ORAL ARGUMENT HAS NOT BEEN SCHEDULED
No. 20-1181, Consolidated with Nos. 20-1192, 20-1231

In The United States Court of Appeals
For The District of Columbia Circuit

THE NASDAQ STOCK MARKET LLC, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

On Petitions for Review of an Order of the
United States Securities and Exchange Commission

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *Amici Curiae* submit the following corporate disclosure statement:

Securities Industry and Financial Markets Association, Inc. and the Council for Institutional Investors are nonprofit corporations. Neither has a parent corporation, and no publicly held company owns 10 percent or more of the stock of either organization.

Investors' Exchange LLC is a registered national securities exchange. It is wholly owned by IEX Group, Inc., a privately-held company in which no publicly held company owns 10 percent or more of the stock.

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GLOSSARY

CII	The Council of Institutional Investors
Data Plans	The plans that currently govern the dissemination of core market data for equity securities
IEX	Investors Exchange LLC
MEMX	MEMX LLC
Exchange Act	Securities Exchange Act of 1934
Nasdaq	The Nasdaq Stock Market LLC
New Plan	The plan for disseminating core securities market data that, under the NMS Governance Order, will replace the Equity Data Plans
NMS	National Market System
Governance Order	Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827, 85 Fed. Reg. 28,702 (May 13, 2020)
NYSE	New York Stock Exchange LLC
Proposed Data Infrastructure Rule	Market Data Infrastructure, Release No. 34-88216, 85 Fed. Reg. 16,726 (Mar. 24, 2020)
Proposed Governance Order	Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-87906, 85 Fed. Reg. 2,164 (Jan. 14, 2020)
SEC	United States Securities and Exchange Commission

SIFMA	The Securities Industry and Financial Markets Association
SIP	Securities information processor
SRO	Self-regulatory organization

INTERESTS OF *AMICI CURIAE*[1]

Amici represent investors, traders and brokers, and newer exchanges, a cross-section of the other participants in the securities markets besides Petitioners.

The Council of Institutional Investors ("CII") is a nonprofit association of public, corporate, and union employee benefit funds and benefit plans; government entities charged with investing public assets; and foundations and endowments with approximately $4 trillion in combined assets under management. CII is a leading voice for effective corporate governance, strong shareowner rights, and sensible financial regulations fostering fair, vibrant capital markets. CII promotes policies that enhance long-term value for institutional asset owners and their beneficiaries.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. SIFMA advocates regarding legislation, regulation, and policies that affect retail and institutional investors, equity and fixed income markets, and related services.

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[1] All parties have consented to the filing of this brief. No party or party's counsel, and no person other than *amici*, their members, and their counsel, authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief.

Investors' Exchange LLC ("IEX") is a registered national securities exchange, founded in 2012 with a mission to improve the stock market ecosystem to level the playing field and prioritize the interests of long-term investors.

MEMX LLC ("MEMX") is a registered national securities exchange, founded by leading market participants to improve equity markets for investors and challenge the status quo in the exchange space for U.S. equities. IEX and MEMX generate market data, but their philosophies and business models regarding that data are different from the Petitioners'.

These *amici* represent companies and individuals that invest in securities markets, that trade securities, and that provide services enabling trading. They are constantly confronted with the consequences of the current flawed system disseminating securities market data. Their shared goal is efficient, fair, and transparent markets; that in turn depends on widespread distribution of and access to information about quotations and transactions in NMS securities. The governance of the Data Plans distorts the market and interferes with that goal. *Amici* submit this brief to give the Court the benefit of their real-world experience of the current deficiencies, and to inform the Court how the order under review would better align the data system with the mandate Congress established when it directed the SEC to ensure the broad dissemination of consolidated market data in the public interest.

SUMMARY OF ARGUMENT

Data are the lifeblood of securities trading. To decide whether to buy or sell a given security, when, and at what price, investors need to know about existing market activity—what transactions have taken place, and what offers are available. Following Congress's mandate, the nation's stock exchanges make certain basic data (called "core data") about trading available to all (subject to specified terms and prices) through three Data Plans. The stock exchanges plus the Financial Industry Regulatory Authority (collectively "SROs" or "self-regulatory organizations") govern the Plans.

In its May 2020 "Governance Order," the SEC ordered the SROs to replace the Data Plans with a single New Consolidated Data Plan ("New Plan") with improved governance.[2] Among other changes, this New Plan must allow voting on plan matters by representatives of non-SRO actors in the nation's stock markets, such as institutional investors and retail investors. An affiliated exchange group should no longer get one vote for each subsidiary exchange within the group; and the Plan's administrator must be independent of the contributing exchanges.

These reforms are modest, but necessary. The pre-existing system, little changed for decades despite radical transformations in market structure, is flawed. The core data from the Data Plans is of limited utility, because it has latency disadvantages, covers

[2] Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827, 85 Fed. Reg. 28,702 (May 13, 2020).

only the very latest quotations, and for many other reasons. Administration of the Data Plans is cumbersome and lacks transparency.

