

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 20–1470

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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INTERCONTINENTAL EXCHANGE, INC., ICE DATA SERVICES WIRELESS LLC, NYSE  
TECHNOLOGIES CONNECTIVITY, INC., ICE DATA CONNECTIVITY & FEEDS, INC., NEW  
YORK STOCK EXCHANGE LLC, NYSE AMERICAN LLC, NYSE ARCA, INC., NYSE  
CHICAGO, INC., AND NYSE NATIONAL, INC.,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

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On Petition for Review of a Final Order  
of the Securities and Exchange Commission

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**BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS  
ASSOCIATION AND FIA PRINCIPAL TRADERS GROUP  
AS *AMICI CURIAE* IN SUPPORT OF  
RESPONDENT SECURITIES AND EXCHANGE COMMISSION**

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**CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES  
PURSUANT TO CIRCUIT RULE 28(A)(1)**

Parties and Amici. All parties and intervenors appearing in this case are listed in the Brief for Respondent. The *amici curiae* appearing in this case in support of Respondent are Securities Industry and Financial Markets Association and FIA Principal Traders Group; McKay Brothers LLC, Quincy Data LLC, Virtu Financial, Inc., and Jump Trading, LLC; and Bloomberg, L.P.

Ruling under Review. An accurate reference to the ruling at issue appears in the Brief for Respondent.

Related Cases. An accurate statement regarding related cases appears in the Brief for Respondent.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici curiae* Securities Industry and Financial Markets Association (“SIFMA”) and the FIA Principal Traders Group (“FIA PTG”) hereby submit that both are non-profit, tax-exempt organizations. SIFMA has no parent corporation, and no publicly held company has a 10% or greater ownership in SIFMA. FIA PTG is an affiliate of the Futures Industry Association, Inc. (“FIA”), and no publicly held company has a 10% or greater ownership in FIA PTG or FIA.

**STATEMENT REGARDING CONSENT TO FILE/AUTHORSHIP/  
MONETARY CONTRIBUTIONS/SEPARATE BRIEFING**

Under Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

Under Federal Rule of Appellate Procedure 29(a)(4)(E), SIFMA and FIA PTG state that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person, other than the *amici curiae*, their members, or their counsel, contributed money intended to fund the preparation or submission of this brief.

Under D.C. Circuit Rule 29(d), counsel for *amici curiae* SIFMA and FIA PTG certifies that a separate brief is necessary. *Amici* are associations of broker-dealers and asset managers that can provide the Court with the unique perspective of securities industry market participants and their concerns if the Petitioners are successful in evading the Respondent's regulation of the Petitioners' wireless services, which are a facility of an exchange under the Securities Exchange Act of 1934. The *amici* are unaware of any other *amici* who intend to supply the Court with this perspective.

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### **INTEREST OF *AMICI CURIAE***

SIFMA is the leading trade association for broker-dealers and asset managers operating in the United States. SIFMA's members employ nearly one million employees and serve millions of customers. SIFMA advocates for legislation, regulation, and business policy affecting retail and institutional investors trading in the equity and fixed income markets. SIFMA serves as an industry-coordinating association to promote fair and orderly markets, inform regulatory compliance, and advocate for efficient market operations and resiliency. SIFMA also provides a forum for industry policy, including the accessibility of market data. Speed and equality of access to market data is a critical issue for SIFMA's members and the retail and institutional customers they serve.

FIA PTG is an association of firms, including many broker-dealers, that trade their own capital on exchanges in futures, options, and equities markets worldwide. FIA PTG members engage in manual, automated, and hybrid methods of trading, in a wide variety of asset classes, including equities, fixed income, foreign exchange, and commodities. FIA PTG member firms serve as a critical source of liquidity, allowing those who use the markets, including individual investors, to manage their risks and invest effectively. The presence of competitive professional traders contributing to price discovery and the provision of liquidity are hallmarks of well-functioning markets. FIA PTG advocates for open access to markets, transparency and data-driven policy.

## PRELIMINARY STATEMENT

The movie theater image of the trading floor of the New York Stock Exchange (the “NYSE”) is one where packed crowds of frantic traders shout buy and sell orders. That image is from the pre-internet world. While a flickering remnant continues on Wall Street, in reality the major U.S. stock exchanges consist of rows of computer servers running automated “matching engines” in non-descript data centers in three New Jersey towns—Carteret, Secaucus, and Mahwah. Trade orders are directed electronically by exchange members’ computers “co-located” as closely as possible to the exchanges’ computers in these same New Jersey data centers. The members’ computers run algorithms that can react in microseconds (millionths of a second) to information, most importantly to bids, offers, and executions (collectively, “market data”) generated on, and transmitted from, the various New Jersey stock exchange data centers.

Though stock exchanges have evolved from institutions where human beings interact on a crowded trading floor to systems where computers interact in a data center, that transformation is more of method than substance. The “Trading Floor” of the NYSE—the set for our movie image—is now the NYSE’s computer based in Mahwah that comprises the exchange’s trade-matching engine. The trader shouting orders on the trading floor is now an algorithm in an exchange member’s computer. The “Floor” of the NYSE (as defined by NYSE Rule 6 as the exchange’s Trading Floor and its immediate premises, “such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad

Street Buildings, and also ... the telephone facilities available in these locations”), now, as a practical matter, includes the grounds of the NYSE’s New Jersey data center located in Mahwah. Historically, the Securities and Exchange Commission (the “Commission”) has always regulated communications from securities firms to their traders on the Floor of the Exchange via telephone lines and more recently through cellular service<sup>1</sup> so that no firm could use the premises of the exchange to manufacture an unfair speed advantage in communications and, thus, in trading. The Commission now regulates the wireless communication services that have supplanted telephones with the same aim.

Notwithstanding this evolution in the methods by which trading occurs, and more significantly for this purpose, the methods by which trading and other market data are communicated, the need for regulation of the stock exchanges by the Commission remains the same. That regulation has two purposes relevant to the Petition: (1) to prevent stock exchanges from charging exorbitant fees for market data; and (2) to provide a level playing field for exchange members to compete by affording them equal, and affordable, access to current market data. The NYSE Group<sup>2</sup> now seeks to evade Commission regulation so that it can provide faster access to market data at a wholly unregulated rate. Its position is antithetical to the

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<sup>1</sup> See NYSE Rule 36 (Communications Between Exchange and Members’ Offices), [https://nyseguide.srorules.com/rules/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B4A07B716-0F73-46CC-BAC2-43EB20902159%7D--WKUS\\_TAL\\_19401%23teid-119](https://nyseguide.srorules.com/rules/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B4A07B716-0F73-46CC-BAC2-43EB20902159%7D--WKUS_TAL_19401%23teid-119).

