

**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, in his official capacity as
Chairman of the U.S. Securities and Exchange
Commission, *et al.*,

Defendants.

Civil Action No. 6:24-cv-00197-
ADA-DTG

**ORAL ARGUMENT
REQUESTED**

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF RENEWED
MOTION FOR A PRELIMINARY INJUNCTION
AND STAY PURSUANT TO 5 U.S.C. § 705**

Mark Siegmund
State Bar Number 24117055
CHERRY JOHNSON SIGMUND
JAMES, PLLC
400 Austin Avenue
Suite 903
Waco, TX 76701
Tel: (254) 732-2242
MSiegmund@CJSLAW.com

Margaret A. Little CT303494
Margot J. Cleveland MIP83564
Caitlin Moyna* NY4176897
Christian Clase* TN041231
Andrea Trifoi* DC90017660
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Tel: (202) 869-5210
Peggy.Little@ncla.legal
Margot.Cleveland@ncla.legal
**Pro Hac Vice forthcoming*

Counsel for Plaintiffs

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INTRODUCTION AND SUMMARY

This case challenges the Securities and Exchange Commission’s (SEC) unlawful Consolidated Audit Trail (CAT), which seizes investors’ data on every stock transaction on every stock exchange in the United States. As the former and current SEC Commissioners observed, this “unprecedented” scheme¹ allows SEC “to watch investors’ every move in real time,”² as it collects data on tens of millions of transactions each day.

Three overarching reasons require the Court to immediately halt the unconstitutional CAT scheme by granting a preliminary injunction *now* (and not in six months as SEC would prefer). *First*, questions about the constitutionality of the CAT scheme—in particular, whether SEC exceeded its authority in creating the CAT in the first place, and whether the seizure of investors’ data without cause violates their Fourth Amendment rights—are threshold issues that must be decided regardless of whether SEC implements its proposed band-aids, none of which cure the constitutional defects. *Second*, SEC’s proposal that it obtain investor PII only after it has seized and then searched anonymized data does not eliminate the Fourth Amendment violation: The government cannot conduct causeless seizures and searches of CAT merely because the identity of the owner is currently unknown, any more than it could search, without cause, storage units only to later request the name of the individuals renting the units from which they discovered incriminating evidence. The Fourth Amendment prohibits both. *Third*, the preliminary injunction balancing test now firmly weighs in Plaintiffs’ favor, as CAT has gathered an additional six-months of investor data, likely exceeding several billions of transactions, further depriving investors of their constitutional freedoms and imperiling their security as cyber threats loom. The resources SEC will have to expend to remedy these harms have ballooned,

¹ ECF 25-19, Ex. H, Then-Chair Gary Gensler, Statement on CAT Funding (Sep. 6, 2023), *available at* <https://www.sec.gov/news/statement/gensler-statement-cat-funding-090623> (last visited May 24, 2024) (quoting ECF 25-7, Ex. B, Mary Schapiro, Opening Statement at SEC Open Meeting: Consolidated Audit Trail (July 11, 2022)).

² ECF 25-34, Ex. OO, Stmt. of Hester M. Peirce in Response to Rel. No. 34-88890 (May 15, 2020).

and the cybersecurity risks grow each day. As former Attorney General William Barr recently observed: “It’s guaranteed that all this data will end up with our adversaries, likely with the Chinese. Far more secure agencies have been successfully hacked.”³

The conditions for a preliminary injunction are satisfied here. Plaintiffs will likely succeed on the merits. SEC lacked statutory authority to create or fund the CAT and thus violated the Constitution and the Administrative Procedure Act (APA). Further, the CAT violates investors’ Fourth and Fifth Amendment rights just as the Framers feared—except SEC wields digital technology and cutting-edge data-analysis tools on an unprecedented, industrial scale the Framers could not have imagined. Irreparable harm is established when an agency issues a rule without authority or violates a plaintiff’s constitutional rights. The CAT does both. Finally, the public interest is plainly served by ending unlawful agency actions while this case proceeds on the merits.

STATEMENT OF FACTS

The CAT still largely functions as described by Plaintiffs when they requested their initial preliminary injunction. Pl.’s. PI. Mot., ECF 25-3, at 5-12. Despite SEC’s promise of change, the CAT continues to surveil investors unabated nearly two years after this action commenced. But several CAT-related developments have occurred since Plaintiffs’ initial motion and the abeyance.

I. THE CAT’S FUNDING MECHANISM WAS HELD UNLAWFUL BY THE ELEVENTH CIRCUIT

The CAT’s funding mechanism has been held unlawful, and aspects of the mechanism have changed. The CAT’s original scheme of taxing Self-Regulatory Organizations (SROs) and certain broker-dealers, *see* 88 Fed. Reg. 62,628 (Sep. 12, 2023), was challenged in a lawsuit, *Am. Sec. Ass’n, v. SEC*, 147 F.4th 1264, 1277-78 (11th Cir. 2025). On July 25, 2025, the Eleventh Circuit held that CAT’s

³ Zach Kessel, *SEC Finalizing a ‘Big Brother’ Database to Track Americans’ Stock Trades in Real Time*, Nat’l Rev. (July 23, 2024, 1:58 PM), <https://www.nationalreview.com/news/sec-finalizing-a-big-brother-database-to-track-americans-stock-trades-in-real-time/>.

funding mechanism was unlawful.⁴ It vacated the CAT’s funding order, briefly stayed the vacatur and required SEC to address the funding model’s deficiencies.⁵

As of today, CAT lacks a funding model, and SEC and the plan participants appear to be using “operational reserve[s] to fund CAT costs.”⁶ Any changes being considered do not address the constitutional and statutory deficiencies identified by Plaintiffs. ECF 99 at 39-42.