The major exchanges have little incentive to improve the Plans, because they sell their own "proprietary" data feeds at much higher prices. Though the petitioners insist that only they, and not the non-SROs who might contribute to Plan governance, have duties to serve the public interest, the current Data Plans show otherwise. Petitioners are profit-making enterprises. Their specific regulatory obligations as SROs are not alone sufficient to "assure the prompt, accurate, reliable, and fair... distribution... of information with respect to quotations for and transactions in… securities and the fairness and usefulness of the form and content of such information." 15 U.S.C. § 78k-1(c)(1). The exchanges have a basic conflict of interest: The Data Plans are in place to force them to meet those standards, but that goal is in conflict with their incentive to promote their own data products to maximize revenue.

The resistance of stock exchanges to provide trading data was exactly why Congress enacted Securities Exchange Act section 11A in the first place. Back then, the exchanges were nonprofits governed by their trading institution members. Today, markets have changed, and investors' and traders' needs for data have altered; while the exchanges have transformed into for-profit businesses. They enjoy the advantages of the old data system, even though the premises justifying the old governance structures have disappeared. Contrary to Petitioners' insistence, the SEC does have authority to address those developments through the modest, sensible governance reforms it

ordered. Section 11A gave the SEC broad authority to set the terms for disseminating trading data; nothing in it prohibits the SEC from mandating that the stakeholders relying on the Data Plans have a role in how they are administered.

Petitioners' fundamental argument is illogical. They ask the Court to conclude that, while Congress gave the SEC plenary authority to mandate a system to disseminate consolidated market data to further the public interest, not private commercial interests, it restricted the SEC from regulating the governance of that system towards that end.

ARGUMENT

I. HISTORICAL PERSPECTIVE ON THE DATA PLANS.

A. Congress mandated the market-data system to force the dominant exchanges to disseminate trading data.

Market data—information on quotations and trades in each of the thousands of securities traded daily in U.S. markets—is "essential to investors and other market participants": It "enabl[es] [investors] to make informed decisions when to buy and sell," "provid[es] the basis for investment and portfolio decisions," and "creat[es] confidence in the fairness and reliability of the markets." *Concept Release Concerning Self-Regulation*, Release No. 34-50700, 69 Fed. Reg. 71,256, 71,271 (Dec. 8, 2004). Wide distribution of market data "at a reasonable price" is essential to achieving price transparency, "a cornerstone of the U.S. national market system." *Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change,* § II (Sept. 14, 2001).[3]

[3] https://www.sec.gov/divisions/marketreg/marketinfo/finalreport.htm.

Before the 1970s, no statute or rule explicitly obligated exchanges to distribute market data. Each exchange decided for itself "what information to disseminate, to whom..., and the amount of fees to charge." *Regulation of Market Information Fees and Revenues*, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,619 (Dec. 17, 1999). Market data was not widely available to all investors; and "NYSE, which operated the largest market, severely restricted public access to market information, particularly its quotations." *Id.* Insiders had a significant informational advantage over the investing public.

The SEC's reforms focused on two principles: unrestricted public access to data, and consolidated handling of data for uniformity and efficiency. *Id.* In 1971, the SEC recommended a "central market system for securities of national importance, in which all buying and selling interest in these securities could participate and be represented under a competitive regime." *Id.* The SEC would allow the exchanges to charge "reasonable, uniform" fees for data, but not to deprive the public of access. *Id.* In 1972—before the provision at issue in this case was enacted—the SEC ordered the exchanges to develop the first Data Plans. Adopted under Exchange Act section 17, 15 U.S.C. § 78q (permitting the SEC to require exchanges to disseminate information), Rule 17a-15 directed the exchanges to file plans for providing transaction and quotation data to vendors, which would then consolidate data from all markets. Release No. 34-9850, 37 Fed. Reg. 24,172 (Nov. 15, 1972).

In 1975, Congress added section 11A to the Exchange Act. This was necessary to "assure... the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities," for the sake of "the protection of investors and the maintenance of fair and orderly markets." 15 U.S.C. § 78k-1(a)(1). Congress recognized that "[t]he linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors,... and contribute to best execution of [trading] orders." *Id.* To fulfill these purposes, Congress directed the SEC to regulate the dissemination of market data. "No self-regulatory organization" is permitted "to collect, process, distribute, [or] publish,... any information with respect to quotations for or transactions... in contravention of such rules and regulations as the Commission shall prescribe" to "assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information." *Id.* § 78k-1(c)(1).

Congress also directed the SEC to establish a national market system ("NMS") to ensure efficient and fair execution of trading orders as brokers navigate the multiple exchanges. *Id.* § 78k-1(a)(1)-(2). To facilitate that objective, Congress authorized the SEC to require joint action by SROs regarding the NMS. *Id.* § 78k-1(a)(3).