<sup>2</sup> “NYSE Group” refers to the Petitioners.

twin purposes of the Commission's exchange regulation regime—it threatens to create a situation where the NYSE Group can charge an effectively unregulated price for market data, by inflating its market data fees with a “wireless communications” access fee for those exchange members that require immediate market data.

To accomplish this, the NYSE Group has gifted itself a competitive advantage in selling market communications services to exchange members by granting itself exclusive use of a “data pole” for the reception of wireless communications on the grounds of its Mahwah data center. This data pole is closer to the computers in the NYSE's data center than the “poles” of other communications services that do not have access to the NYSE Group's premises.

By virtue of its exclusive access to the data pole on its controlled premises, the NYSE Group would allow users of its communications services to send or receive data 700 feet further using wireless signals (the fastest method of communication), and thus skip 700 feet of fiber optic cable (which is slower). This means, all other things being equal, the NYSE Group can distort the competitive equality between its exchange members by delivering market data, to those capable of paying, faster than any other communications service that does not have this privileged access. Because the value of market data depends on the immediacy of access, in microseconds, an ability to deliver market data faster than anyone else would allow the NYSE Group to charge an exorbitant fee for data delivery—or at

least it could if the NYSE Group's communication services can escape the Commission's regulation.

The NYSE Group's goal with this Petition is to evade the Commission's ability to regulate the means by and price at which the NYSE sells market data. Ultimately, there is nothing special about the NYSE Group's wireless communications technology. Rather, the "secret sauce" of the NYSE Group is its control of the data center grounds (effectively the "Floor" of the exchange to apply NYSE Rule 6 to the Mahwah data center) to exclusively situate its technology for the delivery of market data from a physically advantageous location. By using its premises to provide market data faster than any other communications service, NYSE Group positions itself to sell market data for an exorbitant price, provided it can free itself of Commission regulation.

The NYSE Group advances three positions to achieve its goal of selling market data free from Commission regulation.

*First*, the NYSE Group seeks to shrink the definition of the "Floor" of an exchange to little more than the box that holds an exchange's matching engine program, ignoring the fact that the Commission has always treated the NYSE's entire building complex, out to the public streets, as the "Floor" of the exchange and regulated all of the physical space that the exchange controls.<sup>3</sup>

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<sup>3</sup> See NYSE Rule 6 (Defining "Floor"), amended June 14, 2007 ( NYSE-2007-51), <https://nyseguide.srorules.com/rules/document?treeNodeId=csh-da-filter!WKUS->

*Second*, the NYSE Group seeks deregulation of the communications systems between an exchange member firm and the firm's trading algorithm (the modern equivalent of a trader on the Floor) as communications "internal" to an exchange member and not involving the NYSE. This ignores the fact that the Commission has always regulated communications between an exchange member and the member's trader situated on an exchange's Floor to prevent any exchange member or trader from gaining a speed advantage in access to market data.<sup>4</sup>

*Third*, the NYSE Group argues that it is free to take advantage of its ownership of the NYSE to make unregulated profits selling market data so long as the Group funnels those profits to its owner through a separate corporate entity rather than the one with the word exchange in its name and that owns the trade-matching engine. This ignores the broad definition of "exchange" and "facility" in the Exchange Act; the statute does not allow regulated entities conducting regulated activities to evade regulation through corporate formalities.<sup>5</sup>

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<sup>4</sup> See NYSE Rule 36.

<sup>5</sup> See Exchange Act Sections 3(a)(1) (definition of "exchange") and 3(a)(2) (definition of "facility"). Nothing in these definitions suggest that the term "exchange" is limited to a single legal entity: an exchange may consist of an "association, or group of persons, whether incorporated or unincorporated" and thus regulation of an exchange may extend to any number of persons or to entities within a corporate group if they are engaged in the activities of an exchange or a facility. 15 U.S.C. § 78c(a)(1)-(a)(2).

A few words about speed: in the New Jersey data centers, speed is not measured in hours, minutes, or seconds—or even in tenths or hundredths of a second. It is measured in microseconds. A microsecond—a *millionth* of a second—determines the winners and the losers. Speed enables the algorithms operated by the various exchange members to make the most “intelligent” decisions. If one algorithm operates on stale data (*i.e.*, more than a microsecond old), the exchange member or other market participant operating that algorithm will lose money to others whose algorithms use current data. The firm using stale data then has two choices: (i) get out of the trading business; or (ii) pay whatever price the NYSE Group demands.

How can a communications service provider increase the speed of access to data? As the NYSE Group notes, a variety of technological factors matter. But one factor—an absolutely essential one—is limiting the distance that data has to travel through physical cables, as opposed to wirelessly. To minimize that distance, the NYSE Group has built a data pole on which it is able to send and receive market data wirelessly as close as possible to the computers hosting the exchanges’ order-matching engines and the market participants’ trading algorithms. If the NYSE Group can, through its exclusive control of the grounds of the Mahwah data center (essentially the “Floor” of the NYSE), minimize the distance information travels by slow physical cable, it alone can deliver first-in-time market data. Buyers able to



pay whatever unregulated fee the NYSE demands will receive an insuperable informational and trading advantage.

In short, by situating its wireless data pole on grounds that it controls and to which it has refused others equal access, the NYSE Group has arrogated to itself an undeserved competitive advantage in the sale of market data. This creates the potential for a monopoly commercial service—unparalleled speed of access to market information—that will be fully exploited by the NYSE Group if the pricing and provision of this service cannot be regulated by the Commission, and bestow on those market participants that can afford to pay the NYSE Group's price a similar competitive advantage in the securities markets.

There is nothing wrong with exchange members and other market participants competing in their ability to use information and even in the speed of their ability to transmit and receive information. However, competition to receive and deliver information as immediately as is possible ought to stop at the grounds of the NYSE Group—that is essentially the finish line of that race. By installing an exclusive data pole on its own grounds, the NYSE Group is effectively moving the finish line for some of its competitors.

