IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ERIK DAVIDSON, JOHN RESTIVO & NATIONAL CENTER FOR PUBLIC POLICY RESEARCH, Plaintiffs, v. PAUL S. ATKINS, *et al.*, Defendants.	Civil Action No. 6:24-cv-00197-ADA-DTG **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Mark D. Siegmund
State Bar Number 24117055
CHERRY JOHNSON SIEGMUND JAMES, PLLC
7901 Fish Pond Rd., Suite 200
Waco, TX 76710
Tel: (254) 732-2242
MSiegmund@CJSLAW.com

Margaret A. Little CT303494
Caitlin M. Moyna* NY4176897
Andreia Trifoi* DC90017660
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Tel: (202) 869-5210
Fax: (202) 869-5238
Peggy.Little@ncla.legal
Caitlin.Moyna@ncla.legal
Andreia.Trifoi@ncla.legal
**Pro Hac Vice* application pending

Counsel for Plaintiffs

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INTRODUCTION

Plaintiffs respectfully submit this Motion pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure for certification of a class of U.S. investors who invest in stocks traded on U.S. exchanges and whose personal information has been entered into the Consolidated Audit Trail. Proposed class representatives, Erik Davidson, John Restivo and National Center for Public Policy Research ("NCPPR"), seek declaratory and injunctive relief against the Defendants, Paul S. Atkins, the Securities and Exchange Commission ("SEC") and Consolidated Audit Trail, LLC ("CAT LLC"), from enforcing an unlawful and unconstitutional scheme of mass data collection affecting millions of investors in the United States. Plaintiffs also seek for Erik Davidson, John Restivo and NCPPR to be appointed as class representatives, and for their counsel the New Civil Liberties Alliance ("NCLA") to be appointed as class counsel.

SEC promulgated Rule 613 in 2012, claiming authority to do so under the Securities Exchange Act of 1934 ("Exchange Act") as amended. Rule 613 proposed the Consolidated Audit Trail ("CAT"), a massive, centralized database that collects and stores information on every securities transaction conducted on U.S. market exchanges. In 2019, CAT, LLC was formed pursuant to Rule 613's requirements that the SROs would operate the CAT. *See* Consolidated Audit Trail, LLC, *Limited Liability Company Agreement of Consolidated Audit Trail, LLC,* at 1 (Aug. 29, 2019) ("This Agreement, which takes the place of the Selection Plan, is a National Market System Plan as defined in SEC Rule 600(b)(43), and serves as the National Market System Plan required by SEC Rule 613. The Participants shall jointly own the Company, which shall create, implement, and maintain the CAT and the Central Repository pursuant to SEC Rule 608 and SEC

Rule 613.").[1] *However*, nothing in the Exchange Act grants SEC the authority to create and implement this intrusive scheme. Lacking any grant from Congress, SEC and the SEC-mandated CAT LLC are prohibited from collecting ordinary citizens' private investment information unless they can show good cause and comply with the procedural safeguards that protect Americans' civil liberties and respect constitutional limits on government power.

The named Plaintiffs and proposed class representatives are investors whose private investment information has been, and will continue to be, unconstitutionally seized and searched by Defendants. Plaintiffs bring this action on behalf of a putative class of similarly situated investors. Because solely injunctive and declaratory relief are sought, and such relief applies uniformly to all members of the class, certification is appropriate under Rule 23(b)(2). Members of the proposed class are affected in the same way by these regulations and suffer the same injury, and that injury can be prevented by the same declaratory and injunctive relief.

BACKGROUND AND STATEMENT OF THE CASE

I. THE CHALLENGED REGULATION

SEC Rule 613 (the "CAT Rule") was proposed in 2010, *see* 75 Fed. Reg. 32,556 (June 8, 2010), and finalized in 2012, *see* 77 Fed. Reg. 45,722 (Aug. 1, 2012). Prior to the CAT, Self-Regulatory Organizations ("SROs") maintained their own "audit trails," which recorded certain information about stock transactions, such as the names of the stocks traded and the terms of the stock trades. *See* 77 Fed. Reg. 45,722, 45,727-28 & 45,727 n.48 (Aug. 1, 2012); Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail,

[1] *See also* CAT NMS PLAN, *Amended CAT NMS Plan for Consolidated Audit Trail, LLC* (Aug. 29, 2019), https://catnmsplan.com/about-cat/cat-nms-plan; Securities Exchange Act Release No. 87149, at 5 (Sept. 27, 2019) ("The Limited Liability Company Agreement of Consolidated Audit Trail, LLC will become the CAT NMS Plan immediately upon filing the proposed amendment with the Commission.").

