[INITIAL BRIEF]

ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 18-1292 & 18-1293

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

THE NASDAQ STOCK MARKET LLC and NYSE ARCA, INC.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION,

Intervenor for Respondent.

On Petition For Review of An Order
Of The United States Securities and Exchange Commission

CORRECTED REPLY BRIEF FOR PETITIONER NYSE ARCA, INC.

Douglas W. Henkin
Counsel of Record
Richard M. Zuckerman
John Ren
Ilya Schwartzburg
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700

Attorneys for Petitioner NYSE Arca, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

SEC Decisions

Legislative and Regulatory History

GLOSSARY[1]

Bloomberg/Wolverine Amicus	Brief for *Amici Curiae* Bloomberg L.P. and Wolverine Execution Services, LLC in Support of Respondent and Intervenor
DT&M	SEC's Division of Trading & Markets
IEX Amicus	Brief of Amicus Curiae Investors Exchange LLC in Support of Respondent and Intervenor for Respondent
OEC	SEC's Office of Ethics Counsel
OGC	SEC's Office of the General Counsel
SEC Brief	Consolidated Respondent's Brief of the Securities and Exchange Commission
SEC OIG	SEC's Office of Inspector General
SIFMA Brief	Brief of Intervenor Securities Industry and Financial Markets Association

1 Terms not defined herein have the meanings set forth in the Opening Brief For Petitioner NYSE Arca, Inc. ("OB" or "Opening Brief").

INTRODUCTION

Congress created *two* methods for the SEC to assess whether SRO rules are fair and reasonable:

- When an SRO files a proposed rule change, the SEC can, under Section 19(b), suspend and institute proceedings.
- Using Section 19(c) the SEC can change an SRO's rules via notice-and-comment rulemaking.

Here the SEC expressly declined to do both. The SEC cannot ignore the tools Congress gave it and attempt to shoehorn exchange fee filing challenges into Section 19(d), a process Congress never intended to apply to such challenges. An SRO is not subject to Section 19(d) proceedings merely for complying with its rules by applying generally-applicable fee schedules that have become effective under the law.

The SEC and SIFMA nonetheless claim that Section 19(d) can be used to challenge any generally-applicable exchange fee filing, even if the petitioner cannot allege that it was denied anything. But this puts the cart before the horse. The statute is clear that a Section 19(d) proceeding is available ***only*** if the petitioner was sanctioned or otherwise denied or limited access by an exchange to an exchange service. SIFMA was not sanctioned or denied or limited access to anything, and failed to submit evidence that any of its members were denied or limited access either.

Not only did the SEC apply an incorrect legal standard, its proceedings were tainted. Arca's opening brief voiced concerns about whether Brett Redfearn, a former SIFMA member representative who played a role in SIFMA's legal strategy for this proceeding, played a role in drafting the Commission Decision after he became the Director of DT&M on November 6, 2017. The SEC tried to brush aside those concerns in its brief. NYSE sued to compel the SEC to respond to its FOIA request about Redfearn's involvement, and the SEC only finished its (inadequate) response on June 21, 2019.

That lawsuit revealed that Redfearn ***was*** involved in authoring the Commission Decision, having inserted himself into this proceeding ***the day he started at the SEC***. The SEC should not be accorded deference with respect to its review of the ALJ Decision because Redfearn's failure to recuse himself from these proceedings tainted the Commission Decision, which represented an about-face from the position the SEC had held for over a decade:

- The SEC's Division of Market Regulation had approved the ArcaBook fees by delegated authority in 2006 and the SEC itself approved them in 2008.
- Despite comment letters opposing the 2010 ArcaBook Filing, the SEC declined to suspend the filing under Section 19(b), as amended by Dodd-Frank.
- After trial, the ALJ found in favor of Arca.

Redfearn's involvement, and its effect on the SEC's decision, was a fundamental denial of Arca's due process rights. In the proceedings tainted by Redfearn's involvement, the SEC also erred in assessing the existence of competitive constraints. *First*, it failed to accept platform competition despite controlling Supreme Court authority, concessions by SIFMA and its expert, ample record evidence, and the SEC's own previous advocacy of platform competition in its brief in *NetCoalition v. S.E.C.*, 615 F.3d 525, 528 (D.C. Cir. 2010) ("*NetCoalition I*"). *Second*, the SEC ignored record evidence demonstrating competition directly, such as DOJ's conclusions that exchanges compete directly for the sale of proprietary market data and evidence of switching behavior.

For all these reasons, the Commission Decision should be vacated and the SEC should be instructed to dismiss SIFMA's Section 19(d) petition.

SUMMARY OF ARGUMENT

I. Section 19(d) proceedings cannot be used to challenge market data fees. That issue was not resolved by *NetCoalition v. S.E.C.*, 715 F.3d 342 (D.C. Cir. 2013) ("*NetCoalition II*"), and the statutory language and legislative and regulatory history demonstrate that Section 19(d)'s scope does not include challenges to generally-applicable fees.

II. Even if Section 19(d) could be so used, SIFMA lacks standing to do so. Only an entity that consumes market data itself could prove that it had been denied access to something by a fee, which is the only way to trigger Section 19(f)'s review process.

III. Brett Redfearn substantially participated in this proceeding on SIFMA's behalf. After he joined the SEC in a senior staff position in late 2017, he participated in drafting the Commission Decision finding against Arca, in violation of Arca's due process rights and relevant ethics rules. This tainted the SEC's review of the ALJ Decision.

