No. 23-60471

United States Court of Appeals for the Fifth Circuit

NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS; ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION, LIMITED; AMERICAN INVESTMENT COUNCIL; LOAN SYNDICATIONS AND TRADING ASSOCIATION; MANAGED FUNDS ASSOCIATION, AND NATIONAL VENTURE CAPITAL ASSOCIATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the Securities & Exchange Commission

BRIEF OF SECURITIES LAW SCHOLARS AND THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for *amici curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae**:** *Amici curiae* are Paul G. Mahoney, Adam C. Pritchard, J.W. Verret, and the New Civil Liberties Alliance ("NCLA"). All *amici* except for NCLA are individuals. NCLA is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). NCLA does not have a parent corporation, and no publicly held company has a 10% or greater ownership in it.

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November 8, 2023

/s/ *Russell G. Ryan*
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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading securities law scholars and NCLA. The securities law scholars have been intimately focused federal securities law and regulation for decades and have extensive experience regarding SEC's regulatory functions, particularly with respect to SEC's oversight of investment advisers and the investment funds they advise and manage. All have contributed, through academic research and writing, to ensuring SEC's fidelity to its responsibilities under the federal securities laws and the Administrative Procedure Act. All were signatories to at least one public comment letter in connection with the SEC rulemaking at issue in this case.

Amici are more fully described below:

Paul G. Mahoney is a David and Mary Harrison Distinguished Professor at the University of Virginia School of Law, having served as dean of the school from 2008 to 2016. His teaching and research areas are securities regulation, law and economic development, corporate finance, financial derivatives, and contracts. He has published widely in law reviews and peer-reviewed finance and law and economics journals. His book, *Wasting a Crisis: Why Securities Regulation Fails*,

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than *amici curiae*, NCLA's members, or its counsel financed the preparation or submission of this brief.

was published by the University of Chicago Press in 2015. He served on SEC's Investor Advisory Committee from 2018 to 2022.

Adam C. Pritchard is the Frances and George Skestos Professor of Law at the University of Michigan, where he teaches corporate and securities law. His research focuses on securities class actions, SEC enforcement, and the history of securities law in the U.S. Supreme Court. He is the co-author of *Securities Regulation: Cases and Analysis*, currently in its fifth edition, and he has published numerous scholarly articles in various law reviews and economics journals. Earlier in his career, he served as senior counsel in SEC's Office of the General Counsel.

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NCLA is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws

made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is keenly interested in this case because it implicates a profoundly troubling assertion of administrative power and raises critically important issues of constitutional and administrative law.

SUMMARY OF ARGUMENT

The purpose of this brief is to explain how, in promulgating a recent rule that restricts or prohibits certain contractual provisions commonly negotiated between private investment funds and their investment advisers (the "Restricted Activities Rule"), SEC: (i) exceeded its statutory rulemaking authority; (ii) thwarted

congressional design; and (iii) violated the Administrative Procedure Act by failing to consider and address substantial reliance interests the new rule disrupted.

ARGUMENT

I. THE RESTRICTED ACTIVITIES RULE EXCEEDS SEC'S STATUTORY RULEMAKING AUTHORITY

The Restricted Activities Rule was part of a 656-page rulemaking behemoth finalized by SEC in August 2023 with an effective date of November 13, 2023.[2] In adopting the rule (over the dissents of two of the agency's five commissioners), SEC purported to rely primarily on authority Congress granted to the agency in § 913(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. 111-203, 124 Stat. 1376 et seq., which is codified at § 211(h) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. § 80b-11(h). That provision empowered SEC, "where appropriate," to "promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors." *Id*. As the petition in this case asserts, this provision of Dodd-Frank did not plausibly

[2] SEC Final Rule*: Private Fund Advisors; Documentation of Registered Investment Adviser Compliance Reviews* (Aug. 23, 2023) (last visited Nov. 8, 2023, https://www.sec.gov/files/rules/final/2023/ia-6383.pdf), 88 Fed. Reg. 63,206 (Sept. 14, 2023), to be codified at 17 C.F.R. § 275.211(h)(2)-1.

empower SEC to adopt any of SEC's new rules governing private fund advisers, least of all the Restricted Activities Rule.