The Commission's current order prevents the NYSE Group from using its geographic advantage in this way by accepting the NYSE's proposal to lengthen the physical cable connecting the NYSE Group's pole to the computers in the data center. By making the physical cable longer, generally equivalent to the distance

that its competitors' cables must run, the rule effectively mitigates the NYSE's geographic advantage, and equalizes the speed of the NYSE's wireless connections with competing service providers that were deprived access by the NYSE Group to the pole on NYSE's premises. This fulfills the Commission's mandate to ensure that all market participants have equal access to market data, and prevents the NYSE from charging exorbitant fees for market data as the NYSE must compete on equal terms with other communications services transmitting market data.

If the Commission's order is overturned and the NYSE Group's wireless connections are free from regulation, the NYSE Group will have the ability to provide market data faster than competitors, and thus charge an unearned and unregulated premium for access to first-in-time market data. The regulated price of market data will be inflated by the unregulated price of accessing that data at a competitive speed, to the detriment not only of exchange members, but also their customers. The Petition should be denied.

## **FACTUAL BACKGROUND**

### **A. Market Structure**

There are 24 national securities exchanges registered with the Commission. Most of the larger exchanges are members of three consolidated groups (the "Exchange Groups") in the business of providing exchange services. For the purposes of this brief, they will be referred to as the NYSE Group (which includes all of the Petitioners and the owner of the Petitioners, Intercontinental

Exchange, Inc.) which operates five exchanges including the NYSE; the Nasdaq Group which operates six exchanges; and the CBOE Group, which also operates six exchanges.

The Commission regulates the various stock exchanges under Section 6 of the Securities Exchange Act (providing for the direct regulation of the exchanges and facilities of the exchanges) and Section 11A (providing for the regulation of the “National Market System”). Section 11A directs the “linking of all markets for qualified securities through communication and data processing facilities [to] foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors’ orders, and contribute to best execution of such orders.”<sup>6</sup> Section 11A specifically provides for the regulation of “exclusive processors,”<sup>7</sup> defined in Section 3(a)(22)(B) of the Exchange Act to include an exchange that engages in an “exclusive basis” in activities including the “distribution or publication [of] any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange”<sup>8</sup>—the very activity in which the NYSE Group intends to engage. Under Section 11A(c)(1), the Commission is obligated to regulate the exchanges to provide for the “fair collection, processing, distribution, and publication” of market data.<sup>9</sup>

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<sup>6</sup> 15 U.S.C. § 78k-1(a)(1)(D).

<sup>7</sup> *Id.* § 78k-1(b), (c).

<sup>8</sup> *Id.* § 78c(a)(22)(B).

<sup>9</sup> *Id.* § 78k-1(c)(1)(B).

Under the authority granted to the Commission in Section 11A, the Commission adopted various rules under “Regulation National Market System”—intended to tie the exchanges together into a single market so that investors will be provided the best price available on any individual exchange, and brokers can price-compete aggressively across all exchanges. To further cross-market activities, the Commission mandates various systems to require the transmission of data from all of the exchanges to the brokers executing trades on them.<sup>10</sup> This is the comprehensive system of market regulation, developed over almost a century, that the NYSE Group now seeks to evade.

For the most part, all of the national securities exchanges offer trading in the same securities. If an exchange member wants to trade any individual security competitively on one exchange, it must know the market conditions as to trading of that security on other exchanges. Is the price rising or falling? Is there much demand? Is there a better price on another exchange? The Commission’s rules are intended to assure that one exchange member does not have informational advantages over others, in part by regulating the content and price of market data that exchanges provide and the speed at which it is provided.

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<sup>10</sup> *See, e.g.*, 17 CFR § 242.609.

## **B. Regulation of Communications to Ensure Equality in Speed of Access to Market Data**

An essential way in which the Commission has maintained competitive equality between exchange members is to regulate how they can communicate market information from their offices to their traders “shouting” buy and sell orders on the floor of the stock exchange.<sup>11</sup> Historically, NYSE Rule 36 applied to telephone lines running to the floor of an exchange; more recently, it has been expanded to provide for the use of cellular communications. NYSE Rule 36 and related interpretations provide detailed regulations on who may access a telephone on the property of the exchange, who may call to the exchange floor, the permitted subject of the communications, and required recordkeeping. All these requirements are intended to prevent exchange members from gaining any unfair speed advantage in their ability to transmit information or orders to their traders, and to receive information from their traders.

The regulatory importance of maintaining equality of access to data is not diminished by technological changes in how information is transmitted. In the pre-internet world of the regulation of communications by telephone services, differences of speed in seconds were crucial. Today, microseconds matter.<sup>12</sup>

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<sup>11</sup> *See, e.g.*, NYSE Rule 36.

<sup>12</sup> *See* 75 Fed. Reg. 3593 (Jan. 21, 2010) (“Published average response times at some exchanges, for example, have been reduced to less than 1 millisecond”). Speeds have only increased in the past decade.

The continued importance of the regulation of methods by which a firm may gain an unfair speed advantage is illustrated by the Commission's regulation of so-called "co-location" services. The term "co-location," in this context, refers to exchange member firms situating the computer servers running their trading algorithms in the closest possible physical proximity to the exchange's computers hosting the matching engines in a data center.<sup>13</sup> The purpose of co-location is to reduce "latency" (or delay) between the time that information is sent and received, in this case between the computer running the algorithm and the computer running the exchange.<sup>14</sup> Because co-location is a "material aspect of the operation of the facilities" of the exchange,<sup>15</sup> given that it is crucial to the speed of the transmission of market data, exchanges must file with the Commission proposed rule changes, both as to the mode of services and the fees for those services.

### **C. NYSE's Wireless Services at Issue in the Petition**

In 2010, the NYSE sought and received the Commission's approval to charge fees for "co-location services" at its Mahwah data center.<sup>16</sup>

In 2015, the NYSE Group sought a rule change to its co-location services to allow the receipt of market data, by wireless connection, from the various stock exchanges located in Secaucus and Carteret, New Jersey to the NYSE Group's

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<sup>13</sup> *See id.* at 3610.

<sup>14</sup> *Id.*

<sup>15</sup> 17 CFR § 240.19b-4.

