ORAL ARGUMENT SCHEDULED FOR MAY 15, 2025
No. 24-1350

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

CBOE GLOBAL MARKETS, INC., CBOE BZX EXCHANGE, INC., CBOE BYX EXCHANGE, INC., CBOE EDGA EXCHANGE, INC., CBOE EDGX EXCHANGE, INC., NASDAQ, INC., THE NASDAQ STOCK MARKET LLC, NASDAQ BX, INC., and NASDAQ PHLX LLC,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF OF HEALTHY MARKETS ASSOCIATION, COUNCIL OF INSTITUTIONAL INVESTORS, AND AMERICAN SECURITIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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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, *amici*, ruling under review, and related cases.

Parties and amici

Petitioners: Cboe Global Markets, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Nasdaq, Inc., The Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC.

***Amicus curiae* for petitioners:** Securities Industry and Financial Markets Association.

Respondent: U.S. Securities and Exchange Commission.

***Amici curiae* for respondent:** (1) Investors Exchange LLC; (2) Better Markets, Inc.; (3) Prof. J.W. Verret; (4) We the Investors and Urvin Finance, Inc.; and (5) Healthy Markets Association, Council of Institutional Investors, and American Securities Association.

Ruling under review

Petitioners seek review of the SEC's rule, entitled "Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Release No. 34-101070, 89 Fed. Reg. 81620.

Related cases

Amici are unaware of any related cases before this Court or any other Court.

March 25, 2025

/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), *amici curiae* Healthy Markets Association, Council of Institutional Investors, and American Securities Association submit 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.

Council of Institutional Investors is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $5 trillion. It has no parent corporation, and no publicly held company has 10% or greater ownership in it.

American Securities Association is trade association that exclusively represents the wealth management and capital markets interests of regional financial services firms. It has no parent corporation, and no publicly held company has 10% or greater ownership in it.

March 25, 2025

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COUNSEL

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that separate briefing is necessary. *Amici* are aware of several other *amici* briefs in support of respondent. *See* D.C. Cir. R. 29(d). But *amici* submit their brief from the perspectives of finance industry associations that represent pensions and assets managers along with leading brokers, data and technology providers, and execution venues (Healthy Markets Association), regional financial services firms (American Securities Association), and employee benefit funds (Council of Institutional Investors). In contrast, other *amici* have already submitted briefs on behalf of entities or individuals with different perspectives, such as Investors Exchange LLC (a securities exchange that doesn't offer rebates), Better Markets, Inc. (a public-interest entity), Prof. J.W. Verret (a law professor), and We the Investors and Urvin Finance, Inc. (a finance-focused social platform and community for retail investors).

March 25, 2025

/s/ Thomas Burns
Thomas A. Burns

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the petitioners' and the Commission's briefs.

STATEMENT OF *AMICI CURIAE*'S IDENTITIES, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

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] Its 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 addition, it also has working group members (including leading brokers, data and technology providers, and execution venues).[3] Its staff and board include a former senior official of the

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[1] All parties have consented to *amici* filing this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their members or counsel made any monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). All of *amici*'s positions are taken by the organizations themselves and may not reflect individual members' specific interests or positions.

[2] HMA's buyside members include the Arizona State Retirement System, Brandes Investment Partners, CalPERS, Colorado PERA, The London Company of Virginia, Sands Capital Management, 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.

[3] HMA's working group members include Bloomberg LP, BMO Capital Markets, Investors Exchange LLC, Minneapolis Grain Exchange, MIAX, and Truvid.

Commission, current and former senior industry officials, and two leading securities regulation law professors. It frequently opines by invitation in congressional testimony, regulatory panels, industry events, and the press, often submits comment letters in agency rulemaking proceedings (which regulators' proposed and final rules have cited hundreds of times), and routinely submits *amicus* briefs in major securities regulation cases.

American Securities Association is a trade association that represents the retail and institutional capital markets interests of regional financial services firms that provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. Its mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. Its geographically diverse membership of almost 100 entities spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest.

Council of Institutional Investors is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with total assets under management of approximately $4 trillion. Its member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants—*i.e.*, true "Main Street" investors. Its associate members include non-U.S. asset owners with about $4 trillion in assets and a range of asset managers with more than $40 trillion in assets under management.

Amici are keenly interested in this case because they submitted multiple comment letters that addressed the strengths and weakness they perceived in the Commission's proposed rule amendments. *See* JA__ (HMA.2023.08.01); JA__ (HMA.2023.03.31); JA__ (ASA.2023.03.31); JA__ (CII.2023.03.31); JA__ (ASA.2023.02.08). As explained in greater detail in those letters, *amici* believe the Commission acted reasonably and within its statutory authority when it adopted the Regulation NMS amendments, including the amendments to Rule 610's access-fee cap, *see* 17 C.F.R. § 242.610, Rule 611's order-protection rule, *see* 17 C.F.R. § 242.611, and Rule 612's sub-penny tick rule, *see* 17 C.F.R. § 242.612.

