No. 23-60471

In the United States Court of Appeals for the Fifth Circuit

NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS; ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION, LTD.; 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 and Exchange Commission

BRIEF OF AMERICANS FOR FINANCIAL REFORM EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fifth Circuit Rule 28.2.1, *amicus curiae* Americans for Financial Reform Education Fund certifies that, in addition to the persons and entities listed in respondent's brief (C.A. Doc. 76.1) (filed December 15, 2023), the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Further, pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* states it's a nonprofit corporation that isn't publicly owned, has no parent corporation, and no publicly held company has 10% or greater ownership in it.

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STATEMENT OF *AMICUS CURIAE*'S IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus curiae Americans for Financial Reform Education Fund,[1] "the leading voice for Wall Street accountability on Capitol Hill,"[2] is a nonpartisan and nonprofit coalition of over 200 civil rights, consumer, labor, business, investor, faith-based, civic, and community groups. Launched in the 2008 financial crisis's wake, AFREF seeks to build a strong, stable, and ethical financial system that serves the economy and nation as a whole. Its vision is a world in which the rules governing the economy justly and sustainably focus on human needs and help all families and communities thrive.

AFREF routinely submits comment letters to regulators and government entities such as the CFPB, CFTC, Department of Labor, Department of Justice, Federal Reserve, and the SEC, among others. It also participates as an *amicus curiae* in significant securities regulation or

[1] All parties consent to *amicus* filing this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

[2] Zachary D. Carter, *House Votes To Audit The Fed... And Deregulate Wall Street*, Huffington Post (Sept. 17, 2014), *at* https://tinyurl.com/yz5v7a5b (visited Dec. 22, 2023).

litigation cases. *E.g.*, C.A. Docs. 153.1–2, 165 & 213.1–9, *Kirschner v. JP Morgan Chase Bank, N.A.*, 79 F.4th 290 (2d Cir. 2023) (No. 21-2726) (notes supporting $1.775 billion syndicated loan didn't qualify as securities), *petition for cert. filed* (Dec. 19, 2023) (No. 23-670).

AFREF is keenly interested in this case. During the rulemaking process, it submitted a signature list of over 20,000 people who supported the new rules and, like many other like-minded entities, wrote several comment letters. In AFREF's view, the Commission appropriately solved a collective-action problem that was well within its authority under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*

Specifically, as this Court explained when assessing the exemptions under the Securities Act of 1933, "just as a scientist cannot be without his specimens, so the shrewdest investor's acuity will be blunted without specifications about the issuer. For an investor to be invested with exemptive status he must have the required data for judgment." *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 903 (5th Cir. 1977). Unfortunately, as many commenters including AFREF explained in the comment file for the rules, limited partners in private funds often lack sufficient reliable,

comparable, and consistent information to accurately assess the fund's holdings, fees, expenses, and risks.

For example, in 2014, the Commission's staff explained that its examinations of private equity fund advisers' allocations of fees and expenses identified what they believed were "violations of law or material weaknesses in controls over 50% of the time." Andrew J. Bowden, Director, Office of Compliance Inspections and Examinations, *Spreading Sunshine in Private Equity* (May 6, 2014), *at* http://tinyurl.com/5n7x9wxa (visited Dec. 22, 2023). More recently, the Commission's Division on Examinations released findings, which are described in the comment file for these rules, that detail how even the most sophisticated investors often don't have the information they need to make informed decisions, and often lack suffer from mis-assessed fees and expenses, or suffer from conflicts of interest of their investment advisers.

Put simply, in the absence of specific disclosure and conduct requirements, investors have been repeatedly harmed for years without detection or ready recourse. After more than a decade of intense study of the problem by Commission staff, and complaints from investors, the Commission finally acted.

ARGUMENT

As the Commission notes, it actually promulgated five new private fund adviser rules and two new amendments. Resp. Br. 10–12. The new rules are: the quarterly-statement rule; the preferential-treatment rule; the restricted-activities rule; the audit rule; and the adviser-led secondaries rule. *Id.* And the new amendments involve annual compliance documentation and retention of books and records related to the new rules. *Id.* at 12.