<sup>16</sup> Securities Exchange Act Release No. 34-62960 (Sept. 21, 2010).

servers in the Mahwah data center.<sup>17</sup> The 2015 filing stated that wireless services would begin by mid-year 2016 and set prices for the services.<sup>18</sup> Those wireless services would be delivered via a wireless data pole on the premises of the Mahwah data center.<sup>19</sup> Over the next three years, the NYSE sought further Commission rule changes to add more services and impose related fees.<sup>20</sup>

None of the NYSE's prior proposals asserted that the wireless services were not facilities of an exchange or otherwise outside the Commission's oversight.

#### **D. NYSE's 2020 Proposed Rule Amendments**

Beginning on January 30, 2020, the NYSE filed with the Commission two proposed rule changes to establish a schedule of fees for wireless connectivity between the Mahwah data center and the other two Exchange Groups' data centers in Secaucus and Carteret.<sup>21</sup>

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<sup>17</sup> 80 Fed. Reg. 81,609 (Dec. 30, 2015).

<sup>18</sup> *Id.* at 81,610.

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, 81 Fed. Reg. 8313 (Feb. 18, 2016) (adding NASDAQ TotalView Ultra (FGPA) market data feed); 81 Fed. Reg. 49,315 (July 27, 2016) (expanding wireless connection to Bats Pitch BZX and DirectEdge EDGX data to include additional market data feeds); 82 Fed. Reg. 12,658 (Mar. 6, 2017) (adding Toronto Stock Market data feed); 82 Fed. Reg. 50,186 (Oct. 30, 2017) (adding additional third-party data feeds); 83 Fed. Reg. 23,014, 23,015 (May 17, 2018) (adding third-party data feeds "drawn from the Exchange, the Affiliate SROs, and third-party exchanges, including stock and futures exchanges").

<sup>21</sup> 85 Fed. Reg. 8938 (Feb. 18, 2020); 85 Fed. Reg. 10,752 (Feb. 25, 2020).

The first would permit the transmission of market data and information by an exchange member from the other two Exchange Groups, in Carteret and Secaucus, to the grounds of the NYSE Group in Mahwah.

The second proposed a “Wireless Market Data Connection” transmitting market data from the NYSE to customers at the other two Exchange Groups located in Secaucus and Carteret.<sup>22</sup> Collectively, the services provided by these two proposed rule changes are referred to as the “Wireless Connections.” Between them, they would enable exchange members to transfer information at the highest possible speeds to and from the NYSE Group and the two other major Exchange Groups.

#### **E. Objection to the Commission’s Jurisdiction and Commenters’ Responses**

In their proposals, the NYSE objected to the Commission’s jurisdiction over the Wireless Connections, arguing that the services were not properly characterized as an “exchange” or a “facility of an exchange” under the Exchange Act.<sup>23</sup>

The Commission solicited and received comments objecting to both the NYSE’s proposed fee schedule and, more importantly, to its claim that the Commission had no authority over the NYSE Group’s power to grant itself an exclusive right to the fastest possible data-transmission route. To address these

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<sup>22</sup> 85 Fed. Reg. at 10,753.

<sup>23</sup> *Id.* at 8939-41, 10,753-55.



objections, the NYSE Group filed three partial amendments that mitigate the speed advantage its Wireless Connections have over competitors.<sup>24</sup> Ultimately, the NYSE Group proposed to lengthen the physical cable connecting its pole to the Mahwah data center so that it would be equivalent to the distance between the data center and the closest wireless data pole situated off the NYSE Group-controlled grounds.<sup>25</sup> This purportedly eliminated the NYSE Group's data speed advantage and prevented the NYSE Group from becoming a monopoly provider of first-in-time data.

#### **F. The Commission's Order**

On October 15, 2020, the Commission issued an order granting approval to the NYSE's proposed rule changes.<sup>26</sup> The order denied the NYSE's assertion that the Wireless Connections were not subject to Commission oversight.<sup>27</sup> The Commission explained that the Exchange Act defines the term "facility of an exchange" "very broadly" and whether a service constitutes a "facility" requires a fact-specific analysis.<sup>28</sup>

Further, the Commission found that the NYSE Group's various legal entities providing the wireless connections are part of the group operating the NYSE,

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<sup>24</sup> 85 Fed. Reg. 67,044, 67,044 (Oct. 21, 2020).

<sup>25</sup> *Id.* at 67,046.

<sup>26</sup> *Id.* at 67,045.

<sup>27</sup> *Id.* at 67,047.

<sup>28</sup> *Id.* at 67,048.

regardless of its corporate relationship to the NYSE.<sup>29</sup> Specifically, the Commission stated “which corporate entity within the group holds a particular asset” is not important “so long as the asset is provided as part of the relevant exchange market place.”<sup>30</sup> The Commission determined that it had jurisdiction over the wireless connections regardless of which member of the group holds title to the services because they are provided as part of the market place for bringing together purchasers and sellers of securities.<sup>31</sup>

In approving the connectivity fees, the Commission applied the “market based test” to consider whether the exchange’s fees were subject to significant competitive forces.<sup>32</sup> Under this test, the Commission will approve an exchange’s fees unless a substantial countervailing basis exists to find that the proposal violates the Exchange Act or Commission rules. Based on the NYSE’s proposal to lengthen the cables connecting the NYSE Group’s pole to the co-located servers to equal the distance to the closest pole off the grounds controlled by the NYSE Group, the Commission found that the fees were subject to significant competitive forces.<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 67,049.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 67,050.

## SUMMARY OF ARGUMENT

The Court should uphold the Commission's order and jurisdiction over the Wireless Connections, which fall comfortably within the broad definition of "facilities" under the Exchange Act. To hold otherwise would not only give the NYSE Group the ability to dominate the provision of wireless services to and from the Exchange, but also destroy the Commission's authority to regulate the pricing of market data as the Commission would be impotent to regulate the speed of data transmission.

*First*, without regulation, the NYSE Group would have an inherent speed, and thus competitive, advantage over all other wireless competitors. The NYSE Group, acting through its corporate entities, situated a data pole used for the wireless (fast) transmission of market data on grounds that it controls and that are closer to the Mahwah data center than the wireless data poles of other providers of communications services. Because minimizing the distance that data must travel through cables rather than wireless transmission is an essential factor in how fast data can travel, this exclusive geographic advantage would give the NYSE Group *de facto* monopoly power in setting the price of first-in-time market data. *See infra* Section I.A.

