ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1424

In the United States Court of Appeals
for the District of Columbia Circuit

CITADEL SECURITIES LLC,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

INVESTORS EXCHANGE LLC,
Intervenor.

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

BRIEF OF HEALTHY MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND INTERVENOR

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

Counsel for amicus curiae

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3) and 28(a)(1), the following is a list of the parties, intervenor, *amici*, ruling under review, and related cases.

Parties, intervenor, and amici

Petitioner: Citadel Securities LLC.

***Amicus curiae* for petitioner:** Andrew N. Vollmer.

***Amicus curiae* for petitioner:** New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc.

Respondent: United States Securities and Exchange Commission.

Intervenor: Investors Exchange LLC.

***Amicus curiae* for respondent:** Better Markets.

***Amicus curiae* for respondent:** Healthy Markets Association.

***Amicus curiae* for respondent:** XTX Markets LLC.

Ruling under review

Petitioner seeks review of the SEC's final order, dated August 26, 2020, Release No. 34-89686, File No. SR-IEX-2019-15, titled "Self-Regulatory Organizations; Investors Exchange LLC; Order Approving a

Proposed Rule Change to Add a New Discretionary Limit Order Type Called D-Limit," which was filed on October 16, 2020. (ECF 1867322 at Exhibit A.)

Related cases

Amicus is unaware of any related cases before this Court or any other Court.

April 12, 2021

/s/ Thomas Burns
Thomas A. Burns

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), *amicus curiae* Healthy Markets Association submits the following corporate disclosure statement:

Healthy Markets Association, a finance industry trade association, represents U.S. and Canadian pensions and asset managers along with leading brokers, data and technology providers, and execution venues. Healthy Markets Association has no parent corporation, and no publicly held company has 10% or greater ownership in it.

April 12, 2021 /s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COUNSEL

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that separate briefing is necessary. *Amicus* is aware of only two other planned *amicus* brief in support of respondent and intervenor. *See* D.C. Cir. R. 29(d). One is by Better Markets, a public interest nonprofit. The other is by XTX Markets LLC, a liquidity provider. Separate briefing is necessary because those other *amicus* briefs will address different legal arguments from different perspectives.

First, the perspectives of *amici* are different. Better Markets is a public interest organization that serves as a "potent counterweight to the industry as the rules of financial reform are being drafted and challenged." Better Markets, *Our Impact*, *at* https://tinyurl.com/jpd9jm2b (visited Apr. 11, 2021). XTX Markets is a leading algorithmic trading firm with global trading operations. *See* XTX Markets, *at* https://tinyurl.com/3zpsxw9v (visited Apr. 11, 2021).

This brief's perspective is different. Healthy Markets Association submits its brief from the perspective of a trade organization that represents pensions and assets managers along with leading brokers, data and technology providers, and execution venues.

Additionally, the arguments of *amici* are different. Better Markets is arguing about the unfair advantages Citadel enjoys over other market participants, how predatory high-frequency trading harms markets and investors, how D-Limit orders mitigate those harms, and why the SEC properly approved the D-Limit proposal in accordance with the Exchange Act and the Administrative Procedures Act. In turn, XTX Markets is arguing about the prevalence of latency arbitrage in global markets in general and on IEX in particular, how D-Limit orders are a narrowly tailored solution to latency arbitrage that doesn't unduly harm liquidity takers to the benefit of liquidity providers, and how the SEC's approval of D-Limit orders was consistent with its prior rejection of CboeEDGA's proposal.

This brief's arguments are different. Healthy Markets provides some historical context regarding how, over time, the regulatory environment unwittingly created a kill zone for high-frequency traders, clarifies that Citadel Securities doesn't trade "on behalf of" retail investors (while the pensions and asset managers that actually do trade on their behalf actually support the approval of D-Limit orders), and argues Citadel Securities' conveyer belt analogy misdescribes what D-Limit orders actually

do and misconceives how IEX's D-Limit proposal differed from CboeEDGA's proposal.