II. SEC HAS BEEN “RETHINKING” THE CAT FOR MANY MONTHS, BUT IT CONTINUES TO FUNCTION LARGELY UNCHANGED

Months after Defendants received an abeyance last summer on the promise of a comprehensive rethink of the CAT, little has changed. Two days before the abeyance expired, SEC adopted a variety of measures proposed by CAT LLC pertaining to the collection and storage of PII in CAT’s central database.⁷ Specifically, SEC stated that it would not continue to collect and store PII in CAT’s central database.⁸ SEC also plans to eventually remove preexisting PII from the CAT.⁹

SEC admits that removing PII from CAT’s central database still allows it to conduct “regulatory and surveillance efforts” because it will still be able to track “a specific order of a Customer throughout its entire lifecycle” through the use of a unique CAT Customer ID (CCID).¹⁰ In other

⁴ See *id.* at 1269, 1277-78. SEC’s claim that Plaintiffs “distorted” *American Securities Association*, ECF 123 at 4, misrepresents Plaintiffs’ argument. Plaintiffs correctly asserted that the Eleventh Circuit held that the CAT’s funding mechanism unlawful. ECF 121 at 4. More importantly, Plaintiffs cited *American Securities Association* to demonstrate that PII lacks *any* relevance to the statutory or constitutional validity of the CAT’s funding model—a point SEC *itself* distorts.

⁵ *Id.* at 1269.

⁶ See Robert Walley, *Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail regarding CAT Funding Model – Response to Comments*, File No. 4-698, at 2 (Jan. 14, 2026), https://www.catnmsplan.com/sites/default/files/2026-01/LLC_CAT-Response-to-Comments_Funding-Proposal-01.14.26.pdf.

⁷ See generally *Joint Industry Plan; Order Approving an Amendment to the National Market System Plan Governing the Consolidated Audit Trail, as Modified by Amendment Nos. 1 and 2 and by the Commission, Regarding Customer and Account Information*, 91 Fed. Reg. 2,164 (Jan. 16, 2026).

⁸ See *id.* at 2,165.

⁹ *Id.* at 2,165-66.

¹⁰ *Id.* at 2,168.

words, SEC retains the ability to uniquely identify each investor.¹¹ SEC also indicated that, at some undetermined point in the future, it would phase out existing PII from CAT's database.¹² But to date, SEC has *never* indicated that it has ceased searching or relying on CAT data. In fact, it boasts of using the CAT to bring enforcement actions.¹³

There is no clear timetable to implement these changes. CAT LLC suggested that SEC would lose access to reported PII within three months of SEC adopting the amendments,¹⁴ and proposed deleting existing PII within 9-12 months.¹⁵ While SEC agreed "that a phased implementation schedule is appropriate," it encouraged CAT LLC Plan Processor to extend the timelines for hiding PII from regulators and PII deletion.¹⁶ The presence of some investor PII in the CAT still allows SEC to surveil investors' transactions, adding new Fourth Amendment injury daily.¹⁷ The same is true of the Fifth Amendment. *See Amicus Br. of the Cato Institute and Inv'r Choice Advocates Network*, ECF 52-1, at 7-11.

III. THE 1975 AMENDMENTS TO THE EXCHANGE ACT WERE DEREGULATORY AND DID NOT CONTEMPLATE THE CAT

SEC continues to point to § 11(A) of the Exchange Act as statutory authority for the CAT.¹⁸ 91 Fed. Reg. at 2,166. But § 11A provides no such authority.¹⁹ It sought "to break down the unnecessary

¹¹ *See id.* at 2,174; *id.* at 2,173 ("the Participants state that the Proposed Amendment would not prevent regulators from determining the identity of persons involved in potential violations of the securities laws.").

¹² *Id.* at 2,177-79, 2,188.

¹³ *See e.g., Cantor Fitzgerald & Co.*, Exchange Act Release No. 97,906, __SEC Docket __ (July 14, 2023) (order instituting remedial sanctions).

¹⁴ *See* 91 Fed. Reg. at 2,179.

¹⁵ *Id.*

¹⁶ *Id.* (encouraging "the Plan Processor to extend the approximately three-month period for providing regulators with visibility into" investors' PII).

¹⁷ *See Amicus Brief of the American Securities Association, Attorney General William Barr, and the American Free Enterprise Chamber of Commerce*, ECF 63-1, at 17-20.

¹⁸ In this litigation, SEC has also belatedly identified § 17(a) as authorizing the CAT. But that desperate ploy is eviscerated because that Section also did not envision, or does it authorize, the CAT. *See Amicus Brief of Andrew N. Vollmer of the Mercatus Center*, ECF 50, at 7-9.

¹⁹ Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. Ill. L. Rev. 315, 315, 331 (1985).

regulatory restrictions ... which restrain[ed] competition among markets and market makers.” S. Rep. No. 94-75, at 12-13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 191; *see* ECF 50 (“In creating the CAT, the SEC exceeded the NMS authority granted by Congress;” neither § 11A nor § 17A authorize the CAT). “A statute for investors has been turned into a statute for the comfort of regulators.” *Id.* at 9. In short, the CAT exceeds Congress’s stated objectives.²⁰

Instead of the CAT, SEC’s standard investigative procedure at the time of the 1975 Amendments was the blue-sheet process. *See* ECF 25-13, Ex. E, *SEC Enforcement Manual* § 3.2.2 (citing “[§] 17(a) of the Exchange Act and Rule 17a-25 thereunder”); ECF 25-25, Ex. K., 17 C.F.R. § 240.17a-25 (“Electronic submission of securities transaction information by exchange members, brokers, and dealers”).²¹

The *SEC Enforcement Manual* required that SEC have an articulable basis for obtaining information via the blue sheets. *See* ECF 25-13, Ex. E, *SEC Enforcement Manual* § 3.2.2 (requiring SEC Staff to identify specific securities in advance and a time frame for each request). These procedures limit the scope of the request to the stocks and the time frame that are relevant to possible violations. *See id.* The CAT bypasses these procedures, allowing SEC to conduct market-wide, nearly real-time surveillance of securities markets.

IV. EVEN WITH SEC’S PROPOSED COST-CUTTING, THE CAT’S TOTAL COSTS REMAIN STRATOSPHERIC, AND CONGRESS HAS NEVER APPROPRIATED FUNDS FOR THE SCHEME

Despite SEC’s attempts to constrain the CAT’s costs, CAT’s operators estimate that the program will cost nearly \$200 million a year. *See Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail to Further Reduce the Costs of the*

²⁰ *See* Amicus Brief of Andrew N. Vollmer of the Mercatus Center, ECF 50, at 5-7.