81 Fed. Reg. 84,696, 84,807 (Nov. 23, 2016). These audit trails did not collect investment data for every individual trading on U.S. exchanges. *See* Am. Compl. ¶¶ 11-12. Nor did SEC have "direct access" to this data. *See* 77 Fed. Reg. at 45,729. Instead, SEC could only "request" limited information in connection with specific inquiries. *Id*.

The CAT changed this long-standing practice. The CAT Rule requires the collection of data on trades by every investor on any U.S. exchange and allows the government immediate and ongoing access to this data. *See* 17 C.F.R. § 242.613; Am. Compl. ¶¶ 11-12, 22-23, 32-36, 49-41. Since 2020, the CAT rule has required broker dealers to submit extensive data on all securities orders to the CAT database. Am. Compl. ¶¶ 84-87. SEC impermissibly delegated the operation of this massive data-collection scheme to SROs, and authorized the formation of a private corporation, CAT LLC, to manage and operate the CAT. *See* 81 Fed. Reg. at 84,699 ("The LLC Agreement, itself, including its appendices, is the proposed Plan[.]"); Am. Compl. ¶¶ 30-36, 61. The CAT records this information in real time and makes it immediately and directly available to the SEC. Am. Compl. ¶¶ 16-18.

Under the CAT scheme, as it is now implemented, all information about all trades by all Americans is transmitted to the SEC within a day, without any legal justification. *Id*. ¶ 169. The CAT Rule mandates mass surveillance of lawful activity by individuals without suspicion of wrongdoing. *Id*. ¶ 80. This dragnet collection of investment information, indefinitely stored and immediately accessible by government officials, violates the First, Fourth and Fifth Amendments. *Id*. ¶¶ 149-198. Further, SEC lacks any statutory authority to unleash the CAT upon Americans, as the regime unlawfully delegates operation and enforcement powers to SROs, and imposes a multi-billion-dollar financial burden on Plaintiffs (and countless others) without Congressional authorization and appropriation. *Id*. ¶¶ 115-148.

Defendant SEC is also a party to a separate lawsuit centered on the CAT. *See Am. Sec. Ass'n v. SEC*, 147 F.4th 1264 (11th Cir. 2025). That case concerns a Funding Order SEC approved in 2023, which allows SROs to pass through all costs of the CAT to their members. *Id*. Recently, the 11th Circuit held that this funding arrangement was arbitrary and capricious under the Administrative Procedure Act. *Id*. at 1269. The court vacated the 2023 Funding Order but stayed its decision for sixty days. *Id*. That stay expired on November 29, 2025.[2] This means that the Plaintiffs are subject to daily, on-going and exponentially expanding injuries to their civil liberties under a funding plan that has been declared unlawful.

II. THE PROPOSED CLASS AND CLASS REPRESENTATIVES

A. The Proposed Class and Allegations

Plaintiffs seek class certification for Counts I through VII in the Complaint, each addressing uniform harm and violation of rights common to the entire class. Count I alleges that SEC lacked statutory authority or otherwise exceeded any purported delegation of Congressional authority to create the CAT and violated the major questions doctrine in creating the CAT. Am. Compl. ¶¶ 116-31. Count II alleges that the CAT violates the Constitution's vesting the "power of the purse" and appropriations in Congress by self-funding its surveillance scheme by assessments upon regulated SROs. *Id*. ¶¶ 133-48. Count III alleges that the CAT violates the Fourth Amendment's prohibition of warrantless searches and seizures. *Id*. ¶¶ 149-80. Counts IV and V allege that the CAT violates the Fifth and First Amendments of the Constitution, respectively. *Id*. ¶¶ 181-212. Counts VI and VII allege that SEC exceeded its statutory authority under the Administrative Procedure Act and contravened investors' constitutional rights. *Id*. ¶¶ 213-23.

Plaintiffs seek certification of the following class for Counts I through VII:

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[2] To Plaintiffs' knowledge, this is the only other action challenging aspects of the CAT.

> All U.S. investors, including U.S. citizens, U.S. residents and persons domiciled in the U.S., for whom the CAT database contains any securities transaction information, or any personally identifiable information, that refers or relates to the investor or to a securities account associated with the individual. The class includes but is not limited to all investors who are or were legal or beneficial owner[s] of a security or who are or were authorized to give trading instructions relating to a security.