*Second*, the Commission's regulation of the price of market data would be ineffective if the NYSE Group can set monopoly prices for first-in-time access to that data. While the NYSE Group concedes that the Commission may regulate the price of their market data, its insistence that the Commission may not regulate the

pricing of premium delivery speed renders that concession (and the Commission's authority) meaningless. If the NYSE can bestow a competitive advantage to the NYSE Group (acting through its various legal entities) that allow it to dominate the wireless connectivity market, then the *true* price of market data is the regulated price plus whatever access fees the NYSE Group charges in the exercise of its monopoly power to deliver market data faster than any other competitor. *See infra* Section I.B.

*Third*, the Wireless Connections are facilities of the NYSE. The Wireless Connections are used for effecting and reporting transactions on the NYSE because the NYSE Group provides high-speed wireless services for market participants to send trading orders and receive market data between the three Exchange Groups. Moreover, the NYSE Group affiliates use the premises and the property of the NYSE to provide the Wireless Connections to market participants—premises not available to any third-party competitor due to the NYSE Group's exclusive control of the Mahwah data center grounds and the private pole located there. *See infra* Section II.

## ARGUMENT

### I. NYSE USES ITS POSITION TO CREATE A SPEED ADVANTAGE FOR FIRMS THAT USE ITS TECHNOLOGY

Unconstrained by the Commission's order and regulatory authority, the Wireless Connections of the NYSE Group would have an inherent speed advantage, conferred by geography and its control of the premises of the Mahwah data center,

that no competitor could match.<sup>34</sup> The practical effect of exempting the Wireless Connections from regulation would allow the NYSE Group to: (1) charge monopoly pricing for access to first-in-time market data; and (2) as a practical matter, render toothless the Commission's regulated pricing of market data.

**A. The Presence of the Wireless Connections on NYSE's Premises Creates a Speed, and Thus Competitive, Advantage for the Transmission of Market Data.**

Speed of access to market data, measured in microseconds, is essential to many market participants. This simple fact is illustrated by the significance of "co-location." That is, the equities transactions at issue are executed through exchange members' computers located in the same building as the NYSE's servers in its Mahwah data center. Each of these "co-located" computers connects to the NYSE's computers by fiber optic cables that the Commission mandates to be the same length so that no exchange member has an unfair speed advantage in sending and receiving data from the Exchange.<sup>35</sup> Regulating the distance between any exchange member's computer hosting its trading algorithm and the exchange's

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<sup>34</sup> While the Commission's order also found that the Markham connections were within its purview, it required no adjustment to those services as they have no current competitors. 85 Fed. Reg. at 67,050.

<sup>35</sup> See IMC Financial Markets, Comment Letter on NYSE Proposals to Amend Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services (Mar. 12, 2020) <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6978487-214393.pdf>.

computer, and thus the speed with which an algorithm can direct an order to the “exchange,” creates competitive equality.

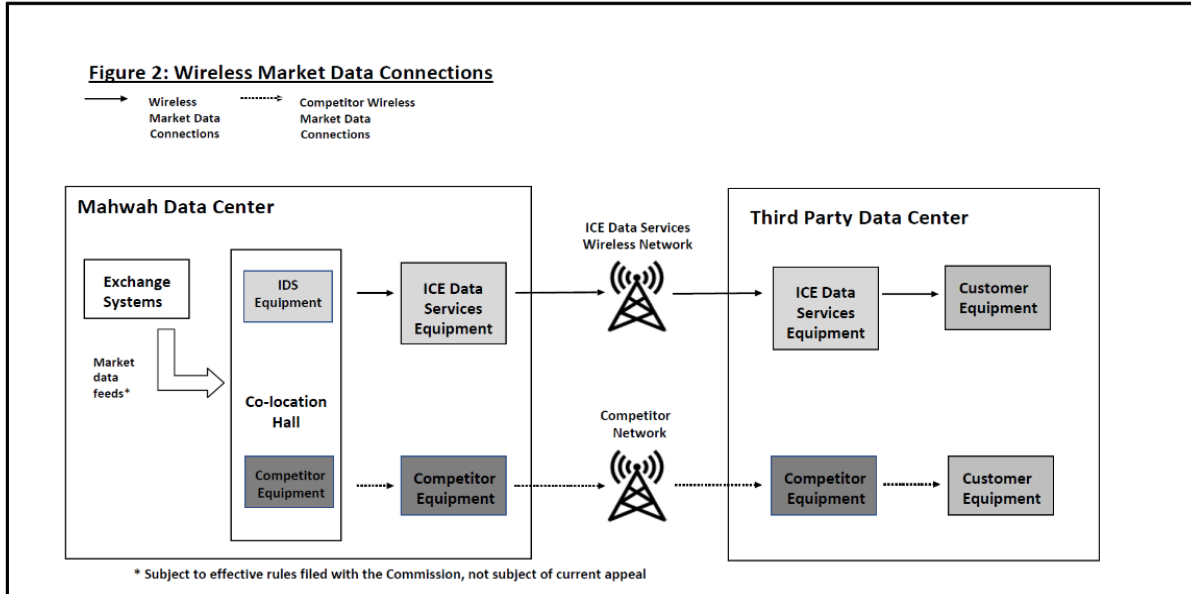
However, that competitive equality would be undermined by granting the NYSE Group’s Petition. Leaving aside the NYSE Group’s data pole, the co-located servers containing the exchange members’ trading algorithms are connected by fiber optic cable to an off-premises pole where data can be sent wirelessly to the exchange members’ co-located servers at other exchanges’ data centers.<sup>36</sup> Several different communications firms provide data services using this off-premises pole and compete with one another to provide the fastest connection over their own wireless networks. Absent the NYSE Group’s Wireless Connections, competitive equality is preserved through equal access to this off-premises pole.