ARGUMENT

I. For years, investors clamored for the Regulation NMS amendments, the Commission had authority to adopt them, and the numbers it chose (*e.g.*, a half penny tick and 10 mils) were based upon robust data and investor comments

Investors had long sought the Regulation NMS amendments, the Commission had statutory authority to adopt them, and the numbers it reasonably chose (*i.e.*, a half-penny tick and 10 mils) were based upon robust data, including investors' comments.

A. Investors wanted the Regulation NMS amendments

Investors clamored for the Regulation NMS amendments for years. For example, CII had "long raised concerns that the structure of stock exchange access fees and rebates may present conflicts of interest for broker-dealers affecting their order routing decisions and lowering the execution quality for institutional investors." JA__ (CII.2023.03.31). And HMA "share[d] the general objectives and intentions of the four Proposals, many of which relate to issues we have been urging the Commission to address for years." JA__ (HMA.2023.03.31).

1. Healthy Markets Association's comment letters supported the tick-size and access-fee rules

HMA submitted two comment letters. JA__ (HMA.2023.08.01); JA__ (HMA.2023.03.31). Relevant here, it recommended "significantly" revising the tick-size and access-fee rules to "reduce the complexity and implementation risks." *Id.* at 2. Generally, it "agree[d] with the Commission that (1) quotation increments should be narrower on the majority of NMS stocks, and (2) trading increments should be standardized across all trading venues, including ATSs and OTC market makers." *Id.* at 18. That was because many sub-penny transactions were taking place off exchanges through over-the-counter market makers. *Id.* at 19. Thus, it recognized that "artificially wide ticks may materially harm investors," whereas "narrowing them could help investors." *Id.* And it observed that all dominant exchanges (NYSE, Cboe, and Nasdaq) had "supported narrower quotation increments under different circumstances." *Id.*

Ultimately, "[b]y leveling the playing field between these different trading venues, the proposal would have significant implications for on- and off-exchange execution prices and volumes." *Id.* at 21. But it "vigorously disagreed" that limiting new tick increments to accepting, ranking, and quoting but not to trading would advantage investors. *Id.* Instead, it believed such a scheme would "simply preserve existing market distortions that segment order flow away from transparent trading centers, provide investors with immaterial "price improvement," and often leave investors with inferior-priced executions." *Id.*

As for access fees, it asserted, "the current fee levels foster and enable significant market distortions in today's marketplace." *Id.* That's because exchanges' access fees "often serve as powerful disincentives for market participants to access that liquidity" and incentivize brokers to "internalize or first route to ATSs or OTC market makers, rather than to exchanges with their customers' orders." *Id.* at 21–22. And those dynamics weren't surprising given brokers' conflicts of interest between customers' best execution, avoiding fees, and chasing rebates: there's "inexplicably no explicit prohibition on brokers' consideration of fees (and avoidance) in their agency routing decisions." *Id.* at 22. Thus, given "significant fee disparities between exchanges and off-exchange trading venues, many brokers' financial incentives often push them towards routing to off-exchange venues, or exchanges with which they may have customized, discounted transaction fees." *Id.*

Also, it observed exchanges' access fees were exorbitant, "often far in excess of those necessary to maintain the operations of the exchange." *Id.* That's because they're "often used to subsidize exchanges' rebates to brokers." *Id.* Alas, those rebates "often explicitly favor the largest volume customers of the exchanges, despite the Exchange Act's express prohibition on exchanges having rules that would provide for inequitable fees, create undue burdens on competition, or be discriminatory." *Id.* And with some exasperation, it reiterated that it had "repeatedly urged the Commission to adopt rules to prohibit brokers from factoring exchange fees and rebates into their routing decisions." *Id.*

Nevertheless, it rejected the notion that access-fee caps would indirectly limit rebates. *Id.* at 23. That may have been true "a decade ago, when the rebates were consistently materially lower than the fees collected on the same transactions." *Id.* But today, it was "no longer consistently the case." *Id.* Rather, "it is clear that a cap on access fees is not a cap on rebates, as is plainly demonstrated by numerous exchange filings that the Commission staff has permitted to go into effect over the past several years." *Id.* That's because exchanges' "fees for connectivity and market data fees products have skyrocketed," and those revenue streams have allowed them to "adopt[] rebates to some customers that already materially exceed the fee caps." *Id.* "Put simply, exchanges are already subsidizing trading by some of their largest volume trading customers with not just the transaction fees of other customers, but also other customers' market data and connectivity payments." *Id.*

It also explained that access-fee caps might reduce without eliminating brokers' conflicts of interest, but "would not address the significant and material competition issues among broker members that the current pricing system imposes." *Id.* So long as the Commission "does nothing to restrict preferential and tiered pricing, and only lowers the fee caps, a larger volume broker or principal trader will still have a very significant competitive advantage over its smaller competitors." *Id.* And it sharply criticized "custom-negotiated" fee schedules as contrary to the Exchange Act. *Id.* at 23–24 n.71.