At the time, the major exchanges were nonprofits mutually owned by their members. 64 Fed. Reg. at 70,624; Governance Order, Release No. 34-88827, 85 Fed.

Reg. 28,702, 28,704 (May 13, 2020). They were thus generally accountable to the interests of their trading members, rather than to profit for the benefit of shareholders. *Id.* Congressional legislation and SEC oversight were needed to achieve coordination, but the data system did not need to protect against exploitation or misuse of exchanges' commercial incentive to benefit themselves at the expense of investors.

B. The SEC's original implementation of section 11A was simple in light of the exchanges' structure.

In the first decades after section 11A was enacted, the SEC's regulation of market-data feeds was light-handed. The data plans adopted under Rule 17a-15 continued, and the SEC specified a minimum set of data to be supplied, including the last sale and the best bid and offer quotations on each exchange. *Dissemination of Quotations for Reported Securities*, Release No. 34-14415, 43 Fed. Reg. 4,342, 4,350-51 (Feb. 1, 1978). But the SEC did not order plan terms in detail; it "relied to a great extent on the abili]ty of the [exchanges] and Plans to negotiate fees that are acceptable to [exchange] members, information vendors, investors, and other interested parties," with SEC intervention available as a backstop but rarely requested. 64 Fed. Reg. at 70,622.

C. Securities markets have changed dramatically in recent years.

Since then, revolutionary changes have reshaped securities markets. Particularly significant, the country's largest stock exchanges—Petitioners NYSE, Nasdaq, and CBOE—are companies, owned by shareholders and dedicated to profiting from their

exchange and related services, including the sale of market data. 85 Fed. Reg. at 28,704. Their commercial interests do not necessarily align with the section 11A goals of "ensur[ing] prompt, accurate, reliable, and fair dissemination of core data." *Id.* As one SEC Commissioner recently explained:

> Our regulatory framework is still based on the model of a non-profit trading floor. That framework did not contemplate for-profit exchanges, and... does not adequately address the reality that today, an exchange's incentives to maximize its own profits are often in direct tension with its regulatory obligations. It is this tension—these conflicts—that has led to a broken and inequitable system of market data distribution.

Commissioner Caroline Crenshaw, *Statement on Market Data Infrastructure* (Dec. 9, 2020) ("Crenshaw Statement").[4]

New exchanges, including two of the undersigned *amici*, have also been introduced to compete with Petitioners on price, service, order structure, and other features. Today's markets include a spectrum of multiple exchanges, interacting through the SEC's NMS rules, 17 C.F.R. § 242.600 *et seq.* The major exchanges have also developed an array of subsidiary exchanges, such as CBOE's BYX, BZX, EDGA, and EDGX exchanges. The Governance Order was addressed to 17 stock exchanges, 85 Fed. Reg. at 28,702, far more than the three that dominated markets in 1975. Non-exchange venues, such as alternative trading systems, have also captured significant trading volume. By 2016, the New York Stock Exchange ("NYSE") and NASDAQ,

[4] https://www.sec.gov/news/public-statement/crenshaw-statement-market-data-infrastructure-120920#_ftnref6.

which had handled about 95% of trading in 2000, accounted for only 30% of the market.[5]

Communications and information technology are also radically different from 1975. U.S. Dep't of Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, 51 (Oct. 2017) ("Treasury Report").[6] High-speed trading dominates trading dynamics in many securities, with specialized firms racing to place and execute orders on microsecond time scales. *Id.* Even lower-speed trading happens over millisecond and second time scales. *Id.* Markets can assimilate new information faster and more efficiently than ever before. *Id.* Meanwhile, technological advances have increased the quantity of transactions.

II. THE SECURITIES INFORMATION SYSTEM NEEDS CHANGE.

Changes to the Data Plans have lagged behind. The major stock exchanges have leveraged the outmoded system to their financial benefit, and to the overall detriment of investors and other participants in the securities markets.

A. The defects in the system are costly to investors.

The Data Plans today have basically the same data streams and governance established 40 years ago. *Compare* 43 Fed. Reg. at 4,351 *with NetCoalition v. SEC*, 615

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[5] Haslag, Peter H. and Ringgenberg, Matthew C., The Demise of the NYSE and NASDAQ: Market Quality in the Age of Market Fragmentation (June 17, 2020). Fourth Annual Conference on Financial Market Regulation, at https://ssrn.com/abstract=2591715 or http://dx.doi.org/10.2139/ssrn.2591715.

[6] https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf.