The Wireless Connections, however, connect to the co-located servers by fiber optic cable that runs to a pole located on the Mahwah grounds to which the NYSE’s affiliates and their contractors have exclusive access. Because that NYSE Group pole is physically closer to the Mahwah Data Center by approximately 700 feet, the Wireless Connections have a geographical advantage that allows the NYSE Group to provide a faster connection than any competitor. The Petitioners’ brief

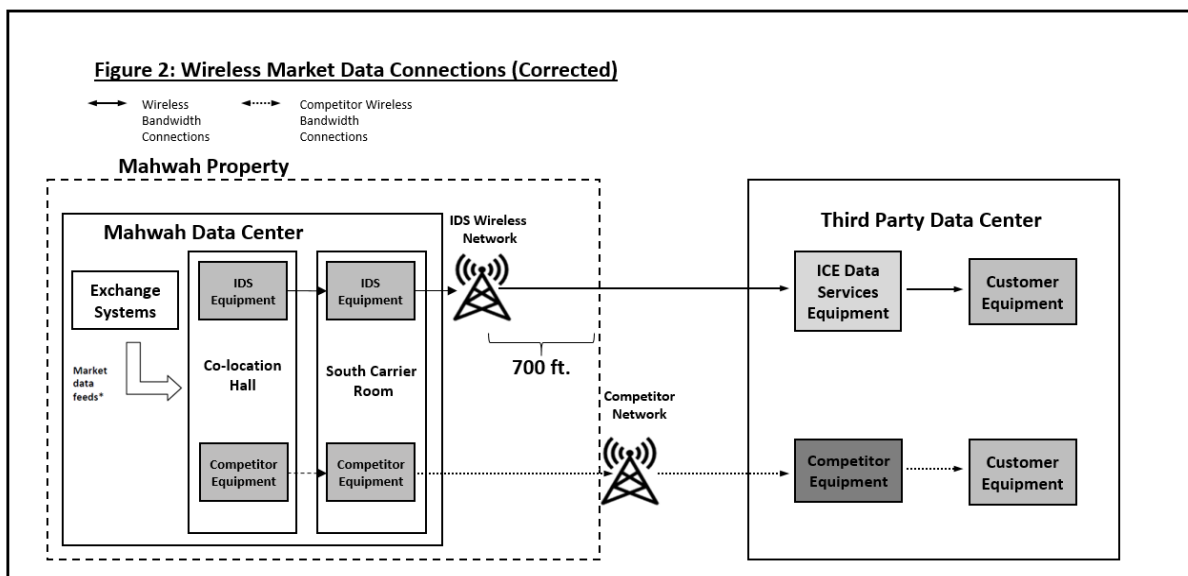
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<sup>36</sup> 85 Fed. Reg. at 10,754.

provides an inaccurate diagram comparing its communications services with its competitors as if they were on an equal footing:



When corrected, the true state of affairs reveals a key fact—the geographic advantage of the pole on the Mahwah property:



This geographic (or speed) advantage, if unchecked, would give the NYSE Group the ability to charge monopoly prices for rapid access to market data. As noted, even a microsecond's difference in market data access makes a crucial competitive difference to market participants. During the comment process on the NYSE's proposals, representatives of broker-dealers and other market participants stated that they would be compelled to subscribe to the NYSE's services if the Commission did not adopt regulations mitigating this advantage.<sup>37</sup>

The NYSE Group fully understands the geographic advantage of its exclusive use of a pole on the Mahwah property. After all, the Group proposed the solution that the Commission ultimately accepted—to lengthen the cable connecting its wireless data pole to the co-located servers in the Mahwah data center and put the closest, off-premises pole on an equal footing.<sup>38</sup>

The NYSE Group has used its control of its premises to put itself at a competitive advantage over all other providers of wireless services. The purpose of the NYSE Group's current Petition is now to remove any Commission impediment to commercial exploitation of that position. Worse still, if unregulated, more speed advantages may be taken by the NYSE Group based on their relationships. For example, in March 2019, the NYSE sought a zoning variance to place wireless

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<sup>37</sup> See SIFMA, Comment Letter on NYSE Proposals to Amend Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services (Apr. 3, 2020), <https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202011-7043670-215347.pdf>.

<sup>38</sup> 85 Fed. Reg. at 67,050.



equipment directly on the Mahwah data center's roof.<sup>39</sup> While that project appears sidelined, if resurrected and used for the Wireless Connections, it would only further strengthen the NYSE Group's monopoly in providing first-in-time data.

**B. Deregulating NYSE's Wireless Connections Will Undermine the Regulated Pricing of Market Data.**

Market data includes information about executed transactions, bids and offers for securities, along with supply-and-demand levels showing depth of market (liquidity). Access to this information is essential to America's world-leading capital markets because professionals, acting both for themselves and for their retail and institutional customers, need the most complete and current market information possible to make informed investing decisions. But data has little to no value if it is untimely; and, in today's markets, timely means immediate. Regulated access to essential market data promotes efficient markets, allows broker-dealers and their customers to make important investing and order-routing decisions in a situation of competitive equality, and allows exchange members to bid aggressively and provide best execution to their customers.

The market data that the NYSE provides is subject to the Commission's price regulation. But the regulated price of market data would be meaningless if the NYSE can grant itself monopoly power over the fastest means to access that data.

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<sup>39</sup> See Healthy Markets, Comment Letter on NYSE Proposals to Amend Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services (Mar. 9, 2020) <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6925373-211372.pdf>.

The effective price of market data would become the regulated price plus whatever price the NYSE Group chooses for its Wireless Connections subscriptions. If the Petition is granted, the Commission's regulation of the price of market data would be eviscerated as the NYSE Group would just increase the price at which it sells first-in-time access to that data.

**C. NYSE's Arguments to the Contrary Do Not Warrant Granting Its Petition.**

The NYSE makes a number of arguments that the Wireless Connections should not be subject to regulation by the Commission.

*First*, the NYSE Group argues “no harm, no foul” because other data transmission systems can provide “similar” speed. Never mind that “similar” speed in a market where microseconds matter is insufficient. The NYSE Group also argues that the Wireless Connections are not currently faster than those of other providers. Whether it *currently* operates the fastest connection, the NYSE Group has given itself an inherent geographic advantage that, left unchecked, will allow it to become the fastest. The NYSE Group further argues that the geographic advantage of having a closer pole is but one of many factors impacting network speed.<sup>40</sup> While this is correct, it is equally true that proximity is a fundamental determinant of speed—if

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<sup>40</sup> 85 Fed. Reg. at 8945.

the NYSE can establish a transmission system that has an exclusive proximity advantage, then the NYSE Group has a speed advantage.<sup>41</sup>

*Second*, the NYSE Group states that it alone is “unnecessarily competitively disadvantage[d]” by submitting its fees and services to the Commission for approval, while its competitors have free reign. (Pet. Br. at 20.) This ignores that no competitors enjoy *exclusive access* to the data pole on the grounds of the exchange: that access is exclusive to the NYSE Group, as mandated by the NYSE Group. The NYSE Group also asserts that freeing it from Commission regulation would increase competition. If that were so, market participants would have no interest in opposing it, as they would benefit from increased competition. The reason that market participants universally oppose the NYSE Group’s position is not to reduce competition for market data transmission, but to prevent the destruction of competition that would result if the NYSE Group could leverage its control of the exchange’s premises to substantially disadvantage its competitors.