Finally, it urged the Commission to adopt a 10 mils fee cap "regardless of the quotation and trading increments selected." *Id.* This change, among others, was a "a once-in-a-generation opportunity to materially improve U.S. equity market structure." *Id.* at 31.

In a second letter, the Healthy Markets Association further criticized exchanges' discriminatory pricing tiers for access fees and rebates. JA__ (HMA.2023.08.01). It connected those practices to access-fee caps: "the vast majority of rebates appear to be funded by the transaction fees assessed on the other sides of the trade," so "rebates tend not to materially exceed that level for most brokers." *Id.* at 13. Given that reality, "if the Commission lowers the transaction fee cap, as it has proposed, the absolute difference in rebate tiers between most-favored brokers and everyone else is likely to narrow." *Id.*

Ultimately, it observed, "many exchanges have implemented non-transparent, discriminatory pricing that benefits the largest, most connected traders to the detriment of everyone else." *Id.* at 4. And it urged the Commission to "adopt a rule to clearly end these pricing practices, which are facially inconsistent with the exchanges' obligations under the Exchange Act." *Id.*

2. Council of Institutional Investors' comment letter didn't mention the tick-size rules, but supported the access-fee rules

CII also submitted a comment letter. JA__ (CII.2023.03.30). It had "long raised concerns that the structure of stock exchange access fees and rebates may present conflicts of interest for broker-dealers affecting their order routing decisions and lowering the execution quality for institutional investors." *Id.* at 1–2. Thus, it supported the access-fee caps; in particular, it noted that 30 mils had "come to be used as the standard rate charged to access quotes at most exchanges, and some or all of those fees are then often "rebated" to liquidity providers." *Id.* at 2.

And it observed that "over 90% of the access fees collected are paid out in the form of rebates," which "disadvantages institutional investors" because rebates create conflicts of interest. *Id.* "[W]hen an institutional investor sends a broker an order, the broker is incentivized to route that order to a trading center or exchange where the broker may pay a lower fee or garner a greater rebate, even when the investor could receive a better execution on another market." *Id.* Thus, reducing access-fee caps "could reduce trading costs for long-term investors and help to reduce the impact of rebates and fee avoidance on order routing and the quality of execution." *Id.*

3. American Securities Association's s comment letter supported the tick-size and access-fee rules

Finally, ASA submitted a comment letter. JA__ (ASA.2023.02.08). It complained that the one-cent increment for tick-constrained stocks was "much larger than what the market on its own would dictate," which "can make it difficult for liquidity providers to fill orders and often results in higher trading costs." *Id.* at 4. Thus, it recommended a half-penny tick-size reduction. *Id.* But it "strongly oppose[d] the application of a one-half cent tick size to any stock outside of the most liquid (narrower spread) stocks—regardless of how the Commission chooses to define that universe" and "oppose[d] reducing the tick size below one-half cent for even the most liquid stocks." *Id.* That's because a "tick size of one-tenth of a cent for the most liquid stocks would directly benefit high frequency trading activity and the exchanges who profit from it." *Id.* And it expressed concern "about the ability of investors to react to rapidly changing prices at multiple price levels on multiple exchanges in a one-tenth of a cent world." *Id.*

It also supported changing access-fee caps because 30 mils had "distorted pricing and increased overall transaction costs" because "for-profit exchanges use their market power to extract monopoly rents through the mispricing of market participant's access to displayed liquidity." *Id.* at 5. Thus, it "strongly support[ed] reducing access fees to 10 mils for all NMS securities because it will reduce the overall cost of exchange trading." *Id.* And it predicted that reduction "should (1) lead to an increase in investor interaction with displayed quotes, (2) provide an economic reason for all participants to submit displayed quotes to an exchange, and (3) end the corrosive and discriminatory nature of the current exchange fee and rebate system." *Id.* But meanwhile, it observed, the "current tiered rebate pricing scheme imposes a burden on market competition that impacts every other exchange member that cannot trade the volume needed to obtain the highest rebate tiers." *Id.*

B. The Commission had statutory authority to adopt the Regulation NMS amendments

Petitioners argue the Commission lacked statutory authority under the Securities Exchange Act of 1934 to impose any global fee cap on all exchanges per Section 11A(c)(1)(B), 15 U.S.C. § 78k-1(c)(1)(B), because it must make those decisions on a "case-by-case basis" for each exchange per Section 19, *id.* § 78s, to ensure fees are "reasonable" and "equitab[ly] allocat[ed]" within the meaning of Section 6(b)(4), *id.* § 78f(b)(4). Pet. Br. 2–3, 21–22, 25–31. In particular, petitioners assert the Commission's invocation of Section 11A(c)(1)(B) of the Exchange Act, 15 U.S.C. § 78k-1(c)(1)(B), was misplaced because that section "does not mention fees at all," and its reference to "information" does not include access fees. Pet. Br. 26. That argument is wrong. *See* SEC Br. 21–29; IEX Br. 6–14; BM Br. 6–22; Prof. Verret Br. 5–17; WTI Br. 13–17.

