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NCLA Asks *en Banc* Fifth Circuit to Vacate 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 (March 22, 2024) – The New Civil Liberties Alliance has filed an opening [brief](#) in *National Center for Public Policy Research v. SEC* urging the *en banc* U.S. Court of Appeals for the Fifth Circuit to set aside Nasdaq’s unconstitutional “Board Diversity Rules,” which SEC promulgated without statutory authority. These Rules impose gender, race and sexual orientation quotas on corporate board membership for Nasdaq-listed companies. Further, the Rules compel companies that fail to meet their board seat quotas to explain why or face involuntary delisting from the stock exchange. Under a related rule, SEC will furnish lists of quota-satisfying names to companies unable to meet such quotas on their own. A Fifth Circuit panel had upheld the Board Diversity Rules, but the *en banc* court granted NCLA’s request to rehear the case. The 1934 Securities and Exchange Act limits SEC’s regulatory role to ensuring fair and honest markets, investor protection, orderly and efficient markets, and facilitating capital formation. SEC cannot venture outside of those statutory guardrails as it did here.

Nasdaq reported 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 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 sexual orientation. SEC accepted Nasdaq’s assertion that the Diversity Rule serves investor interests without any independent analysis.

The 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 without addressing the statutory prohibitions that should invalidate the Rules. These measures also compel speech in derogation of the First Amendment.

Nasdaq also offered companies whose boards fail to meet the Rules’ diversity quotas access to a list of “board-ready” director candidates, but SEC failed to analyze how Nasdaq (or the company it hired to provide recruiting services) determines when a candidate is “board-ready.” By failing to thoroughly and independently investigate these issues before approving the Rules, SEC acted arbitrarily and capriciously, violating the Administrative Procedure Act. NCLA looks forward to the *en banc* Fifth Circuit’s addressing each of these problems in turn.

NCLA released the following statements:

“Executive agencies only have the powers that Congress statutorily assigns to them. By approving the Nasdaq Board Diversity Rules, SEC has arrogated power to itself that is not only obviously beyond its statutory mandate, but expressly forbidden by the very terms of that same statute.”

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

“Pressuring companies to hire directors based on their race and gender falls far outside of the regulatory authority conferred by the Exchange Act. The *en banc* Fifth Circuit should halt SEC and Nasdaq’s attempt to abuse their statutory authority to encourage illegal and un-American discrimination.”

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

“SEC’s power grab is unprecedented. Not only is it trying to seize power from the states—the traditional regulators of boards of directors—but it is purporting to exert power Congress never bestowed. Congress set up the SEC to ensure ‘fair and orderly markets,’ not to authorize Gary Gensler’s social engineering experiments.”

— **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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