But the scope of this appellate proceeding is far narrower, because the petitioners don't address the audit rule, the adviser-led secondaries rule, or the amendments; instead, they challenge only the first three rules regarding quarterly statements, preferential treatment, and restricted activities. *Id.* At 10–11. And contrary to petitioners' arguments about those three challenged rules, the Commission acted within its statutory authority and carefully considered extensive commentary and data gathered for well over a decade before adopting rules that promote transparency, reduce conflicts of interest, and protect investors.

I. The quarterly-statement, preferential-treatment, and restricted-activities rules are within the Commission's statutory authority and promote transparency, reduce conflicts of interest, and protect investors

The Commission's brief elegantly explains how the quarterly-statement, preferential-treatment, and restricted-activities rules were within its statutory authority (Resp. Br. 16–33) and promote transparency, reduce conflicts of interest, and protect investors (*id.* At 36–44). Similarly, the Institutional Limited Partners Association's *amicus curiae* brief explains in very helpful detail the legal structures and market dynamics that had been playing out between private fund advisers (who generally serve as general partners that control access to essential information) and many investors (who generally serve as limited partners that may range in assets from a dentist in Toledo, Ohio, to local and state pension funds, to the Yale University endowment). *See generally* ILPA Br.

The disparate assets, risk tolerances, investment time horizons, investment objectives, legal and due diligence capabilities, investment expertise, connections, and market power vis-à-vis their private fund advisers may vary widely. And yet, even the largest and most sophisticated investors often lack necessary information and sufficient market power to make informed investment decisions.

This brief won't retrace that ground. Instead, this brief will buttress the Commission's statutory authority to require disclosures pursuant to its antifraud powers of the Investment Advisor Act of 1940, explain what kinds of investors have exposure to private funds, focus on some of the concerns that commenters brought to the Commission's attention during the rulemaking process while highlighting some of the practical problems that the Commission quite properly sought to address, and summarize the majority Commissioner's statements adopting the rules.

A. The Investment Advisors Act of 1940 gives the Commission broad antifraud authority pursuant to which it can adopt prophylactic measures to prevent fraud from occurring in the first place

The Investment Advisors Act of 1940 gives the Commission broad antifraud authority. 15 U.S.C. §§ 80b-6(1)–(4), 80b-7. Those sections of the Act have always been understood to confer upon the Commission the prophylactic authority to require investment advisers to make various disclosures and punish materially false or misleading responses. *See, e.g.*, *Vernazza v. SEC*, 327 F.3d 851, 856, 858 (9th Cir. 2003) ("as investment advisers, Vernazza and IMS were required to file a 'Form ADV' with the Commission and to update it annually").

For instance, Form ADV's (https://www.sec.gov/about/forms/formadv-part2.pdf) Item 12 requires investment advisers to "[d]escribe the factors that you consider in selecting or recommending broker-dealers for client transactions and determining the reasonableness of their compensation" and to "[d]iscuss whether and under what conditions you aggregate the purchase or sale of securities for various client accounts." Those questions involve answers to a dozen other subquestions, but none of them derive *directly* from the statute's text. Instead, consistent with its statutory mandates to prohibit fraud and protect investors, the Commission has required such disclosures from investment advisers outside the private-fund industry to prevent fraud from occurring in the first place. *See SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 194 (1963) (Investment Advisers Act of 1940 imposes on investment advisers "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts").

B. Access and exposure to private funds isn't limited to behemoths like the Abu Dhabi Investment Authority or the Yale Endowment

Although private fund advisers often attempt to project their clients as all behemoths like the Abu Dhabi Investment Authority and the Yale

University endowment, that's simply not the case. *See* ILPA Br. 9. Other participants include "children's hospitals with modest endowments and small private and municipal pension funds." *Id.*

In fact, in recent years, private fund advisers have solicited and obtained investments from individuals and smaller institutional investors with far more modest means; indeed it has been one increasing focus. *See* Miriam Gottfried, *Blackstone, Other Large Private-Equity Firms Turn Attention to Vast Retail Market*, The Wall Street Journal, June 7, 2022, *at* http://tinyurl.com/4px55mma (visited Dec. 22, 2023). Individual investors have become increasingly the target investors for private fund advisers. Or Skolnik, Markus Habbel, Brenda Rainey, Alexander De Mol, & Isar Ramaswami, Bain & Company, *Why Private Equity Is Targeting Individual Investors* (Feb. 27, 2023), *at* http://tinyurl.com/4zjk4ysb (visited Dec. 22, 2023).