The need for access fee caps is directly tied to the order-protection rule. Petitioners don't challenge the Commission's authority to adopt the order-protection rule, and fee caps are necessary to effectively implement it. The Commission reasonably adopted the order-protection rule to ensure customers' executions on exchanges weren't materially worse than those then available on other venues with protected quotations. But because the order-protection rule essentially compels market participants to access exchanges with protected quotations, the Commission needed to consider a secondary risk: monopoly access and pricing controls.

If the Commission adopted the order-protection rule without adopting a reasonable fee cap, venues with protected quotations would escalate their fees, effectively capturing government-sanctioned economic rents from market participants, including HMA's, CII's, and ASA's members. In fact, it was to ameliorate the risk that exchanges would monopolistically abuse protected quotation status that the Commission narrowly tailored the fee caps to apply only to trading against protected quotations. Trading against other quotations—whether on- or off-exchange—may not be subject to the caps.

Further, the tick-size amendment is also reasonably connected to the fee caps as well. Failure to adjust the fee-cap and tick-size amendments concurrently would create significant market distortions.

The tick-size amendment is a carefully calibrated Goldilocks solution that "ensures that orders are transmitted in price increments that appropriately balance the NMS goals of 'price competition' and 'incentives for liquidity provision.'" SEC Br. 23. Critically, tick sizes "cannot be reduced in line with these goals without also adjusting the access-fee caps to preserve price coherence and avoid market distortions." SEC Br. 23.

As the Commission explains, the order-protection rule and tick-size amendment "cannot function sensibly in the absence of access-fee caps," so "caps are a 'necessary or appropriate' means of carrying out the statutory directives those policies implement and, more broadly, ensuring the fair and efficient operation of the [national market system]" and "fall[] well within the Commission's authority to 'assure' the 'fairness and usefulness' of 'information with respect to quotations for and transactions in [NMS] securities.'" SEC Br. 21–22 (citing 15 U.S.C. §§ 78k-1(c)(1)(E)–(F), 78w(a)(1), 78k-1(c)(1)(B)). An access-fee cap preserves the order protection rule, which requires orders to be routed to markets displaying the best-priced quotations, because otherwise, exchanges would almost certainly charge exorbitant fees that would "disrupt the routing of orders to the venue with the best price." SEC Br. 23.

The Commission is statutorily authorized to "assure the 'fairness and usefulness' of quotation information," but it can't do that unless it can place "some limit on the extent to which the true price for those who access quotations can vary from the displayed price." SEC Br. 23–24 (quoting 15 U.S.C. § 78k-1(c)(1)(B) and 70 Fed. Reg. at 37545). This "prevents trading centers from taking improper advantage of the Order Protection Rule by charging high fees to access their protected quotes." SEC Br. 24. And exercising that authority isn't breaking new ground: "nobody disputes that [Sections 11A and 23 of the Act] authorize the Commission to change the [access-fee] cap." *NYSE v. SEC*, 962 F.3d 541, 560 (D.C. Cir. 2020) (Pillard, J., concurring).

Finally, petitioners' contrary reliance on the negative-implication canon to contrast and compare provisions within Section 19, 15 U.S.C. § 78s, and Section 11A, *id.* § 78k-1, misunderstands those provisions. For one thing, Section 19 governs oversight of all self-regulatory organizations, including exchanges, whereas Sections 11A and 23(a) regulate all trading centers. SEC Br. 25. Thus, petitioners' misinterpretation is "'unpersuasive'" because those sections "address different subject matter, use different language, regulate different entities, and serve different purposes." SEC Br. 28 (quoting *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 772 (D.C. Cir. 2019)).

Other *amici* concur with the Commission's views. For instance, IEX grounds the Commission's statutory authority not only in Section 11A and Section 23, but also in its statutory mission to establish a national market system. IEX Br. 11–12. It also points out how petitioners "ignore the crucial connection between access fees and protected quotations" despite the Commission's "unquestioned authority to set minimum tick sizes requires corresponding modifications to access fees, as Petitioners concede." IEX Br. 12–13. And it explains how the Commission has authority to prevent high access fees from distorting quotation "information" within the meaning of 15 U.S.C. § 78k-1(c)(1)(B). IEX Br. 13–14.

Better Markets, in turn, places the Commission's statutory authority in Sections 11A and 23, explains why petitioners misplace reliance on Sections 6 and 19, and distinguishes *Loper Bright* as inapplicable because the statutory authorization is clear, not vague. BM Br. 6–19.