IV. The SEC erred in rejecting platform theory as a basis for finding competitive constraints on pricing. Controlling Supreme Court precedent, SIFMA's concessions, and the record below leave no room for a different conclusion.

V. The SEC also erred in rejecting Arca's other evidence of substantial competitive constraints on exchange market data pricing. There is substantial competition among exchanges, and the value market data users derive from market data is undeniably related to whether its price is fair and reasonable.

ARGUMENT

I. MARKET DATA FEES CANNOT BE CHALLENGED UNDER SECTION 19(D)

The core of this appeal is whether Section 19(d) applies to proceedings where a party asserts that a fee is higher than the party would like it to be ***for its own business purposes***. There is no question that Section 19(d) is not the vehicle for such challenges.

Congress provided two specific statutory methods to address arguments that an SRO fee is not fair and reasonable: Section 19(b) suspension and disapproval proceedings and Section 19(c) rulemaking proceedings. 15 U.S.C. § 78s(b) & (c). Because the SEC used neither here, the SEC and SIFMA now imagine a third: that Section 19(f) puts the burden on an SRO to demonstrate that its fee is fair and reasonable, and that if the SRO does not do so, the fee constitutes a denial-of-access under Section 19(d). This is imaginary and backwards.

A. Section 19(d) May Not Be Used To Challenge Market Data Fees

1. The Language of Section 19(d)

Section 19(d)(1) provides that if any SRO takes one of four enumerated adjudicatory or quasi-adjudicatory actions (which do not include charging market data fees pursuant to properly filed and effective exchange rules), the SRO "shall promptly file notice thereof" with the SEC and that "notice shall be in such form and contain such information as the [SEC], by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter." 15 U.S.C. § 78s(d)(1). Everything that follows, including the Section 19(f) review process, is predicated on this notice.

The SEC and SIFMA's arguments do not comport with this Court's law regarding statutory construction. Statutory interpretation begins with the language of the statute, and the meaning of statutory language always depends on context. *See Roberts v. Sea-Land Servs., Inc*., 566 U.S. 93, 101 (2012). Put differently, federal courts "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215, 1223 (2d Cir. 1996).

Much of the SEC and SIFMA's argument is based on the assumption that "limitation" would have no substantive meaning if market data fees were not included. *E.g.,* SEC Brief 30 (arguing "limits" would otherwise be superfluous). This is not the case. "Limitation" of access has been applied to cover cutting off of telephone service, an alleged group boycott of a member by an SRO, and, under 15 U.S.C. § 78o–3(h)(2), the "barring" of professional traders from using the Small Order Execution System. *See generally MFS Sec. Corp. v. New York Stock Exch., Inc.*, 277 F.3d 613, 618–19 (2d Cir. 2002); *Timpinaro v. S.E.C.*, 2 F.3d 453, 455 (D.C. Cir. 1993). Notably, the foregoing examples all involve restrictions on access to ***a service***, not charging generally-applicable fees.[2]

2 The SEC itself declined to allow the use of Section 19(d) by parties arguing that SEC-approved fees were wrongfully charged. *See Chicago Bd. Options Exch., Inc. v. Sec. & Exch. Comm'n*, 889 F.3d 837, 841 (7th Cir. 2018).

2. The Legislative History of Section 19(d)

The SEC's Section 19(d) arguments are based on generic cases discussing other statutes using words like "limit" and "access," but notably contain no discussion of cases involving market data fees.[3] SEC Brief 29-38. The legislative history of Section 19 helps explain this dearth of authority. S. Rep. 94-75 discussed what became Section 19(d) and explained that Section 19(d) was intended only to allow review by the SEC of SRO "disciplinary actions" and "quasi-adjudicatory" actions, precisely as Arca has argued from the beginning of this proceeding. S. Rep. 94-75, 1975 WL 12347, at *13, 26, 131-32 (1975).

The Senate Report also confirmed that an SRO action subject to Section 19(d) would require notice to the SEC from the SRO, but the SEC has never taken the position that market data fees require such notice. Nor is it clear how an SRO could provide such notice if the manner by which a generally-applicable fee becomes effective is through a proposed rule change filed with the Commission as required by Section 19(b). It is even less clear how an SRO could

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[3] The only case relied on by the SEC that involved market data, *NASD v. SEC*, 801 F.2d 1415 (D.C. Cir. 1986) (SEC Brief 38), does not support the SEC's position because it did not arise under Section 19(d) and involved an SRO's alleged refusal to allow a specific vendor to sell the SRO's market data without the vendor charging a markup designed to make the vendor's competing product less financially attractive than the SRO's product.

identify in that notice—as Section 19(d) requires—who was limited access to exchange services because of such generally-applicable fees.

3. SEC Rules Implementing Section 19(d)

SEC Rule 19d-1 sets forth the requirements for the notice discussed in Section 19(d)(1), and further demonstrates that Section 19(d) does not apply here. The SEC adopted Rule 19d-1 following the enactment of Section 19(d). 42 FR 36410 (July 14, 1977). The SEC's adoption of Rule 19d-1 thus demonstrates its understanding of the scope of Section 19(d) contemporaneous with the statute's enactment.