²¹ *See also* 66 Fed. Reg. 35,836, 35,836 (June 29, 2001) (Final Rule - Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers) (“For several decades, the Commission requested” information about buyers and sellers of securities through the blue-sheet process).

Consolidated Audit Trail, 90 Fed. Reg. 61,506 (Dec. 31, 2025). Actual costs will likely be *substantially* higher, as SEC estimated that it would cost \$37.5 to \$65 million to build the CAT, and the actual costs of building the CAT have exceeded \$500 million.” Rebekah Whittington, *The SEC’s 2023 Funding Order for Consolidated Audit Trail Is Arbitrary and Capricious*, Eleventh Cir. Bus. Blog (July 31, 2025).²² Indeed, CAT’s total costs since inception likely exceed SEC’s own operating budget. Pls.’ PI Mot., ECF 25-3, at 11-12.

And Congress has never appropriated a dime. *Id.* at 24. While CAT’s funding remains in limbo given the Eleventh Circuit’s vacatur, the proposed funding amendments leave the funding burden on the investing public and CAT’s operators.²³

ARGUMENT

Under Fed. R. Civ. P. 65(a), a preliminary injunction is warranted when a movant shows “(1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.” *Ladd v. Livingston*, 777 F.3d 286, 288 (5th Cir. 2015). All four factors favor Plaintiffs, entitling them to a preliminary injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

As the Court previously found, ECF 92 at 6, Plaintiffs have a substantial likelihood of success on the merits, because the CAT program violates the Constitution (Am. Compl. Counts One and Two), the APA (Count Seven) and the Fourth Amendment (Count Three). Plaintiffs are likely to prevail on all of these claims. As recent developments reinforce, Plaintiffs carry their burden for this

²² Available at <https://www.11thcircuitbusinessblog.com/2025/07/the-secs-2023-funding-order-for-consolidated-audit-trail-is-arbitrary-and-capricious/>.

²³ See Walley, *supra* note 6, at 2 (“as the Court recognized, the CAT NMS Plan has always ‘required both the self-regulatory organizations and the broker-dealers to bear the costs of the CAT.’”).

motion so long as they are likely to prevail on even one count.

A. SEC Violated the Constitution and the APA by Acting Without Statutory Authority

“Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.” *NFIB v. OSHA*, 595 U.S. 109, 117 (2022) (per curiam). *See also La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[An] agency literally has no power to act ... unless and until Congress confers power upon it.”). Agencies exceeding delegated authority require courts to “hold unlawful and set aside agency action.” 5 U.S.C. § 706(2)(C).

SEC bears the burden of showing it had legal authority to create the CAT. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022); *see Inbanse Techs., LLC v. EPA*, 96 F.4th 888, 893 (5th Cir. 2024). Meeting this burden requires that SEC “point to explicit Congressional authority.” *Id.* *See also Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022) (“As always, we begin with the text.”). SEC contends it has broad discretionary authority citing Exchange Act § 11A(a)(3)(B).²⁴ That grasp for authority cannot withstand the Supreme Court’s caution about reliance on agency claims of discretionary powers. “When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.” To fulfill that role, the court must “ensur[e] the agency has engaged in ‘reasoned decisionmaking’ within those boundaries.” *Loper Bright Enters. v. Raimondo and Relentless, Inc. v. Dep’t of Com.*, 603 U.S. 369, 395-96 (2024). And as the Court previously held, ECF 92 at 5, § 11A does no such thing. *See* Brief *Amicus Curiae* of Andrew Vollmer. SEC’s reliance on § 11A(a)(3)(B) is misplaced because it ignores that the authority specified in § 11A(a)(3) is limited by the preamble. Section 11A(a)(2) “directs” SEC to “use its authority under this chapter ... in accordance with the findings and to carry out the objectives set forth in paragraph (1) of

²⁴ *See, e.g.*, Consolidated Audit Trail, 75 Fed. Reg. 32,556 (proposed June 8, 2010); 88 Fed. Reg. at 62,673.

this subsection.” 15 U.S.C. § 78k-1(a)(2) (emphases added). Section § 11A(a)(3)(B) further limits SEC’s ability to “authorize or require” SROs “to act jointly” in “planning, developing operating, or regulating a national market system,” only “in furtherance of the directive in this paragraph.” 15 U.S.C. § 78k-1(a)(3)(B) (emphasis added).

Thus, SEC’s authority to “authorize or require self-regulatory organizations to act jointly,” is limited to rules that are “in furtherance of the directive in paragraph (2).” And, in turn, Congress’s directive in § 11A(a)(2) to SEC is to regulate “in furtherance of” the objectives specified by paragraph (1) of this subsection 11A. 15 U.S.C. § 78k-1(a)(2).

Those objectives, *see* 15 U.S.C. § 78k-1(a)(3)(C), are specific and limited first to assuring:

- (i) economically efficient execution of securities transactions;
- (ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;
- (iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;
- (iv) the practicability of brokers executing investors’ orders in the best market; and;
- (v) an opportunity, consistent with the provisions of clauses (i) and (iv) of this subparagraph, for investors’ orders to be executed without the participation of a dealer.

Additionally, 15 U.S.C. § 78k-1(a)(3)(D) provides as an objective:

- (D) The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors’ orders, and contribute to best execution of such orders.

None of these purposes or objectives authorizes the CAT—even implicitly.

The D.C. Circuit has held that these objectives limit SEC’s power. *See Bus. Roundtable v. SEC*, 905 F.2d 406, 416 (D.C. Cir. 1990) (explaining that § 11A “requires” SEC “to use its authority in accordance with the findings and to carry out the objectives” § 11A “set[s] forth”). After a full review of § 11A and its enactment, the *Business Roundtable* panel concluded:

Indeed, Congress made clear that the power to regulate central information processing was not intended to give the SEC “either the responsibility or the power to operate as

an ‘economic czar.’” ... To argue that Congress’s ‘equal regulation’ mandate supports SEC control over corporate governance through national listing standards is to gamble that the court will accept a Commission spin on a statutory fragment without even a glance at its context. Wrong court, bad gamble.