April 12, 2021

/s/ Thomas Burns
Thomas A. Burns

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT iii

CERTIFICATE OF COUNSEL iv

TABLE OF AUTHORITIES ix

STATUTES AND REGULATIONS xi

STATEMENT OF *AMICUS CURIAE*'S IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE 1

ARGUMENT 3

I. Citadel doesn't trade "on behalf of" retail investors 3

A. Automated trading, the proliferation of multiple exchanges with potentially different stock prices, and order-routing rules have unintentionally created a kill zone for high-speed traders 5

B. As a market maker, Citadel Securities doesn't trade "on behalf of" retail investors 10

C. Investment firms (including members of Healthy Markets Association) acting "on behalf of" actual investors and beneficiaries support the D-Limit rule 13

II. Citadel misdescribes what a D-Limit order actually does and how it differs from CboeEDGA's proposed rule 17

A. Citadel's analogy to a grocery conveyer belt is flawed 18

B. The idea behind IEX and the D-Limit rule is to limit high-speed, predatory trading 19

1. Purpose 20

2. Automation and certainty 22

3. Quote accessibility 22

Summary 24

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Eldred v. *Reno*,
239 F.3d 372 (D.C. Cir. 2001),
aff'd sub nom. Eldred v. *Ashcroft*, 537 U.S. 186 (2003) 4

In re Barclays Liquidity Cross & High-Frequency Trading Litig.,
126 F. Supp. 3d 342 (S.D.N.Y. 2015) 6, 7, 10

In re Citadel Sec. LLC,
No. 3-17772 (SEC Jan. 13, 2017),
at https://tinyurl.com/s4tnxuay (visited Apr. 11, 2021) 11

In re NYSE Specialists Sec. Litig.,
503 F.3d 89 (2d Cir. 2007) 6

Michel v. *Anderson*,
14 F.3d 623 (D.C. Cir. 1994) 4

Regulations **Page(s)**

17 C.F.R. § 242.610 22

17 C.F.R. § 242.611 8

Rules **Page(s)**

Fed. R. App. P. 29 1

D.C. Cir. R. 29 iv

Other authorities **Page(s)**

Better Markets,
Our Impact,
at https://tinyurl.com/jpd9jm2b (visited Apr. 11, 2021) iv

Cox, James D., *et al.*,
SECURITIES REGULATION: CASES AND MATERIALS (2020) 2

Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, *Hearing Before the House Committee on Financial Services*, 117th Cong. (Feb. 18, 2021) (Statement of Kenneth C. Griffin, Founder and CEO of Citadel and Founder and Principal Shareholder of Citadel Securities),
at https://tinyurl.com/zd8mfvv (visited Apr. 8, 2021)..................10, 11

LEWIS, MICHAEL,
FLASH BOYS: A WALL STREET REVOLT (2014)...................................9, 12

Osipovich, Alexander,
High-Frequency Traders Eye Satellites for Ultimate Speed Boost,
WALL ST. J., Apr. 1, 2021,
at https://tinyurl.com/762k47za (visited Apr. 8, 2021).......................14

SEC,
Concept Release on Equity Market Structure (Jan. 14, 2010),
at https://tinyurl.com/2na2u4pn (visited Apr. 4, 2021) 10

XTX Markets,
at https://tinyurl.com/3zpsxw9v (visited Apr. 11, 2021)......................iv

Zero-fee trading helps Citadel Securities cash in on retail boom,
FINANCIAL TIMES, June 21, 2020,
at https://tinyurl.com/5nk3j7jc (visited Apr. 9, 2021).........................12

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the briefs for Citadel Securities LLC, IEX, and the SEC.

STATEMENT OF *AMICUS CURIAE*'S IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Launched in September 2015, *amicus curiae* Healthy Markets Association is an investor-focused nonprofit coalition that provides independent information and analysis to investors and regulators so as to promote transparency, reduce conflicts of interest, and ultimately reduce the costs of trading for investors.[1]

Healthy Markets members manage the retirement savings of millions of North Americans (including U.S. and Canadian pensions and asset managers with trillions of dollars in assets under management).[2] In

---

[1] All parties and intervenor have consented to *amicus* filing this brief. Citadel Securities further noted that it "consents to the filing of [this] brief, but reserves the right to object absent a sufficient showing in the certificate of counsel that this *amicus* brief is sufficiently distinct" from those being filed by the public-interest group Better Markets and the liquidity provider XTX Markets LLC. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

[2] The buyside members include the Arizona State Retirement System, Brandes Investment Partners, CalPERS, Colorado PERA, Federated Hermes, The London Company of Virginia, Macquarie Investment Management, OMERS, PSP Investments, Quantitative Investment Management, Sands Capital, and the State of Wisconsin Investment Board. Collectively, those investment fiduciaries control the retirement accounts of millions of Americans and currently have trillions of dollars in assets under management.