The class members are ascertainable because the CAT itself has already identified them by collecting their personal and securities transactions information, and Defendants have access to their identities through the CAT database. *See id*. ¶ 49 (stating that the CAT database collects "trading information for every transaction and every investor in the U.S. equities markets"). The class size is estimated to exceed 100 million individuals in the United States. *Id*. ¶ 109.[3]

Common questions of law and fact predominate. They include:

a) Whether SEC Rule 613 and the CAT program exceed SEC's authority and were *ultra vires* in violation of Article I's Vesting Clause;

b) whether SEC Rule 613 and the CAT program exceed SEC's authority and were *ultra vires* in violation of Article I, § 7, cl. 1; Article I, § 8, cl. 1; and Article I, § 9 Appropriations Clauses;

c) whether SEC Rule 613 and the CAT program violate investors' Fourth Amendment Rights by requiring and conducting unreasonable searches and seizures of Plaintiffs' private papers and information;

d) whether SEC Rule 613 and the CAT program violate investors' Fifth Amendment rights by taking their property without due process;

e) whether SEC Rule 613 and the CAT program violate the Administrative Procedure Act, 5 U.S.C. § 706(2)(B), because they violate Plaintiffs' constitutional rights; and

[3] Citing estimate from Securities Industry and Financial Markets Association at Randy Snook, Beware of CAT, SIFMA (Nov. 30, 2017), https://perma.cc/8YJLAAE9.

f) whether SEC Rule 613 and the CAT program violate the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), because they are not authorized by the Securities Exchange Act or any other statute.

See Am. Compl. ¶ 110.

The requested relief in Counts I through VII is entirely declaratory and injunctive and includes no claim for damages. The requested relief includes:

a) Declaring that SEC's Rule 613 is null and void, and set aside in its entirety, because it violates the Vesting and Appropriations Clauses of Article I;

b) Declaring that SEC's Rule 613 is null and void, and set aside in its entirety, because it violates Plaintiffs' Fourth Amendment Rights;

c) Declaring that SEC's Rule 613 is null and void, and set aside in its entirety, because it violates Plaintiffs' Fifth Amendment Rights;

d) Declaring the SEC's Rule 613 is null and void, and set aside in its entirety, because it violates Plaintiffs' First Amendment Rights;

e) Declaring that, in promulgating Rule 613, Defendants violated the Administrative Procedure Act by taking an action contrary to Plaintiffs' constitutional rights;

f) Declaring that, in promulgating Rule 613, Defendants violated the Administrative Procedure Act by taking an action in excess of statutory authority; and

g) Setting aside and holding unlawful SEC's Rule 613 and declaring that Rule 613 is null and void in its entirety under the Administrative Procedure Act.

Additional requested relief includes an order prohibiting Defendants from the continued unlawful collection of investor transaction information and ordering Defendants to expunge all the information relating or referring to Plaintiffs already collected under SEC Rule 613. *See*

Am.Compl., "Prayer for Relief," ¶¶ I-L. The only monetary relief sought in the Complaint is for reasonable attorneys' fees and costs." *Id*. ¶¶ M-N.

B. The Proposed Class Representatives

1. Erik Davidson and John Restivo

Two of the proposed class representatives in this action, Erik Davidson and John Restivo, are individuals who invest in securities traded on U.S. exchanges. Their desire to represent the class stems from their concerns about this government overreach and its constitutional violations. They further believe that the CAT puts every investor's information (including theirs) at risk, which can only be resolved by putting an end to the entire CAT scheme. *See* Declaration of Erik Davidson ("Davidson Decl."), attached hereto as Exhibit A, ¶ 11; Declaration of John Restivo ("Restivo Decl."), attached hereto as Exhibit B., ¶ 11.

Plaintiffs Davidson and Restivo are investors who have purchased and sold public-company stocks on U.S. exchanges since at least June of 2020. Along with the unconstitutional seizure of their private investment information, they incurred monetary expenses, either through their respective broker-dealers or, in the case of Mr. Davidson, by direct assessment of costs associated with the multi-billion-dollar CAT. Davidson Decl. ¶¶ 4, 5; Restivo Decl. ¶¶ 4, 5. As a result of CAT, Plaintiffs' First, Fourth and Fifth Amendment rights have been violated. Their freedoms have also been impaired, as they have been subject to SEC's overreach in enacting the CAT in an unlawful manner in violation of the Constitution and the APA. Plaintiffs Davidson and Restivo both have a reasonable expectation that their investment brokers will not disclose their personal or other information to any third party, except as necessary to execute stock trades or in the rare circumstance where a government entity obtains a warrant or similar legal authority to require the broker to provide that personal, private and proprietary information. Davidson Decl.

¶ 6; Restivo Decl. ¶ 6. Plaintiffs Davidson and Restivo are also harmed by CAT because it limits their right to transact in securities free from SEC's overreach. Congress did not enact the CAT, nor a statute that even purported to authorize SEC to do so, nor did Congress appropriate funding for the CAT. Davidson Decl. ¶ 8; Restivo Decl. ¶ 8. The CAT's effects on Plaintiffs' constitutional and other rights are identical to effects on any other investor's rights that fall within its purview. Davidson Decl. ¶ 9; Restivo Decl. ¶ 9.