905 F.2d at 416 (citation omitted).

SEC concedes it lacks express authorization from Congress by offering only this roundabout rationale for the CAT: “There is no reason to question that Congress would have intended for the Commission to address the serious shortcomings and regulatory obstacles associated with the lack of a consolidated audit trail,” 88 Fed. Reg. at 62,673, offered in response to comments asserting that such a database was a major question only Congress could decide. In other words, from the outset SEC knew it lacked statutory authority. This court should apply common sense and hold the agency within its boundaries. And not even Congress can pass legislation that violates the First and Fourth Amendments to the Constitution.

SEC has failed to identify any § 11A objective CAT would purportedly advance, and its proposed changes to the CAT are no help. It is hard to understand how *any* SEC surveillance system, let alone the CAT, serves the permissible objectives of “linking” the different exchanges, “the efficient execution of securities transactions,” or providing market information “to brokers, dealers, and investors.” 15 U.S.C. § 78k-1(a)(1)(C) & (D). Section 11A’s objectives do not permit SEC to seize and scrutinize individual investors’ information, or allow SEC to fund a surveillance program with an outsourced taxing-and-spending system. This silence—the dog that didn’t bark—is fatal to the CAT. *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (congressional silence does not provide an agency the authority to act).

SEC’s oversight of SRO audit trails provides no authority to establish the CAT for at least two reasons. First, it fails to identify “specific” authority in a *statute*. *Inhance Techs.*, 96 F.4th at 893 (“[A]gencies, as mere creatures of statute, must point to explicit Congressional authority justifying

their decisions.”).²⁵ Nor could it. No statutory language authorizes SEC to order SROs to seize for later search investor-identifying information about every trade in the entire market. SEC’s new offer that it will later encode such data, does not authorize it to seize it in the first place.

Second, the blue sheet process did not collect investor-identifying information.²⁶ Two former SEC Chairs attested to these differences by touting the CAT as “unprecedented,” ECF 25-19, Ex. H, Gensler stmt. (quoting ECF 25-7, Ex. B, Mary L. Schapiro, *Opening Statements at SEC Open Meeting: Consolidated Audit Trail* (July 1, 2012)) and a “sea change.” ECF 25-21, Ex. I, Mary Jo White, *Chairman’s Address at SEC Speaks 2014* (Feb. 21, 2014).²⁷ And SROs declared the CAT “the first of its kind, both in substance and in scale.” 89 Fed. Reg. 10,850, 10,882 (Feb. 13, 2024). By its own words, SEC cannot now contend that CAT is merely an incremental, organic adjustment to the prior SRO audit trails.

1. Pre-CAT History Shows SEC Knew § 11A Did Not Authorize the CAT

SEC’s regulatory history confirms it knew it lacked authority to adopt the CAT. Prior to 2010, SEC never sought to collect information on individual investors under the guise of § 11A authority. For more than 35 years after Congress passed § 11A, SEC rules relating to the national market system were limited to promoting competition, improving stock trading procedures, and enhancing communications among stock exchanges and market participants.²⁸ SEC cannot “point to anything ... that so much as hints at the existence of [the] ‘latent’ authority” it now asserts. *Ry. Lab. Exec. Ass’n*

²⁵ SEC’s string cite for general authority to oversee SROs falls short. *See* 75 Fed. Reg. at 32,605 nn.413-415 (citing 15 U.S.C. § § 78b, 78(f)(b)(1), 78(f)(6), 78s(g)(1), 78(h)(1), 78o–3(b), 78o–3(b)(2)).

²⁶ *See* 81 Fed. Reg. 84,696, 84,811-12 (Nov. 23, 2016) (discussing contents of SRO audit trails); *see also* ECF 25-7, Ex. B, Schapiro Stmt., *supra* note 8 (stating that before the CAT, these audit trails had “never collected” the identity of the investors (emphasis added)).

²⁷ Available at <https://www.sec.gov/news/speech/2014-spch022114mjw> (last visited May 24, 2024).

²⁸ For a discussion of rules SEC issued during the first 30 years under § 11A, *see* Dale A. Oesterle, *Regulation NMS: Has the SEC Exceeded Its Congressional Mandate to Facilitate a “National Market System” in Securities Trading?*, 1 N.Y.U. J. L. & Bus. 613, 654-55 (2005). *See also*, *Regulation NMS*, 70 Fed. Reg. 37,496, 37,498 (June 29, 2005) (SEC’s “comprehensive” revision and consolidation of the rules it had issued under § 11A).

v. Nat'l Mediation Bd., 29 F.3d 655, 669 (D.C. Cir. 1994) (en banc).

There is more. Before SEC created the CAT, it accessed PII only through the blue-sheet process. SEC's decades-long blue-sheet practice provides powerful evidence that it never before believed it was authorized to ignore that process and instead seize all investor information in the entire NMS. *See West Virginia v. EPA*, 597 U.S. at 725 (previous agency practice indicates agency's understanding it did not have the authority it now is claiming); *see also id.* at 725 (When a court is deciding "the extent of [agency] power conveyed by ... statutory language, ... the want of assertion of power by [the agency that] presumably would be alert to exercise it, is ... significant in determining whether such power was actually conferred" (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941))).

2. The Supreme Court's "Major Questions" Decisions Further Confirm That Congress Never Authorized the CAT's Creation

The Supreme Court's "major questions doctrine" teaches that when an agency claims authority of particularly great "breadth" and "economic and political significance," *West Virginia v. EPA*, 597 U.S. at 721, it must establish that Congress granted it such authority with clarity: The greater the scope of authority Congress intends to grant, the greater the clarity expected from Congress. *See id.* at 723-24. This expectation follows from "commonsense principles of communication," *Biden v. Nebraska*, 600 U.S. 477, 514 (2023) (Barrett, J., concurring), which teach that Congress would not delegate authority of "economic and political significance" using words that are "cryptic." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Biden v. Nebraska*, 600 U.S. at 507 (requiring congressional clarity follows from "traditional tools of judicial decisionmaking").