In adopting Rule 19d-1, the SEC specifically described the SRO actions to which it applies, but did ***not*** include market data fee filings. Instead, the SEC explained that "[t]hese rules prescribe the form and content of notices to be filed with the Commission by [SROs] as required by the 1975 Amendments … concerning formal and summary action taken by those organizations to discipline their participants and their members, and members' officials and employees …." *Id*. at 36410. The SEC further stated that "Rule 19d-1 provides for the content of notices relating to four general types of adjudicatory actions taken by an SRO as follows …," and it included "Summary Limitation or Prohibition of Access to Services" as being included in the fourth category of "adjudicatory actions" covered by the Rule. *Id*. at 36411. What the SEC clearly meant by the latter was such things as prohibiting access to a trading floor, not objections to market data fees.

The SEC has amended Rule 19d-1 twice, and neither amendment made it applicable to market data fees. In 1984, the SEC amended Rule 19d-1 to permit SROs to submit plans for abbreviated reporting of minor disciplinary infractions, such as violations of the rules governing trading floor personal decorum. 49 FR 23828 (June 8, 1984). In 2005, the SEC amended Rule 19d-1 to require SROs to file notices of delistings of listed companies (a clear "denial-of-access" to a market when that happens). 70 FR 42456 (July 22, 2005). Critically, when Rule 19d-1 was last amended in 2005, both NYSE and Nasdaq sold depth-of-book data products. If the SEC had meant the rule to apply to such products it could and should have said so then, but did not.[4]

There is one mention of "fees" and "charges" in a footnote in the adopting notice for Rule 19d-1 (42 FR at 36412 n.13), but two important things about that footnote make clear that it contradicts the SEC's current interpretation of Section 19(d). *First*, the footnote is attached to a textual sentence that says the Exchange Act requires that an SRO give the SEC "notice of all ***sanctions***." (42 FR at 36412, emphasis added). The SEC points to no authority treating market data

[4] If the SEC has changed its view of the scope of Section 19(d) it would have to amend Rule 19d-1 through notice-and-comment procedures, not by statements in litigation.

fees as "sanctions," and to the extent it is now trying to equate generally-applicable market data fees with member-specific "sanctions" through litigation as opposed to rulemaking, that violates the Exchange Act and APA. *Second*, the footnote itself makes clear that when adopting Rule 19d-1, the SEC did not consider all "fees" or "charges" to be "sanctions" even when such fees or charges were imposed in connection with conduct that *was* required to be reported under Rule 19d-1. Two of the three hallmarks of such non-sanction fees or charges were that the SRO has no discretion as to their application or amount and that they are fixed and provided for in the SRO's rules. (42 FR at 36412 n.13) But that precisely describes market data fees: Once such fees become effective, an SRO must charge them as set forth in its rules or risk violating Section 19(g) (15 U.S.C. § 78s(g)). The SEC does nothing to address this clear history.

The SEC has never directed an SRO to file a Rule 19d-1 notice relating to a market data fee, has never pointed to authority requiring such a notice, and has never held any SRO market data fee invalid for failure to file such a notice. That makes sense given the absence of any mention of market data fees in any SEC filings relating to Rule 19d-1.

Moreover, Rule 19d-1 is a "legislative rule" as opposed to an "interpretive rule"—it binds the SEC and members of the public to which it applies and has legislative effect. Because legislative rules can impose obligations on members of the public distinct from, and in addition to, those imposed by statute, agencies have the power to issue legislative rules only if, and to the extent that, Congress has so authorized. *See Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000). And as *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), makes clear, once a legislative rule has been adopted, an agency must apply it consistently and cannot depart from prior applications without explaining why (*Rapoport v. SEC*, 682 F.3d 98, 104 (D.C. Cir. 2012)) or without enacting a new rule through proper notice-and-comment proceedings (*Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011)).

Thus, Section 19(d) only applies when the predicate action set forth in Section 19(d)(1) has occurred (the "if" in the first sentence of Section 19(d)(1)). That predicate action is the filing of a notice required by Rule 19d-1, which is what gives the SEC power to entertain review of conduct enumerated in Section 19(d)(1) when a Section 19(d) petition is later filed. The absence of any Rule 19d-1 filings for market data fees or any SEC requirement that exchanges submit such notices for market data fees thus requires the conclusion that the SEC's attempt here to use Section 19(d) to allow review of market data fee filings is inconsistent with the statute.

B. Sections 19(b) and (c) Provide the Proper Avenues for Challenging Market Data Fee Filings

Despite this clear statutory language and legislative history, the SEC and SIFMA argue that Section 19(d) challenges to market data fees must be permitted, otherwise immediately-effective fee filings could evade review. SEC Brief 34. This is clearly wrong.

Congress has expressly granted the SEC authority under Section 19(b), within 60 days of a rule filing designated by an SRO as immediately effective, to temporarily suspend the proposed rule and institute proceedings to determine whether the proposed rule should be approved or disapproved. 15 U.S.C. § 78s(b)(3)(C). Congress also gave the SEC the power to change SRO rules via Section 19(c). If the SEC believes an existing SRO rule should be changed—including a rule concerning market data fees like the one at issue here—the SEC may change it through notice-and-comment rulemaking. 15 U.S.C. § 78s(c).

