud, and other provisions, the securities laws also seek to hold members of the securities industry to high ethical standards. *See* MO. REV. STAT. § 409.4-412. Regulation of the ethics of the securities industry is a vital component of investor protection. Even when they are not technically fraudulent, unethical and dishonest practices in the securities industry can severely damage investors' trust in the industry and thereby impair the health of the markets as a whole. *See Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009) (stating that ethical regulation is necessary ". . . in order 'to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry' and 'to cope with those methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market.'") (quoting VI LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2796 (3d ed.2002) (quoting S.

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Rep. No. 75–1455, at 3 (1938); H.R. Rep. No. 75–2307, at 4 (1938))); *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963) (explaining that it is "essential . . . that the highest ethical standards prevail in every facet of the securities industry").

However, the securities laws offer no investor protection if they cannot be enforced and wrongdoers are not held accountable. In such an environment, investor confidence in the securities markets suffers because investors cannot have confidence that the laws will be obeyed. *See* Luis A. Aguilar, Commissioner, U.S. SEC, Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation (Apr. 4, 2011) ("Aguilar Remarks"), *available at* https://www.sec.gov/news/speech/2011/spch040411laa.htm (noting that investor confidence requires both "confidence that the laws will be obeyed and that, when they're not, that the fraudsters will be made to pay"). Accordingly, courts have routinely held that securities regulators and the public share a strong interest in enforcement of the securities laws to protect investors and deter misconduct. *See*, *e.g.*, *SEC v. Egan*, 856 F. Supp. 401, 402 (N.D. Ill. 1993) (stating that the "SEC and the public have a substantial interest in the deterrence of securities

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violations, one of the goals furthered by SEC enforcement actions"); *Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 843 F. Supp. 2d 191, 211-12 (D. Mass. 2012) ("Massachusetts has a strong interest in enforcing its securities laws and protecting its investors.") (citing *Bulldog Investors Gen. P'Ship v. Sec'y of Commw.*, 929 N.E.2d 293, 301 (Mass. 2010)); *Williams v. Lubin*, 516 F. Supp. 2d 535, 545 (D. Md. 2007) ("Under the Maryland Securities Act . . . the Securities Commissioner has a strong interest in swift enforcement.").

b. State securities laws were intended to capture all violations, regardless of the wrongdoer's registration status.

In the Enforcement Action, the Division seeks relief pursuant to its administrative enforcement authority under MO. REV. STAT. § 409.6-604, based on Brady's alleged violations of MO. REV. STAT. §§ 409.4-412(d) and 409.5-502. Nothing in the Act exempts an unregistered or formerly-registered person from the Division's enforcement jurisdiction under MO. REV. STAT. § 409.6-604.

Under MO. REV. STAT. § 409.6-604, the Division is expressly authorized to pursue enforcement against "*a[ny] person*" who "*has engaged*, is engaging, or is about to engage in . . . *a[ny] violation* of [the

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Act].” MO. REV. STAT. § 409.6-604(a) (emphases added); *see also* MO. REV. STAT. § 409.6-603(a) (same). This provision does not distinguish between registered and unregistered persons, nor does it distinguish between violations of one section of the Act and any other. On the other hand, it does expressly include past, present, and imminent violations of the Act. This is because the Act, like other securities laws, was meant to capture misconduct by all violators, registered and unregistered alike.

The Act is based on, and virtually identical to, the Uniform Securities Act of 2002[3] in all material respects. *See*, *e.g.*, H.B. 380, 92nd Gen. Assembly (Mo. 2003) (as read 1st time Feb. 5, 2003), *available at* https://house.mo.gov/billtracking/bills03/bills/HB380.HTM (follow “Introduced” hyperlink under “Bill Text for HB380” heading) (“409.1-101. Sections 409.101 through 409.7-707 may be cited as the Uniform Securities Act (2002) and in this chapter as this Act.”). “When the legislature has adopted a model act, the applicable comments of the

[3] The Uniform Securities Act of 2002 (as amended) is available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=04ece01b-d3d9-751d-9925-e5c4ca6c104f&forceDialog=0.

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drafting committee for the model act will often be influential in the interpretation of the language of the statute adopted." *State v. Porter*, 241 S.W.3d 385, 391 (Mo. Ct. App. W.D. 2007) (citing *State v. Anderson,* 515 S.W.2d 534, 539 (Mo. 1974); *State v. Slavens,* 190 S.W.3d 410, 413 (Mo. Ct. App. S.D.2006)).