The transformation of SEC's role to collector of PII and financial data of more than 100 million investors—from every walk of life, from retired teachers to young families—is well beyond "major" because, for the first 75 years it existed, SEC had no direct relationship with investors. *See West Virginia v. EPA*, 597 U.S. at 724 (referring to changes that are "major" or "transformative"). The

SEC is not the Inquisitor of Investor Transactions—at least not yet!

SEC’s unlawful attempt to transform a statutory directive to “facilitate the establishment of a national market system for securities,” 15 U.S.C. § 78k-1(a)(2), into a license to create a mass surveillance regime over private actors, constitutes a “fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation’ into an entirely different kind.” *West Virginia v. EPA*, 597 U.S. at 728 (citation omitted; bracket in original). This change easily triggers the heightened expectations of clarity identified in the “major questions” cases.

The costs to build and operate the CAT are also indisputably “significant.” *West Virginia v. EPA*, 597 U.S. at 721 (stating that where costs are of “economical and political significance,” the agency’s assertion of authority provides a “reason to hesitate before concluding that Congress meant to confer such authority”) (cleaned up). Each element of the CAT’s cost is substantial: the estimated \$500 million to establish it,²⁹ the \$188 million to operate it in 2025,³⁰ and the estimated compliance costs on broker-dealers of up to an additional \$1.5 billion or more each year.³¹ These costs are similar to costs in other regimes that require clear evidence of Congress’s intent. *See NFIB v. OSHA*, 595 U.S. at 120; *see also BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (\$3 billion Covid vaccine mandate compliance costs); *West Virginia v. EPA*, 597 U.S. at 774 n.6 (\$5-\$8 billion compliance costs) (Kagan, J., dissenting); *see also id.* at 714 (addressing compliance costs).

CAT’s costs also have independent constitutional defects because SEC bypassed Congress’s control of the appropriations process. U.S. CONST. art. I, § 9. Rather than seek an appropriation from Congress, SEC ordered SROs under its regulatory thumb to raise the money to fund it. In effect, SEC

²⁹ *See Am. Sec. Ass’n*, 147 F.4th at 1269.

³⁰ *See Joint Industry Plan, Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail to Further Reduce the Costs of the Consolidated Audit Trail*, 90 Fed. Reg. 61,506 (Dec. 31, 2025).

³¹ 81 Fed. Reg. at 84,801, 84,860.

has created for itself an unheard-of outsourced limited liability company comparable in size to the agency's entire \$2.4 billion Congressionally approved budget to engage in unlawful suspicionless surveillance of Americans. This is constitutionally prohibited: "[A]mong Congress's most important authorities is control of the purse." *Biden v. Nebraska*, 600 U.S. at 505-06. SEC's effort to sidestep the appropriations process makes it even less likely that, when Congress passed § 11A, it authorized SEC to create a private LLC to run the CAT.

The changes SEC wrought through the CAT also are "political[ly] significan[t]," *West Virginia v. EPA*, 597 U.S. at 721. The damage that CAT has inflicted on investors' privacy has triggered years of controversy. SEC Commissioner Peirce has warned about "the significant costs that a comprehensive surveillance tool of this type presents to Americans' liberty and privacy." ECF 25-34, Ex. OO, Stmt. of Hester M. Peirce in Response to Release No. 34-88890 (May 15, 2020).³²

Also controversial, the CAT forces investors to endure increased risks from cyberhackers. SEC's own EDGAR database already has been hacked, causing losses to investors.³³

The CAT scheme has triggered objections by critics ranging from the American Civil Liberties Union to securities industry groups,³⁴ and has drawn significant criticism across the political spectrum

³² Available at <https://www.sec.gov/news/public-statement/peirce-statement-response-release-34-88890-051520> (last visited May 24, 2024).

³³ See ECF 25-8, Ex. BB, SEC Then-Chair Jay Clayton, Statement on Cybersecurity (Sept. 20, 2017), <https://www.sec.gov/news/public-statement/peirce-statement-response-release-34-88890-051520> (last visited May 24, 2024). In 2024, SEC Chair Gensler's X (Twitter) account was breached and misused, causing more losses to investors. See, e.g., Austin Weinstein & Jamie Tarabay, *SEC Had a Fraught Cyber Record Before X Account Was Hacked*, Bloomberg Law (Jan. 11, 2024), <https://www.bloomberg.com/news/articles/2024-01-11/sec-had-a-fraught-cyber-record-long-before-x-account-was-hacked> (last visited May 24, 2024).

³⁴ ECF 25-50, Ex. Y, Letter from ACLU to SEC (Dec. 16, 2019), <https://www.aclu.org/documents/aclu-letter-sec-consolidated-audit-trail> (last visited May 24, 2024); ECF 25-32, Ex. NN, SIFMA Letter to Ms. Vanessa Countryman on CAT Data Security Questions (Jun. 4, 2020), <https://www.sifma.org/wp-content/uploads/2020/06/SIFMA-Letter-on-March-17-2020-CAT-Cybersecurity-Questions.pdf> (last visited May 24, 2024).

about CAT's irreparable damage to investor privacy and cybersecurity.³⁵ In this case alone, 19 states filed a brief describing violations to their citizens' civil liberties and cybersecurity risks.³⁶

In sum, by every relevant consideration, the CAT Rule triggers the “major questions” expectation—that Congress would have spoken clearly if, in 1975, it had intended to grant SEC the expansive authority that SEC claimed when it issued the CAT Rule. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress ... does not ... hide elephants in mouseholes.”). Congress did not “speak clearly” to authorize an SEC surveillance program when it passed Exchange Act § 11A, *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). To the contrary: Every one of the statutory-construction factors points in the opposite direction, separately and together establishing that Congress did not authorize SEC to create the CAT. Because SEC has acted “contrary to constitutional right, power, privilege, or immunity and in excess of statutory jurisdiction, authority or limitations or short of statutory right,” 5 U.S.C. § 706, Plaintiffs have a strong likelihood of prevailing on the merits of their constitutional and APA claims.

