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In NCLA Amicus Win, Fifth Circuit Topples SEC’s Unlawful Effort to Regulate Private Funds

National Association of Private Fund Managers, et al. v. Securities and Exchange Commission

Washington, DC (June 5, 2024) – Today, the U.S. Court of Appeals for the Fifth Circuit issued a [decision](#) in *National Association of Private Fund Managers v. Securities and Exchange Commission* vacating SEC’s recent final rule restricting—and in some cases prohibiting—certain common contractual agreements between private investment funds and investment advisers. Following the New Civil Liberties Alliance *amicus curiae* [brief](#)’s advice, the Court declared that SEC exceeded its statutory authority in promulgating the unlawful rule because Congress never gave SEC oversight of this aspect of private funds. NCLA thanks securities law scholars Paul Mahoney, Adam Pritchard, and J.W. Verret for joining in NCLA’s brief as *amicus* partners.

SEC argued Congress gave it the legal authority to promulgate the “Restricted Activities Rule,” which affected an estimated \$26 trillion private-fund industry, via a provision in the Dodd-Frank Act of 2010. The Fifth Circuit rejected this argument, recognizing that the Dodd-Frank provision in question was focused on retail customers and not the highly sophisticated customers of private investment funds.

“By congressional design, private funds are exempt from federal regulation of their internal ‘governance structure,’” Fifth Circuit Judge Kurt Engelhardt wrote for the Court. Moreover, the Dodd-Frank provision SEC cited as purported authority to write its rule “has nothing to do with private funds.” The Court also rejected SEC’s claim that its rule was authorized by an anti-fraud provision of the Investment Advisers Act of 1940, finding that claim “pretextual” because SEC “fail[ed] to explain how the [rule] would prevent fraud.”

NCLA released the following statements:

“NCLA applauds the Fifth Circuit’s decision vacating—in its entirety—SEC’s latest attempt to burden private industry through lawless administrative fiat. As our *amicus* brief explained, the unelected bureaucrats at SEC have no business imposing sweeping new regulations unless and until our elected representatives in Congress empower them to do so.”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

“NCLA commends the Fifth Circuit for reining in SEC’s latest rampant abuse of the people they regulate. The bureaucrats over at the SEC appear to be slow learners when it comes to respecting civil liberties, but maybe this decision will encourage them to finally start honoring statutory limits on the agency’s administrative power.”

— **Mark Chenoweth, President, NCLA**

For more information visit the *amicus* page [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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