addition, Healthy Markets also has working group members (including leading brokers, data and technology providers, and execution venues).[3] Its staff and board include a former senior SEC official, current and former senior industry officials, and a securities regulation law professor.[4] It is frequently invited to opine in congressional testimony, regulatory panels, industry events, and the press. In doing so, Healthy Markets often submits comment letters in agency rulemaking proceedings, and regulators have cited its work hundreds of times in proposed and final rules.[5]

Healthy Markets is keenly interested in this case because it submitted two comment letters against CboeEDGA's competing proposal[6] and two letters in support of IEX's D-Limit proposal. *See* Docs. 27; 48. As

---

[3] Its working group members include Barchart, Bloomberg LP, BMO Capital Markets, DTN, LLC, Investors Exchange, IHS Markit, Maystreet, Miax, Minneapolis Grain Exchange, LLC, and UBS Securities, LLC.

[4] *See* James D. Cox *et al.*, SECURITIES REGULATION: CASES AND MATERIALS (2020).

[5] All positions taken by Healthy Markets Association are taken by the organization itself and may not be reflective of specific interests or positions of any individual member.

[6] *See* Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Vanessa Countryman, Acting Secretary, SEC (July 16, 2019), *at* https://tinyurl.com/7bpvu2du (visited Apr. 8, 2021); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Vanessa Countryman, Acting Secretary, SEC (Oct. 21, 2019), *at* https://tinyurl.com/5ayvp98z (visited Apr. 8, 2021).

explained in great detail in those letters, Healthy Markets asserted CboeEDGA's proposed rule violated the Exchange Act and SEC regulations and wouldn't reduce abusive trading practices that harm investors. In contrast, Healthy Markets argued IEX's D-Limit rule was compliant and would protect investors.

Now that Citadel Securities has challenged the D-Limit rule in this Court and asserted CboeEDGA's proposed rule was treated inconsistently, Healthy Markets must once again explain how the SEC properly distinguished them. Further, as discussed below, several buyside members of Healthy Markets' have joined several dozen other pension funds and asset managers to similarly support IEX's D-Limit rule and contrast it from the CboeEDGA's proposed rule. Healthy Markets has a unique point of view that necessitates its own brief because its membership comprises leading pensions and asset management companies, brokers, data and technology providers, and execution venues.

ARGUMENT

Finance and securities regulation aren't easy, they're hard. Even for the pros, it can be all too easy to get tied up in details and miss the forest for the trees. To that end, instead of recasting the litigants'

argument about how to interpret statutes, regulations, or case law in different terms or injecting new issues altogether,[7] this brief seeks to draw the Court's attention to the big picture: investors are concerned with predatory trading, and IEX's D-Limit is designed and intended to protect them. To flesh out that picture, this brief provides some historical context regarding how the regulatory environment unwittingly created a kill zone for high-frequency traders and seeks to clarify two discrete points. First, Citadel Securities doesn't trade "on behalf of" retail investors. Second, Citadel Securities misdescribes what D-Limit orders actually do and how IEX's proposed rule differed from CboeEDGA's proposed rule.

I. Citadel doesn't trade "on behalf of" retail investors

No fewer than nine times in its brief, Citadel Securities asserts it trades "on behalf of" retail investors. Citadel Br. 3, 15, 20, 26, 30, 33, 34, 38. But that's not even remotely true. As explained herein, Citadel

[7] For instance, it wouldn't make sense to inject a new issue the petitioner didn't even raise, such as arguing the SEC altered Regulation NMS in violation of the Administrative Procedures Act (*see* Vollmer Br. 11-16), because *amici* can't inject new issues the parties aren't already litigating. *Eldred* v. *Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (*amici* can't expand scope of appeal to implicate issues parties didn't raise), *aff'd sub nom. Eldred* v. *Ashcroft*, 537 U.S. 186 (2003); *Michel* v. *Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) ("[o]rdinarily, we would not entertain an *amicus*' argument if not presented by a party"); *see also* SEC Br. 59 n.17.

Securities trades "on behalf of" retail investors exactly and precisely to the same extent that a scalper transacts business "on behalf of" a sports or music fan.

That's because Citadel Securities is a market maker that *purchases* order flow from brokers and then trades *against* those retail orders in arms' length transactions in the same way that scalpers sets up shop on a street corner to trade *against* the buy and sell orders of fans. Citadel Securities has no contractual relationship to retail investors. Indeed, Citadel Securities doesn't even *communicate* with retail investors, much less represent them or act on their behalf. But to appreciate why and how that is, one must first understand how the regulatory environment changed since the 1980s to dictate how the stock market works. So that's where our story begins.