The Official Comments to the Uniform Securities Act of 2002 explain that the statute was intended to capture misconduct by all violators, regardless of their registration status. For example, Comment 2 to Section 604 explains that:

> Sections 603 and 604 are intended to be available to the administrator against persons not subject to stop orders under Section 306 or proceedings . . . under Section 412. All persons or securities not subject to Section 306 or 412 will be subject to Sections 603 and 604. *A person must be covered by either (1) Sections 306 or 412 or (2) Sections 603 or 604.*

(Emphasis added.) *See also* Comment 3 to Section 402 (Agent Registration Requirement and Exemptions) ("A broker-dealer in violation of Section 402(a) may be disciplined under Section 412 *and* . . . Section 603 or 604.") (emphasis added); Comment 4 to Section 501 (General Fraud) ("The possible consequences of violating Section 501 . . . include [the specified sanctions] under Section 412; criminal prosecution under Section 508; civil enforcement proceedings under

Sections 603; *and* administrative proceedings under 604.") (emphasis added); Comment 2 to Section 603 (Civil Enforcement) ("The administrator *alternatively* may proceed to seek administrative enforcement under Section 604; . . . under Section 306; or . . . under Section 412.") (emphasis added).

Thus, the Act was intended to prevent regulatory gaps precisely like the one created by the Order in Prohibition below. If a person or firm can evade accountability by terminating or withdrawing from registration, there is no deterrent for similar misconduct in the future. Instead, others may be emboldened to engage in similar misconduct if they think it will be both profitable and easy to evade liability. In such an environment, investors cannot be "confiden[t] that the laws will be obeyed" because there can be no confidence that "when they're not, that the [wrongdoers] will be made to pay." *See* Aguilar Remarks, *supra*. This result would do tremendous damage to the vitality of the Act, the perceived integrity of the securities industry in Missouri, and Missourians' confidence in the very markets and professionals they rely on to meet their financial goals, such as a secure retirement.

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c. The Order in Prohibition, by making it easy for a formerly registered person to evade accountability under the Act, undermines the Division's ability to protect investors.

Ignoring the text and intent of Mo. Rev. Stat. § 409.6-604, the Circuit Court ordered the Commissioner to dismiss the entire Enforcement Action, with prejudice. Order in Prohibition at 9. If the Order in Prohibition is allowed to stand, it will undermine the Division's ability to enforce the Act and protect investors by providing respondents in Division enforcement proceedings with an escape hatch through which to evade accountability for their misconduct.

Although Brady entered a Letter of Acceptance, Waiver and Consent ("AWC") barring him from association with a FINRA member firm, the AWC does not represent accountability for his alleged misconduct. Rather, it was imposed as a consequence of his violation of FINRA rules by refusing to provide information and documents requested by FINRA, thereby thwarting FINRA's investigation into those very issues. *See* Letter of Acceptance, Waiver and Consent No. 2017055941601 (accepted June 8, 2018).

Further, while it is true that the victims of Brady's misconduct pursued and settled private claims against Brady and FASI, the

Division alleges that FASI settled these claims "without [Brady's] participation." Order to Cease and Desist and Order to Show Cause Why Restitution, Civil Penalties, Costs, and Other Administrative Relief Should Not Be Imposed (Apr. 24, 2020) ("Cease & Desist Order"), ¶ 175. As a result, Brady has not paid any restitution or penalty, nor has he even been subjected to the deterrent effect of a public hearing and presentation of evidence as to his alleged violations. Compounding this utter lack of accountability for Brady, the Order in Prohibition essentially allows Brady to profit from his misconduct and keep more than $400,000 of ill-gotten profits in the form of commissions. *See* Cease & Desist Order, Section IV, ¶ E. In short, Brady has escaped all pecuniary consequences for his alleged misconduct. This is the opposite of deterrence.

Apart from being detrimental to investor protection, this result is also inconsistent with the broader statutory and regulatory scheme under the Act. While the Act's antifraud provisions apply equally to both registered and unregistered persons, registered members of the securities industry are deliberately held to a higher standard of ethics and honesty under MO. REV. STAT. § 409.4-412(d)(13). In effect, the

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Circuit Court would allow a registered person who violates the law to avoid accountability by terminating or withdrawing from registration, while this option would ironically not be available to a person who violates the Act while unregistered. Allowing a registered person to avoid accountability where an unregistered person cannot – especially where, as here, the (formerly) registered person is charged with violating provisions of the Act that apply with equal force to an unregistered person – is inconsistent with the intentional imposition of higher ethical standards within the securities industry than outside of it.

