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***En Banc* Fifth Circuit Will Hear NCLA Lawsuit Against Legally Defective Nasdaq Board Diversity Rules**

National Center for Public Policy Research v. Securities and Exchange Commission;
Alliance for Fair Board Recruitment v. Securities and Exchange Commission

Washington, DC (February 20, 2024) – The U.S. Court of Appeals for the Fifth Circuit has agreed to an *en banc* rehearing of the New Civil Liberties Alliance’s *National Center for Public Policy Research v. SEC* lawsuit challenging “Board Diversity Rules” that SEC promulgated without statutory authority. These rules impose race, gender, and sexual orientation quotas on corporate board membership for companies listed on the Nasdaq stock exchange, along with compelling corporate speech to explain any quota missed. SEC also furnishes lists of quota-satisfying names to companies unable to meet such quotas on their own. NCLA welcomes the opportunity to argue this case before the full Fifth Circuit, where we will urge the Court to set these unlawful rules aside. The Court also granted the petition for rehearing *en banc* filed in the case by the Alliance for Fair Board Recruitment.

Nasdaq reported a wave of alleged investor interest in discriminating against some companies and in favor of others based on the gender, race, and sexual orientation of those companies’ directors. Nasdaq responded by proposing a set of rules to SEC that would help investors discriminate with respect to these identities. One Rule forces every Nasdaq-listed company to either include on its board minimum quotas of individuals of a certain gender, race, and sexual orientation, or else to explain why the board does not meet such quotas. The Rules also require the companies to publicly disclose information about their directors’ self-identified gender, race, and sexuality. These measures compel speech in derogation of the First Amendment, and they further violate Americans’ rights to due process of law and equal protection under the law.

The 1934 Securities Exchange Act explicitly forbids SEC from approving Nasdaq rules that regulate matters unrelated to the Act’s purposes. Gender, race, and sexual orientation fall outside the Act’s purposes because SEC itself determined these demographic characteristics have no rational relationship to corporate performance and investor returns. Nevertheless, SEC approved these rules by concluding that compelled explanations and disclosures regarding gender, race, and sexual orientation promote “fair and orderly markets” by giving investors the information they need to engage in discrimination based on such characteristics. The Fifth Circuit panel in this case deferred to that flawed reasoning and upheld these rules without addressing the statutory prohibitions.

That reasoning wrongly treats irrational, invidious discrimination based on gender, race, and sexual orientation as regulatory objectives of the Exchange Act. The panel decision’s reasoning lacks any limiting principle, allowing SEC to approve the mandatory explanation and disclosure of any matter that some investors claim to want, even if the information is extremely private (such as sexual orientation) or has nothing to do with keeping markets fair and orderly. Under this standardless approach, nothing would be off the table, including how companies’ officers vote, their religious faiths, or any other data irrelevant to the Exchange Act’s actual purpose of investor protection. The panel also declined to decide the merits of NCLA’s compelled speech argument, erroneously deciding that the rules and SEC’s approval of them did not involve state action subject to constitutional scrutiny. NCLA looks forward to the *en banc* Fifth Circuit correcting these glaring errors very soon.

NCLA released the following statements:

“We are rejoicing over the Court’s vote to rehear the panel decision, as the Constitution, state and federal laws, and Supreme Court precedents all forbid such invidious discrimination. The Rules shock the conscience in even being proposed, much less in being approved as law. NCLA looks forward to ending this arrogation of unlawful power over internal corporate governance.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“The panel erroneously concluded that discrimination based on race, gender, and sexuality somehow falls within the Exchange Act’s objective to promote ‘fair and open markets.’ Nothing in the Act authorizes SEC to approve an Exchange’s use of quotas and compelled speech to facilitate invidious discrimination based on those characteristics. Indeed, Congress could not even amend the Act to explicitly grant SEC such unconstitutional authority.”

— **Sheng Li, Litigation Counsel, NCLA**

"It is deeply heartening—restorative of a faith in the American Experiment that has taken quite a beating in recent years—that the full Fifth Circuit has proven willing to review the decision of the three-judge panel in this vital manner. I think, and I hope and trust that they alike think, that the panel simply misunderstood the scope of the SEC's powers, even as it refused to recognize the vital, existential constitutional problems that lay beneath the question of the locus of and restrictions on SEC authority.

— **Scott Shepard, Director, Free Enterprise Project at the National Center for Public Policy Research**

“SEC should stick to its lane and focus on investor protection, as Congress has instructed. This frolic and detour into trendy governance notions are none of its business. In fact, these rules promote odious discrimination. NCLA is delighted that the Fifth Circuit has voted to vacate the deeply flawed panel opinion and rehear the case.”

— **Mark Chenoweth, President, NCLA**

For more information visit the case page [here](#) and watch the case video [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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