A. Automated trading, the proliferation of multiple exchanges with potentially different stock prices, and order-routing rules have unintentionally created a kill zone for high-speed traders

Since the 1980s, regulators have accelerated the automation of trading (to promote efficiency), allowed multiple exchanges and dark pools with potentially different stock prices to proliferate (to promote competition), and defined rules about how orders are sliced up and routed

(to ensure orders are executed at best prices). Unfortunately, these well-intentioned regulatory moves have had the unintended consequence of creating a fertile hunting ground for high-speed, predatory traders to profit at the expense of slower-moving, long-term investors.

One of the major drivers of the reforms was competition. In the late 20th century, many investors and brokers were concerned with trading abuses at the then-dominant trading centers. For example, many investors were concerned that market makers or specialists would self-deal by getting in the middle of trades. *See, e.g., In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 93 (2d Cir. 2007) (discussing civil litigation, SEC enforcement proceedings, and criminal prosecutions concerning NYSE specialists who had engaged in self-dealing by interpositioning, trading ahead, freezing the book, and manipulating the tick).

Regulators responded to these concerns by seeking to promote competition amongst trading centers. Regulation ATS (short for Alternative Trading Systems) and the demutualization of exchanges, amongst other reforms, promoted competition for trading venues and led to the proliferation of multiple public exchanges and dozens of dark pools. *See In re Barclays Liquidity Cross & High-Frequency Trading Litig.*, 126

F. Supp. 3d 342, 349 (S.D.N.Y. 2015) ("In 1998, in response to the growth of trading over electronic platforms and other emerging technologies, the SEC authorized electronic platforms to register as national exchanges." (citing Regulation of Exchanges and Alternative Trading Systems, SEC Release No. 34-40760, 63 Fed. Reg. 70844 (Dec. 22, 1998)). Today, there are 24 national securities exchanges (*e.g.*, NYSE, Nasdaq, BATS, IEX, etc.), and dozens private exchange-like venues (also called dark pools), often run by large financial institutions such as Goldman Sachs, Credit Suisse, and others.

This competition, however, has exacerbated a long-standing problem for investors and their brokers: identifying where they may obtain the best available prices. Although brokers are required generally to seek out the best available prices for their customers under the circumstances, what prices those brokers see is often a function of where they look. An investor wanting to buy 1,000 shares of stock who looks at NYSE may see a price of $10 per share, but one who looks at Nasdaq may see a price of $9.98 per share.

Regulators wanted to make sure customers could get the benefit of better available prices, wherever those prices may be. As a result, the

SEC adopted the Order Protection Rule, which essentially commands exchanges to adopt policies reasonably designed to avoid executing orders at prices that are inferior to protected quotes that are available on other exchanges, and route orders to those exchanges offering the best-displayed price.[8] 17 C.F.R. § 242.611.

Combined, these rules were intended to help investors obtain better prices for trading, without the risks of market makers from exchanges exploiting their privileged positions. And in some ways, this worked.

But this regulatory environment also created a fertile hunting ground for high-speed traders. By proliferating many different venues with potentially varying prices, regulators gave an advantage to any trader that could identify and trade based on the price differences between the different venues. Such a trader, in a split second, can earn

---

[8] Rule 611 was adopted to essentially provide teeth to the SEC brokers' longstanding requirements to seek "best execution" for their customers. But the often nebulous standard for "best execution" often afforded brokers too much discretion, frequently resulting in brokers' customers receiving prices inferior to those available at major market centers, like exchanges. Rule 611 applies only to so-called "protected quotations," which generally concern only those orders on exchanges for 100 shares or more. *See* Letter from Dave Lauer, Chairman, Healthy Markets Association to Brent J. Fields, Secretary, SEC (Feb. 26, 2016), *at* https://tinyurl.com/bcn4w7cm (visited Apr. 8, 2021).

instant profits by buying on one exchange at a lower price before racing to the next exchange to sell it at a higher one. That race, often called latency arbitrage, amounts to a significant tax on large, slower-moving investors like pensions and asset managers, which often want to trade hundreds of thousands of shares at a time:

> To illustrate how stupid routing can be, say you have told your Wall Street broker—to whom you are paying a commission—that you wish to buy 100,000 shares of Company XYZ at $25 and now, conveniently, there are 100,0000 shares for sale at $25, 10,000 on each of ten different exchange, all of which will charge the broker to trade on your behalf (though far less than the commission you have paid to him). There are, however, another 100 shares for sale, also at $25, on the BATS exchange—which will pay the broker for the trade. The sequential cost-effective router will go first to BATS and buy the 100 shares—and cause the other 100,000 shares to vanish into the paws of high-frequency traders (in the bargain relieving the broker of the obligation to pay to trade). The high-frequency traders can then turn around and sell the shares of Company XYZ at a higher price, or hold onto the shares for a few seconds more, while you, the investor, chase Company XYZ's shares even higher. In either case, the result is unappealing to the original buyer of Company XYZ's shares.

MICHAEL LEWIS, FLASH BOYS: A WALL STREET REVOLT 75-76 (2014).

Put simply, high-speed traders now use "computer-driven algorithms to rapidly move in and out of stock positions, faster than the blink of an eye making money by arbitraging small differences in stock prices—often across different exchanges—rather than by holding the stocks for

an appreciable period of time." *In re Barclays*, 126 F. Supp. 3d at 349; *accord* SEC, *Concept Release on Equity Market Structure* (Jan. 14, 2014), *at* https://tinyurl.com/2na2u4pn (visited Apr. 4, 2021).

B. As a market maker, Citadel Securities doesn't trade "on behalf of" retail investors

Throughout its brief, Citadel Securities repeatedly complains the definition of latency arbitrage is nebulous. Citadel Br. 19, 25, 34, 39. But it really isn't necessary for IEX, the SEC, or the Court to define latency arbitrage with precision here.[9] Instead, it's enough simply to understand how Citadel Securities actually makes money from so-called retail orders.

As mentioned, Citadel Securities repeatedly asserts it is trading "on behalf of" retail investors. Citadel Br. 3, 15, 20, 26, 30, 33, 34, 38. Similarly, in a recent hearing of the House Committee on Financial Services, Citadel's CEO testified that his firm "executes more trades on behalf of retail investors than any other firm." *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide*, *Hearing Before the House Committee on Financial Services*, 117th Cong. (Feb. 18, 2021) (Statement of Kenneth C. Griffin, Founder and CEO of

---

[9] Of course, the SEC did give more than adequate consideration to the existence of latency arbitrage on IEX. *See* SEC Br. 27-29.

Citadel and Founder and Principal Shareholder of Citadel Securities), *at* https://tinyurl.com/zd8mfvv (visited Apr. 8, 2021).

But that's wrong, because Citadel Securities is a market maker. Not only does Citadel Securities have no customer or contractual relationship with the broker's retail clients, they have no communication with them either. *See In re Citadel Sec. LLC*, No. 3-17772, at 10 n.14 (SEC Jan. 13, 2017) (ordering Citadel Securities to pay $5.2 million disgorgement, $1.5 million prejudgment interest, and $16 million fine while observing it "did not have direct communications with the retail customers who placed orders with [its] retail broker-dealer clients"), *at* https://tinyurl.com/s4tnxuay (visited Apr. 11, 2021). Instead, Citadel Securities purchases retail order flow from brokers and other than an order to buy or sell said stock, no personal identifying information from the broker is shared with Citadel on those stock orders. And rather than being on the same side of a transaction as retail customers, Citadel Securities pays for the privilege of having the opportunity to trade *against retail orders*.

Brokers, such as Robinhood or Charles Schwab, are the ones who have the actual relationships with retail customers. They have customer agreements, names, and contact information. They have "know your

customer" obligations and have detailed regulatorily and contractually imposed obligations to those retail customers.

Modern market makers like Citadel Securities, in contrast, do not have any relationship with retail investors, but instead have relationships with the brokers.[10] Citadel doesn't know who the retail brokers' customers are, much less have any explicit contractual relationship with them. Rather, "Citadel Securities pays hundreds of millions of dollars [to brokerages like Charles Schwab] for this [retail] order flow and makes money by automatically taking the other side of the order, then returning to the market to flip the trade." *Zero-fee trading helps Citadel Securities cash in on retail boom*, FINANCIAL TIMES, June 21, 2020, *at* https://tinyurl.com/5nk3j7jc (visited Apr. 9, 2021); *see also* LEWIS, *supra*, at 107-12 (describing hypothetical with Scalpers Inc.).