At 849 pages, Dodd-Frank was its own behemoth, covering a multitude of topics relating to the financial system (and beyond). Among its 16 different titles, only one—Title IV, bearing the heading "Regulation of Advisers to Hedge Funds and Others" and the suggestion that it be cited as the "Private Fund Investment Advisers Registration Act of 2010"—explicitly dealt with private fund advisers. *See* 124 Stat. at 1570–80. Among other things, Dodd-Frank Title IV imposed registration and carefully limited reporting and recordkeeping requirements on some private fund advisers, along with limited rulemaking authority that not even SEC claims would authorize its Restricted Activities Rule. *Id.*

Under ordinary notions of textual logic and statutory design, if Congress intended through Dodd-Frank to empower SEC to promulgate sweeping new regulatory burdens and restrictions on private fund advisers, one would naturally have expected to find that authority within Title IV, or at least closely nearby. But Dodd-Frank § 913—the section SEC claims to have empowered it to promulgate the Restricted Activities Rule (along with other provisions of its recent rulemaking)—was *not* part of Title IV, nor anywhere close.

Instead, SEC needed to skip forward five more Dodd-Frank titles, spanning more than 250 pages of statutory text, before finding its purported rulemaking

authority in Dodd-Frank § 913, *which makes no mention of private fund advisers*—and for obvious reasons. The universally understood focus of § 913 was the provision of personalized investment advice to relatively unsophisticated *retail customers* of broker-dealers and investment advisers, not to highly sophisticated private funds or their well-heeled investors.

That focus is unmistakable. Section 913 started with a new statutory definition of "retail customer." 124 Stat. at 1824; *see also id*. at 1828 (incorporating that new definition into the Advisers Act). It then directed SEC to study, report on, and promulgate rules regarding the regulatory standard of care applicable to the provision of personalized advice to retail customers. *Id*. at 1824–28. Next, it amended the broker-dealer registration provisions of the Securities Exchange Act of 1934 and the rulemaking provisions of the Advisers Act to authorize SEC to adopt rules bringing the regulatory standard of conduct for broker-dealers (previously the so-called "suitability" standard) more closely into harmony with the fiduciary standard governing investment advisers by holding both types of financial professionals to a "best interest" standard when they provide personalized advice to their retail customers. *See id*. at 1828.

Immediately after all this focused attention on the provision of personalized advice to retail investors, § 913 then added a new subsection (h) to § 211 of the

Advisers Act, titled "Other Matters." *Id.* That new subsection, codified at 15 U.S.C. § 80b-11(h), authorized SEC to:

> (1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and
>
> (2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

Incredibly, SEC claims that *this* statutory authority empowered it to adopt the Restricted Activities Rule (and other provisions of its private fund adviser rulemaking). Despite the provision's origin within a section of Dodd-Frank focusing entirely on personalized investment advice offered to *retail* customers, SEC seized upon the provision's use of the generic term "investors" rather than "retail customers" to infer that the provision gave the agency license to impose vast new obligations and restrictions on the estimated $26 trillion private-fund industry.

That inference is textually and logically implausible. SEC's generous reading of § 913 betrays a belief that Congress improbably hid a very large elephant inside a very tiny mousehole. SEC's asserted reliance on § 913, more than a decade after

the statute's enactment, is therefore untenable. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023) (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)).[3]

II. THE RESTRICTED ACTIVITIES RULE THWARTS CONGRESSIONAL DESIGN

The Advisers Act was the last in a series of statutes designed to eliminate certain abuses in the securities industry. It was preceded by the Securities Act of 1933, the Securities Exchange Act of 1934, and, most importantly for present purposes, the Investment Company Act of 1940 (the "ICA"). The ICA and the Advisers Act were simultaneously enacted as Titles I and II, respectively, of Pub. L. No. 76-768, and are therefore considered "sister statutes." The ICA sets forth a rigid, proscriptive, and highly constraining framework for regulating and governing pooled investment vehicles that are available to the public at large. *See generally* 15

[3] SEC also arguably relied on Advisers Act § 206(4) as purported authority for the Restricted Activities Rule. That section, which Congress added to the statute way back in 1960, authorizes SEC rules designed to prevent conduct that is "fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4). But the final promulgated version of the Restricted Activities Rule is not prefaced with any indication that it is "reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative[,]" thereby implicitly disavowing reliance upon § 206(4) as enabling authority. In any event, the contractual provisions addressed by the Restricted Activities Rule are inherently not fraudulent, deceptive, or manipulative because they are transparently negotiated with and agreed to between highly sophisticated market players on both sides, typically represented by highly sophisticated counsel and other advisers. Finally, as Petitioner notes (Pet. Br. at 36–37, 57), SEC did not cite fraud prevention among the purported benefits of any part of the omnibus rulemaking, much less the Restricted Activities Rule. For all these reasons, any suggestion that § 206(4) authorized the Restricted Activities Rule would, if anything, be even less plausible than SEC's claim that Dodd-Frank § 913 authorized it.