B. The CAT Rule Violates the Fourth Amendment

Plaintiffs are also likely to prevail on their Fourth Amendment claim. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects[] against unreasonable searches and seizures.” U.S. CONST. amend. IV. In promulgating the CAT Rule, SEC ordered the collection of investors' records, which is a seizure under the Fourth Amendment. SEC's later review of those records constitutes a search. The seizures and later searches are “unreasonable”

³⁵ *See, e.g.*, ECF 25-31, Ex. N, Implementation and Cybersecurity Protocols of the Consolidated Audit Trail, Hearing before the U.S. H.R. Comm. on Fin. Servs. (Nov. 30, 2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg31288/pdf/CHRG-115hhrg31288.pdf> (last visited May 22, 2024); ECF 25-33, Ex. O, Data Security: Vulnerabilities and Opportunities for Improvement: Hearing before the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Servs. 115th Cong. (Nov. 1, 2017), <https://financialservices.house.gov/uploadedfiles/115-52.pdf> (last visited May 24, 2024).

³⁶ Brief of Arkansas and 18 Other States as Amici Curiae In Support Of Petitioners, ECF 77.

because they were not supported by a warrant—or even a reasonable suspicion of wrongdoing—and do not satisfy a recognized exception to the warrant requirement.

1. The CAT's Collection of Investors' Information Is a Search and Seizure

A Fourth Amendment “search” occurs whenever the government intrudes on a person’s “papers,” “effects,” or other property to gather information, or it violates that person’s “reasonable expectation of privacy.” *United States v. Jones*, 565 U.S. 400, 405-06 (2012) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). The Fourth Amendment protects “effects” and confidential financial “papers,” see *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-06 (1924); *Boyd v. United States*, 116 U.S. 616 (1886) (papers are protected). Digital files stored on a smartphone are likewise protected, *Riley v. California*, 573 U.S. 373, 399, 401 (2014) (quoting *Arizona v. Gant*, 446 U.S. 332, 345 (2009)). So too is email. See, e.g., *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016); *United States v. Warshak*, 631 F.3d 266, 274 (6th Cir. 2010). Likewise, confidential business data is protected as “property.” In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that defendants’ misappropriation of financial information deprived it of “money or property” for purposes of the mail and wire fraud statutes. *Id.* at 25-26. See also *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984) (recognizing confidential business data as property protected by the Takings Clause); *Resol. Tr. Corp. v. Walde*, 18 F.3d 943, 949 (D.C. Cir. 1994) (holding that Fourth Amendment required statute to be interpreted as prohibiting agency from inspecting personal financial records absent articulable suspicion of wrongdoing).

The Fourth Amendment also protects electronic personal data where the person at issue has a reasonable expectation of privacy. *Katz*, 389 U.S. at 360 (Harlan, J., concurring). The Supreme Court recently held that the Fourth Amendment protects cell phone records of a person’s physical movements, and therefore that the government’s acquisition of those digital records to open an “intimate window into a person’s life” amounted to a search. *Carpenter v. United States*, 585 U.S. 296,

310 (2018).³⁷ Plaintiffs have a reasonable expectation of privacy that their brokers would maintain the confidentiality of their information, absent the government obtaining a warrant, subpoena, or other legal process. ECF 122-3, Davidson Dec. ¶ 3; ECF 122-4, Restivo Dec. ¶ 4, NCPPR Dec. ¶ 4.³⁸

2. The Searches and Seizures Violate the Fourth Amendment

The Fourth Amendment requires searches and seizures to be “reasonable.” *Carpenter*, 585 U.S. at 317. Nothing about the CAT or SEC’s proposed changes thereto are reasonable. The CAT systematizes an unlawful dragnet fishing expedition—except now on an oceanic scale made possible by recent advances in digital and analytics technology. These technologies enable SEC to conduct a continuous dragnet of suspicionless searches, vacuuming up vast amounts of private information from more than 100 million citizens.

SEC exacerbates its record-breaking violation by making the improperly seized information broadly available outside the agency. At its discretion, SEC discloses this information to prosecutors at the Department of Justice and in the states, ECF 25-13, Ex. E, *SEC Enforcement Manual* § 5.2.1, and to FINRA and more than 20 stock exchanges. *See, e.g.*, ECF 25-9, Ex. C, CAT NMS Plan § 3.1; ECF 25-5, Ex. A; App. D, § 8.1. Well over 3,000 regulators and non-governmental contractors spread across SEC and more than 20 other organizations can access investors’ securities transactions.

Still worse, the CAT exposes investors’ private information to broader disclosure through theft

³⁷ *See also* Mihailis E. Diamantis, *Privileging Privacy: Confidentiality as a Fourth Amendment Protection*, 21 U. Pa. J. Const. L. 485, 494 (2018) (footnote omitted) (summarizing authorities and noting the “widespread recognition in the law that people have privacy interests in their financial information”).

³⁸ The “third-party” doctrine, articulated in 1976 in *United States v. Miller*, 425 U.S. 435, 443 (1976), is not relevant here. The doctrine does not apply at all where a *property*-based search has occurred. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). Nor does it extend to “expectation of privacy” cases that involve “detailed and comprehensive” collections of digital data. *Carpenter*, 585 U.S. at 309-10 (holding that the third-party doctrine does not extend to data reflecting one person’s cell-phone location history). *See also United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (the third-party doctrine “is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks”).

by cyberhackers—an event knowledgeable commenters consider inevitable.³⁹ The risks cyberhacking imposes on investors could hardly be more serious. Cyberhackers not only can disclose investors’ private information to the world at large, they can steal investors’ portfolios outright. *See also* ECF 25-51, Ex. Z, Letter from Sen. Kennedy, *et. al.*, to SEC Chair (July 24, 2019) (“Chinese hackers could use this information to ... steal entire portfolios and sell them on the dark web.”).⁴⁰ Americans do not “voluntarily ‘assume[] the risk’” that SEC will “turn[] over” the details of their personal investment activity for review by SEC every time they trade a security. *Carpenter*, 586 U.S. at 315 (first alteration in original) (quoting *Smith v. Maryland*, 442 U.S. 735, 745 (1979)).