Although a sovereign wealth fund or university with billions of dollars to invest in a single fund may be able to negotiate quarterly statements from its private fund adviser, a dentist or a small fund may be very unlikely to do so. And the disparities in treatment for investors go well beyond access to information.

For example, although many individual investors in the Blackstone Real Estate Investment Trust (BREIT) have been effectively blocked by the fund adviser from withdrawing their funds, and suffering poor performance for well over a year, the University of California was able to selectively negotiate a guaranteed annual return of at least 11.25% per year for several years, that was supported by $1 billion of collateral posted by Blackstone itself. Dawn Lim, *Blackstone's BREIT Gets $4 Billion California Injection*, Bloomberg (Jan. 3, 2023), *at* http://tinyurl.com/3zu2rd7a (visited Dec. 22, 2023). The "retail" investors in that private fund not only don't get that deal, but may suffer because of it.

In fact, for private fund advisers, so-called "retail" investors may often be the most attractive investors precisely because they often lack sophistication and market power, and thus may be more likely to accept materially less information or worse terms. They're also less likely to be able to read and understand the financial statements, identify risks, or otherwise question the advisers.

As ILPA explains, pensions of all sizes—which owe fiduciary duties to their members and retirees, such as police officers, fire fighters, paramedics, teachers, and other civil servants—invest in private funds on

behalf of their beneficiaries. ILPA Br. 3. Thus, to improve the efficiency and fairness of the private fund market, the Commission proposed and adopted modest changes that, in many cases, do little more than simply provide a baseline of minimum essential information and rights for investors. Many of these are often already afforded to the very largest, most sophisticated investors. But even some of those largest, most sophisticated investors (like pension funds) currently struggle to get this basic information. *See infra* Argument I.C.4.

C. Comment letters from investors and investor advocates submitted during the rulemaking illustrated problems with the private fund market and explained how the proposed rules would solve them

During the rulemaking process, many organizations submitted comment letters supporting the Commission's proposed actions. This included comments from AFREF, as well as investors such as the National Electric Benefit Fund Investments, the New York State Insurance Fund, and the Healthy Markets Association. We highlight those letters below.

1. AFREF's letters

AFREF submitted three comment letters. Initially, AFREF explained how it had become "increasingly clear that investors in private funds are not receiving detailed or complete information around fees,

expenses, and returns," which "undermin[ed] the fairness of these markets and investors' ability to negotiate to protect their own interests." AFREF Letter at 1 (Apr. 25, 2022), *at* http://tinyurl.com/y4846362 (visited Dec. 22, 2023).[3] As examples, it cited "truly one-sided arrangements where investors are asked to waive the fiduciary duty requirements owed by the fund adviser." *Id.* And it complained that the "fairness of these markets is further obscured by bilateral negotiations via 'side letters' that create varying, hidden tiers of preferential treatment." *Id.* Indeed, AFREF noted "some instances" where "the most aggressive private fund advisers have abused these information asymmetries to shift assets and value away from investors." *Id.* at 2.

Thus, AFREF explained that a modest quarterly-disclosures requirement would "even the playing field for investors" by "simply provid[ing] investors with information that advisers typically are already collecting as part of managing their portfolio companies." *Id.* And it noted several instances where the lack of a quarterly-disclosure requirement contributed to private fund investments that "were unexpectedly and

[3] In a second letter submitted a few weeks later, AFREF reiterated many of its previously expressed concerns. AFREF Letter at 1 (June 13, 2022), *at* http://tinyurl.com/mw9wt6t5 (visited Dec. 22, 2023).

quickly wiped out." *Id.* "For example, investors in EnCap Investments, saw their investments in US energy company Southland Royalty plunge from $773.7 million in September 2019 to zero by the end of 2019." *Id.*

In another letter submitted about a year later, AFREF underscored that the proposed rules mandated disclosures "will create a fairer and more competitive market" and "protect retirees hard earned pensions and other savings." AFREF Letter at 1 (May 8, 2023), *at* http://tinyurl.com/4wztbwhn (visited Dec. 22, 2023). It complained that private fund investment "is not a transparent, standardized process but rather a series of bespoke, bilateral negotiations where investors attempt to negotiate basic terms such as the level of granularity of reporting around fees and expenses that are charged, along with what those fees and charges are, or how investment performance is reported." *Id.*