U.S.C. §§ 80a-7 to 80a-22. Unlike the Advisers Act, the framework of the ICA necessarily, and intentionally, has the effect of severely limiting the choices available to investors.

More specifically, the ICA establishes a comprehensive regulatory framework for regulating pooled investment vehicles that are open to the public, replete with reporting and disclosure requirements, restrictions on expenses that may be charged to investors by funds, restrictions on fund investments and fund capital structure, prohibitions against affiliate self-dealing, and prescriptive contractual and governance requirements. But in 1996, at the suggestion of SEC itself, Congress purposely added § 3(c)(7) to the ICA to *exclude* from regulation as investment companies those private funds available only to "qualified purchasers," because it determined such regulation was unwarranted—both unnecessary from investors' perspective, and unwarranted as an expenditure of public funds and energy.

Qualified purchasers are sophisticated market participants capable of investing their money as they wish and tailoring their own relationships with private funds and those funds' investment advisers.[4] The qualified purchaser standard applicable to investors in § 3(c)(7) funds is high, and indeed, is more stringent than

[4] Generally, a qualified purchaser includes a natural person who owns not less than $5,000,000 in investments or any other person acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests not less than $25 million in investments. 15 U.S.C. § 80a-2(a)(51).

the "accredited investor" standard under the Securities Act of 1933. *Cf.* 15 U.S.C. § 77b(a)(15); 17 C.F.R. § 230.501(a). Moreover, in adopting rules to further implement the ICA's provisions regarding qualified purchasers, the SEC acknowledged that Congress intended this exclusion for persons with "investment experience and sophistication necessary to evaluate the risks of investing in unregulated investment pools." SEC Final Rule: *Privately Offered Investment Companies*, 62 Fed. Reg. 17512, 17515 (Apr. 9, 1997).

The legislative history of Section 3(c)(7) is also revealing. Congress adopted this new exception based in large part upon the recommendation of the staff of the SEC's own Division of Investment Management, which had determined that "[t]he new exception would be premised on the theory that 'qualified purchasers' do not need the [ICA's] protections because they are able to monitor [for themselves] such matters as management fees, transactions with affiliates, corporate governance, and leverage." SEC Div. of Inv. Mgmt., *Protecting Investors: A Half Century of Investment Company Regulation* at 104–05 (May 1992) (emphasis added). SEC staff further concluded that "no sufficiently useful governmental purpose is served by continuing to regulate funds owned exclusively by sophisticated investors." *Id.* at 114–15. The Section 3(c)(7) exclusion thus reflected a *congressional* determination that financially sophisticated investors are sufficiently capable of appreciating the risks associated with certain investment pools that they do not need

the protections offered by burdensome SEC regulation, and that the government's regulatory apparatus and limited enforcement resources are better directed elsewhere.

The Restricted Activities Rule upends this long-standing, congressionally mandated regulatory regime by suggesting exactly the opposite. SEC now asserts that sophisticated investors are unable to evaluate the risks of investing in pooled investments without the SEC prescribing and restricting the contractual terms pursuant to which these investors and their advisors may invest. SEC has provided no satisfactory explanation for this drastic and unwelcome change in policy. *See* Section III, *infra*. Given the legislative history and statutory provisions regarding these funds, SEC exceeded its statutory authority when it used the administrative rulemaking process to reach a result so dramatically at odds with statutory text, legislative intent, and the previous SEC positions upon which Congress acted.

The Restricted Activities Rule also runs afoul of the well-established principle of U.S. law that sister statutes *in pari materia* should be read harmoniously. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252–55 (2012); Cass Sunstein, *Interpreting Statutes in The Regulatory State*, 103 HARV. L. REV. 405, 458 (1989). The rule conflicts directly with the text and clear purpose of the ICA, the companion statute specifically designed to regulate pooled investment vehicles. As noted, Congress excluded private funds from the SEC's

regulatory authority in 1996 by adding a new § 3(c)(7) to exempt certain pooled investment vehicles from the reach of the statute. Yet, the vast majority of private funds the Restricted Activities Rule addresses are such exempt "3(c)(7)" funds. Moreover, in selecting funds in which they might invest, there are an estimated 5,000 registered managers vying for qualified purchasers' business. This is a robust market in which investors of means, with a very high degree of sophistication, are readily able to negotiate for the terms that are important to them.