SEC attempts to justify the CAT’s unlawful searches and seizures by complaining that the procedural requirements limiting its access to investor information impeded its law-enforcement and other regulatory goals. *See, e.g.*, 77 Fed. Reg. 45,722, 45,727-28 (Aug. 1, 2012) (explaining SEC’s view that the CAT is justified because of the procedural hurdles in SEC “blue-sheet” process); 75 Fed. Reg. at 32,557-58 (same). It has touted that CAT will enhance its “efficiency,” *see, e.g.*, 77 Fed. Reg. 45,722, *passim*; 75 Fed. Reg. 32,556, 32,557, *passim*. It plans to use advanced data-analysis tools to search the CAT for evidence of “potential securities law violations,” 77 Fed. Reg. at 45,727.

SEC’s impatience with legally required procedures does not excuse it from the requirements of the Fourth Amendment. Constitutional procedures are meant to inconvenience the government. No doubt, law enforcement would be more efficient if SEC could simply vacuum up every transaction

³⁹ *See, e.g.*, ECF 25-43, Ex. T, Letter from Christopher A. Iacovella, Chief Executive Officer, American Securities Association, to Vanessa Countryman, Secretary 1-2 (Jan. 29, 2021), https://d1d329da-dbb0-4cc9-b461-d7bd4ad09b4e.usrfiles.com/ugd/d1d329_edad42e865154f2fa50b72b0b5584fc8.pdf (last visited May 24, 2024); ECF 25-45, Ex. U, Letter from eight Attorneys General to Congress 4-5 (Aug. 15, 2023), <https://arkansasag.gov/wp-content/uploads/2023-08-15-Arkansas-AG-Letter-Supporting-Investor-PII-Protections.pdf> (last visited May 24, 2024).

⁴⁰ Available at https://www.kennedy.senate.gov/public/_cache/files/a/a/aa9c1d31-12e9-41e0-8f77-29e0404d4a13/A822E08E203D7481239ED084DE86BAEC.letter-to-sec-on-pii-on-cat-002-.pdf (last visited May 24, 2024).

in the entire marketplace, then search the database for leads by using advanced data analytics and releasing its bots. But administrative efficiency in search of possible violations is not an exception to the Fourth Amendment's warrant requirement. *See Chandler v. Miller*, 520 U.S. 305, 323 (1997) (law-enforcement efficiency does not excuse the failure to get a warrant, because "the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged"). A full century ago, Justice Holmes applied this principle to a federal agency—the FTC—when that agency attempted to ignore the Fourth Amendment and search private materials for possible violations of the law. *Am. Tobacco Co.*, 264 U.S. at 305-06. He warned against agencies that seek to ignore the Fourth Amendment and thus "sweep all our traditions into the fire ... to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." *Id.* (citation omitted).

Concern about government intrusions much less severe than the one the CAT unleashes motivated the Framers to adopt the Fourth Amendment. As the Supreme Court explained, "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley*, 573 U.S. at 403. That is why a "central aim of the Framers was to place obstacles in the way of a too permeating police surveillance." *Carpenter*, 585 U.S. at 305 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). The Framers could not, however, have anticipated the far more serious danger presented by the CAT.

The CAT violates the Fourth Amendment rights of more than 100 million Americans by seizing their private information for SEC's use. Using advanced analytical technology, it then combs this private information to create "the single largest government database targeting the private activities of American citizens." *See* ECF 25-36, Ex. PP, William P. Barr, *The SEC is Watching You*, Wall

St. J. (April 15, 2024).⁴¹ Against that background, Plaintiffs are likely to succeed on the merits of their Fourth Amendment claim.

II. PLAINTIFFS HAVE SUFFERED AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

Plaintiffs are also “likely to suffer irreparable harm before a decision on the merits can be rendered.” *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). First, the CAT subjects them to a surveillance regime that SEC established without legal authority, which is irreparable. *Louisiana v. Horseracing Integrity & Safety Auth., Inc.*, 617 F.Supp.3d 478, 500 (2022). Second, the CAT violates Plaintiff’s constitutional rights, which “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accordingly, “when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995)) (internal quotation marks omitted). Third, the increased costs of the CAT program will irreparably harm Plaintiffs. “[N]onrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm.” *Rest. L. Ctr. v. U.S. Dep’t of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023) (citing *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022)). This Court has already found that “the CAT’s enhanced recordkeeping will inflict the kind of irreparable harm that may warrant the issuance of a preliminary injunction,” ECF 92 at 5, and should do so again here.

III. THE BALANCE OF EQUITIES WEIGHS IN PLAINTIFFS’ FAVOR

The balance of harms and the public interest also favor an injunction. These two factors “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

⁴¹ Available at <https://www.wsj.com/articles/the-securities-and-exchange-commission-is-watching-you-surveillance-4e782f82> (last visited May 24, 2024).

“[N]either [the government] nor the public has any interest in enforcing a regulation that violates federal law.” *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 235 (5th Cir. 2023); *see also Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022) (“There is generally no public interest in the perpetuation of unlawful agency action.”). On the other hand, there is an important public interest “in having governmental agencies abide by the federal laws that govern their existence and operations,” *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (per curiam) (quotation omitted), to say nothing of the Constitution. In that case, “the government/public-interest analysis collapses with the merits.” *All. for Hippocratic Med.*, 78 F.4th at 251. Since Plaintiffs have established a likelihood of success on the merits, the remaining preliminary injunction “factors are presumed and weigh in favor of an injunction.” *See Elrod*, 427 U.S. at 373; *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013). Put differently, “our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 766 (2021).⁴² Although the Court previously found that the balancing test favors Defendants, ECF 92 at 6-7, the balance now weighs in Plaintiffs’ favor as investors’ data has been seized unlawfully for an additional six months. Further, the Court had previously found persuasive Defendants’ assertion that the “CAT is critically important to the government and securities industry.” *Id.* at 6. That is belied by Defendants’ current contention that under their proposal to remove PII, they will still have to use the blue sheet process to obtain investor PII. ECF 2-3. They do not explain why they cannot revert to the blue sheet process in its entirety.

IV. THE COURT SHOULD ISSUE A STAY AND AN INJUNCTION

A. The Court Should Issue a Stay Under 5 U.S.C. § 705

⁴² Financial considerations also favor the Plaintiffs. Halting the hemorrhaging of billions of dollars in unauthorized expenditure that has served as an unlegislated tax and deadweight cost on Americans who invest in the market to maximize returns serves both the Plaintiffs and the public interest. Any minor costs SEC incurs to comply with a stay and preliminary injunction are dwarfed by the continuation of this costly and illegal scheme.