Accordingly, the statutory scheme set out by Congress in Section 19 puts the onus on entities aggrieved by a rule change to convince the SEC to act under Sections 19(b) or (c). Here, that mechanism worked as Congress intended. Several parties submitted comment letters asking the SEC to temporarily suspend implementation of the 2010 ArcaBook Filing (https://www.sec.gov/comments/sr-nysearca-2010-97/nysearca201097.shtml), but the SEC declined to do so. The

SEC has also received petitions for rulemaking regarding market data fees generally,[5] *i.e.,* to act under Section 19(c), but has acted on none of them.

SIFMA argues that the proper way to view the relationship between Sections 19(b) and (c), on the one hand, and Section 19(d), on the other hand, is between "review instituted by the Commission" and "review instituted by affected parties" (SIFMA Brief 28). But that assertion is wrong because (i) it ignores the fact that Section 19(d) expressly permits review by the SEC on its own motion just as Section 19(c) does (15 U.S.C. § 78s(d)(2)) and (ii) any party is free to petition the SEC to use its ordinary rulemaking authority to modify or delete a specific SRO rule under 15 U.S.C. § 78s(c).

C. This Court Did Not "Invite" the SEC To Rely on Section 19(d)

Contrary to the SEC's assertion (SEC Brief 37-38), this Court in *NetCoalition II* did not invite or direct the SEC to accept challenges to market data fees under Section 19(d), nor did it hold that Section 19(d) was a proper method of challenging generally-applicable fees.

Whether Section 19(d) could be used to challenge fee filings was not at issue in *NetCoalition II*. When the SEC first suggested in its *NetCoalition II* brief that Section 19(d) could be used to provide a path to appellate review for fee

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[5] *E.g.,* No. 4-728, Aug. 23, 2018 (https://www.sec.gov/rules/petitions/2018/petn4-728.pdf) & No. 4-623, Jan. 28, 2011 (https://www.sec.gov/rules/petitions/2011/petn4-623.pdf).

filings, even SIFMA recognized it as perverse: SIFMA admitted during the *NetCoalition II* oral argument that there was no precedent for using Section 19(d) to challenge market data fees, and that it would be counterintuitive for SIFMA to argue that someone receiving market data, even if paying for it, was being "denied access" to anything. (OB 17-20) Because the issue was not before the Court, Arca and Nasdaq said nothing about the issue in their *NetCoalition II* briefing, but both exchanges have challenged each Section 19(d) petition filed by SIFMA as improper for all the reasons stated here.

The SEC now asserts that fee filing challenges must be allowed under Section 19(d), or else such fee filings are immune from appellate review. SEC Brief 37. But this argument disregards the statutory scheme that Congress enacted. Congress designed the Dodd-Frank amendments to Section 19 to simplify and streamline the rule-filing process. *See* S. Rep. No. 111-176, 2010 WL 1796592, at *106 (Apr. 30, 2010); H.R. Conf. Rep. 111-517, 2010 WL 2671804, at *727 (Jun. 29, 2010). Fully cognizant that appellate review was only available for final agency actions (15 U.S.C. § 78y(b)), Congress chose to allow rule filings to become immediately effective upon filing, subject only to (i) suspension by the SEC within 60 days (Section 19(b)(3)(C)) or (ii) notice-and-comment rulemaking by the SEC to abrogate or change the proposed rule (Section 19(c)). Congress explicitly stated that Commission action under Section 19(b)(3)(C) would not be reviewable by this Court. This was not an error needing "correction" by resort to Section 19(d), it was precisely what Congress intended.

Although whether Section 19(d) can be used in this manner was not before the Court in *NetCoalition II*, it is now squarely before this Court. The impropriety of using Section 19(d) here requires vacatur of the Commission Decision and dismissal of SIFMA's petition.

D. Even if Section 19(d) Did Apply, the Burden Would Be on the Petitioner to Establish a Denial of Access

Even if Section 19(d) were an avenue for challenging generally-applicable market data fees, the initial burden would not be on the SRO to establish that the fee is fair and reasonable. The SEC and SIFMA contend that Section 19(f) establishes this burden, and that if an SRO fails to do so, the fee constitutes a denial-of-access and is subject to Section 19(d). That is backwards: The language of Section 19(d) makes clear that a petitioner must establish a denial-of-access before the Section 19(f) process applies. The SEC and SIFMA are thus trying to bootstrap support for the use of Section 19(d) in a way Congress never intended.

The legislative history confirms this. The Senate Report notes that a Section 19(d) proceeding relating to denial-of-access to services must be dismissed if the SRO's actions are consistent with its rules and were not applied in a discriminatory or unfair manner (S. Rep. 94-75, 1975 WL 12347, at *132), thus confirming that the initial burden of proof in a Section 19(d) proceeding should be on the entity claiming that there was a denial-of-access.

II. SIFMA LACKS STANDING TO CHALLENGE THE ARCABOOK FILING

The SEC and SIFMA rely on Section 19(d)'s supposed silence on associational standing to argue that such standing is appropriate, but that misstates the statutory text. 15 U.S.C. § 78s(d)(2) expressly depends on a particular person being aggrieved and contains a direct injury requirement to seek review, which is incompatible with associational standing. The same reasoning has barred representational standing under Section 216(b) of the Fair Labor Standards Act (*United Food & Commercial Workers Union, Local 1564 of New Mexico v. Albertson's, Inc.*, 207 F.3d 1193, 1200–02 (10th Cir. 2000)) and Section 501(b) of the Copyright Act (*Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 452–53 (S.D.N.Y. 2012), *aff'd in relevant part*, 755 F.3d 87 (2d Cir. 2014)).[6]