Prof. Verret explains how courts have repeatedly recognized the Commission's broad statutory authority to implement a national market system,[4] observes historical access-fee caps were set "high enough to fund distortionary rebates" that eventually "helped venues 'bribe' order flow from brokers" instead of making order flow decisions based on where customer orders would best execute, and argues that petitioners' argument would both "lead to absurd results" such as "the original adoption of NMS itself would have been unauthorized" and contradict the private nondelegation doctrine. Prof. Verret Br. 6–7 & n.4, 13, 15–17 (citing *Nat'l Horsemen's Benevolent & Protective Ass'n v. FTC*, 53 F.4th 869 (5th Cir. 2022)). Thus, Prof. Verret explains, petitioners "face two mutually exclusive options: either accept robust SEC oversight of exchange fees (which would preserve SRO status but defeat their current litigation position) or maintain their argument against SEC fee oversight (which could undermine the constitutional basis for their SRO status)." Prof. Verret Br. 17.

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[4] *E.g.*, *Nasdaq Stock Mkt. LLC v. SEC*, 34 F.4th 1105, 1106 (D.C. Cir. 2022) (Section 11A "grants the Commission broad power to establish a national market system for the trading of securities"); *Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 242 (D.C. Cir. 2003) (the 1975 amendments "direct[ed] the SEC to 'facilitate the establishment of a national market system'"); *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1131 (D.C. Cir. 2022) (1975 amendments granted the Commission "broad, discretionary powers" to ensure "maximum flexibility" in "oversee[ing] the development of a national market system"); *Alliance for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 177 (5th Cir. 2024) ("Congress gave SEC broad discretion to flesh out the contours of the NMS").

Finally, We the Investors identifies multiple statutory bases for the access-fee caps, which it notes "relied on years of meetings and hundreds of comment letters," including "various research papers, articles, and other research." WTI Br. 13–18. And it observes the "only discernible position change here" since the Transaction Fee Pilot is the *exchanges'* self-interested change regarding their fee-and-rebate models. WTI Br. 20–23.

C. The Commission reasonably chose numbers (*i.e.*, a half-penny tick and 10 mils) that were based upon robust data and investor comments

The half-penny tick and 10 mils figures were based on robust data, including significant investor comments. *See* SEC Br. 45–55; IEX Br. 26–29; Prof. Verret Br. 18–24; WTI Br. 18. And the Commission's chosen numbers were subjected to extensive empirical analysis. 89 Fed. Reg. at 81682–768.

The Commission noted that many commenters who favored reducing access-fee caps said "amendments to Rule 612 to reduce tick sizes would necessitate a reduction in the access fee caps," whereas "many others stated that the preexisting access fee cap should be lowered to 10 mils per share for protected quotations in all NMS stocks priced at $1.00 or more regardless of whether there was a reduction in tick size." 89 Fed.

Reg. at 81649. The Commission understood that mismatches between tick size and access fees "can create pricing distortions" and mixed signals, so it reduced tick size to half a penny and reduced access fees to 10 mils. 89 Fed. Reg. at 81651. The Commission picked 10 mils despite a "divergence of opinion around the appropriate level of the access fee cap" because many "commenters viewed 10 mils as the appropriate level." 89 Fed. Reg. at 81658.

That number, the Commission believed, would "result in lower costs to investors to access protected quotes," "align access fees with other elements of investor transaction costs (all of which have decreased)," "recalibrate the access fee cap levels to reflect increased efficiencies, technological advancements and structural changes in the markets," "continue to allow for competitive business models and innovation," and "align on-exchange pricing more closely with off-exchange venues such as ATSs." 89 Fed. Reg. at 81658. Notably, this reasoning is remarkably similar to the Commission's logic in adopting the longtime fee cap of 30 mils.

As to its statutory authority, the Commission observed, "[t]he commenter that questioned the Commission's authority to reduce the level of the access caps to 10 mils acknowledged the Commission's authority to reduce the access fee caps 'to accommodate the new, smaller tick sizes' and in an earlier comment letter stated it 'supports adjusting the access fee cap to accommodate new tick sizes.'" 89 Fed. Reg. at 81655.

II. Petitioners are in a procedural pickle because they invited an "error" about which they now complain and failed to administratively exhaust it

During the rulemaking, petitioners repeatedly conceded the Commission had statutory authority to modify access fees. JA__ (Nasdaq.2023.03.30); JA__ (Cboe.2023.03.23). That is, petitioners had argued, at base, not that the Commission lacked authority to set any access-fee cap, but rather that it lacked authority to set an access-fee cap at levels with which they disagreed. And they've further acknowledged the Commission has authority to select the appropriate access-fee levels, as they've been subjected to the 30 mil fee cap for two decades. In doing so, petitioners invited one of the so-called errors about which they now complain—*i.e.*, the exercise of statutory authority the Commission supposedly doesn't have—and otherwise failed to administratively exhaust it.