Further, all those negotiations were being done while limited partners "remain[ed] in the dark on what terms other investors in the same fund have received." *Id.* That lack of standardization led to inefficiencies in negotiating what should've been "basic, sensible terms of investment" in a functioning market. *Id.* And even worse, "this opaque and siloed system of negotiating" was enabling general partners "to coerce investors to

accept unfavorable terms such as indemnification, limited liability, and standard of care provisions." *Id.* Those terms "seriously disadvantage investors by providing unduly broad protection" for general partners when they commit wrongdoing. *Id.*

To be sure, limited partners had been doing what they could to ameliorate the situation by negotiating their own side letters with general partners. *Id.* at 1–2. But the problem was that this process was "pitt[ing] LPs against one another," thereby preventing a standardized market solution and impeding market transparency. *Id.* at 2.

2. NEBF's letter

NEBF, which has $18 billion in assets under management and provides pension benefits to over 500,000 participants and beneficiaries in the union electrical industry, thought the Commission's proposed rules were "carefully considered, well designed, practical, and highly beneficial to institutional investors." NEBF Letter at 1 (Apr. 25, 2022), *at* http://tinyurl.com/4dt3hrn3 (visited Dec. 22, 2023). NEBF noted that, because its fiduciaries are subject to ERISA's heightened "prudent expert" fiduciary standard of care when allocating capital, it has "frequently incur[red] significant costs when negotiating relationships with the sponsors, advisors,

and general partners" private funds in which it invests," including "the allocation of significant time and attention on the part of NEBF Investments staff and the NEBF's fiduciary advisors, along with hundreds of hours of work by legal counsel." *Id.* at 2.

Thus, overall, NEBF was pleased that the proposed rules were not only practical, reasonable, and cost-effective, but would also "reduce costs and improve [its] ability to evaluate investment opportunities and monitor [its] existing Private Fund investments" by "improv[ing] transparency" and "better align[ing]" general partners' interests "with their investors." *Id.* Ultimately, NEBF expected that would "result in more efficient capital allocation by investors." *Id.*

As to the quarterly-statement requirement, NEBF complained that in the existing market, it was forced "to incur substantial time and effort to reach agreement with some GPs" regarding "regular detailed disclosure of fees and expenses." *Id.* In particular, to stave off these wasted efforts, it supported adopting ILPA's fee reporting template as the industry standard. *Id.* And it disagreed with private equity industry participants that argued this would place an undue burden on general partners, because standardization would reduce their costs and efforts while

simultaneously "improv[ing] transparency in the industry," which would "provid[e] investors greater confidence when allocating capital to private equity." *Id.*

Regarding preferential treatment, NEBF acknowledged general partners "frequently treat their investors differently, provide differing terms and provisions in agreements, and disclose differing degrees of detail in information related to portfolio holdings," any one of which could have "material consequences." *Id.* at 7. NEBF insisted all limited partners "should have a right to know the nature of such preferential treatment and how it might affect the investors' rights and investment returns." *Id.* That's because "[w]ithout such transparency," investors would be "unable to appropriately evaluate" general partners and their funds. *Id.* Furthermore, NEBF asserted all investors "should be treated equally with respect to liquidity, distributions, exits from a fund, and access to secondary transactions, except in cases where regulatory or other concerns may exist that require otherwise." *Id.*

As for restricted activities, NEBF supported efforts for standardizing what kinds of fees couldn't be charged, such as for services not performed, compliance, and other non-pro-rata expense allocations that

often "represent[] an indirect (and often invisible) subsidy to these favored parties." *Id.* at 5. It also expressed concern that allowing general partners to pass regulatory fines and penalties through to limited partners would misalign incentives and exclude pensions, which owe special fiduciary duties under ERISA. *Id.* at 6.