None of Citadel's trades are "on behalf of" retail customers. Citadel is either taking the opposite side of customers' trades or routing them elsewhere for execution.

---

[10] Historically, market makers undertook market risk because they'd need to hold positions for appreciable periods of time in order to provide liquidity to investors. But high-frequency traders take no market risk because they take no positions. Instead, they hold stocks for mere microseconds and make money through volatility and fragmentation.

Now, Citadel Securities undoubtedly excels at what it does. But it takes a breathtaking amount of chutzpah to claim that you speak on behalf of your direct counterparty in a zero-sum game. In other words, when Citadel Securities claims it is acting only "on behalf of" retail investors, it has all the gravitas of Sylvester the Cat claiming innocence while Tweety's tailfeathers are hanging out of his mouth.

C. Investment firms (including members of Healthy Markets Association) acting "on behalf of" actual investors and beneficiaries support of the D-Limit rule

By contrast, pension funds and asset managers, including members of Healthy Markets Association, who do, as a matter of law, act "on behalf of" actual investors and beneficiaries (*e.g.*, servicemen and servicewomen, teachers, firefighters, policemen and government employees) are concerned with high-speed, predatory trading practices. That's why dozens of pension funds and asset managers, collectively overseeing trillions of dollars for their customers and beneficiaries, have expressed support for the D-Limit rule.

Unlike high-speed traders, pensions and asset managers generally aren't in the business of building technological infrastructure to make trading decisions measured in nanoseconds (*i.e.*, billionths of a second).

Instead, these investment fiduciaries are generally trying to make wise investment allocation decisions to best grow and protect assets for their millions of customers and beneficiaries. Pensions and asset managers generally lack the resources and expertise to engage in the technological arms race for trading speed that rapidly moved from telephone lines, to cables, to microwave towers, to lasers, and soon, to space. Alexander Osipovich, *High-Frequency Traders Eye Satellites for Ultimate Speed Boost*, WALL ST. J., Apr. 1, 2021, *at* https://tinyurl.com/762k47za (visited Apr. 8, 2021). Institutional investors are often the victims of high-speed predatory trading strategies, which is why they have been so vocal about supporting efforts to combat latency arbitrage, and have expressed such strong support IEX's D-Limit order type. *See, e.g.*, Docs. 18, 30, 31, 33.

For instance, several Healthy Markets Association members (the Arizona State Retirement System, CalPERS, the State of Wisconsin Investment Board, and OMERS, which collectively have over $700 billion in assets under management) joined a comment letter that argued to the SEC that the D-Limit order type "is narrowly-tailored to protect against latency arbitrage without preventing access to liquidity by investors and their brokers." Doc. 33 at 2.

Another Healthy Markets Association member, Brandes Investment Partners, joined several investment advisers and pensions in a letter that argued "IEX's innovations generally seek to deemphasize the importance of speed, and so seek to level the playing field, particularly for the institutional investment community." Doc. 31 at 2. They noted their close familiarity with "IEX's Discretionary Peg order and the Crumbling Quote Indicator, which already assist us and other investors in accessing liquidity at the market midpoint." *Id.*

Yet another Healthy Markets Association member, The London Company of Virginia, sent a letter that described D-Limit as "a displayed order that adjusts to a less aggressive price when the CQI is on, avoiding trading during brief moments of market instability when latency arbitrage strategies take advantage of participants not fast enough to move out of the way and avoid trading at potentially stale prices." Doc. 30 at 1. As a result, it believed the implementation of D-Limit "will both result in better performance for orders handled by our brokers that provide displayed liquidity and encourage more displayed trading across the board from all participant types." *Id.* at 1-2. It also noted that although D-Limit orders were "designed to avoid executions when the NBBO is predicted

to crumble," any "liquidity displayed with D-Limit orders will be accessible throughout the day for all non-latency arbitrage strategies, with the IEX signal firing for mere seconds of the trading day." *Id.* at 2.