F.3d 525, 528-29 (D.C. Cir. 2010) (describing modern core data feeds). But given modern capabilities to analyze volumes of information, combined with the technology to trade in microseconds and changes in market structure, investors and traders need more. For example, four decades ago stock prices were quoted in eighths of a dollar; today securities are priced in cents. This shift altered market dynamics,[7] and also changed the meaning and value of core data that includes only the best quote on each exchange. When quotes were forced into one-eighth-dollar buckets, a fair amount of volume was usually available at the same price as a given quote; with one-cent-level precision, much less volume is available at the same price. There might be significant additional volume one penny away, but core data will not show those quotations. *Proposed Data Infrastructure Rule*, Release No. 34-88216, 85 Fed. Reg. 16,726, 16,750-53 (Mar. 24, 2020). Other changes in the markets, such as the further fragmentation of trading, the growth of odd lots, and the acceleration of fast trading have also increased traders' need for data beyond what the Data Plans currently provide, and faster than the core data feeds. *Id.* at 16,728-29.

The major exchanges are keenly aware of that need. They sell "proprietary" data feeds that are more complete and delivered more quickly than consolidated data. *See* Crenshaw Statement at 1 ("[T]his [proprietary data] feed provides a faster and deeper

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[7] *See, e.g.*, Chao, Yong, Chen Yao, and Mao Ye, "Discrete Pricing and Market Fragmentation: A Tale of Two-Sided Markets," *American Economic Review*, 107 (5): 196-99 (2017).

picture of that exchange's market. And to get a complete picture of the markets, firms need to subscribe to multiple feeds."); Commissioner Robert Jackson, *Unfair Exchange: The State of America's Stock Markets* (Sept. 19, 2018) ("The result [of exchange control over core data] has been a public feed that is slower and less robust than the private feeds the exchanges sell.") ("Jackson Statement");[8] 85 Fed. Reg. at 28,704-705.

Access to data matters. Investors and traders with the broadest array of information get better pricing than those without. This is self-evident; a trader assessing whether to sell 100 shares at $10.05 would benefit from knowing whether that is the last offer near the price, or if there are another 10,000 shares waiting at $10.06. The value of expanded data is also evident in the prices for the major exchanges' proprietary data feeds. For example, NYSE sells depth-of-book data in the "NYSE Integrated" feed for around $7,500 a month for access plus $20,000 a month for the data, around 10 times the price of the core data from the Data Plan covering NYSE-listed stocks.[9] Core data prices are themselves excessive, *see infra* at 18-19, and traders would not pay 10 times above that unless proprietary data improves trade execution. Indeed, market participants have repeatedly warned the SEC that the deeper proprietary data feeds are

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[8] https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stockmarkets.

[9] IEX, "The Cost of Exchange Services" p.6 (Jan. 2019), at https://iextrading.com/insights/cost-transparency-whitepaper/; Consolidated Tape Ass'n, Schedule of Market Data Charges, p.1 (Jan. 1, 2015), at https://www.ctaplan.com/pricing#110000093271. Charges vary depending on the nature of the subscriber, how it uses the data, and other factors, and there can be ancillary fees. The basic difference in price is robust to those variations.

now essential to the operation of institutional traders. *E.g.* SEC Staff Roundtable on Market Data Products, Market Access Services, and Their Associated Fees, Transcript pp. 57-58 (Oct. 25, 2018) ("Market Data Roundtable") (Virtu Financial's CEO: "Without proprietary data feeds, it's just impossible to exercise your fiduciary obligations").

Fees charged by some exchanges for proprietary market data increased by three orders of magnitude or more between 2010 and 2018, while public data fees increased by 5 percent during the same period. *Market Data Infrastructure*, Release No. 34-88216, 85 Fed. Reg. 16,726, 16,816 (Mar. 24, 2020). Petitioner Nasdaq recently submitted a rule change to reduce its fees for several proprietary data streams—because, Nasdaq said, of fierce competition on data products. Release No. 34-90177, 85 Fed. Reg. 66,620 (Oct. 20, 2020). After *amicus* SIFMA submitted comments welcoming the price reduction, Nasdaq withdrew the proposal, leaving in place fees Nasdaq had claimed are uncompetitive.[10]

"In the end, the current system is heavily tilted toward the exchanges, who can sell their prop data feeds at increasingly high prices without any meaningful competition from the public feeds or otherwise. The investing public pays the price, though they may never even know it." Crenshaw Statement at 1.

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[10] Submission of Daniel Cantu, Nasdaq Sen. Assoc. Gen. Counsel, in File No. SR-NASDAQ-2020-065 (Nov. 23, 2020).

B. The payment processes for core data are flawed.

Payment processes, based on usage audits, are often onerous and lack transparency. Pricing is often based partly on the volume of data consumed and a particular subscriber's usage, factors that the Plans verify through audits of subscribers. Those audits—run by the Data Plan administrators—are expensive and time-consuming, and often produce skewed results.