3. NYSIF's letter

Similarly, NYSIF, an insurance company that fulfills its statutory mandate to provide low-cost workers' coverages, pay timely benefits, and maintain solvency by investing premium income into diverse asset classes, supported the private adviser rules. NYSIF Letter at 1 (Apr. 25, 2022), *at* http://tinyurl.com/5apnvbjb (visited Dec. 22, 2023). It noted private funds' had grown "explosive[ly]" over the past decade while "institutional investors such as public pension funds, foundations, endowments, and others ha[d] invested heavily in them." *Id.* But while investor demand for private funds had soared, NYSIF complained "private market regulation ha[d] failed to keep pace," which produced "a competitive imbalance favoring fund advisers over investors." *Id.*

In particular, that disparate bargaining power "severely disadvantage[d] investors" because it often forced them to "accept one-sided

contractual provisions, such as those waiving adviser fiduciary obligations or entitling advisers to fees for unperformed services" and to "contend with a lack of consistent and standardized information on fees, expenses, and fund performance." *Id.* And this "opaque" and "bespoke" process "imped[ed]" investors' "ability to evaluate and compare investments across funds or track adviser fees and expenses," "erode[d] investor confidence," and presented "challenges" for "even the most sophisticated investors." *Id.* at 1–2.

As agency staff reports and enforcement actions documented, "th[o]se difficulties can hinder investor decision-making and have led to abusive practices that undermine investor and public trust." *Id.* at 2. For that reason, NYSIF supported the private fund adviser rules. *Id.*

As to the quarterly-statement requirement, NYSIF complained that general partners' "periodic statements on fees, expenses, and fund performance" weren't mandatory and "may not be sufficiently detailed or standardized," which "make fund performance comparisons and fee and expense tracking challenging." *Id.* NYSIF also expressed concern that some general partners' statements "have sometimes been incomplete,

inaccurate, and misleading," which is why it also supported the related audit rule. *Id.* at 2–3.

As for preferential terms, NYSIF agreed with the Commission that side letters "are granted for 'strategic reasons that benefit the adviser,' 'do not necessarily benefit the fund or other investors,' and, 'can have a material, negative effect on other investors.'" *Id.* at 4. In particular, NYSIF was troubled by side letters that granted some investors preferential redemption rights and authorized selective disclosures of portfolio holdings or exposures, which "can lead to an unlevel playing field between investors," thereby "misaligning incentives and distorting markets." *Id.* Thus, the preferential-terms rule "would go far in helping restore a level playing field between advisers and investors and promote market efficiency." *Id.*

Finally, as to restricted activities, NYSIF was deeply troubled by general partners' insistence on waivers of fiduciary duties and obligations to indemnify such breaches, which it believed would inescapably lead to problems of moral hazard. *Id.* at 3. Similarly, NYSIF favored the prohibition of certain fees, such as: "fees for unperformed services, such as accelerated monitoring fees; fees or expenses associated with an

investigation or regulatory examination; regulatory or compliance expenses; and fees and expenses related to a portfolio investment on a pro-rata basis when multiple private funds and other clients have invested in the same investment." *Id.* And it agreed the Commission's enforcement actions had documented such abuses. *Id.* at 3–4.

In conclusion, NYSIF asserted, it was "unpersuasive" to argue "institutional investors are sophisticated," so they "do not need the [proposed rules'] protections." *Id.* at 4. Instead, the problem was that "private fund markets suffer from uneven bargaining power and informational asymmetry that harm investors." *Id.* And given "economic and market dynamics," the problem wouldn't solve itself through private action (or "vot[ing] with their feet," as petitioners put it (Pet. Br. 10)), because "institutional investors are already heavily invested in private funds and are likely to increase allocations." *Id.* at 4–5. In short, a "hands-off approach will further distort markets, while the Proposal will foster sustainable economic growth." *Id.* at 5.

4. HMA's letters

HMA, whose members include some of the largest public pensions in North America, submitted two comment letters.[4] Its first letter explained the private-fund marketplace was "extremely skewed towards private fund advisers," so it implored that the Commission "must intervene to provide transparency and competitive balance for investors." HMA Letter at 16 (Apr. 15, 2022), *at* http://tinyurl.com/3huc6mxe (visited Dec. 22, 2023).