Lastly, T. Rowe Price (which has over $1 trillion in assets under management) submitted a letter that "commend[ed] and support[ed] IEX for taking steps to address the speed and information asymmetry advantages that are utilized by a small subset of market participants to the disadvantage of asset managers and other institutional investors." Doc. 18 at 1. As T. Rowe Price explained, "Adverse selection risk disincentiv[iz]es liquidity provision, which ultimately reduces price discovery." *Id.* Further, that disincentive "continues to plague displayed markets" because all market participants "fear" to provide displayed quotes lest they get "'picked off' when the price of a security is in transition to a new price level." *Id.* It further noted that, "More importantly, institutional order routing is even less impacted by D-Limit since institutional order 'taking' strategies are driven by a fundamental demand for liquidity and are not intentionally seeking to trade while the CQI is 'on.'" *Id.* at 2. That's because "institutional orders on IEX typically occur before IEX's systems predict a quote change is imminent—consequently, these orders

will be able to access the liquidity they see before the CQI changes to 'on.'" *Id.* In short, D-Limit "seeks to limit reactive strategies used by a small subset of proprietary trading firms that invest in high speed infrastructure to predict price changes, leverage small latency advantages, and opportunistically trade against stale quotes." *Id.*

These investment firms with fiduciary obligations to their customers and beneficiaries, not Citadel, are acting on behalf of investors.

II. Citadel misdescribes what a D-Limit order actually does and how it differs from CboeEDGA's proposed rule

Toward the beginning of its brief, Citadel Securities uses an analogy to explain how D-Limit orders work:

> To put it in practical terms, imagine a grocery store that has deliberately installed extra-long conveyor belts on its checkout lines. After you've committed to buy your items at the advertised price by placing them on the belt, the store uses the extra time required to traverse the belt to determine whether any item that was available at the same price at competitors' stores has sold out. If so, the store's computers quickly raise its own price before your item reaches the cashier. You can either pay the higher price or try to find the item elsewhere.

Citadel Securities Br. 1. But the analogy is flawed and obscures key differences between IEX's proposal and CboeEDGA's proposal.

A. Citadel's analogy to a grocery conveyer belt is flawed

The grocery conveyer belt hypothetical is the wrong way to think about how D-Limit orders would work. That's because it casts the grocer in the role of both the investor and the exchange. And it also suggests the repricing is occurring *because* the item was placed on the conveyer belt, when it reality the repricing has occurred because of external events.

A better example is to imagine a farmer (the investor) trying to sell tomatoes through a grocers' stand (an exchange) operated within a farmers market (the national market system). Ordinarily, the grocers' stand would sell his tomatoes at the market price he set. Periodically, the farmer checks the other stands to make sure the prices for his tomatoes are consistent with the market price at all the other grocers' stands. Sometimes, however, he's noticed the market price for tomatoes crumbles, and the other grocers' stands start selling their tomatoes at a higher price. He doesn't want to sell his tomatoes for a below-market price, but he also doesn't have the quickness to run from the other grocers' stands to correct his prices in time.

This is a problem because one of the customers who has a hankering for tomatoes and arbitrage, let's call him Flash (a high-speed trader),

immediately buys his tomatoes from whatever grocers' stand still has stale prices. As it happens, however, the grocers' stand offers a service: when its proprietary technology determines that the price of tomatoes is about to crumble at the other grocers' stands, it'll automatically update the prices of the tomatoes without the farmer having to lift a finger (a D-Limit order). That way, he won't be selling his tomatoes to Flash at a stale price. (And it's also exactly what the farmer would do on his own, if only he had the quickness to do it, and it's what Flash already does himself when prices move the wrong way on him.)

B. The idea behind IEX and the D-Limit rule is to limit high-speed, predatory trading

During proceedings before the SEC, Healthy Markets Association explained why D-Limit orders would comply with the Exchange Act and SEC rules, unlike the different CboeEDGA proposal. *See* Docs. 27; 48.

At the outset, Healthy Markets noted that the SEC had "previously permitted IEX to offer order types that will not execute during the periods when the CQI is 'on.'" Doc. 27 at 3. Additionally, Healthy Markets noted the SEC had "previously permitted exchanges to reprice orders based on the exchanges' determinations that the NBBO has changed." *Id.* The novelty about the D-Limit proposal was that the SEC was being

asked "to permit the exchange to reprice orders based upon the exchange's determination that the NBBO is about to change." *Id.* However, just like the long-permitted peg order types, the D-Limit order type works the same for everyone, doesn't introduce any broker or exchange optionality, and is in line with order types that the SEC has permitted for decades. In contrast, the CboeEDGA proposal sought to impose an asymmetric delay on liquidity taking orders, which would have necessitated "a very unique regulatory treatment, including exemptions from several different existing SEC rules and interpretations." *Id.* at 5.