The Restricted Activities Rule is therefore entirely inconsistent with Congress's determination to exempt such funds from the proscriptive rigors of the ICA. The Commission lacks statutory authority, through rulemaking, to undo this congressional design.

III. SEC Violated the Administrative Procedure Act by Adopting the Restricted Activities Rule Without Considering and Addressing Reliance Interests

A foundational premise of administrative law is that when agencies exercise their vast discretionary powers to bind regulated parties, they must provide reasoned explanation and cannot act arbitrarily or capriciously. This premise is codified by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and confirmed by countless federal court decisions, *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mut. Ins. Co.*, 463 U.S. 29 (1983); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–61 (2012); *Clarke v. CFTC*, 74 F.4th 627, 636 (5th Cir. 2023) (citing *Wages &*

White Lion Invs., LLC v. FDA, 16 F.4th 1130, 1139 (5th Cir. 2021)). *See generally* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW, 14–15 (2017) (citing cases).

Clearing this low bar is the least we expect from unelected administrators entrusted to promulgate and enforce the ever-expanding reams of regulation that federal agencies require private citizens and businesses to obey. Yet agencies often fail to clear it. SEC's Restricted Activities Rule provides one such example, and the Court should therefore set it aside.

The Administrative Procedure Act requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). One of the most common ways an agency acts arbitrarily and capriciously is by inadequately explaining its reasons for taking regulatory action, especially when that action reverses or rescinds a policy position previously taken by the same agency.

Whether described as regulatory "whiplash," "bait-and-switch," "flip-flop," "U-turn," "volte-face," "see-sawing," or the "surprise switcheroo,"[5] agency policy reversals demand rational explanations because they often wreak havoc on private property and reliance interests engendered by the prior policy. "Individuals and

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[5] *Wages & White Lion Invs., LLC v. FDA,* 41 F.4th 427, 446 (5th Cir. 2022) (Jones, J., dissenting), *reh'g granted and vacated*, 58 F.4th 233 (5th Cir. 2023) (quoting *Env't Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)).

institutions operate around and build upon official representations of the law[,]" and they "are incapable of managing the risk of legal change in a rational and effective manner, as they are unable to inoculate themselves against unforeseeable, broad swings in policy." Gary M. Bridgens, *Demystifying Reliance Interests in Judicial Review of Regulatory Change*, 29 GEO. MASON L. REV. 411, 430 (2021). By contrast, just as *stare decisis* honors legitimate reliance interests created by judicial precedent, "[s]tability in regulation promotes efficiency [and] transparency, and ensures accountability upon departure from the status quo." *Id.*

A seminal case in this area is *State Farm*, 463 U.S. 29, in which the Supreme Court set aside the rescission by the National Highway Traffic Safety Administration of a regulation promulgated 14 years earlier that required motor vehicles to be equipped with "passive restraints" such as airbags or automatic seatbelts. As relevant here, the Court held that the arbitrary-and-capricious standard applies to the "rescission or modification" of regulatory action no less that it does to the original action and that, accordingly, an agency reversing course "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 41–42. Although four dissenting justices would have found adequate explanation for rescinding the automatic seatbelt requirement imposed by the rescinded regulation, all nine justices agreed that the agency acted arbitrarily and capriciously when it "gave no explanation at all" for

rescinding the airbag requirement. *Id*. at 58 (Rehnquist, J., concurring in part and dissenting in part).

The Court elaborated on this point in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which arose from a Comptroller of the Currency regulation that allowed banks to charge late fees even to customers who resided in states that forbade such fees, a position arguably inconsistent with informal positions previously taken by the agency. Although the Court ultimately held the agency had not actually changed its position (but rather had merely resolved conflicting prior positions), Justice Scalia's opinion for the unanimous Court made clear—citing *State Farm* and other cases—that "[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] an abuse of discretion.'" *Id*. at 742 (second alteration in original) (citations omitted) (quoting 5 U.S.C. § 706(2)(A)).