HMA offered detailed, evidentiary support for requiring quarterly statements that include standardized, comparable, reliable, performance, fees, and expense information; requiring audits designed to ensure the integrity of the valuation processes, as well as the performance, fee, and expense information; prohibiting advisor-led secondaries unless

[4] HMA is an investor-focused nonprofit coalition that provides independent information and analysis to investors and regulators so as to promote transparency, reduce conflicts of interest, and ultimately reduce the costs of trading for investors. Its buyside members manage the retirement savings of millions of North Americans (including U.S. and Canadian pensions and asset managers with trillions of dollars in assets under management), and its working group members include leading brokers, data and technology providers, and execution venues. *See* Healthy Markets Association, *Membership*, *at* http://tinyurl.com/bdfhchc7 (visited Dec. 22, 2023).

the adviser obtains and shares a fairness opinion and a summary of its relationship with the provider of that opinion; prohibiting certain activities, such as collecting fees for services not performed or barring claims from investors for gross negligence by the investment adviser; and prohibiting some forms of preferential treatment, while requiring detailed disclosure of others. *Id.* at 2.

More particularly, HMA explained that because "no federal regulatory requirement for investment advisers offering private funds to provide their investors with regular statements," their provision of quarterly reports was hit or miss. *Id.* at 4. And even "to the extent some investors receive information, it may not be prepared in a standardized, consistent, comparable, or reliable way." *Id.* It also noted a discrepancy between large, sophisticated investors that "often receive the most useful information in a timely manner," whereas "smaller, less sophisticated investors often receive less timely and complete information." *Id.* at 5. And even for big investors, the "lack of detailed information often means that even large investors may be unable to identify and track their associated fees and expenses." *Id.*

As for restricted activities, HMA was troubled by abusive practices in which investment advisers charged fees associated with governmental investigations, for services never performed, and to some investors but not others. *Id.* at 11–12. Arguing that disclosures might not be enough, HMA asserted, “competitive pressures in the private fund marketplace make it extremely unlikely that mere disclosure will meaningfully check these abusive practices.” *Id.* at 12. Thus, HMA favored a regime of outright prohibition rather than mere disclosure. *See id.*

Regarding preferential treatment, HMA was asserted bespoke, privately negotiated side letters were both inefficient and opaque. *Id.* at 14–16. “Private fund investors often lack essential information about preferential terms granted to other investors, including terms that may directly impact the funds’ investments, performance, and fees.” *Id.* at 15. Anticipating the argument that a disclosure regime would cause investment advisers to discontinue side letters, HMA argued that threat was “simply not credible”:

> Private fund advisers want large, sophisticated, and experienced investors to participate in their funds. Further, as we have personally experienced, even amongst the largest, most sophisticated investors in the world, the lack of information regarding side letters creates significant risks. Put simply, even the investors who may most often benefit from

> side letters are often disadvantaged by them. Prohibiting some preferential terms will thus both raise the overall level of investor protections in private funds, but also reduce costs and inefficiencies of lengthy negotiations and severe information and rights asymmetries across investors.

Id. at 16.

Unfortunately, as HMA noted, "pension funds, endowments, and other institutional investors have been forced to accept lower protections (and greater risks) if they want to make investments in private funds." *Id.* at 8. And "[t]he fact that competitive pressures have led investors [including fiduciaries] to participate in private funds without audits is a market failure." *Id.*

This wasn't an idle problem, HMA explained, because "[e]ven some of the largest, most sophisticated asset owners [were worried] that raising concerns with their own contractual terms may lead to them being disfavored or discriminated against by private fund advisers." *Id.* at 16. Shockingly, HMA had "even heard some asset owners express fear that they may be discriminated against for simply publicly commenting on this Proposal." *Id.* And if even large, sophisticated pensions were finding it impossible to negotiate for the terms and disclosures they wanted, then smaller investors wouldn't stand a chance. *See* Healthy Markets

Association, *In the Public Interest: Why Policymakers and Regulators Must Restore Public Capital Markets* (Jan. 2022) (discussing congressional testimony of Profs. Renee M. Jones and Elisabeth de Fontenay), *at* http://tinyurl.com/36kjpsuj (visited Dec. 22, 2023).