Healthy Markets focused on three key questions: (1) what was the purpose; (2) whether the action was automatic and certain or discretionary; (3) the predicted impact on quote accessibility. *Id.* at 6.

1. Purpose

Healthy Markets observed that CboeEDGA's proposal asymmetric delay of four milliseconds was both too long and too short. For high-frequency traders, it was "effectively an eternity." *Id.* at 7. But at the same time, for most market participants, it was "an extremely short period of time." *Id.* Thus, it "would effectively benefit only those with significant geographical and informational advantages, as well as extensive

predictive analytical capabilities." *Id.* In other words, high-frequency traders would have impunity to offer extremely aggressive phantom quotes on the exchange, without fear of having to actually ever execute at those prices. *Id.* As such, CboeEDGA's purpose seemed to be "to (1) provide misleadingly attractive prices that are unlikely to result in executions, and (2) offer opportunities for ultra-low latency traders to lure other market participants into revealing their trading intentions." *Id.*

By contrast, Healthy Markets argued, the D-Limit order essentially sought to recreate for all market participants on IEX a market function that high-frequency traders were already able to perform on other market venues. For instance, based on their geographical and informational advantages, as well as their predictive analytics, high-frequency traders would cancel, reprice, and engage in other actions. *Id.* Now, when combined with IEX's 350 microsecond speed bump and CQI, D-Limit orders would thus provide narrowly targeted protection by repricing its orders on behalf of the Member during those periods when its CQI predicts the market may be moving—but without the need for the Member to have any geographical or informational advantages or its own predictive analytical capabilities. *Id.*

2. Automation and certainty

Healthy Markets observed that CboeEDGA's proposal "would essentially provide all market participants with resting orders a free option to modify or cancel their orders before execution," but that option was mostly illusory because it "could practically be utilized by only ultra-low latency traders." *Id.* at 8. Regardless, the option would introduce "uncertainty for the outcomes" because "[s]ometimes a liquidity taking order would receive an execution, and other times it would not." *Id.*

In contrast, the D-Limit orders were not optional. "When the CQI triggers, the orders would reprice—100 percent of the time." *Id.* Plus, the process for when the CQI triggers was transparent and codified in the IEX rulebook. *Id.* Thus, the D-Limit was both deterministic and transparent. *Id.*

3. Quote accessibility

Because the CboeEDGA proposal would apply throughout the trading day, it would essentially provide high-frequency traders with the option to "fade" their quotes all day long. By definition, that would dramatically reduce the accessibility of all quotes on the exchange, rendering it inconsistent with the Quote Rule. *See* 17 C.F.R. § 242.610(a).

In contrast, D-Limit orders would move the price levels only during the 1.64 seconds per symbol per day the CQI was triggered. Doc. 27 at 8. Facially, that is not a significant negative impact on the overall accessibility of quotes on IEX.

Further, Healthy Markets observed that IEX had offered a meaningful analysis of the trading on its exchange, including when the CQI is on. This analysis demonstrated that full-service and agency broker dealers accessing the exchange do not appear to be submitting aggressive orders to IEX based upon their anticipation of a particular price change (as determined by the triggering of the CQI). *Id.* By contrast, IEX's analysis demonstrated that proprietary trading firms tend to submit substantial percentages of their orders immediately before and shortly after the triggering of the CQI, which suggests strongly that these traders are looking to "pick off" orders based on those firms' own determinations that the markets are about to, or are in the process of, moving. *Id.* Institutional traders seeking to access liquidity on IEX would thus continue to be able to access orders the vast majority of the trading day. *Id.*

Summary

At root, Citadel Securities is attempting to cloak itself in the name of investors to argue directly against the interests of those who actually do trade "on behalf of" millions of American families and businesses. But that's a flimsy disguise, and the Court should see through it.

CONCLUSION

For the foregoing reasons and those in the SEC's, IEX's, Better Markets', and XTX Markets LLC's briefs, the petition should be denied.

Respectfully submitted,

/s/ Thomas Burns

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

Counsel for amicus curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rules of Appellate Procedure 29(a)(5)'s and 32(a)(7)(B)'s type-volume requirements. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 4,941 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

April 12, 2021

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and eight copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 12th day of April, 2021, to:

Mark Langer, Clerk of Court
U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, DC 20001

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 12th day of April, 2021, to all counsel of record.

April 12, 2021

/s/ Thomas Burns
Thomas A. Burns