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NCLA Persuades *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 (December 11, 2024) – Today, the New Civil Liberties Alliance convinced the *en banc* U.S. Court of Appeals for the Fifth Circuit in *National Center for Public Policy Research v. Securities and Exchange Commission* to [vacate](#) SEC’s approval of Nasdaq’s “Board Diversity Rules,” which the agency lacked statutory authority to do. These Rules imposed gender, race and sexual orientation quotas on corporate board membership for Nasdaq-listed companies, compelling those that failed to meet their board seat quotas to explain why or face involuntary delisting from the stock exchange. Representing the National Center for Public Policy Research, NCLA thanks the *en banc* Fifth Circuit for correctly ruling that the Rules violate the Securities and Exchange Act of 1934.

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. Even 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 Act ... required companies listed on a registered stock exchange to comply with SEC disclosure regulations,” Fifth Circuit Judge Andrew S. Oldham wrote for the Court. But “SEC may not approve even a disclosure rule unless it can establish the rule has some connection to an actual, enumerated purpose of the Act.” The Court found that the race, gender and sexuality of corporate board members has no connection to the purposes of the Exchange Act. In disapproving Nasdaq’s attempt to impose quotas based on these controversial demographic criteria, Judge Oldham wrote, “SEC has intruded into territory far outside its ordinary domain.”

The Court decided that Nasdaq “offered little support for its claim that there is an empirically established—even logical—link between the racial, gender, and sexual composition of a company’s board and the quality of its governance.” SEC also failed to justify how the Rules helped to promote free and open markets, a core stated purpose of the Exchange Act.

NCLA released the following statements:

“The *en banc* majority hewed closely to the plain text of the Exchange Act and its 1975 Amendments. It adopted NCLA’s statutory construction analysis that not only did Congress fail to confer such extraordinary power on this *financial* regulator, but SEC is statutorily forbidden to approve rules unless they further the ‘purposes’ of the Act to ensure fair and open markets.”

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

“The Diversity Rules strip people of their individuality and force companies to classify them based on gender, race, ethnicity, and sexuality. The *en banc* Court correctly recognized that neither SEC nor Nasdaq has any business regulating the composition of corporate boards along these controversial demographic dimensions.”
— **Sheng Li, Litigation Counsel, NCLA**

“The *en banc* Fifth Circuit has now agreed with NCLA for the third time in the last three years. This time, the Court held that Congress did not authorize SEC to adopt disclosure rules willy-nilly. Today’s decision should chasten SEC to stick to its knitting and stop trying to abuse its market-regulating power.”
— **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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