Even if this Court were to decide that the Circuit Court was correct that the Division lacks jurisdiction to discipline Brady for his past violations of MO. REV. STAT. § 409.4-412(d) once he ceased being registered, the Circuit Court went too far in ordering full dismissal of the Enforcement Action. In addition to violations of MO. REV. STAT. § 409.4-412(d), the Division alleges that Brady engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person, in violation of MO. REV. STAT. § 409.5-502. Cease & Desist Order, ¶¶ 185-89. Even if the Division's

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jurisdiction were as limited as the Circuit Court believes with respect to unethical or dishonest conduct in the securities business, there is no basis in the Act or in policy to similarly restrict the Division's fraud claims. The antifraud provisions in the Act unequivocally apply to everyone, regardless of whether they are registered, were registered, or have never been registered.

In sum, the Division has a strong interest in enforcement of the Act and broad jurisdiction to do so, regardless of the wrongdoer's registration status. By allowing wrongdoers to evade accountability, the Order in Prohibition undermines the Division's ability to protect investors, contrary to the text and intent of the Act. The Circuit Court should be reversed and the Division should be allowed to hold Brady accountable for his alleged misconduct.

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II. Settlements of private securities litigation cannot unilaterally restrict a securities regulator's authority to perform its statutory duties or seek statutorily authorized remedies.

a. Regulatory enforcement actions and private securities litigation serve different interests and objectives.

As this Court has acknowledged, "the Securities Division is charged with enforcement duties that may reasonably extend beyond a limitation on a private party's civil suit" and the remedies available to the Division in enforcement actions are "distinct" from those available to private plaintiffs. *State ex rel. Lavender Farms, LLC v. Ashcroft*, 558 S.W.3d 88, 94 (Mo. Ct. App. W.D. 2018).[4] While private plaintiffs are generally concerned only with recouping their own economic losses,

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[4] Other courts have also acknowledged the significant difference between the interests served by public enforcement and private litigation under similar regulatory schemes. *See*, *e.g.*, *CFTC v. Kratville*, 796 F.3d 873, 889 (8th Cir. 2015) ("[G]overnmental agencies have statutory duties, responsibilities, and interests that are far broader than the discrete interests of a private party.") (internal quotations omitted); *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) ("Thus, aside from its duty of protecting the individual beneficiaries of these pension programs, the government in this case clearly has an even stronger and paramount obligation to protect the very integrity, heart and lifeline of the [ERISA] program itself."); *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983) (acknowledging that "the United States has an interest in enforcing federal law that is independent of any claims of private citizens").

regulatory actions serve much broader goals. Securities regulators pursue enforcement to benefit and protect all investors by, for example, punishing and deterring misconduct, preventing investor harm, and maintaining high professional standards within the securities industry for the benefit of all investors, not only those harmed by the alleged misconduct. *Cf. Egan*, 856 F. Supp. at 402.

The securities laws grant regulators a wide range of tools to preserve the public interest, and to punish and deter wrongdoing. For example, the Division can seek to enjoin ongoing or potential violations and recover its own investigative costs, as well as obtain civil penalties and require violators to disgorge ill-gotten profits. MO. REV. STAT. §§ 409.6-603, 409.6-604. The Commissioner can also issue stop orders under MO. REV. STAT. § 409.3-306 to prevent investor harm from exposure to potentially fraudulent, unlawful, or misleading securities offerings. Further, a censure under MO. REV. STAT. § 409.4-412(c) allows the Commissioner to send a clear message to the public and the industry that certain conduct is unacceptable and that the Commissioner will be diligent about upholding the applicable standards, even if the conduct at issue might not warrant a more severe

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sanction. The Commissioner can also limit a violator's ability to harm investors in the future by imposing a temporary or permanent bar on future registration. *See* MO. REV. STAT. § 409.4-412(c).

Although securities regulators can generally order rescission or restitution where these remedies are legally authorized, the imposition of compensatory remedies in an enforcement action serves important remedial goals other than compensating victims.[5] Specifically, restitution also serves as a powerful deterrent. As the U.S. Supreme Court has explained in the context of criminal prosecutions, restitution is an effective deterrent because it

> forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

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[5] In a similar context, the U.S. District Court for the Eastern District of Missouri has explained that "in enforcing the Fair Housing Act, [the U.S. government] is not merely a proxy for the victims of discrimination, but safeguards public interests independent of the victims. Courts may award relief including monetary damages to the persons aggrieved without Plaintiff standing in the shoes of those persons." *U.S. v. Rupp*, No. 4:19-CV-02644-SEP, 2021 WL 2187912, at *3 (E.D. Mo. May 28, 2021) (internal quotations and citations omitted).