A. Petitioners' argument oddly puts the access-fee cart before the tick-size horse

There's an inherent cart-before-the-horse oddity to petitioners' argument. The Commission adopted Rule 612's sub-penny tick rule before it adopted Rule 610's linked access-fee cap in response. *See* SEC Br. 3. Instead of following that order of battle, petitioners misdescribe the access-fee cap as either "a standalone ratemaking decision, a do-over of prior Commission action on exchange fee-and-rebate structures, or a reflexive conforming of exchange fees to those of off-exchange venues." SEC Br. 3. It's only at the tail end of their brief that petitioners "acknowledge the critical link between the Access-Fee-Cap Amendment and the Tick-Size Amendment." SEC Br. 3.

Relatedly, there's a separate oddity about petitioners' inconsistent access-fee arguments during the rulemaking. SEC Br. 21. Initially, petitioners invited the Commission during the 22-month rulemaking to use its delegated statutory authority to draw lines *somewhere* in reducing both the tick size and linked access fees. JA__ (Nasdaq.2023.03.30); JA__ (Cboe.2023.03.23). In fact, Nasdaq asked the Commission to reduce access fees from 30 mils to 15 mils. JA__ (Nasdaq.2023.03.30). "Unsatisfied with the Commission's choice of 10 mils" instead of 15 mils, petitioners "have changed course." SEC Br. 21. They now assert the Commission had no statutory authority whatsoever over access fees. Pet. Br. 21–22, 25–

31. But that inconsistency embroils petitioners in a serious procedural dilemma vis-à-vis invited error and administrative exhaustion.

"There is, of course, nothing inherently wrong with ambidexterity in an advocate. The ability to argue both sides of a question, depending upon whose ox is being gored, is a lawyer's blessing." *Walton v. Cowin Equip. Co., Inc.*, 733 F. Supp. 327, 330 (N.D. Ala. 1990). But it's a bit unseemly for litigants to request a decisionmaker (whether it be a lower tribunal or an agency) to reach one outcome, then change faces like Janus to assert to an appellate court that the decisionmaker should've reached the exact opposite outcome.

Existing doctrine squares that circle: having invited the statutory-interpretation error of which petitioners now complain—and having failed to administratively exhaust it during the rulemaking's notice-and-comment phase—this Court should preclude consideration of it. Effectively, that procedural posture would dramatically narrow the issues pending before this Court and reduce much of the dispute to whether this Court should substitute its judgment for that of an expert agency whether a line should be drawn at 15 mils or 10 mils. Ordinarily, courts wouldn't second guess that kind of line-drawing question. *See WorldCom,* *Inc. v. FCC*, 238 F.3d 449, 461–62 (D.C. Cir. 2001) (agencies have "wide discretion" to make regulatory "line-drawing" decisions and are "not required to identify the optimal [number] with pinpoint precision").

B. The invited-error doctrine typically precludes appellate review of outcomes invited below

Typically, this Court prohibits appellants and petitioners from challenging on appeal a ruling that they had invited below. *United States v. Driscoll*, 984 F.3d 103, 112 (D.C. Cir. 2021). Although the invited-error doctrine doesn't bind the Supreme Court, every sister circuit applies it. *See United States v. Wells*, 519 U.S. 482, 488 (1997). It "discourages sandbagging," and when it has been triggered, appellate consideration of the argument is completely foreclosed. *United States v. Thomas*, 999 F.3d 723, 732 (D.C. Cir. 2021). Generally, it's subject to three exceptions:

First, it doesn't apply when the party merely "misspoke" or "blunder[ed]" rather than tactically or strategically invited the wrong outcome. *E.g.*, *United States v. Long*, 997 F.3d 342, 353–54 (D.C. Cir. 2021). Second, it doesn't apply when the party merely invited the decisionmaker to apply the wrong legal test while still requesting an outcome consistent with the argument advanced on appeal. *E.g.*, *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 923 (11th Cir. 2018) (Wm. Pryor, J.) ("parties cannot waive the application of the correct law or stipulate to an incorrect legal test"). Third, it doesn't apply when "the 'error' invited by a party 'relied on settled law that changed while the case was on appeal.'" *United States v. Duldulao*, 87 F.4th 1239, 1255 (11th Cir. 2023) (quoting *United States v. Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017), and citing *United States v. Andrews*, 681 F.3d 509, 517 n.4 (3d Cir. 2012)).

Here, the invited-error doctrine is triggered because petitioners invited the Commission to exercise statutory authority to reduce access fees (JA__ (Nasdaq.2023.03.30); JA__ (Cboe.2023.03.23)) before they made a 180-degree turn to inconsistently argue the Commission lacked any statutory authority whatsoever (*see* Pet. Br. 21–22, 25–31). And none of the invited-error doctrine's exceptions apply.