Finally, as is true of all investors whose data is captured by CAT, Plaintiffs Davidson and Restivo are at risk of potential data breaches that will expose their information to third parties, and of the potential for catastrophic financial loss that would result from such breaches. Davidson Decl. ¶ 7; Restivo Decl. ¶ 7.

Abolition of the CAT is the only way to halt the unconstitutional seizure of their private investment information and to stop the ongoing pass-through costs that they have been forced to incur. Davidson Decl. ¶ 10; Restivo Decl. ¶ 10.

2. NCPPR

Plaintiff NCPPR is a 501(c)(3) organization incorporated in Delaware with its principal place of business in Washington, D.C. *See* Declaration of Stefan Padfield ("Padfield Decl."), attached hereto as Exhibit C, ¶ 1. Since June 2020, NCPPR has both purchased public-company stocks traded on U.S. stock exchanges and has received contributions of these traded stocks. *Id*. ¶¶ 2-3. Along with the unconstitutional seizure of its private investment information, the organization has been forced to incur monetary expenses to pay costs of the CAT through its broker-dealer. *Id*. ¶¶ 5-6. NCPPR has a reasonable expectation that its investment brokers will not disclose its private or proprietary information to third parties, except as necessary to execute stock trades or in the rare circumstance where a government entity obtains a warrant or similar legal

authority to require the broker to provide that information. *Id*. ¶ 7. Like Plaintiffs Davidson and Restivo, NCPPR is also concerned about potential data breaches of the CAT database that will expose its information to third parties, not to mention the harm resulting from such breach. *Id*. ¶ 8.

The CAT affects NCPPR's constitutional and other rights in the same way as all other members of the class, because, based on the CAT Rule, the information of each investor in the class, including organizations and institutional investors, is subject to unconstitutional seizure. *Id*. ¶ 10. Abolition of the CAT is the only way to halt the unconstitutional seizure of NCPPR's private investment information. *Id*. ¶ 11. NCPPR believes the harm caused by CAT's constitutional violations, limitations on freedoms and risks posed to investors' information can only be resolved by eliminating the entire CAT scheme. *Id*. ¶ 12.

C. The Proposed Class Counsel

The Proposed Class Counsel in this matter, the New Civil Liberties Alliance ("NCLA"), and its counsel here, Margaret A. Little and Caitlin M. Moyna, have the requisite experience and capabilities to serve as class counsel in this matter. *See* Declaration of Margaret A. Little, Esq. ("Little Decl."), attached hereto as Exhibit D; Declaration of Caitlin M. Moyna, Esq. ("Moyna Decl."), attached hereto as Exhibit E.

NCLA is a nonpartisan, nonprofit civil rights organization and public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs and other means. Little Decl. ¶ 3. It was founded by Philip Hamburger, the Maurice and Hilda Friedman Professor of Law at Columbia Law School and the author of *Is Administrative Law Unlawful?* (2014). *Id*. ¶ 4. NCLA aims to defend civil liberties, primarily by seeking to enforce constitutional constraints on agency power. *Id*. ¶ 5. NCLA has represented individuals in complex administrative matters all over the country, and at every level

of the federal judicial system, including the Supreme Court of the United States. *Id*. ¶ 6; *see* Brief for Petitioners, *Relentless v. Dep't of Commerce*, No. 22-1219 (S. Ct.) (filed Nov. 20, 2023), *available at* https://nclalegal.org/filing/brief-for-petitioners-2/; Brief for Respondent, *SEC v. Cochran*, No. 21-1239 (S. Ct.) (filed June 30, 2022), *available at* https://nclalegal.org/filing/opening-brief-for-respondent/; Brief for Respondent, *Garland v. Cargill*, No. 22-976 (S. Ct.) (filed Jan. 22, 2024), *available at* https://nclalegal.org/filing/brief-for-the-respondent-3/.

NCLA's attorneys appearing in this matter as proposed class counsel are Margaret A. Little and Caitlin M. Moyna, both Senior Litigation Counsel. Ms. Little has been a member of the Bar of Connecticut for 40 years and is a member of the bars of the District of Columbia and the Supreme Court of the United States. Little Decl. ¶ 8. She is also admitted to the Fifth Circuit. *Id*. She is a graduate of Yale Law School, and a former judicial law clerk to a judge on the U.S. Court of Appeals for the Second Circuit. *Id*. Ms. Little has extensive trial and appellate experience in complex regulatory, mass-tort, class-action, products liability, securities, commercial and civil rights litigation, where she has represented individuals and high-profile litigants including Fortune 50 companies, financial institutions, public companies, and universities. *Id*. ¶ 9. She has represented parties in state courts and at all federal court levels, including recently securing a victory for the respondent in *Axon v. FTC and SEC v. Cochran*, 598 U.S. 175 (2023), in which she represented the plaintiff-respondent Michelle Cochran, from filing the complaint in the Northern District of Texas to the final, unanimous decision by the Supreme Court. *Id*. ¶ 11. Additionally, Ms. Little's work in *Cochran* involved securing an *en banc* victory at the Fifth Circuit that created the circuit split that launched both *Axon* and *Cochran* to the Supreme Court. *Id*. In *Axon/Cochran*, the Supreme Court unanimously reversed and/or overturned six circuit Courts of Appeals that had

denied Article III jurisdiction for plaintiffs challenging the constitutionality of their administrative adjudications. 598 U.S. at 195-96.