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Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986); *accord Paroline v. U.S.*, 572 U.S. 434, 456 (2014). In many cases, the deterrent effect of restitution will mean that compensating harmed investors will serve the public interest. However, in some cases – for example, a crumbling Ponzi scheme in which there are insufficient assets to fully compensate all of the victims – the public interest may be better served by ordering less than full restitution to all of the individual victims, despite each victim having a strong individual interest in full compensation for their losses. Thus, regulators may seek restitution when investors have suffered financial harm, but they are not required to do so. *See* MO. REV. STAT. § 409.6-604(d)(2). If an enforcement action includes restitution, the victim generally cannot enforce a right to receive payment of restitution ordered, nor does the victim control the decision to award restitution or the amount of restitution awarded.

In fact, the Commissioner may issue consent orders in settlement of enforcement proceedings under the Act if the settlement is in the broader public interest, even if the settlement does not provide for compensation to victims. *See* MO. REV. STAT. § 409.6-604(h). Similarly, although the Commissioner "may create an 'Investor Restitution Fund'"

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to distribute monetary sanctions to harmed investors, he is not required to create such a fund. MO. REV. STAT. § 409.6-603(e). Thus, although restitution and other compensatory remedies are among the panoply of tools available to state securities regulators, these remedies are not the *sine qua non* of investor protection. Regulatory enforcement actions serve many important interests other than compensating harmed investors, and they have both the discretion and the responsibility to choose the most appropriate relief for each given set of facts.

In sum, regulatory enforcement actions serve important remedial interests, including punishment and deterrence of misconduct and the maintenance of high professional standards in the industry. These interests are independent and distinct from, and far broader than, the interests of private plaintiffs, and private claims are not a viable substitute for regulatory enforcement.

b. The Division's interests were not raised, litigated, or resolved by the victims' settlements of their private claims.

While the victims' settlements of their private claims might reasonably decrease the amount of restitution that may be ordered directly from Brady, it should have no effect on the Division's

jurisdiction and authority to pursue enforcement and seek relief that is authorized under the Act. As discussed above, regulatory enforcement actions serve different interests than private litigation.

As a result, government agencies seeking to enforce statutes that implicate both public and private interests, like the Act and other securities laws, are generally not bound by private litigation of the same or similar issues. *See*, *e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982) (in suits to enforce Section 5 of the Voting Rights Act, U.S. Attorney General is not bound by the results of prior litigation of the same issues by private parties); *Kratville*, 796 F.3d at 889 (enforcing the Commodity Exchange Act and its implementing regulations); *EEOC v. Pemco Aeroflex, Inc.*, 383 F.3d 1280, 1290-91 (11th Cir. 2004) (EEOC enforcing Title VII); *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998) (suit under ERISA); *see also Fitzsimmons*, 805 F.2d at 692 ("The Government is not barred by the doctrine of *res judicata* from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."). This principle has generally been applied in cases involving statutory

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schemes, similar to the securities laws, that provide for private enforcement of individual rights as well as suits by the government to vindicate the public interest in compliance with the law. *See Cunningham*, 716 F.2d at 1462 ("This principle is based primarily upon the *recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens*.") (emphasis added). As the U.S. Court of Appeals for the Seventh Circuit explained in a case concerning a suit by the Secretary of Labor to enforce the Employee Retirement Income Security Act ("ERISA"),

> [s]imilarly [to enforcement of the Voting Rights Act, Title VII, and the Sherman Act], the government's interest in bringing an ERISA action is to enforce fiduciary standards and ensure the financial stability of billions of dollars of assets which in turn have a monumental effect on not only the Treasury of the United States, but on the national economy and commerce as well. Thus, aside from its duty of protecting the individual beneficiaries of these pension programs, the government in this case clearly has an even stronger and paramount obligation to protect the very integrity, heart and lifeline of the program itself. In an ERISA action the Government participates as a party in order that it might sustain the very public confidence so necessary to the vitality of the enormous private pension fund system that provides billions of dollars of capital for investments affecting interstate commerce, and that substantially influences the revenues of the United States[.]