An audit can last several years. At the end, the auditing party issues findings on whether any unlicensed use of data and/or underpayment occurred during the audit period, and the Data Plan issues a bill for any outstanding fees. If an audited party disagrees with the findings and refuses to pay (for whatever reason, substantiated or not), the Plan can stop providing future market data, which may be essential to the recipient's business. Trading firms maintain significant staff just to manage these audits. Proposed Governance Order, Release No. 34-87906, 85 Fed. Reg. 2,164, at 2,177-78 & nn. 164-66 (Jan. 14, 2020).

Worse, "exchanges have weaponized this [audit] process to deter competition." Healthy Markets, *Comment Letter about Concerns Regarding Certain Exchange Market Data Policies*, 2 (Dec. 12, 2018) ("Healthy Markets Comment").[11] For example, "[i]t is a common exchange practice for the 'audit' team to request, and be provided with, specific identities of [the data recipient's] customers," and some audited parties have

[11] https://www.sec.gov/comments/4-729/4729-6413383-198487.pdf.

complained that "executives of an exchange affiliate" have subsequently "solicited some of those customers [disclosed during an audit] for its own sales of similar data products." *Id.* It is also common for audit teams to expand or redefine terms in the underlying agreements and policies in order to extract additional licensing fees, through settlement or otherwise. Some *amici* have direct experience of audit processes like these.

III. PLAN GOVERNANCE IS A CAUSE OF CURRENT MARKET-DATA PROBLEMS.

This is not the occasion to resolve specific matters about the content or pricing of core data feeds. These are, by their nature, a baseline service to be offered to all. There are balances to strike about what data to include, how to manage the data flow, and how to charge for the service. The SEC did not determine, and *amici* are not here advocating, answers to those questions. The issue is larger and structural. The problems with core data exist because of conflicts of interest inherent in the current governance of the Data Plans.

The major exchanges have an interest in maintaining the *status quo*, in which the standard-issue publicly disseminated core data feeds are limited and slower and that very fact increases the value of the proprietary data products. "The exchanges stand to gain from any gap in speed and content that forces market participants to pay for the expensive prop data feeds.... [T]his conflict of interest has resulted in public feeds that cannot compete on the same level." Crenshaw Statement at 1. *See also* SIFMA, *Comment Letter on Proposed Rule on Market Data Infrastructure*, p.3 (May 26, 2020) ("The SROs... have

not made—or have been slow to make—similar investments in the SIPs that they have made to their proprietary data feeds… [T]he current market data infrastructure does not provide them with an incentive to do so.”);[12] Jackson Statement at 3 (“Unsurprisingly, exchanges have underinvested in the public feed.”).

A. The governance structure presents genuine conflicts of interest.

The existing model, in which SROs exclusively drive decisions about what to include in core data, how to distribute data, and how to manage pricing and payments, is unsound. The major exchanges dominate the Data Plans’ administration, for reasons the SEC explained in its proposal. *See* 85 Fed. Reg. at 2,174-82. For example, voting power is concentrated in groups of affiliated exchanges. *Id.* at 2,174-75. CBOE maintains votes for five affiliated exchanges, nearly one third of the total; NYSE another five; and Nasdaq four. Each group has integrated operations and staff, and the profit rolls up to the same holding company. Often the only thing distinguishing an individual subsidiary exchange is a separate fee schedule. *Id.* Yet each subsidiary has one vote, even though the groups use the same individual voting representative for all their subsidiaries. 85 Fed. Reg. at 28,713. If a group sees its vote diluted by new exchanges like *amici* IEX and MEMX, adding another subsidiary exchange can readily recover voting power. *Id.* at 28,711-12.

[12] https://www.sec.gov/comments/s7-03-20/s70320-7235189-217109.pdf.

The exchanges' alteration from non-profit to for-profit entities creates its own problems. *Id.* at 28,704; 85 Fed. Reg. at 2,173-74. When deciding whether to set new fees, offer new functionality, or streamline audit processes, the fundamental reality is that the major exchanges earn more by attracting more customers for their proprietary data feeds. That basic incentive necessarily drives their decision-making about how to manage the Data Plans. The exchanges assert that they, and only they, have the public interest in mind on such issues. Petitioners' Brief, at 38. But they are for-profit businesses. They have regulatory obligations, just like other businesses, but cannot genuinely claim those obligations compel them to serve the public interest—rather than the interests of their shareholders, to which they actually owe fiduciary duties—in administering the Data Plans. Nor can they identify any regulation requiring them to care for public investors' concerns when structuring their own data products.

The SEC and securities market participants have repeatedly acknowledged these inherent conflicts of interest. *See, e.g.*, Market Data Roundtable, at 10 (Commissioner Kara Stein noting the "inherent[] conflict[]" for "the NMS planned governance committees [that] oversee the National Market System... because they work for the exchanges.");[13] *id.* at 64 (IEX's CEO Brad Katsuyama: "[T]he less valuable the SIP is, the more subscribers you have to the [proprietary exchange data] feeds that have more robust information. So it's just a pure conflict issue."); Market Data Roundtable Day 2

[13] https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf.