1. The invited-error doctrine should be extended to petitioners who challenge rulemakings pursuant to the Securities Exchange Act of 1934

As a threshold matter, there doesn't appear to be a case in which this Court or a sister circuit has decided whether to extend the invited-error doctrine to a petitioner challenging administrative action. The closest *amici* have found is six judges of the *en banc* 12-judge Federal Circuit who almost applied it in *Marine Polymer Tech., Inc. v. HemCon, Inc.*, 672

F.3d 1350, 1367 & n.1 (Fed. Cir. 2012) (Dyk, J., dissenting from equally divided *en banc* court's affirmance).

There, those six judges suggested that "'doctrines of estoppel, waiver, invited error, or the like'" would typically bar an inconsistent appellate argument about patent construction. *Id.* at 1367 n.1. That was so because "[o]ne might at the outset be somewhat skeptical of this construction because it was not proposed by either party and was indeed contrary to the patentee's own proposed construction" in the district court and the U.S. Patent and Trademark Office. *Id.* at 1367 (citation omitted).

Nevertheless, this Court should extend the invited-error doctrine to the administrative context because it would be consistent with the Securities Exchange Act of 1934's *textual* administrative-exhaustion requirements, the invited-error doctrine's purposes, and public policy (including Article III standing limitations). There are five main reasons.

First, applying the invited-error doctrine would be consistent with the express administrative exhaustion requirement of the Securities Exchange Act of 1934, as amended in 1975, *see* Pub. L. No. 94-29 § 20, 89 Stat. 159 (1975), which now provides: "No objection to an order *or rule* of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. § 78y(c)(1) (emphasis added). The Securities Act of 1933 contains a similar administrative-exhaustion requirement: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission." 15 U.S.C. § 77i(a). But unlike the Securities Exchange Act of 1934, it uses the phrase "order of" and lacks the phrase "or rule," which could limit its administrative exhaustion requirement to adjudications, not rulemakings.

Here, petitioners have identified no place in the administrative record in which they preserved any argument about the Commission lacking any statutory authority to regulate access fees. *See generally* Pet. Br. 21–22, 25–31. In contrast, petitioners' opponents have identified places in the administrative record where they encouraged the Commission to draw the line they preferred by exercising limited statutory authority over access fees, which they now assert the Commission never had. And typically, it would be too late to present a new argument why "there was a reasonable ground for failure to do so," 15 U.S.C. § 78y(c)(1), in a reply brief. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir.

2008). Moreover, nothing in the Administrative Procedure Act, 5 U.S.C. §§ 551–559, "require[s] a different result" because it "purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499–500 (1955).

Second, applying the invited-error doctrine would be consistent with its purposes because it would discourage regulated entities from engaging in sandbagging and gamesmanship in administrative proceedings as a prelude to litigation. *See Thomas*, 999 F.3d at 732 (invited-error doctrine "discourages sandbagging"). For instance, in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 874 (D.C. Cir. 2002), this Court rejected a challenge to agency's rulemaking because the appellants "failed to raise it during the notice-and-comment period." *Id.* This Court so held because the appellants' "general claim falls well short of providing the agency with the required 'adequate notice' of [their] specific claim." *Id.* Additionally, this Court again distinguished *Darby v. Cisneros*, 509 U.S. 137 (1993), which involved a debarment adjudication as opposed to a rulemaking,[5] because it "'addresses exhaustion of remedies, not waiver of claims, and is thus wholly inapposite' to the latter issue." *Nat'l Mining Ass'n*, 292 F.3d at 874 (quoting *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002)). If anything, it would be fairer to apply the doctrine to regulated entities (which are typically represented by sophisticated counsel) than it is to apply it to criminal defendants or *pro se* litigants (who often scrape by with counsel who either lack the wherewithal or resources to adequately represent their interests).

Third, as to public policy, the public, private, and judicial inefficiencies of allowing petitioners to evade administrative exhaustion are astronomical: in this case alone, not only does the Commission has to brief and argue this appeal, but it is joined by *five* groups of *amici* who retained at least 10 different lawyers, including a former Solicitor General of the United States, a former Assistant to the Solicitor General, four former Supreme Court clerks, and others. Plus, this Court has to consider the briefs, hear oral arguments, and decide the question. But all of these

[5] Unlike challenges to rulemakings under the Securities Exchange Act of 1934, 15 U.S.C. § 78y(c)(1), *Darby* also involved a regulatory scheme in which "neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review." 509 U.S. at 139.

statutory-interpretation questions could've been resolved conclusively at the agency level instead of sandbagging them until litigation in this Court. Indeed, it would be consistent with the Article III standing limitations of injury-in-fact, causation, and redressability, because petitioners who invited error haven't been injured in fact.