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Fitzsimmons, 805 F.2d at 692-94 (internal quotations omitted). The Division has similar interests in the enforcement of the Act, and these interests are not served by the private settlements in this case.

The Division was not a party to the private litigation among the victims, Brady, and FASI. The Division did not have an opportunity to participate in the litigation, and its interests were neither raised, litigated, nor resolved in the settlement of that litigation. As discussed above, the Order in Prohibition essentially permits Brady to evade accountability under the Act. Consequently, "although the monetary settlement in the prior litigation may have achieved the goals of the private plaintiffs, it is clearly inadequate to vindicate the broader interest of the" Division and the public. *Cunningham*, 716 F.2d at 1462; *see also Herman*, 140 F.3d at 1426 ("While private plaintiffs understandably may be willing to compromise claims to gain prompt and definitive relief, . . . [t]he national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and 'parties in interest' from ERISA violations."). To the contrary, the Circuit Court's conclusion that the

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private settlements should restrict the Division's ability to seek statutorily authorized relief undermines the statutory scheme of the Act and is antithetical to the goal sought to be achieved by the Uniform Securities Acts.

Under circumstances remarkably similar to those in this case, at least one U.S. District Court denied a defendant's motion to enjoin prosecution by state attorneys general over credit card payment protection plans on the basis of a previous nationwide class action settlement approved by that court approximately two years prior. *See Spinelli v. Capital One Bank, USA*, No. 8:08-CV-132-T-33EAJ, 2012 WL 3609028 (M.D. Fla. Aug. 22, 2012). The class action settlement at issue in *Spinelli* contained a release that was similar in scope to the one in the private settlement agreements at issue in this case. *Id.* at *1 n.1 and accompanying text.

The *Spinelli* court concluded that the state attorneys general were not bound by the settlement and related orders of the court because they did not participate or have the opportunity to participate in the class action litigation. *Id.* at *2. The court also found it significant, albeit in a slightly different context from the case before this Court, that

the private litigation had been closed for over a year, the court no longer had jurisdiction of the case, nor did it have any "desire to preserve its long-relinquished jurisdiction" over the matter. *Id.* Finally, the *Spinelli* court explained that enjoining the state prosecutions in these circumstances "would usurp the claims of two sovereign states in violation of the Eleventh Amendment and other laws." *Id.* at *3.

The *Spinelli* court's reasoning fits cleanly within the circumstances of the case before this Court. The Division had no opportunity to participate in the private litigation and, as a result, its interests were not raised or considered in those proceedings. And the tribunals that handled those proceeding no longer have any interest in or jurisdiction over that litigation which might be impaired by the Division's Enforcement Action: the private claims at issue here were settled nearly two years ago. Order in Prohibition, ¶ 9.

c. The Division is not bound by the terms of the victims' private settlement agreements.

The Circuit Court appears to conclude that, despite the Division not being a party to the private litigation and its regulatory interests not being represented, the Division is nonetheless bound by the terms of the release included in the settlement agreements. That is not correct.

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The Circuit Court quotes the settlement agreements between the private parties as follows: "Claimants, on behalf of themselves and their heirs, executors, beneficiaries, administrators, trustees, agents, attorneys, insurers, representatives, successors, and assigns, members, and managers and anyone claiming through or under them, hereby release . . . ." Order in Prohibition, ¶ 9. Neither the Division nor any other government entity are mentioned in this list of parties subject to the release, for good reason: the Division was not a party to the contract. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."); *Retro Television Network, Inc. v. Luken Comms., LLC*, 696 F.3d 766, 769 (8th Cir. 2012) ("As a general rule, a contract's obligations do not extend to nonparties to the contract."). The Division is not an heir, executor, beneficiary, administrator, trustee, agent, attorney, insurer, representative, successor, assign, member, or manager of any of the individual victims. The Division also is not "claiming through or under them." Rather, it is pursuing a statutorily authorized enforcement process, that is both independent and distinct from the victims' individual private claims, to vindicate its broader interest in

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enforcement of the Act. Private parties do not – and should not – have authority to bind the Division, nor can they nullify the General Assembly's grant of authority to the Division through private settlement.

The Circuit Court relies on *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328 (2d Cir. 1985), for the conclusion that the Division, in seeking remedies that may result in compensation to the victims, is acting as a "representative" of the victims and may therefore be bound by the settlement of their private claims. *See* Order in Prohibition, ¶¶ 39-40. This reliance is misplaced for two reasons.