Transcript, p.41 (Oct. 26, 2018) (AQR Capital's Isaac Chang: "[I]n a world where you have a public feed and you have proprietary feeds produced by the same underlying exchanges, you have an inherent conflict of interest that needs to be managed.");[14] *id.* at 123 (IEX's John Ramsay, observing that as a member of a Data Plan governance committee, "I have seen tangible cases where conflicts of interest have impacted the work of the committee,... the competing prop[rietary] feeds [] certainly is one of them."); SEC Equity Market Structure Advisory Committee, *Recommendations Regarding Enhanced Industry Participation in Certain SRO Regulatory Matters*, 5 n.1 (June 10, 2016) (acknowledging the "conflicts at play").[15]

A few concrete examples:

- Two of the Data Plans imposed new fees for core data without involving actual market participants in the discussion even though core data is a basic market utility. Consolidated Tape Association; Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan, Release No. 34-83148, 83 Fed. 20,127 (May 7, 2018). After an extensive adjudication process in which SIFMA and others objected to the changes, the SEC ultimately found the fee changes unjustified and reversed them. *Id.* at 20,128.

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[14] https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf.
[15] https://www.sec.gov/spotlight/emsac/recommendations-enhanced-industry-participation-sro-reg-matters.pdf.

- Two Data Plans attempted to expand the application of "non-display" pricing to impose a host of new fees on a product of Bloomberg L.P. that competes with the exchanges' proprietary data. *See* Release No. 34-83755 (July 31, 2018), at 1.[16] Staying that decision upon Bloomberg's motion, the SEC found "CTA has made no attempt to justify the fairness and reasonableness of the 2017 Amendments' fee changes." *Id.* at 2.[17]

- About 90% of Data Plan revenue flows directly to the exchanges,[18] leaving little available to upgrade processing and distribution systems.

- The Data Plans proposed their first-ever mandatory conflict-of-interest and confidentiality policies in 2019. *Joint Industry Plan*, Release No. 34-87909, 85 Fed. Reg. 2,164 (Jan. 14, 2020). Non-SRO representatives objected that the policies did not address key issues, such as that the individuals participating in Data Plan oversight were also business executives responsible for the exchanges' proprietary data products. *See* CTA/UTP Advisory Committee, Letter Re: CTA/UTP Conflicts of Interest Policy (Jan. 24, 2020).[19] Before approving the new policies, the SEC had

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[16] https://www.sec.gov/litigation/opinions/2018/34-83755.pdf.
[17] https://www.govinfo.gov/content/pkg/FR-2018-09-24/pdf/2018-20661.pdf.
[18] The SEC disclosed annual revenue for the Data Plans, about $430 million in 2017. 85 Fed. Reg. at 2,180 n.190. The Plans disclose the payments back to the exchanges, totaling about $387 million for the same period. https://www.ctaplan.com/publicdocs/CTA_Quarterly_Revenue_Disclosure_4Q2017.pdf; https://www.utpplan.com/DOC/UTP_Revenue_Disclosure_Q42018.pdf.
[19] https://www.sec.gov/comments/sr-ctacq-2019-01/srctacq201901-6694051-205990.pdf

to modify them to address that obvious conflict (and strengthen them in other ways). Release No. 34-88823, 85 Fed. Reg. 28,046, 28,054-55 (May 12, 2020). Notably, the exchanges continue to object. NYSE says the conflict is unavoidable because any person it sends to a Data Plan committee or administration is representing the interests of the exchange, not acting as an individual. NYSE, Comment Letter re File No. 4-757, 12-18 (Nov. 16, 2020).[20]

Disputes like these are persistent and inevitable because the major exchanges have obligations to their shareholders that inherently conflict with the public interest.

Meanwhile, the administrators of each Data Plan, the entities that oversee the audit processes described above, are affiliates of the two largest listing exchanges. Given major exchanges' incentives to maximize revenue from both consolidated market data and proprietary data products, it is unsurprising that the audits are non-transparent and burdensome. Having more transparent and efficient audits that reach sensible results would conflict with the profit interests of the major exchanges that control the administrators.

The SEC's Governance Order detailed many other problems with the existing regime. 85 Fed. Reg. at 28,703-705. Petitioners have not meaningfully disputed the accuracy of those findings. In particular, Petitioners have never explained how their

[20] https://www.sec.gov/comments/4-757/4757-8022261-225489.pdf.

regulatory obligations as SROs can be expected to ensure their exclusive administration of the Data Plans will override their obvious conflicts of interest.