*Third*, the NYSE Group makes several remarkable arguments that the Commission lacks authority to regulate exchange members’ communications that do not go directly to the exchange’s computers. The NYSE Group says that the Commission cannot regulate the Wireless Connections because: (1) the NYSE Group does not know what information is being transmitted; (2) the communications

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<sup>41</sup> See *Beyond Bandwidth: Why Distance Matters When Choosing A Data Center*, <https://365datacenters.com/resources/white-papers/beyond-bandwidth-why-distance-matters-when-choosing-a-data-center/>.

sent over the connections are “internal” to the exchange member because they run between an exchange member’s offices and its computers; and (3) the Wireless Connections are mere “empty pipes.” These arguments ignore the rationale underlying NYSE Rule 36, and the Commission’s long history of regulating any intra-exchange member communication service with the potential to provide a competitive advantage.<sup>42</sup> Moreover, as Petitioners must know, market participants are using these “empty pipes” between Mahwah, Carteret, and Secaucus for a single purpose—to facilitate trading by transmitting orders, market data, and related information.

## **II. NYSE’S USE OF AFFILIATES DOES NOT EXEMPT ITS WIRELESS CONNECTIONS FROM THE EXCHANGE ACT**

The statutory definitions of “exchange” and “facility” are broad.<sup>43</sup> An “exchange” includes “any organization, association, or group of persons ... which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing ... the functions

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<sup>42</sup> The NYSE continues to enforce Rule 36 given the importance of maintaining equal access as to intra-exchange member communications. *See, e.g.*, NYSE Letter of Acceptance, Waiver and Consent re: Quattro M. Securities Inc. No. 2020-03-00021 (Mar. 18, 2021) (improper use of telephones on the exchange floor), [https://www.nyse.com/publicdocs/nyse/markets/nyse/disciplinary-actions/2021/QMS%20AWC%20\(Fully%20Executed\).pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/disciplinary-actions/2021/QMS%20AWC%20(Fully%20Executed).pdf).

<sup>43</sup> *See* J. Scott Colesanti, *Trotting Out the White Horse: How the S.E.C. Can Handle Bitcoin’s Threat to American Investors*, 65 Syracuse L. Rev. 1, 18 (2014) (statutory definition of “exchange” is “dauntingly broad”); Securities Exchange Act Release No. 44201 (Apr. 18, 2001) (facility of an exchange is defined “very broadly”).

commonly performed by a stock exchange ... and includes the market place and the market facilities maintained by such exchange.”<sup>44</sup> A “facility” of an exchange includes “its premises, tangible or intangible property whether on the premises or not, any right to use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”<sup>45</sup>

The Wireless Services fall comfortably within these definitions. As the Commission’s order correctly held, application of the “exchange” definition does not turn on which particular legal entity happens to hold a particular asset; what matters is which functions are part of the relevant market place.<sup>46</sup>

**A. Corporate Separateness Is a Red Herring.**

The NYSE Group’s Petition hinges on the fact that it proposes to provide first-in-time access to market data through a different legal entity from the one that runs the computer hosting the exchange’s matching service. But in reality, the NYSE Group collectively operates the exchange market place—which group

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<sup>44</sup> 15 U.S.C. § 78c(a)(1).

<sup>45</sup> *Id.* § 78c(a)(2).

<sup>46</sup> 85 Fed. Reg. at 67,047 (“A particular function provided by a group of persons ... may fall within the statutory definition of ‘exchange’ when business activities performed across the group constitute part of that market place for bringing together purchasers and sellers.”).

company directly holds a particular asset that, in the aggregate, comprise the exchange does not matter so long as the asset is part of the relevant market place. The NYSE Group's argument that corporate separateness insulates its members from the Commission's regulation is inconsistent with the definition of "exchange," which expressly includes a group.

Further, any analysis of whether something is a facility of an exchange must depend on whether the particular product, function, or service falls within the "facility" definition, regardless of the corporate entity offering it. Indeed, the Commission has previously found that services operated by an entity *unaffiliated* with an exchange can constitute a facility of that exchange.<sup>47</sup> If the mere use of an affiliate or a third party to carry out an exchange function or service renders that function or service no longer a "facility" of an exchange, exchanges could delegate other essential functions and services to third parties to avoid regulation. There is no basis for such an outcome under the Securities Exchange Act or the Commission's historical practices, and courts have also long recognized the fundamental proposition that one cannot accomplish indirectly what is prohibited directly.<sup>48</sup>

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<sup>47</sup> See 71 Fed. Reg. 59,184, 59,191 (Oct. 6, 2006) (order approving Philadelphia Stock Exchange, Inc.'s ("Phlx") new equity trading system and operation of an optional outbound router as a facility of where Phlx had no ownership interest in the third-party operator).

<sup>48</sup> See *Ford Motor Co. v. Abercrombie*, 62 S.E.2d 209, 216 (Ga. 1950) (applying legal maxim *quando aliquid prohibetur ex director, prohibetur et per obliquum*—

Contrary to the NYSE Group’s argument, the fact that the functions performed by a group of persons can constitute an exchange does not mean that the Commission has “the authority to regulate any service provided in whole or in part at the Mahwah data center—from security services to groundskeeping to car services—as part of its Exchange Act authority.” (Pet. Br. at 49.) The Exchange Act applies only to facilities “for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood.”<sup>49</sup> Unlike security services, grounds-keeping, or car services, the Wireless Connections are used for effecting and reporting transactions of the exchange, or in other words, facilitating trading on the exchange.<sup>50</sup>

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anything prohibited directly is also prohibited indirectly); *People v. Hudson River Connecting R. Corp.*, 126 N.E. 801, 808 (N.Y. 1920) (“The law will not permit that to be done by indirection which is unlawful directly.”).

<sup>49</sup> 15 U.S.C. § 78c(a)(1).