First, *Baldwin-United* involved an injunction under the federal All-Writs Act, rather than a generally applicable legal principle that private settlements should bar a regulator from seeking restitution in an enforcement action or that a regulator seeking compensatory remedies is necessarily acting as a direct representative of any individual victims. In *Baldwin-United*, the states involved sought to influence *ongoing* settlement negotiations and the court barred them from using investigations or enforcement actions "to induce the

defendants to contribute more toward the settlement *being reached* in the federal court . . . [and thereby] affect[ing] the rights of any plaintiff or purported class member in [the proceedings at hand]." *Id.* at 341 (emphasis added). The Division is doing no such thing here. The private litigation at issue in this case has long been settled and the Division seeks to pursue its own claims, rather than modifying the victims' rights under the settlement agreements (to which Brady does not appear to have contributed at all).

Second, the injunction in *Baldwin-United* was based on pragmatic concerns that state investigations and enforcement actions would impair the court's ability to manage complex, multi-district litigation representing the consolidated proceedings of more than 100 private federal securities lawsuits, involving nearly 100,000 plaintiffs and 26 defendants. *See Baldwin-United*, 770 F.2d at 331-41. These considerations are not relevant to this case. The underlying private claims in this case were made in 10 FINRA arbitrations and a single lawsuit that are no longer pending – a far cry from the ongoing complex, multi-district litigation in *Baldwin-United*. *See* Order in Prohibition, ¶ 9. Unlike the proceedings involved in *Baldwin-United*, neither the

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arbitrators nor the court in which the private suit was filed have any further interest in those disputes because those disputes have been settled. *Id.*

The Circuit Court erred in misinterpreting the private settlements' terms and also in relying on the settlements to prohibit the Commission's enforcement action. While the private settlements might reasonably reduce the amount of restitution to be paid, the Circuit Court's conclusion that private settlements should bar the Division from seeking statutorily authorized remedies undermines the public interest in enforcement of the securities laws. The Court should therefore reject it.

III. The Circuit Court's interference in the administrative enforcement process was premature and contrary to the appropriate functioning of the administrative enforcement process.

a. The Circuit Court prematurely interfered in the Division's administrative enforcement process.

As explained above, the Division elected to pursue the Enforcement Action using its administrative enforcement authority under MO. REV. STAT. § 409.6-604. This process allows the Commissioner to interpret and apply the Act in the first instance,

subject to judicial review after a final order is entered. MO. REV. STAT. §§ 409.6-604, 409.6-609. Similar to other states, Missouri courts accord substantial respect for and deference to legislatively established administrative processes. Missouri law generally disfavors "premature interference in agency processes." *Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 352 (Mo. 1995). Even when Missouri courts review an agency decision on appeal, "the interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *State ex rel. Sprint Missouri, Inc. v. Public Service Comm'n of State*, 165 S.W.3d 160, 164 (Mo. 2005) (internal quotations omitted).[6]

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[6] In this regard, Missouri is consistent with other states in which courts recognize a common principle that administrative proceedings are entitled to deference. *See, e.g.*, *Ass'n of California Ins. Cos. v. Jones*, 386 P.3d 1188, 1199 (Cal. 2017) ("Where an agency has been granted both the power to adjudicate and to promulgate rules, the Supreme Court generally defers to the agency's choice of how to proceed"); *Puorro v. Commonwealth*, 794 N.E.2d 624, 626-27 (Mass. App. Ct. 2003) ("Where the Legislature has provided an administrative process for the resolution of disputes in the first instance, the courts must respect that choice."); *Texas Utilities Elec. Co. v. Public Citizen, Inc.*, 897 S.W.2d 443, 446 (Tx. Ct. App. 1995) ("The Legislature's grant of authority to an administrative agency requires that a court refrain from the premature interruption of the administrative process") (citations and internal quotations omitted); *Feiler v. New Jersey Dental Ass'n*, 467 A.2d 276, 280 (N.J. Sup. Ct. 1983) ("A suitor may not bring to a court matters

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Chapter 530, authorizing courts to issue writs of prohibition, is no exception to these principles. A writ of prohibition is appropriate only in "extraordinary" circumstances, *e.g.*, *State ex rel. Larew v. Sale*, 87 S.W. 967, 968 (Mo. 1905), where it is "clearly evident" that the agency lacks jurisdiction, *State ex rel. Martin v. Peters*, 649 S.W.2d 561, 563 (Mo. Ct. App. W.D. 1983). Critically, the writ is not intended "to provide a remedy for all legal difficulties *or to serve as a substitute for appeal*." *State ex rel. Picerno v. Mauer*, 920 S.W.2d 904, 912 (Mo. Ct. App. W.D. 1996) (emphasis added); *Martin*, 649 S.W.2d at 563. The Circuit Court's interference in the Division's administrative enforcement process was premature and contrary to these principles in three primary respects.