SEC has created and adopted the CAT through a Rule effectuated through a series of orders.⁴³ However, as detailed above, SEC lacks authority establish the CAT, and violates the Fourth Amendment in doing so. Accordingly, this Court should stay SEC CAT Rules, including ECF 25-22, Ex. II, SEC Release No. 34-80255 and ECF 25-20, Ex. HH, Release No. 34-67457.

The interim remedy of a stay is authorized by 5 U.S.C. § 705. *See, e.g., Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (“We have the power *to stay* the agency’s action ‘to the extent necessary to prevent irreparable injury[.]’” (quoting 5 U.S.C. § 705) (emphasis added) (alteration in original)). The preliminary injunction factors govern whether stays are warranted. *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010); *see also Texas v. EPA*, 829 F.3d at 435 (applying preliminary injunction factors).

Under Section 705, courts—including the Supreme Court—routinely stay already-effective agency action. *See, e.g., West Virginia v. E.P.A.*, 577 U.S. 112 (2016) (mem. op.); *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); *Texas v. EPA*, 829 F.3d 405. A federal court has broad power to “issue all necessary and appropriate process to postpone the effective date of an agency action *or to preserve status or rights pending conclusion of the review proceedings.*” 5 U.S.C. § 705 (emphasis added). The “status quo” to be restored is “status quo absent the unlawful agency action.” *Wages & White Lion Invs.*, 16 F.4th at 1144. Here, that is the absence of CAT.

B. The Court’s Injunction Should Apply to CAT LLC and Relevant Third Parties

Plaintiffs also seek a preliminary injunction to preserve the Court’s ability to effectuate

⁴³ *See* ECF 25-20, Ex. HH, CAT Rule, Exchange Act Release No. 34-67457 (July 18, 2012); SEC Release No. 34-80255 (Mar. 15, 2017) (approving FINRA CAT-compliance rules that require broker-dealers to transmit information to the CAT); FINRA Rule 6800 Series; ECF-25-22, Ex. II, SEC Release No. 34-80255 (citing ECF 25-23, Ex. J, 17 C.F.R. § 242.613 (“Consolidated audit trail”) and ECF 25-27, Ex. L, 17 C.F.R. § 242.608 (“National market system”).

necessary relief on the merits. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). Implementation and enforcement lie in the hands of third parties, and this Court should order affirmative measures to effectuate and “preserve the court’s ability to render a meaningful decision on the merits.” *Id.* Thus, a specific injunction under Rule 65 should enter, binding all “other persons who are in active concert or participation with,” Fed. R. Civ. P. 65(d)(2)(C), “the parties,” and/or “the parties’ officers, agents, servants, employees and attorneys.” *Id.* (d)(2)(A)-(B).

The injunction here should bind CAT LLC in addition to the other defendants, for multiple reasons. CAT LLC should be bound—and would be bound even if it were not a party—because it is acting as an “agent” of SEC and in “active concert” with it. Fed. R. Civ. P. 65(d)(2) (injunction order can bind the parties’ agents and persons in active concert); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (“defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding”).

SEC’s creation of CAT LLC renders it an indisputable state actor. A private entity is treated as a state actor “when the government compels the private entity to take a particular action, ... or ... when the government acts jointly with the private entity.” *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (internal citations omitted). *See also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (“[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”) (cleaned up).

CAT LLC maintains information in the CAT database solely because SEC “compel[led]” its owners—the SROs—to do so. Moreover, SEC has acted jointly with CAT LLC and the SROs to create and carry out the CAT program. *See, e.g.*, ECF 25-23, Ex. J, 17 C.F.R. § 242.613(a)(1) (stating that the SROs “shall” submit a plan to create the CAT); ECF 25-23, Ex. J, 17 C.F.R. § 242.613(e)(1) (stating that the SROs “shall provide for the creation and maintenance of a central repository” as

defined in the Rule). SROs are also required to make this database available to SEC.

Not only did SEC “compel[]” the creation of CAT LLC, *Halleck*, 587 U.S. at 809, it acts jointly with CAT LLC and its owners by micromanaging the CAT’s operations and requiring government access to all its data. SEC has published no fewer than 63 SEC releases discussing the CAT. ECF 25-29, Ex. M, SEC Rule 613 (Consolidated Audit Trail) Releases.⁴⁴ Because CAT LLC exists solely to perform functions compelled by and for the benefit of SEC, it is a state actor and an agent of SEC. Accordingly, the stay and preliminary injunction should apply to CAT LLC, as well as the other Defendants.

Finally, FINRA and other SROs should also be enjoined from enforcing the FINRA Rule 6800 Series, “Consolidated Audit Trail Compliance Rule,” because they are “in active concert” with SEC and/or CAT LLC, and SEC lacked the authority to approve the CAT Rule.

CONCLUSION

For the reasons detailed above, the Court should grant the motion for a stay and preliminary injunction. A proposed Order accompanies this motion.

Respectfully submitted,

⁴⁴ Available at <https://www.sec.gov/divisions/marketreg/rule613-info> (last visited May 24, 2024).

Mark D. Siegmund
State Bar Number 24117055
CHERRY JOHNSON SIEGMUND
JAMES PLLC
The Roosevelt Tower
400 Austin Avenue, 9th Floor
Waco, Texas 76701
Tel: (254) 732-2242
Fax: (866) 627-3509

/s/ Margaret A. Little
Margaret A. Little CT303494
Margot J. Cleveland* MIP83564
Caitlin Moyna* NY4176897
Andreia Trifoi* DC90017660
Christian Clase* TN041231
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Tel: (202) 869-5210
Fax: (202) 869-5238
* *Pro Hac Vice* forthcoming

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2026, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record. In addition, a true and accurate copy of the foregoing was served by hand to:

Brenda Wright
U.S. Attorney's Office
800 Franklin Avenue
Suite 280
Waco, Texas 76701

/s/ Margaret A. Little