In its second letter, HMA highlighted how the proposed rules might've staved off the then-recent and still-spectacular failure of FTX. HMA Letter at 1–14 (Jan. 12, 2023), *at* http://tinyurl.com/5n7jkcba (visited Dec. 22, 2023). HMA noted that private fund investment advisers played a key role in FTX's rise and fall because they didn't conduct adequate due diligence or accurately assess the values of their positions in FTX. *Id.* at 7–8. "Aside from impacting their own fortunes, those investment advisers' missteps resulted in retirees and other beneficial owners losing millions of dollars." *Id.* at 7. And those "investment decisions by a handful of investment advisers to private venture capital funds conferred an aura of legitimacy upon FTX that caused its harm to continue and exponentially grow." *Id.* at 8. All told, HMA argued that more reliable and timely valuations, audits, due diligence, and quarterly statements from private fund advisers would help avoid or mitigate investor harms like FTX. *Id.* at 8–14.

D. In adopting the final private fund adviser rules, the Commission and the Commissioners carefully considered those comment letters, along with other concerns

Naturally, because their views didn't prevail before the Commission's staff or the Commissioners themselves, the petitioners have focused on the dissents of Commissioner Pierce and Commissioner Uyeda. Pet. Br. 1, 18, 21, 22, 42, 43, 46, 48, 56, 58, 71. But the statements of Chairman Gensler, Commissioner Crenshaw, and Commissioner Lizarraga are important to read as well.

1. Chairman Gensler's statement

Chairman Gensler supported the proposed rules because Congress "gave the Commission specific new authorities under the Investment Advisers Act of 1940 to prohibit or restrict advisers' sales practices, conflicts, and compensation schemes." Chairman Gensler Statement (Aug. 23, 2023), *at* http://tinyurl.com/mty5ubkf (visited Dec. 22, 2023). He also noted that, since 1996, Congress had required the Commission to "consider efficiency, competition, and capital formation in addition to investor protection and the public interest." *Id.* Importantly, that obligation wasn't "cabin[ed]" "only to retail investors." *Id.* Rather, the Commission was adopting "today's rules on behalf of all investors—big or small,

institutional or retail, sophisticated or not." *Id.* He explained how the proposed rules would foster transparency through quarterly statements and disclosures about preferential treatment and fairness by limiting restricted activities. *Id.* And he explained how the proposed rule and been modified from flat prohibitions to more flexible arrangements that depended on disclosures. *Id.*

2. Commissioner Crenshaw's statement

Commissioner Crenshaw emphasized how the rules took aim at the private fund market's opacity. Commissioner Crenshaw Statement (Aug. 23, 2023), *at* http://tinyurl.com/5e5xxkh7 (visited Dec. 22, 2023). In particular, she "address[ed] the critique that the SEC should play no part in the negotiations between sophisticated investors," which she described as a "[s]trawman" because "the playing field is not level." *Id.* "Even sophisticated investors accept sub-optimal contractual terms for a number of reasons, including the fear that if they push for higher quality terms, they will lose access to current or future fund allocations." *Id.* And "because not all investor interests are aligned, collective action problems appear to prevent coordination among investors to bargain for uniform baseline terms." *Id.* "In other words, relying on the parties' sophistication

alone, in the absence of regulation, will continue to leave investors exposed to unfair or harmful practices." *Id.*

3. Commissioner Lizárraga's statement

Similarly, Commissioner Lizárraga sought to "level the playing field for investors of all sizes." Commissioner Lizárraga Statement (Aug. 23, 2023), *at* http://tinyurl.com/y35xjrds (visited Dec. 22, 2023). He expressed concern that market forces hadn't corrected disparities between general partners and limited partners: "The way the market works under current rules places many of these investors in the unfair position of having no choice but to accept disadvantageous terms from their advisers." *Id.* And, for example, those disparities were hurting the beneficiaries of pensions that "serve firefighters, educators, law enforcement officers, and other workers who provide vital services to communities throughout our country." *Id.*

"Under the status quo, these beneficiaries can be harmed, through lower returns, by a lack of transparency in fees and expenses and when their advisory relationships are tainted with inadequately addressed conflicts." *Id.* "By leveling the playing field for investors, today's reforms help remedy these disparities." *Id.* In sum, he explained the Commission had

"undertaken a considered, targeted approach to crafting today's reforms, consistent with the rigorous public comment process required by law." *Id.*

II. The Court should address the intertwined standing and venue questions with care and caution

Petitioners assert venue is appropriate here because NAPFM "is incorporated, and has its principal office or place of business, in Texas." Pet. Br. 4 (citing 15 U.S.C. § 80b-13(a), and *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 188 & n.5 (5th Cir. 2023). But in response, the Commission argues venue is improper because NAPFM—the only entity among the several petitioners that resides within this Court's geographic borders—hasn't established its own associational standing by affidavit or other evidence. Resp. Br. 15–16. The Court should carefully consider the merits of the Commission's contention given NAPFM's relatively recent formation, its caginess about its members' identities and locations, and the potential risk that petitioners might be using it to forum shop.