If Section 19(d) could apply at all, a proceeding would have to be brought by an entity that purchased market data (or sought to purchase market data but literally could not afford it) and, as a result, could demonstrate that it was

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6 *N.Y. Republican State Comm. v. SEC*, No. 18-1111, 2019 WL 2508986 (D.C. Cir. June 18, 2019), makes clear that direct injury is key. The majority only found Article III standing because one petitioner submitted specific factual evidence that the challenged rule caused *it* injury-in-fact (*id*. at *1), and Judge Sentelle would not have found standing even with that evidence (*id*. at &10-11). SIFMA submitted no evidence that *it* was injured by any ArcaBook fee.

somehow denied or limited access to an exchange because it had to pay (or could not afford to pay) such fees.[7]

To illustrate, Bloomberg[8] and Wolverine, who appear in this Court as *amici*, each purchase market data. If Section 19(d) were available for this purpose, Bloomberg and Wolverine each could have brought this proceeding. But if they had done so, each would have had to offer evidence that it had been denied or limited access to Arca's market because it had to pay ArcaBook fees, and Arca would have had an opportunity to explore their specific use of ArcaBook and demonstrate that they had not been denied or limited in their access to anything by the fees at issue. But by hiding behind SIFMA, Bloomberg, Wolverine, and other SIFMA members avoided this type of scrutiny entirely. That approach mocks the concept of standing.

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[7] Contrary to SIFMA's assertion (SIFMA Brief 26), the argument that *Hunt* does not establish statutory standing has not been waived, and satisfying *Hunt* does not establish statutory standing. *See, e.g.*, *HathiTrust*, 902 F. Supp. 2d at 450–53 (association satisfied *Hunt* test but lacked statutory standing), *aff'd in relevant part*, 755 F.3d 87 (2d Cir. 2014).

[8] Bloomberg was no mere spectator to the proceedings below. It played an active role in SIFMA's case (such as preparing SIFMA's experts), but hid behind privilege (it appears throughout SIFMA's privilege log (JA__(Doc.60.Exh.B))) and SIFMA's experts to avoid being subject to discovery (OB 17-20).

III. THE COMMISSION'S REVIEW OF THE ALJ DECISION WAS TAINTED BY BRETT REDFEARN'S INVOLVEMENT

Although Arca and Nasdaq raised concerns about Redfearn's possible involvement with the Commission Decision numerous times, the SEC never acknowledged those concerns. Here, the SEC tried to brush the issue aside in a tightly-crafted footnote stating that Redfearn "is subject to ethics rules" but ***not*** that they were complied with. SEC Brief 65 n.8.

After the SEC issued the Commission Decision, NYSE made a FOIA request regarding Redfearn's involvement. When the SEC failed to respond, NYSE sued, which finally forced the SEC to (partially) respond between the filing of Arca's opening brief and this reply brief. The SEC completed its initial response on June 21, 2019, although it asserts deliberative process privilege over part or all of nearly every responsive document, including supposedly ***final*** decisions. NYSE will promptly challenge that in the District Court (and this Court may wish to retain jurisdiction because those proceedings will likely show further details regarding how Redfearn's involvement influenced this proceeding).

The SEC's incomplete FOIA response shows that Redfearn was ***substantially*** involved in drafting the Commission Decision: He began asking about this proceeding on November 6, 2017, ***the day he began working at the SEC***. *See* JA__(Attachments 1, 11). Thereafter he sent or received at least ***32*** emails containing drafts of the Commission Decision and/or his comments on drafts and participated in at least six meetings to discuss drafts. (JA__(Attachment 2 at 3, 6, 9-13, 15-16, 18-19; Attachments 3-6)). And on September 20, 2018, Redfearn held a "SIFMA Decision Briefing" for Elad Roisman, then the newest SEC Commissioner, in Redfearn's office. (JA__(Attachments 7-9)).

This begs the question (which SEC OIG also asked) whether ethical advice was sought regarding whether it was proper for Redfearn to participate in drafting the Commission Decision. Drafts of an OEC memorandum regarding Redfearn's participation in market data-related matters were circulated in December 2017 and apparently finalized on December 14, 2017 (JA__(Attachment 10 at 1-4; Attachment 11)), but the SEC did not disclose that memorandum until June 21, 2019, and it has withheld the bulk of the final memorandum under the deliberative process privilege. Although that is itself wrong, *see N.L.R.B. v. Sears*, 421 U.S. 132, 151-52 (1975), another troubling issue is that the OEC email forwarding the "final" memorandum reveals that Redfearn edited his own ethics memorandum and, of course, all those edits have been withheld (Attachment 11).

Although it is impossible to fully evaluate the OEC memorandum as it has been produced, even the highly-redacted document raises red flags:

- On its face the memorandum does not state that Redfearn was permitted to participate in this proceeding, it only states that he could be involved in "matters of general applicability" relating to market data fees, whereas a preceding sentence suggests that he should not be involved in "administrative adjudication" affecting the legal rights of the parties to a proceeding in which he had previous involvement. JA_(Attachment 11 at 3).