The Court developed this concept further in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). There, the Court upheld a regulatory order by the Federal Communications Commission that expanded the agency's prior position regarding when isolated utterances of expletives on television might be deemed actionably indecent and thus subject to enforcement under the Communications Act of 1934. In an opinion again authored by Justice Scalia, the Court held that the agency's explanation for reversing course was adequately explained and "entirely rational,"

and therefore not arbitrary or capricious. *Id*. at 517–18. In doing so, however, the Court made clear that the agency's policy reversal would have warranted greater skepticism had the agency ignored "serious reliance interests" created by its prior interpretation of the relevant statute:

> [T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, … its prior policy has engendered serious reliance interests that must be taken into account. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S. Ct. 1730, 135 L.Ed.2d 25 (1996). *It would be arbitrary or capricious to ignore such matters*.

Id. at 515 (emphasis added). Four dissenting justices would have gone further by insisting that *any* regulatory reversal—even those that do not undermine substantial reliance interests—be supported not only by reasoned explanation, but by "a more complete explanation than would prove satisfactory were change itself not at issue." *Id*. at 549 (Breyer, J., dissenting).

In more recent cases, the Court has continued to demand reasonable explanation when agency flip-flops trample on legitimate reliance interests. For example, in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), the Court held that the Department of Labor acted arbitrarily and capriciously when, without meaningful explanation, it reversed its prior position on whether automobile dealerships must pay overtime to certain "service advisors" under the Fair Labor Standards Act. The Court was especially troubled by the Department's failure to

consider the automobile industry's "significant reliance interests" in having operated their businesses and negotiated their labor and employment contracts based on the Department's prior interpretation of the relevant statutory provision. *Id.* at 222–23.

The Court raised similar concerns more recently when reviewing a decision by the Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals program, commonly known as DACA. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020). Among other reasons, the Court held the rescission arbitrary and capricious because the Department failed to address the substantial reliance interests of the program's beneficiaries. "[B]ecause DHS was 'not writing on a blank slate,' it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915 (emphasis in original) (citation omitted) (internal quotation from dissenting opinion of Justice Thomas).

To summarize this line of Supreme Court authority: An agency acts arbitrarily and capriciously when it flip-flops on a policy position without articulating a reasoned explanation for doing so, and that explanation must specifically address any legitimate reliance interests engendered by the agency's prior position and explain why those interests were disregarded or not reasonably accommodated.[6]

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[6] For similar reasons, courts deny agencies so-called *Auer* deference when "there is reason to suspect that the agency's interpretation [of its own rule] 'does not reflect the agency's fair and considered judgment on the matter in question,'" *SmithKline*,

In promulgating its Restricted Activities Rule, SEC did neither. Despite reversing its long-standing recognition that private fund investors are highly sophisticated investors who, unlike retail customers, do not need the protection of highly prescriptive government regulation of their fund advisers, and despite thereby disrupting commonplace contractual arrangements used throughout an industry that has grown to an estimated $26 trillion in assets under management in reliance on SEC's prior policy judgment, SEC did not mention the phrase "reliance interests" a single time in its 656-page final rule release, much less explain why those reliance interests needed to be overridden.

SEC's failure to consider and address reliance interests here is even more problematic than failures addressed in other cases discussed above. That is because, as previously discussed, the Restricted Activities Rule contradicts not just SEC's prior regulatory position but the position codified *by Congress* in 1996 when it agreed with SEC that private funds should be exempt from prescriptive regulation under the ICA. Wholly apart from SEC's lack of statutory authority to override that judgment of Congress, the Restricted Activities Rule is arbitrary and capricious and

567 U.S. at 155 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)), such as "when the agency's interpretation conflicts with a prior interpretation," *id*. (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

should be set aside for failing to consider and address the long-standing reliance interests of private fund advisers and their clients.

CONCLUSION

SEC's Restricted Activities Rule exceeds the SEC's statutory rulemaking authority and violates the Administrative Procedure Act. This Court should therefore grant the petition, hold the agency's action unlawful, and set the rule aside pursuant to 5 U.S.C. § 706(2)(A).

November 8, 2023

Respectfully submitted,

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I hereby certify that on November 8, 2023, I electronically filed this *Amici Curiae* brief with the Clerk of this Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

November 8, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this *Amici Curiae* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3823 words, excluding those portions of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

November 8, 2023

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