Ms. Little has been directly involved with public interest litigation for the past eight years since she joined NCLA as a Senior Litigation Counsel in 2018. Little Decl. ¶ 12. At NCLA, she has directed litigation and represented individuals *pro bono* in several challenges against the SEC. *Id*. ¶ 13.[4] She has represented other clients *pro bono* against the federal government in many cases. *Id*. In 2009, prior to joining NCLA, Ms. Little was on the appellate team representing 20 firefighters that secured a Supreme Court victory in *Ricci v. DeStefano*, 557 U.S. 557 (2009), a case in which the Supreme Court not only reversed the lower court's entry of summary judgment, but entered judgment in favor of her clients against city officials who had violated the Civil Rights Act of 1964. *Id*. ¶ 10. Currently, Ms. Little is counsel in one other matter in which class action allegations were made.[5] *Id*. ¶ 15; *see* First Amended Complaint, *Wright v. Mass. Dep't of Public Health*, No. 22-cv-11936 (D. Mass) (filed Mar. 20, 2023), available at https://nclalegal.org/filing/first-amended-complaint-for-declaratory-and-injunctive-relief/.

Ms. Moyna has been practicing complex commercial litigation since 2002, when she graduated with honors from Northwestern University School of Law, where she was also admitted to the Order of the Coif. Moyna Decl. ¶ 3. Ms. Moyna has extensive experience litigating class actions in federal and state courts across the country. *Id*. ¶ 4. From 2011 to 2025, Ms. Moyna was

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[4] *See also* Petitioners' Opening Brief, *Powell v. SEC*, No. 24-1899 (9th Cir.) (filed June 17, 2024), *available at* https://nclalegal.org/filing/petitioners-opening-brief-3/; Opening Brief for Petitioner National Center for Public Policy Research, *NCPPR v. SEC*, No. 21-60626 (5th Cir.) (filed Dec. 20, 2021), *available at* https://nclalegal.org/filing/opening-brief-for-petitioner-national-center-for-public-policy-research/; Petition for a Writ of Certiorari, *Romeril v. SEC*, No. 21-1284 (S. Ct.) (filed Mar. 21, 2022), *available at* https://nclalegal.org/filing/petition-for-a-writ-of-certiorari-16/.

[5] The plaintiff class has not, as of the date of this filing, been certified in this matter. Ms. Little has not represented a plaintiff class in any other class action.

affiliated with the prominent investor-protection firm, Grant & Eisenhofer P.A., where she was promoted to Principal (partner). *Id*. Most recently, Ms. Moyna focused on representing investors and classes of investors in securities class actions. *Id*. She has also represented classes of investors and others in actions challenging corporate governance structures, asserting breaches of fiduciary duty by corporate directors and management, and alleging antitrust violations and breaches of contract. Over the course of her career, Ms. Moyna has represented or sought to represent a class of investors or other persons in at least thirty actions. *Id*.

Examples of significant class actions in which Ms. Moyna served as lead or class counsel include *Yoshikawa v. Exxon Mobil Corp.*, 3:21-cv-00194-N (N.D. Tex.) (motion for class certification pending); *Teachers' Retirement System for the City of New York v. Snowflake, Inc.*, 5:24-cv-01234-PCP (N.D. Cal.) (motion to dismiss pending); *Sjunde AP-Fönden v. General Electric Co.*, 1:17-cv-8457-JMF (S.D.N.Y.) ($362.5 million recovery for investors); *Deka Invs. GmbH v. Santander Consumer USA Holdings, Inc.*, 3:15-cv-2129-K (N.D. Tex.) ($47 million recovery for investors). *Id*. ¶ 5.

Ms. Moyna joined NCLA in January 2026 and is committed to ensuring that bureaucratic violations of Americans' constitutional rights are remedied, and in securing their freedom from overreach of administrative agencies such as the SEC. *Id*. ¶ 6. Currently, Ms. Moyna does not serve as counsel in any case styled as a class action. *Id*. ¶ 7.