- The factual basis of the memorandum is wrong. Redfearn did not just "occasionally participate on SIFMA's Market Data Committee, which would get updates on the SIFMA market data challenges" JA__(*Id*. at 2-3). Although SIFMA only produced a snapshot privilege log for the proceedings before the ALJ, that log contained 84 entries, Redfearn appears in 16 of them, ***and in four he <u>sent</u> email to SIFMA's counsel***. *See* JA__(Doc.60.Exh.B). And the emails Redfearn received generally included "discussion of legal strategy" ***related to this proceeding*** (*id*.).[9]

- The "covered person" conclusion in the memorandum is wrong. A "covered person" relationship requires recusal, and there is no question that Redfearn was a covered person for both JP Morgan and SIFMA. (5 CFR § 2635.502(b)(iv)-(v)) Redfearn's inclusion in SIFMA's privilege log necessarily means that he was an "agent" or "consultant" for SIFMA with respect to this proceeding, because otherwise SIFMA would have had no basis for asserting attorney-client and work product privileges with respect to communications involving Redfearn. Recusal was required because, as the memorandum acknowledges, Redfearn's cooling off period goes back two years, a period which includes work Redfearn did for SIFMA on this proceeding.

- The memorandum also does not appear to address 17 CFR § 200.111. That regulation specifically governs communications relating to Section 19(d) proceedings and operates from the time a Section 19(d) proceeding is filed (c(ii)) through the time to file a petition for rehearing from the final order of the Commission has expired (c(2)). There is no question that Redfearn worked on SIFMA's Section 19(d) petitions, including this one; his inclusion in SIFMA's privilege log establishes that.

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9 The memorandum's discussion of Redfearn's Equity Market Structure Advisory Committee testimony was also incorrect. Redfearn advocated positions identical to those advocated by SIFMA in this proceeding in some of his testimony. *See* https://www.sec.gov/spotlight/emsac/emsac-102715-transcript.txt at 182:18-183:11.

- While Section 200.111 is in effect, there can be no *ex parte* communications with a decisional employee of the SEC relevant to the merits of the proceeding at issue.

- The clear point of Section 200.111 is to prohibit improper influence on SEC decisionmakers addressing Section 19(d) petitions. But allowing Redfearn to participate in drafting the Commission Decision without Arca's knowledge was equivalent to *ex parte* communications by a SIFMA representative with the SEC about SIFMA's petition.

- Put differently, having worked on this proceeding on behalf of both JP Morgan and SIFMA, Redfearn could not exert more influence on the Commission Decision as an SEC employee than he could have as a private party, which the memorandum entirely failed to address.

The SEC seems to have realized that the December 2017 memorandum was flawed. Arca and Nasdaq's October 4, 2018 submission regarding Redfearn generated significant internal SEC discussion, including a second OEC "opinion" issued on October 12, 2018, ***after*** Redfearn had improperly influenced the Commission Decision and just four days before the Commission Decision was released:

- JA__(Attachment 13) shows Redfearn forwarding a news article about the recusal portion of Arca and Nasdaq's October 4, 2018 submission with the comment "I'm not sure how widely read this news summary is …." OGC's response is redacted in its entirety.

- JA__(Attachment 14) is an email chain, and some of its associated Vaughn Index entries are in JA__(Attachment 15). The chain's purpose was "gathering information so that OEC could provide advice in response to" the recusal issue raised by Arca and Nasdaq (JA__(Attachment 15 at 5)). The chain itself evidences weekend phone calls and emails between Redfearn and an OEC attorney discussing Arca and Nasdaq's submission to "put" that submission "into context." Almost everything else is redacted.

- JA__(Attachment 16), which originated with the SEC OIG's *sua sponte* inquiry, contains the second opinion, which is a 1½ page email from an OEC attorney to Redfearn from which nearly everything but the conclusion is redacted under a deliberative process claim. Beyond the improper redactions of a final determination, this email makes the same errors as the original memorandum (such as the erroneous "covered person" analysis). Moreover, this appears to be the first time anyone in OEC addressed the specific issue of whether Redfearn should have been disqualified from ***this proceeding***, and they only did so ***after*** he had already been involved.

- Finally, the email twice asserts that a reasonable person could not question Redfearn's ability to work impartially on this proceeding. Aside from the fact that everything "supporting" those assertions is redacted, SEC OIG raised precisely those questions just three weeks after the Commission Decision was released, and the record provides ample support for just such questions, which of course required Redfearn's recusal. Recusal is required where "a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). It is hard to see how a disinterested person would ***not*** view Redfearn as having prejudged the issues in the ArcaBook proceeding.

All of this is important because the significant involvement of Redfearn, an architect of SIFMA's litigation strategy, may explain why the SEC did such an abrupt about-face, completely disregarding the ALJ's findings and adopting SIFMA's arguments in their entirety. Having the thumb of someone so involved with SIFMA's litigation strategy on the scale also likely explains why the SEC entirely ignores *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), in its brief. With a former SIFMA representative in a position to influence the direction of the Commission Decision free from Arca's ability to address that influence, the SEC was doing worse than what this Court found objectionable in *Susquehanna* (accepting evidence from a party without critically evaluating it): here the person advocating for those positions had become a senior SEC employee in the interim and should have had no input into the Commission Decision.

Put differently, had Redfearn not become Director of DT&M, SIFMA would not have had the level of access and influence over this proceeding it achieved with Redfearn in that position. The SEC's misconduct here so infected its process that the SEC is not entitled to any deference with respect to its review of the ALJ Decision, and the proper remedy is vacatur of the Commission Decision with directions to dismiss SIFMA's petition.