First, the Order in Prohibition was premature because judicial review may not be necessary after a full hearing in this matter. Brady will be able to present all of his defenses in a hearing before the

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entrusted by the Legislature to the expertise of an administrative agency created for the purpose") (citations omitted); *Furnitureland v. Comptroller*, 771 A.2d 1061, 1065 (Md. 2001) ("[W]here the Legislature has provided an administrative remedy for a particular matter or matters, there is a presumption that the Legislature intended such remedy to be primary and intended that the administrative remedy must be invoked and exhausted before resort to the courts").

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Commissioner, including those related to the settlement of the victims' private claims. The Commissioner may find in Brady's favor on liability, or he may limit or decline to order certain relief requested by the Division. The Enforcement Action could also be resolved via settlement, short of a full hearing. *See* MO. REV. STAT. § 409.6-604(h). The Circuit Court should defer to the administrative proceeding and allow the Commissioner to make the appropriate factual and legal findings prior to Brady seeking judicial review.

Second, the Order in Prohibition allowed Brady to circumvent the legislatively established hearing and appellate process. Shortly before seeking a writ of prohibition from the Circuit Court, Brady filed a motion to dismiss the Enforcement Action on the grounds that, *inter alia*, the Division lacks subject matter jurisdiction and is otherwise barred by the release provisions in the private settlement agreements. Order in Prohibition, ¶ 14. After full briefing and oral argument from the parties, the Commissioner denied Brady's motion to dismiss. *Id.*, ¶¶ 15-17. Missouri statutes provide a comprehensive procedure for judicial review of the Commissioner's decisions. *See* MO. REV. STAT. §§ 536.100 through 536.160. A person aggrieved by an order of the Commissioner

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is entitled to seek judicial review after they have exhausted their administrative remedies. MO. REV. STAT. § 536.100. The exhaustion requirement "afford[s] the parties and the courts the benefit of [the Division's] experience and expertise," and allows the Division's administrative process to "function efficiently" because the agency will not find itself forced into court to defend every decision made during an administrative proceeding. *See Farm Bureau*, 909 S.W.2d at 352. It also allows the Commissioner to "correct [his] own errors . . . and to compile a record which is adequate for judicial review." *Id.* Notably, Missouri law expressly provides for review of precisely the issue that the Circuit Court purported to resolve in the Order in Prohibition, namely, whether the Enforcement Action or any of the relief sought by the Division was "in excess of the statutory authority or jurisdiction of the [Division][.]" MO. REV. STAT. §§ 536.100, 536.140(2). *See also State ex rel. Kansas City Pub. Serv. Co. v. Waltner*, 169 S.W.2d 697, 701 (Mo. 1943) ("A want of jurisdiction or an excess of jurisdiction may be corrected by appeal or writ of error."). The Order in Prohibition circumvents this process, and in doing so undermines the Division's very authority to conduct administrative enforcement proceedings. If

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the Order in Prohibition is allowed to stand, it will encourage other respondents in the Division's administrative enforcement proceedings to do the same.

Third, even if judicial review were warranted at this juncture, which it is not, the circumstances do not justify a writ of prohibition. For the reasons explained above, it is not "clearly evident" that the Division lacks jurisdiction to pursue the Enforcement Action or authority to seek statutorily authorized remedies. The Order in Prohibition fails to accord due respect and deference to the Division's administrative enforcement process, and should be reversed.

b. The Circuit Court's reasoning in the Order of Prohibition is contrary to the appropriate functioning of the administrative process.