Fourth, extension of the doctrine to administrative challengers of Securities Exchange Act rulemakings wouldn't be unduly burdensome. Nasdaq Inc. is a sophisticated securities exchange with market capitalization of $42 billion and annual revenue of $6 billion; Cboe Global Markets Inc. is likewise a sophisticated securities exchange with market capitalization of $22 billion and annual revenue of $4 billion. Both at the rulemaking and appellate stages, they and their subsidiaries or related entities have the sophistication and resources to hire counsel at the pinnacle of the profession.[6]

[6] Put otherwise, this isn't a situation where Congress or courts are requiring administrative issues of national significance to turn on whether *pro se* litigants have the wherewithal to administratively exhaust claims for creamy peanut butter instead of chunky. *See Thompson v. DEA*, 492 F. 3d 428, 430 (D.C. Cir. 2007). Although even *pro se* inmates must administratively exhaust their claims, *e.g.*, *Dimanche v. Brown*, 783 F.3d 1204, 1207 (11th Cir. 2015) (prisoner exhausted grievance), or solve other procedural dilemmas, *e.g.*, *Bates v. Sec'y, Dep't of Corr.*, 964 F.3d 1326, 1327 (11th Cir. 2020) (habeas petition was timely).

Fifth, extension of the invited-error doctrine would also help this Court and sister circuits expeditiously resolve and control the size of their administrative dockets. The primary purposes of administrative exhaustion are to solve problems "without having to file a lawsuit," *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008), to "improve[] the quality of" cases "that are eventually filed," and to create "an administrative record that is helpful to the court," *Woodford v. Ngo*, 548 U.S. 81, 95 (2006). In other words, agency rulemakings and administrative exhaustion aren't meaningless kabuki theaters that serve as empty preludes to preordained, inevitable litigation; rather, they exist to allow this Court to efficiently sift through its docket to separate the wheat (meritorious claims) from the chaff (unmeritorious ones).

Thus, petitioners' administrative-exhaustion failure illustrates their statutory-interpretation argument's flaws. And by withholding it until filing this case, petitioners deprived both the Commission and other commenters the opportunity to address it during the rulemaking.[7] *See* 89

[7] In fact, petitioners seemingly capitalize on withholding that statutory-interpretation argument until now when they suggest—incorrectly (*see* WTI Br. 13–14)—that the only statutory authority the Commission invoked during the rulemaking proceeding was Section 11A(c)(1)(B), not Section 23 or other provisions. *See* Pet. Br. 26–29.

Fed. Reg. at 81655–56 (addressing Nasdaq's argument that the Commission might lack statutory "'authority to reduce the fee cap *beyond what is needed to accommodate the new, smaller tick sizes*'" (emphasis added)).

2. No exception to the invited-error doctrine applies

No exception to the invited-error doctrine would apply here either. Petitioners' comment letters didn't misspeak or blunder. Nor did they inadvertently misstate the law while asking for the same outcome they seek on appeal. Finally, they didn't misplace reliance on any settled precedent that's no longer binding. The only conceivable new precedent that could qualify would be *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), which petitioners cite briefly (Pet. Br. 30).

But *Loper Bright* is "irrelevant" because there's "no genuine ambiguity." SEC Br. 24 n.3; BM Br. 14. Namely, it doesn't establish a "clear statement rule"; rather, it establishes a "'best reading'" rule in which judicial review of "'delegate[d] discretionary authority" is "simply to interpret 'the boundaries of the delegated authority' and 'ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries.'" SEC Br. 24 n.3 (quoting *Loper Bright Enters.*, 144 S. Ct. at 2263 (cleaned up)).

C. If the invited-error doctrine bars petitioners' statutory authority argument, then all that's left of petitioners' access-fee argument concerns agency line drawing, which this Court shouldn't second guess

If the Court extended the invited-error doctrine to agency rulemakings under the Securities Exchange Act, little of petitioners' argument would remain.

In administrative law, line-drawing problems are typically committed to expert agencies instead of being treated as judicially redressable harms. *E.g.*, *WorldCom, Inc.*, 238 F.3d at 461–62 (regulatory "line-drawing" needn't involve " pinpoint precision"); *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 543 (D.C. Cir. 2006) ("in regulatory line-drawing," "[w]e have never required anything more" than that "the Commission confronted the issue[s]" "and made reasonable trade-offs"); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) ("[w]hen an agency must balance a number of potentially conflicting objectives" in drawing such a line, "judicial review is [particularly] limited").

Once the statutory-interpretation question is out of the picture, however, the petitioners' core claim boils down to whether the Commission acted arbitrarily or capriciously when it selected 10 mils instead of 15 mils. But by that standard, courts don't usually rescue regulated entities from agency-drawn lines they belatedly regret when everyone knows their real gripe is "you was in on the [tick-size] heist, you just don't like your [access-fee] cut." *The Age of Spin: Dave Chappelle Live* (Netflix 2017) (52:10–20), *available at* https://tinyurl.com/yr7ut75s.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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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 6,496 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.

March 25, 2025

/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 25th day of March, 2025, to:

Mark Langer, Clerk of Court
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 25th day of March, 2025, to all counsel of record.

March 25, 2025

/s/ Thomas Burns
Thomas A. Burns