IV. SIFMA'S PETITION FAILS AS A MATTER OF LAW BECAUSE OF PLATFORM COMPETITION

The SEC incorrectly claims (SEC Brief 63) that Arca waived reliance on *Ohio v. American Express Co*., 138 S. Ct. 2274, 2285 (2018), by not raising that case in response to one of the SEC's form offers to submit new information, all of which were based on the SEC's general post-*Lucia v. SEC*, 138 S. Ct. 2044 (2018) clean-up efforts (*e.g.,* Release No. 83671, Admin Proc. File No. 3-15350 at 1 & n.4 (July 19, 2018).

American Express is binding Supreme Court authority issued while the SEC was working on the Commission Decision, but before it was issued. The SEC articulates no basis for ignoring this unquestionably binding precedent, which was raised before the Commission Decision was issued. Moreover, the parties made ***three*** separate requests for oral argument before the SEC, including a final written request from Arca and Nasdaq specifically citing *American Express* so that the SEC was on notice of the significance of *American Express* and that it would have been discussed had the SEC granted argument. (JA__[Oct.4.Filing]) The SEC was still working on the Commission Decision when Arca brought the case to the SEC's attention in that filing, but the SEC did not acknowledge that filing publicly and it is not even mentioned in the Commission Decision.

And the SEC offers no rebuttal of the significant evidence, including concessions by SIFMA and its expert (David Evans), addressing this issue. All it says is it does not think the record is sufficient. SEC Brief 62-63. Once again the SEC has substantively changed its position without explanation: During *NetCoalition I*, the SEC argued that *less* than this record was enough to support reliance on platform competition (*see NetCoalition I*, 615 F.3d at 541 n.16), and it offers no explanation for its change of position, which is especially problematic in light of the fact that *American Express* is now binding law. Moreover, the SEC's assertion that Arca cited writings by one SIFMA expert that were available before the Commission Decision but were not "in the record" (SEC Brief 63) ignores (i) that expert's concessions at trial and (ii) that the Supreme Court relied on those writings in *American Express*.

Indeed, the SEC's error in rejecting platform competition here is made more glaring by the Commission's later decision in Release No. 34-85121; File No. SR-OCC-2015-02, 2019 WL 624243 at 43-44 (Feb. 13, 2019), which spends almost a full page explaining multiple ways options exchanges could, *inter alia*, "offer[] technological services … to enhance the trading process" and noted that "there are numerous ways that competition among the exchanges … would not necessarily manifest directly as immediately observable competitive behavior." There is no substantive difference between that and the platform competition the SEC rejected here; indeed, each part of that discussion was framed in terms of "exchanges" "competing" with other exchanges.

The IEX Amicus further demonstrates the SEC's errors with respect to platform competition. The IEX Amicus is almost entirely devoted to why IEX believes its choices between transaction prices and market data prices provide a better platform for investors than choices made by other platforms. But that is confirmation that such choices are normal and permissible and that exchange platforms compete based on them, precisely the point of platform competition.

V. ARCA ANSWERED THE QUESTIONS POSED BY *NETCOALITION I*

In its Opening Brief, Arca demonstrated that it had provided answers to the questions raised by *NetCoalition I* and that SIFMA had failed to submit countervailing evidence (and had gone out of its way to prevent evidence from its members from becoming part of the record). Arca will not repeat those arguments in detail, but will point out some of the more egregious responses by the SEC, SIFMA, and *amici*.[10]

A. The Commission Wrongly Rejected the Exchanges' Evidence of Switching Behavior

A prime example of the SEC purporting to rely on "evidence" where there was none was its rejection of NQ 505 because "that customer's attempt proved fruitless and harmful to the customer's business." SEC Brief 27. But there

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10 The IEX Amicus relies almost entirely on sources that are both outside the record and post-date the proceeding before the ALJ by several years (IEX Amicus v-vi). Moreover, IEX's "cost" discussion (IEX Amicus 17-26) was prepared by IEX employees, not experts in platform competition or accounting, and is irrelevant to the issues before the Court; if the Court reviews it at all, it should also review the analysis of the cost of market data produced by Columbia University Professor Charles Jones, https://www0.gsb.columbia.edu/faculty/cjones/papers/2018.08.31%20US%20Equity%20Market%20Data%20Paper.pdf, an econometric expert with long experience regarding market microstructure. His study shows that the actual cost of market data has negligible (if any) impact on retail investors' trading costs. Moreover, IEX's brief is primarily an advertisement for IEX versus other exchanges, which underscores the existence of competition among exchanges and that not charging for market data is one way IEX tries to compete, notwithstanding that it costs more overall to trade on IEX.

was no evidence to support either conclusion, because SIFMA failed to adduce it. *See* OB 17-20.[11] Moreover, the SEC's assertion that traders shifting orders from an exchange in response to depth-of-book prices could incur costs from "forgone profits" (SEC Brief 48) is pure speculation. Without record evidence from actual traders on this point—there was none—there was no basis for the SEC to rely on this as to reject the ALJ's conclusions.

The SEC's response to Arca's argument that it only knows who switched, not necessarily why, is to create a Catch-22. The SEC asserts that if an exchange knows that a customer switched, it should know why, because the exchange must show that its fees are fair and reasonable (SEC Brief 59). Not only is this a *non sequitur* (because fee changes usually precede switching), but exchanges would never be able to satisfy this requirement unless they had information from all subscribers about every subscription change—a requirement found nowhere in any statute, regulation, or decision and that is entirely at odds with Dodd-Frank's effort to make fee filings simpler rather than more complex.