A common reason that legislatures grant jurisdiction over regulatory disputes to administrative agencies is to allow experts in the regulatory field to make the requisite findings of fact and conclusions of law. *See, e.g.*, *Tri-County Counseling Servs., Inc. v. Office of Admin.*, 595 S.W.3d 555, 568 (Mo. Ct. App. W.D. 2020); *Halici v. City of Gaithersburg*, 949 A.2d 85, 94 (Md. Ct. Spec. App. 2008) ("[I]n general, statutes should be interpreted in the first instance in contested cases by

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the administrative agency, especially in those instances in which the agency possesses specialized knowledge or expertise regarding the underlying subject matter") (citations and internal quotations omitted); *N.J. Coalition of Health Care Prof'ls, Inc. v. N.J. Dept. of Banking and Ins., Div. of Ins.*, 732 A.2d 1063, 1076 (N.J. Super. Ct. App. Div. 1999) ("[T]he basic purpose of establishing administrative agencies to promulgate rules is to delegate the primary authority of implementing policy in a specialized area to governmental bodies with the staff, resources, and expertise to understand and solve specialized problems") (citations and internal quotations omitted).

These considerations are important in this case because securities regulation is a complex field, involving numerous state and federal agencies, statutes, rules, and regulations, as well as non-governmental self-regulatory organizations. The Commissioner's expertise is particularly useful in determining whether certain conduct is deemed "dishonest or unethical practices in the securities . . . business." MO. REV. STAT. § 409.4-412(d)(13).

As described above, the securities laws seek to hold members of the securities industry to high ethical standards. These provisions are

intentionally broad, and they are designed to police conduct that is not otherwise specifically addressed in securities statutes. *See Heath*, 586 F.3d at 132; *Avery v. Moffatt*, 573 N.Y.S.2d 215, 228 (N.Y. Sup. Ct. 1945) (explaining that "securities trading is a highly complex field in which it is not always feasible to define by statute or by administrative rules having the effect of law every practice which is inconsistent with the public interest or with the protection of investors").

Given his expertise, the Commissioner is best suited to supervise the ongoing operation of the securities industry in Missouri, and to determine what is in the public interest and which practices are dishonest and unethical. *See Johnson-Bowles Co. v. Div. of Sec. of Dep't of Com. of State of Utah*, 829 P.2d 101, 114-15 (Utah Ct. App. 1992); *cf. Brewster v. Md. Sec. Comm'r.*, 548 A.2d 157, 160 (Md. Ct. Spec. App. 1988) (explaining that the term "dishonest and unethical" has "a meaningful referent" in self-regulatory organization rules and industry firm compliance manuals); *but see Yoshikawa v. SEC*, 122 Fed. Appx. 364, 365 (9th Cir. 2005) (finding "the SEC properly rejected Yoshikawa's argument that he was not liable . . . because others in the industry engaged in the same conduct"). The Commissioner's

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familiarity and experience with the securities industry, its norms, and the rules and regulations governing it will enable him to ask the right questions in order to make salient factual findings and legal conclusions.

Another reason it is appropriate to allow administrative proceedings to run their course is that administrative adjudicatory processes enhance judicial efficiency. Without the administrative enforcement process provided in the Act, all of the Division's enforcement actions would have to be adjudicated in the courts. Not only can the "factual record . . . be more fully developed" during the administrative proceeding to assist courts' eventual review, but the process "encourage[s] agencies to correct their own errors" and "a matter may be resolved by the agency, rendering review by the court unnecessary." *Tri-County*, 595 S.W.3d at 568. This helps conserve limited judicial resources by ensuring that individuals are not encouraged to ignore the administrative process and seek premature, potentially unnecessary, interference by the courts. *See id.*; *see also Citizens for Mount Vernon v. City of Mount Vernon*, 947 P.2d 1208, 1211

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(Wash. 1997) (citing *McKart v. U.S.*, 395 U.S. 185, 193-94 (1969)); *Voight v. Snowden*, 923 P.2d 778, 781 (Alaska 1996).

Premature action in this case will upset all of these recognized purposes of the administrative process. The best way to preserve those purposes is to allow the administrative process to run its course. Consistent with the intent of the General Assembly, this Court should reverse the Circuit Court and permit the Commissioner to carry out his statutory duty to interpret and apply the Act in this case.

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CONCLUSION

For the reasons explained above, the Court should reverse the Circuit Court and allow the Division to exercise its clearly established prerogative to protect investors by holding Brady accountable for his alleged serious violations of the Act.

Respectfully Submitted

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on July 30, 2021.

Further, this brief complies with the limitations contained in Supreme Court Rule 84.06 and Local Rule 41. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 9162, excluding the cover, table of contents, table of authorities, signature block, and this certificate. The font is Century Schoolbook 14-point type. The electronic copies of this brief were scanned for viruses and found to be virus free. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned.

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