NCLA has engaged the services of Mark D. Siegmund of Cherry, Johnson, Siegmund, James, PLLC to serve as local counsel. *See* Little Decl. ¶ 16. Ms. Little has investigated this case through contacts with the named Plaintiffs and other individuals and organizations that invest in stocks traded on U.S. exchanges. *Id*. ¶ 17. Ms. Little has discussed with Plaintiffs the nature of this litigation and the potential advantages and disadvantages of proceeding as a class action rather

than individually. *Id*. ¶ 19. Ms. Little has also explained to Plaintiffs the duties they will assume should they be appointed class representatives, including that they must actively monitor the progress of the litigation, including reviewing filings and other litigation papers, and actively participate in any major litigation decisions. *Id*. ¶¶ 18-19. Ms. Little has explained, and they understand, that they will be acting in the best interests of absent class members.

ARGUMENT

A court may certify a class consistent with Rule 23(a) if the proposed class meets four prerequisites. First, the class must be so numerous that joinder of all members is impracticable. *See* Fed. R. Civ. P. 23(a)(1). Second, there must be questions of law or fact common to the entire class. Fed. R. Civ. P. 23(a)(2). Third, the claims of the representative parties must be typical of the represented class. Fed. R. Civ. P. 23(a)(3). Finally, the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4).

The Court can certify a class pursuant to Rule 23(b)(2) if "the Party opposing the class has acted … on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Notice to absent class members is not required under Rule 23(b)(2). This case satisfies the Rule 23(b)(2) standard for certification because it challenges the *ultra vires* CAT Final Rule and requests injunctive and declaratory relief appropriate to the class as a whole.

I. ALL RULE 23(A) PREREQUISITES HAVE BEEN MET

"'The decision to certify is within the broad discretion of the court' as long as 'that discretion [is] exercised within the framework of rule 23.'" *Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 736 (5th Cir. 2023) (internal citations omitted). The proposed class in this case satisfies all four prerequisites of Rule 23(a), and the Court should certify the class.

A. The Proposed Class Is Sufficiently Numerous

The proposed class numbers in the tens or hundreds of millions, which easily meets Rule 23(a)'s numerosity prerequisite. The Fifth Circuit has suggested that any number of class members over 40 makes joinder difficult, if not impracticable. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (approving a class of 100 to 150 members); *see also Boykin v. Ga. Pac. Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983) (stating that a class of 317 individuals was certainly "large enough to meet the numerosity requirement."). In deciding whether joinder would be impracticable, courts may also consider relevant factors such as "geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *J.A.V. v. Trump*, 349 F.R.D. 152, 156 (S.D. Tex. 2025), *appeal filed*, No. 25-40400 (5th Cir. June 30, 2025); *see also Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980).

Plaintiffs seek to certify a class defined as follows:

> All U.S. investors, including U.S. citizens, U.S. residents, and persons domiciled in the U.S., for whom the CAT database contains any securities transaction information, or any personally identifiable information, that refers or relates to the investor or to a securities account associated with the individual. The class includes but is not limited to all investors who are or were legal or beneficial owner[s] of a security or who are or were authorized to give trading instructions relating to a security.

The total number of investors dispersed across the United States is estimated to exceed 100 million individuals. *See* Am Compl. ¶ 109. The numerosity requirement is satisfied. *See Boykin*, 706 F.2d at 1386.

B. The Issues in this Case Are Common to the Entire Class

The commonality prerequisite of Rule 23 is also satisfied because this litigation is driven primarily by seven questions of law common to all investors under CAT's purview. *See* Am. Compl. ¶ 110. Commonality is demonstrated where a question of law is "of such a nature that it is capable of class-wide resolution." *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This

enables the class action "to generate common *answers* apt to drive the resolution of the litigation." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012) (emphasis in original). Commonality also requires "the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50 (quotations omitted). This can be satisfied with just one "instance of the defendant's injurious conduct." *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014).

Constitutional claims are routinely found to meet the commonality prerequisite of Rule 23(a). *See generally Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) (whether school district's use of drug sniffing dogs on students amounted to an unreasonable search under the Fourth Amendment was a common issue for class certification purposes); *M.D. v. Perry*, 294 F.R.D. 7, 38-39 (S.D. Tex. 2013) (commonality prong met when plaintiffs' claim was that policy of over-assigning caseloads for caseworkers violated 14th Amendment); *Mertz v. Harris*, 497 F. Supp. 1134, 1138 (S.D. Tex. 1980) (commonality met when the only issue to be resolved was whether or not particular provision of the Social Security Act was unconstitutional); *U.S. Navy Seals 1-26 v. Austin*, 594 F. Supp. 3d 767, 779 (N.D. Tex. 2022) (class certified when plaintiffs claimed a vaccine mandate with no religious accommodations violated their First Amendment rights). In other words, in cases where plaintiffs bring a constitutional challenge to a single regulation, commonality is easily achieved. *See Willis v. City of Seattle*, 943 F.3d 882, 891 (9th Cir. 2019) (Christen, J., concurring in part) ("[C]ourts have long recognized that facial constitutional challenges present the archetypal common question for class certification.").