B. Non-SRO voting rights are essential.

The SEC's solution outlined in the Governance Order is a simple and modest step, not even as far-reaching as some commenters (including some *amici*) advocated, that would require some outsider involvement in plan governance. On corporate boards, the presence of outside directors is widely recognized as best practice. *See* Council of Institutional Investors, *Corporate Governance Policies*, § 2.3 Independent Board (Sept. 17, 2019) ("At least two-thirds of the directors [of corporate boards] should be independent; their seat on the board should be their only non-trivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer.");[21] Business Roundtable, *Principles of Corporate Governance*, 12, (2016) ("[A] substantial majority of the board's directors should be independent");[22] Melvin A. Eisenberg, *The Structure of the Corporation: A Legal Analysis* 170 (1976) (noting the benefits of independent directors). Indeed, NYSE and Nasdaq require companies listing with them to have independent board majorities. *See* NYSE Listed Company Manual,

[21] https://www.cii.org/files/ciicorporategovernancepolicies/09_17_19_corp_gov_policies.pdf.

[22] https://s3.amazonaws.com/brt.org/archive/Principles-of-Corporate-Governance-2016.pdf.

§ 303A.01;[23] Nasdaq Listing Rules 5605(b)(1), 5605-1.[24] It would be at least as valuable to include outside members on the NMS operating committee for these data plans that are fundamental utilities in equities markets. The SEC has required less than NYSE and Nasdaq do; the SEC mandated that non-SRO representatives have no more than one third of the votes. 85 Fed. Reg. 28,730.

Participants representing institutional investors, retail investors, issuers, and other businesses involved in the securities markets can offer valuable input about reforming the Data Plans to respond to today's challenges and tomorrow's. *Id.* at 28,707, 28,715. They will be an important counterweight to the exchanges' primary incentive to increase the value of their non-SIP data products. *Id.* Participants like these already have some involvement through advisory committees that the SEC mandated several years ago, and those interactions have not produced problems. But these non-SRO representatives have no voting rights and therefore no effective ability to affect outcomes.

Voting is essential. Advisors can easily be ignored—as incidents like those discussed above, *supra* at 18-20, illustrate. The only way to ensure that the exchanges take account of non-SRO concerns when they deliberate changes to the new data plan is to empower non-SROs to vote on the changes. In the governance that the SEC mandated, non-SROs cannot veto decisions, but as a practical matter most proposals

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[23] https://nyse.wolterskluwer.cloud/listed-company-manual.
[24] https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.

will need support from at least one or two non-SRO representatives.[25] Nothing less than actual voting would enable non-SROs to provide a counterbalance to the self-interest in profit that, understandably, drives the exchanges' decisions regarding the Data Plans.

In several instances noted above, non-SROs, having been ignored in the decision-making process, successfully urged the SEC to overrule Plan decisions by the self-interested exchanges. But the SEC should not constantly have to adjudicate these matters. In the original model 40 years ago, the SEC relied on exchanges and traders to work out plan details among themselves. It is reasonable for the SEC to prefer that approach still; but given the nature of the exchanges today, that requires giving non-SROs voting rights. Moreover, the SEC cannot routinely scrutinize the day-to-day operation of the data feeds. For non-SROs to have input on oversight of those important details, they must have votes on the operating committees.

The exchanges say non-SROs are improper committee members because they are not regulated by the SEC as SROs are. Petitioners' Brief, at 38-40. The exchanges overstate their own responsibilities. They have no fiduciary duties to make SIP data optimally useful to market participants, and the evidence discussed above shows they

[25] The SEC mandated that every decision will need a two-thirds vote; but that the votes are allocated so that the SROs collectively will always have two thirds of the voting power. 85 Fed. Reg. 28,721-22. Thus, if the SROs are unanimous on an issue they could override non-SRO objections; but if they are not, some non-SRO support would be needed for an issue to win two thirds of the votes.

do not behave as if they did. They have specific regulatory responsibilities, but in data plan governance they operate like the for-profit businesses they are.

Finally, while the exchanges now say it is improper to include non-SRO representatives in data plan governance, Nasdaq advocated for exactly that in 2019: "Nasdaq shares the securities industry's view," it wrote, that "as a public good, the SIP should be governed by a partnership between the exchanges and the industry." *See* Nasdaq, *TotalMarkets* 22 (Apr. 2019).[26] Back then, Nasdaq "recommend[ed] two non-exchange votes for members of the brokerage, institutional and investor community." *Id.* at 23. It is unclear why Nasdaq has repudiated its prior view and now says the reform it proposed would be unlawful.

C. The Plan administrator must be independent.

The current Data Plans have administrators selected by the major exchanges to make day-to-day decisions. 85 Fed. Reg. at 2,174. These administrators are responsible, among other things, for overseeing audits. *Id.* at 2,183. The conflict of interest associated with this current arrangement is inherent and obvious. A customer would not want its supplier to audit its accounts and make a unilateral determination of how much is owed. Yet that is what the SRO-appointed administrators do.