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[11] SIFMA also argues that there can never be an actual competitive constraint because multiple firms diverting order flow from an exchange could amount to an illegal group boycott. SIFMA Brief 42-43. SIFMA is thus arguing, against the words of its member that authored NQ 505 and whatever its author told Evans (which was hidden by SIFMA and Evans) that what that member said in a carefully-crafted email could never happen. Of course there is no evidence to support that, and the ALJ correctly read the words of NQ 505 and Nasdaq's evidence further supporting it as disproving this theory on its face.

Indeed, were the SEC's position valid, exchanges would be tied up in litigation over market data fees forever, which is no doubt SIFMA's goal but is entirely inconsistent with ***Congress's*** goal.

SIFMA's argument is even more brazen: It argues that evidence regarding how traders respond to price changes is "in the Exchange's exclusive possession" (SIFMA Brief 30), ignoring the testimony that such information is the exclusive domain of SIFMA's members and was available to SIFMA's experts but was neither requested nor reviewed by SIFMA's experts (OB 17-20).

Bloomberg and IEX also err in arguing that exchange market data fees limit access to U.S. capital markets. Bloomberg's argument (Bloomberg/Wolverine Amicus 9-11) ignores the other fees that make up the bulk of users' cost to access capital markets, including the unregulated fees that Bloomberg charges to redistribute Arca's data. As demonstrated at trial, exchange market data fees are dwarfed by fees like those charged by vendors like Bloomberg (OB 54-55), and it is these far larger vendor fees, if anything, that limit users' abilities to switch. In light of these unregulated vendor fees, even if exchange market data fees were lower, that would not have an appreciable impact on users' costs, and therefore exchange market data fees cannot be said to "limit access." IEX provides a different sort of example—although it charges nothing for its market data, users' overall costs of trading on IEX are approximately one-third higher than on NYSE markets even when the cost of NYSE market data is included (https://www.nyse.com/equities-insights#20181107), demonstrating again that market data fees do not "limit access" and thus do not prevent switching.

B. The SEC Erred in Concluding There Was Lack of Evidence of Competition Among Exchanges

Two errors are most critical to the SEC's flawed competition analysis. The first is its insistence that DOJ's conclusions that exchanges actually compete to sell proprietary market data are irrelevant. (SEC Brief 64) The bottom-line question raised by *NetCoalition I* was whether there are competitive constraints on proprietary data pricing. *NetCoalition I* did not depend on the form of the proceeding to examine a fee; it merely asked about the existence of competitive constraints, and DOJ had not reached the conclusions Arca relied on when *NetCoalition I* was decided. But now that the existence of actual competition for the sale of proprietary market data has been established it is, *ipso facto*, evidence of competitive constraints.

The SEC also failed to acknowledge that the barriers to entry of new exchanges with different competitive models are lower now than previously. IEX is an example. And three entirely new equities exchanges have announced plans to open in the near future. *See* https://memx.com (discussing plans to launch "Members Exchange"); https://ltse.com/ (noting that the SEC has approved the Long-Term Stock Exchange's exchange application);

https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_05172019.pdf (discussing intent to open new cash equities exchange under MIAX PEARL's exchange license).

C. The Commission Erred In Not Considering Evidence Regarding the Value ArcaBook Provides to SIFMA Members

Although the SEC rejected Arca's argument that the value ArcaBook provides to subscribers is relevant to whether the fees are fair and reasonable as "difficult to fathom" (SEC Brief 69), the Bloomberg/Wolverine Amicus demonstrates why the SEC was wrong.

No one disputes that SIFMA members profit from their use of depth-of-book data or that it would be difficult for so many entities to do so were ArcaBook's prices not fair and reasonable. And it is telling that Bloomberg and Wolverine spend nearly a third of their *amicus* brief railing against this argument (Bloomberg/Wolverine Amicus 18-27), going all the way back to Adam Smith's *The Wealth of Nations*, only to argue that market prices are "not typically" determined by the value a purchaser derives from a product (*id*. 20).

But Arca did not argue that prices should be determined by value, only that the issue was relevant to whether fees are "fair and reasonable." One way of showing that a fee is fair and reasonable is to show that it is competitive. But what Bloomberg and Wolverine pointed out is that more generally a fee is fair and reasonable when the transaction it applies to is beneficial to both parties.

When a party claims that a fee is not fair and reasonable, it thus necessarily puts at issue its side of that transaction (*i.e.,* its own profitability).

CONCLUSION

For the foregoing reasons and those set forth in Arca's Opening Brief, the Court should grant Arca's petition for review, vacate the Commission Decision, and instruct the Commission to dismiss SIFMA's Section 19(d) petition.

June 24, 2019

Respectfully submitted,

/s/ Douglas W. Henkin

Douglas W. Henkin
Counsel of Record
Richard M. Zuckerman
John Ren
Ilya Schwartzburg
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700

Counsel for NYSE Arca, Inc.

CERTIFICATE OF SERVICE

On this 24th day of June, 2019 a true and correct copy of the foregoing was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the District of Columbia Circuit, which currently provides electronic service on the counsel of record.

/s/ Douglas W. Henkin
Douglas W. Henkin

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font, size 14.

/s/ Douglas W. Henkin
Douglas W. Henkin