This case is a challenge to the lawfulness and constitutionality of an agency regulation and resulting scheme that collects and makes accessible in real time the proprietary investment information of every person who trades on national exchanges. *See* Am. Compl. ¶ 18 (*citing* Hester

Peirce, Statement in Response to Release No. 34-88890; File No. S7-13-19, at 7 (May 15, 2020)). It is a uniform regulation that injures every investor in the same way. Plaintiffs allege that the CAT Rule and the entire CAT scheme exceed SEC's statutory authority and are *ultra vires* in violation of, *inter alia,* Article I's Vesting Clause and Appropriations Clause and 31 U.S.C. § 9102. *Id*. ¶ 110. Plaintiffs assert violations of constitutional rights, including the right to be free from unreasonable searches and seizure under the Fourth Amendment, the right to due process of law under the Fifth Amendment and the right to free association under the First Amendment. *Id*. Counts I-VII will generate common answers regarding SEC's *ultra vires* conduct and the unconstitutionality of the entire CAT scheme. These claims are easily capable of class-wide resolution, which will be achieved by vacating the CAT Rule in its entirety. *See* Am. Compl. at 56 ("Prayer for Relief"). Commonality is therefore satisfied.

C. The Injuries Caused to Class Representatives Are Typical of the Entire Class

Typicality "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen*, 186 F.3d at 625. When an unconstitutional government regulation, policy or practice affects all members of the class and the class representatives uniformly, the typicality standard of Rule 23(a)(3) is easily met. *M.D.*, 294 F.R.D. at 45. This is particularly so because, like commonality, "the threshold for demonstrating typicality is low." *Colindres v. QuitFlex Mfg.*, 235 F.R.D. 347, 374 (S.D. Tex. 2006); *see also Ictech-Bendeck v. Waste Connections Bayou, Inc.*, 349 F.R.D. 106, 119 (E.D. La. 2025) ("If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.").

Each of the class representatives in this case is suffering, and will continue to suffer, the same injuries from the CAT as the absent class members. As have all the investors whom CAT

ensnares, Plaintiffs have purchased and sold securities on U.S. exchanges since CAT began collecting data in June of 2020. *See* Restivo Decl. ¶ 2; Davidson Decl. ¶ 2; Padfield Decl. ¶¶ 2-3. The private investment information of each of the class representatives has been, and will continue to be, unconstitutionally seized by Defendants. *See* Restivo Decl. ¶ 4; Davidson Decl. ¶ 4. They are all at risk of potential data breaches and the catastrophic financial loss that would result from such breaches. *See* Restivo Decl. ¶ 7; Davidson Decl. ¶ 7. And each of them is suffering from curtailment of their freedom by an overreaching administrative agency, since the CAT Rule has never been authorized or approved by Congress. Restivo Decl. ¶ 8; Davidson Decl. ¶ 8. The claims of the class representative are typical of those of the entire class of investors subject to the unconstitutional CAT Rule. *See Horton*, 690 F.2d. at 484 (finding typicality prong satisfied where all named plaintiffs were merely subjected to the government action complained of).

D. The Proposed Class Representatives Are Adequate

Adequacy of representation turns on the following factors: (1) the adequacy of the class representatives to take an "active role in and control the litigation to protect the interests of the absentees"; (2) "the zeal and competence of the representatives' counsel"; and (3) "the risk of conflicts of interest between the named plaintiffs and the class they seek to represent." *Angell*, 67 F.4th at 737 (cleaned up).

"The basic elements of [adequate representation] are the absence of conflict between the representative and the class members and an assurance of vigorous prosecution by the representative." *Mertz*, 497 F. Supp. at 1139 (certifying class where class members sought same declaratory relief, class representatives had identical interests to all class members, and there was no intra class conflict). Here, all class members and class representatives are seeking identical relief and have identical claims. *See* Am. Compl. ¶ 110; Am. Compl. at 56 (Prayer for Relief).

Plaintiffs seek to terminate the CAT scheme for the same reasons: they are concerned about the unlawful and continuous seizure of their private investment information, and they are opposed to such unlawful and unconstitutional government surveillance. *See* Restivo Decl. ¶ 6; Davidson Decl. ¶ 6; Padfield Decl. ¶ 7.

Plaintiffs have also each assured that they are willing and capable of helping to direct the litigation. Restivo Decl. ¶ 11; Davidson Decl. ¶ 11; Padfield Decl. ¶ 12. They have already demonstrated that they are eager participants in this litigation when they attended the October 28, 2024 hearing on the motion to dismiss. *See* ECF No. 93, at 2:12-14 (introducing Mr. Davidson and Mr. Restivo who were sitting behind counsel table). They remain active participants, reviewing filings before they are submitted and receiving regular updates from counsel. *See* Little Decl. ¶ 16.