Moreover, the audit function can be used to advance the business objectives of one or more of the major exchanges, in cases where they compete with an entity that is

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[26] https://www.nasdaq.com/docs/Nasdaq_TotalMarkets_2019_2.pdf.

the subject of an audit. 85 Fed. Reg. at 28,723. Commenters raised serious concerns about the current "exchange administrators' use of market data and associated customer information obtained through their role as Equity Market Data Plan administrators for their proprietary data feed businesses." 85 Fed. Reg. at 2,174; *see, e.g.*, Healthy Markets Comment, at 1-2.

Here, too, the SEC's solution is simple, straightforward, and necessary. An auditor with authority under the Data Plans should be independent from the profit-making businesses that sell the input data (and their more expensive proprietary data feeds). *Id.* It is hardly earth-shattering to establish an administrator and audit overseer with some independence. The exchanges do not suggest how else the SEC should have addressed the concern, which it deemed legitimate, about "the potential use of SIP subscriber audit data to pursue commercial interests outside of the New Consolidated Data Plan." 85 Fed. Reg. at 28,723.

IV. THE GOVERNANCE REFORM ORDER IS CONSISTENT WITH THE SEC'S STATUTORY AUTHORITY.

A. The current circumstances mirror those motivating Congress in 1975.

In 1975, the exchanges did not share information that traders needed to enable effective competition and efficient markets. Back then, their failure to do so resulted from the interest of their members in retaining exclusive access to market data. *See supra*, at 5-8.

Today, the structural causes of investors' inadequate access to data are different: The exchanges are responding to their shareholders' interests in maximizing the profit from separate sales of proprietary market data. *See supra*, at 8-10. Nonetheless, Congress gave the SEC the tools to break down the barriers to information in securities markets. The SEC should be permitted to use them.

B. Section 11A provides ample authority for what the SEC has done.

Petitioners argue the SEC cannot mandate non-SRO participation in data plan governance because section 11A authorizes the SEC to "require [SROs] to act jointly with respect to developing, operating, or regulating a national market system." Petitioners' Brief, at 39. That crabbed view of the SEC's authority ignores the rest of section 11A.

The new data plan certainly *will* involve the exchanges acting jointly. The exchanges are left to argue that by authorizing the SEC to require exchanges to act jointly, Congress implicitly excluded the SEC from mandating the involvement of anybody else. But this Court has repeatedly held that "the *expressio unius* canon is a feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014). The exclusion is a particularly insensible inference here, because Congress obviously did expect the exchanges to act jointly with at least some non-SROs—the securities information processors that section 11A(b) explained would distribute market data. In a statute meant to authorize the SEC

to promote wide dissemination of market data, Congress would hardly have barred the SEC from requiring the exchanges to coordinate data flow with the information processors; and even less would Congress have communicated that limitation by a negative implication.

The exchanges surely could not object to that form of joint action with non-SROs. It is only the particular sort of supposed "joint action" that they identify in the SEC's order, namely voting by representatives of their customers, that they conveniently find excluded.

The Court has also said the *expressio unius* canon is a particularly "poor sign of Congress'[s] intent" when it is "countervailed by a broad grant of authority contained within the same statutory scheme." *Adirondack*, 740 F.3d at 697. Section 11A contains such a grant. Subsection (c), quoted above, *supra* at 7, authorizes the SEC to regulate the flow of securities information, and prohibits the exchanges from disseminating securities information except in accordance with SEC rules. 15 U.S.C. § 78k-1(c). That is enough on their own to authorize the SEC's governance reforms.

Notably, the SEC permitted joint action by the exchanges in establishing data plans in 1972, 37 Fed. Reg. 24,172, before section 11A was enacted. Rule 17a-15 relied on the SEC's section 17 authority to require information reports. The section 11A(c) authority is even stronger support for the SEC's authority to regulate the governance of data plans as it has done here. Section 11A, adopted in the wake of Rule 17a-15,

approved the SEC's policies for consolidated market data feeds; it can hardly be said to straitjacket how the SEC develops those policies.

In 1975, Congress did not specify the details of data plan governance, presumably because it expected the SEC to work such matters out over time. Markets have evolved, and the exchanges even more so. They have converted into profit-making businesses while enjoying monopolies on data products that are supported, in part, by a data governance structure developed decades ago when they were nonprofits. They insist, in effect, that they be allowed to retain the old structure simply because Congress did not foresee their transformation and legislate specifically to address it. The Court should not accept that narrow reading of the Exchange Act.

CONCLUSION

For these reasons, *amici* ask the Court to deny the petitions.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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By /s/ *Keith Bradley*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing **BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT** upon counsel listed in the Service Preference Report via email through the Court's CM/ECF system, and all counsel of record are registered users of CM/ECF for this case.

Dated this 15th day of January, 2021.

/s/ Keith Bradley