<sup>50</sup> The NYSE’s Group’s past conduct also contradicts its corporate-separateness argument. NYSE Group, Inc.—not its affiliates—filed the zoning applications for the Wireless Connections (which included installing antennae on the monopole inside the NYSE compound) that the Petitioners now say should not be deemed a facility of an exchange. *See* Virtu Financial, Inc., Comment Letter on NYSE Rule Filings, Ex. A (Mar. 10, 2020), <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6931591-211589.pdf>.

In Mahwah Zoning Board proceedings, an NYSE engineer testified that the purpose of the Wireless Connections was to allow for the transfer of data from customers to the NYSE data center, and for the provision of NYSE market data to its customers. The NYSE Group, Inc.’s Zoning Board application and the testimony of the NYSE engineer demonstrate that, regardless of which corporate affiliate sells the service, its sole purpose is to facilitate faster connections for the purpose of trading securities.

**1. The Wireless Connections Are Used for Effecting or Reporting a Transaction.**

Wireless Connections are “facilities” of the NYSE because they are services, in the form of a system of communication, offered by a group of persons providing a market place for securities. Such services are for the sole purpose of transacting on, or communicating to or from, the exchanges, and in fact use the Wireless Connections to send trading orders and receive market data. The NYSE Group acknowledges as much.<sup>51</sup>

Market participants purchase the Wireless Bandwidth Connections for the purpose of increasing the speed of communications between the Mahwah data center and the other exchange data centers. While the connections may be “empty pipes” (Pet. Br. at 15), just like telephone lines to the exchange floor that have always been subject to Commission regulation, the purpose of those “empty pipes” is to transmit vital market data and effect orders.

The NYSE Group acknowledges that “the data contained in market data feeds are exchange products regulated by the Commission,” but nonetheless argue that their affiliates “do not become an ‘exchange’ by virtue of offering a transmissions pathway for these feeds” because “the connections are simply ‘one-way connections away from the Mahwah [D]ata [C]enter.’” (Pet. Br. at 36-37.) But, again, the entire point of the service is to provide market data that market participants

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*See* Board of Adjustment Meeting, Township of Mahwah, New Jersey (Mar. 20, 2019) (videotape), <http://mahwahnj.swagit.com/play/03202019-1419>.

<sup>51</sup> *See* 85 Fed. Reg. at 8939.



use for the purposes of effecting transactions. Indeed, the NYSE’s affiliate admits that market data is “used to inform trading and risk management decisions throughout the lifecycle of a transaction” even if that lifecycle “spans microseconds.”<sup>52</sup>

**2. The Wireless Connections Use the NYSE Group’s Premises and the Property to Provide a Market Place for Bringing Together Purchasers and Sellers of Securities.**

The Wireless Connections are a system of communications that exist, in part, on NYSE’s premises, to which NYSE’s affiliated co-location and connectivity vendors are given exclusive access. These premises and property include the Mahwah data center grounds, the data center pole, and equipment thereon. Regardless of which member of the NYSE Group holds title to any individual asset, the Group provides them as part of the market place for bringing together purchasers and sellers of securities.<sup>53</sup> The wireless services provide market participants with the crucial information necessary for multiple parties to trade—the very essence of “bringing together multiple buyers and sellers.”

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<sup>52</sup> *ICE Exchange & Market Data*, <https://www.theice.com/market-data/exchange-data>.

<sup>53</sup> As noted above, NYSE Rule 6 defines “Floor” as not only the narrow physical area where trades are agreed upon but also the various buildings in which that physical area is situated. It would undercut Commission regulation if the Exchange Group could diminish the Commission’s authority by shifting the title to its property.

The Petition offers no explanation why the NYSE pole is not the property of the NYSE Group or on the premises of the NYSE Group. Indeed, the Group acknowledges that the pole is located on the premises of the Mahwah data center,<sup>54</sup> and that access to the pole is limited to corporate entities within the NYSE Group.<sup>55</sup>

**B. The Commission’s Oversight of the Wireless Connections as a Facility Is Consistent with Previous and Existing Regulations.**

The NYSE has always regulated—subject to the Commission’s oversight—telephonic communications between (i) a firm’s trader on the floor of an exchange (effectively the firm’s co-located server running an algorithm) and (ii) other persons working for that firm (effectively the incoming communications). These telephone lines, or “empty pipes,” are currently the subject of extremely detailed regulation under NYSE Rule 36 (Communications Between Exchanges and Members’ Offices). Under the NYSE Rules, no telephone line is permitted without the NYSE’s approval and the use of any approved telephone line is subject to very extensive regulatory requirements, including recordkeeping requirements.

The primary purpose of those rules is to prevent an NYSE member firm from gaining an advantage in its ability to transmit information from off-floor to a

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<sup>54</sup> See 85 Fed. Reg. at 10,759.

<sup>55</sup> See *id.* (Except for “the non-ICE entity that owns the wireless network used for the Wireless Connections . . . , third parties do not have access to such pole, as the IDS wireless network has exclusive rights to operate equipment on the Mahwah data center pole.”).

floor trader. But now, the NYSE and the exchanges see an ability to profiteer from their ability to provide faster communications, and they therefore wish to treat the Commission's regulatory authority to prevent such profiteering as being as outdated as the rotary phone.

### CONCLUSION

For the foregoing reasons, SIFMA and FIA PTG respectfully request that the Court deny the Petition.

Dated: April 19, 2021

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**CERTIFICATE OF COMPLIANCE**

Under Fed. R. App. P. 29(a)(4)(G) and 32(g)(1), counsel hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 7,643 words and 716 lines (as counted by counsel's word processing system) excluding those portions exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), which is not more than half the maximum length of Respondent's principal brief under the rules. Counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in a 14-point Times New Roman font.

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\*Not admitted to practice in the D.C. Circuit.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of April, 2021, a true and correct copy of the foregoing Brief for *Amici Curiae* Securities Industry and Financial Markets Association and FIA Principal Traders Group in Support of Respondent Securities and Exchange Commission was served on all counsel of record in this appeal via CM/ECF, pursuant to D.C. Cir. R. 25(a) and (f). I further certify that, consistent with D.C. Cir. R. 31(b), an original and eight copies of this brief will be filed with the court forthwith.

/s/ Jason M. Halper

Jason M. Halper  
Counsel for *Amici Curiae*

April 19, 2021