As to the adequacy of the class representatives' counsel, the Fifth Circuit has stated that, when unchallenged, courts can take judicial notice as to the zeal and competence of class counsel. *Berger v. Compaq Comput. Corp*., 257 F.3d 475, 481 n.12 (5th Cir. 2001). Employment at a prominent public interest law firm indicates adequate representation. *See Horton*, 690 F.2d. at 484 (highlighting employment of counsel at the American Civil Liberties Union as a factor favoring in counsel's zeal and competence). Here, NCLA's mission, and that of its representative counsel, is to pursue challenges against unlawful agency action, as is occurring in this case. *See* Little Decl. ¶ 5. NCLA and its counsel have won several cases at the Supreme Court. *Id*. ¶ 6. The founder of the organization, Philip Hamburger, is the most prominent academic advocate for reining in the unlawful and unconstitutional attributes of the modern administrative state. *Id*. ¶ 4. Moreover, the class claims in this case have been thoroughly investigated, and local counsel has been secured. *Id*. ¶¶ 16-17. The court should therefore take judicial notice of the zeal and competence of class counsel in this case.

The risk of conflicts of interest might arise when named plaintiffs waive some of the class's claims. *Angell*, 67 F.4th at 737. But no claim is waived here. Furthermore, the claims of the class are uniform and will not require subclasses presently or in the future. The prerequisites of Rule 23(a) have thus been satisfied in this case.

II. ALL REQUIREMENTS FOR AN INJUNCTIVE CLASS UNDER RULE 23(B)(2) HAVE BEEN MET

Rule 23(b)(2) requires common behavior by the defendant toward the class. *Yates v. Collier*, 868 F.3d 354, 366 (5th Cir. 2017). There are three components to this requirement: (1) class members must have been harmed in essentially the same way; (2) injunctive relief must predominate over monetary damage claims; and (3) the injunctive relief sought must be specific. *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007); *see also Wal-Mart*, 564 U.S. at 360-61 ("In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class."); *M.D.*, 294 F.R.D. at 30. Class actions alleging civil rights violations are particularly well-suited for Rule 23(b)(2) class certification. *Cf. Wal-Mart*, 564 U.S. at 361 ("'[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture" (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997))).

For the reasons explained *supra* at page 17, the class members have been harmed in identical ways. Further, no monetary relief (other than attorneys' fees) is sought, and therefore injunctive relief predominates.

The specificity element requires that plaintiffs make an "effort to give content" to the injunctive relief they seek "so that final injunctive relief may be crafted to describe in reasonable detail the acts required." *M.D. ex rel. Stukenberg*, 675 F.3d at 848 (internal quotations omitted). At the class-certification stage, there is no need to determine the precise terms of the injunction. *M.D.*,

294 F.R.D. at 30. It is sufficient at the class-certification stage to demonstrate that an injunction specific enough to meet Fed. R. Civ. P. 65(d)'s requirements can be conceived. *Id*. And few cases find that the specificity requirement had not been met. *Yates*, 868 F.3d at 368. Here, Plaintiffs have set out the specific declaratory and injunctive relief they seek in Parts B through L in the Amended Complaint's Prayer for Relief. This suffices for purposes of a Rule 23(b)(2) class.

CONCLUSION

For all the reasons stated and upon the entire record herein, the Plaintiffs respectfully request that their motion for class certification be granted, that Plaintiffs be appointed as class representatives and that NCLA be appointed as class counsel.

Dated: January 23, 2026

Respectfully Submitted,

/s/ *Margaret A. Little*

Margaret A. Little CT303494
Caitlin M. Moyna* NY4176897
Andreia Trifoi* DC90017660
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Tel: (202) 869-5210
Fax: (202) 869-5238
Peggy.Little@ncla.legal
Caitlin.Moyna@ncla.legal
Andreia.Trifoi@ncla.legal
* *Pro Hac Vice* application pending

Counsel for Plaintiffs

Mark Siegmund
State Bar Number 24117055
CHERRY JOHNSON SIEGMUND JAMES, PLLC
7901 Fish Pond Rd., Suite 200
Waco, TX 76710
Tel: (254) 732-2242
MSiegmund@CJSLAW.com

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Texas, Waco Division, using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ *Margaret A. Little*
Margaret A. Little (CT 303494)

CERTIFICATE OF CONFERENCE

I hereby certify that on January 21, 22 and 23, 2026, I conferred with counsel for Defendants Securities and Exchange Commission and on January 22, 2026, I conferred with counsel for defendants Consolidated Audit Trail, LLC. Defendants oppose this motion.

/s/ *Margaret A. Little*
Margaret A. Little (CT 303494)