To start, NAPFM's origins, organizational structure, membership, shareholders, directors, executives, personnel, and physical location are shrouded in mystery. Initially, NAPFM registered with the Texas Secretary of State on April 22, 2022. *See* Form 706 (Add. 3–4). That registration indicated NAPFM was a nonprofit association that "does not have a

federal employer identification number at this time." *Id.* It was signed by an individual named "M. Stewart." *Id.* And it boasted an address in one of Fort Worth's most beautiful skyscrapers, the Bank of America Building located at 301 Commerce Street, Suite 2600, Fort Worth, Texas 76102-4160. *Id.* Remarkably, it shared the same suite address as the 17-lawyer Forth Worth office of Haynes & Boone (https://www.haynesboone.com/locations/fort-worth), a well-regarded 700-lawyer firm based in Texas.

About a year later, on May 24, 2023, NAPFM registered again with the Texas Secretary of State. *See* Form 202 (Add. 5–6). This time, instead of registering as a nonprofit *association*, NAPFM registered as a non-profit *corporation* and indicated it "will have members." *Id.* Once again, it listed the same office address (Suite 2600) and was signed by Mr. Stewart, who this time disclosed his first name as Matt.[5] *Id.* But it made no representation about whether NAPFM had acquired a federal employer identification number. *See id.*

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[5] Coincidentally, the Dallas office of Haynes & Boone has a partner named Matt S. Stewart, who practices in its investment management and private equity practice groups. *See* Haynes & Boone, *Matt S. Stewart*, *at* https://www.haynesboone.com/people/stewart-matthew (visited Dec. 22, 2023).

Later that same day (based on the document numbers the Texas Secretary of State assigned to each filing), NAPFM filed a cancellation of its initial registration and appointment of statutory agent to accept service of process. *See* Form 709 (Add. 7). It again described itself as a nonprofit association, again listed the same office address (Suite 2600), again indicated it "does not have a federal employer identification number at this time," and was again signed by Mr. Stewart. *Id.*

Other information about NAPFM is similarly sketchy. NAPFM's website doesn't indicate who its members are, apart from vaguely stating it "includes investment advisers in the private fund management industry." NAPFM, *About*, *at* https://www.napfm.org/#about (visited Dec. 20, 2022). Importantly, there's no public information to indicate any such investment advisers either (1) manage private funds with assets exceeding $150 million of private fund assets or $100 million of regulatory assets (which is a threshold below which some of the Commission's private fund rules don't apply), *see, e.g.*, SEC Release No. IA-6383 (File No. S7-03-22) at 68 ("Final Rule") (such private fund advisers "will not be subject to the quarterly statement rule"), or (2) joined NAPFM's membership before it filed the petition (C.A. Doc. 1.1) on September 1, 2023, *see Grupo Dataflux*

v. Atlas Global Group, LP, 541 U.S. 567, 570 (2004) ("'the jurisdiction of the court depends upon the state of things at the time of the action brought'" (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824))).

Likewise, NAPFM's website's whois information is similarly cagey about its membership's identity, unlike that of more commonly known companies like, say, *The Wall Street Journal*. *Compare* https://www.whois.com/whois/wsj.com (visited Dec. 22, 2023), *with* https://www.whois.com/whois/napfm.org (visited Dec. 22, 2023). And oddly, NAPFM's whois information indicates its website registrant contact's location is in Florida, not Texas. *Id.*

To be sure, since its initial and revised registrations in Texas, NAPFM has participated as an *amicus curiae* in several federal appellate matters and one district court litigation concerning securities regulation issues. *E.g.*, C.A. Docs. 35 (filed July 8, 2022) & 50.2 (tendered Dec. 2, 2022, but not yet accepted for filing), *SEC v. Almagarby*, No. 21-13755 (11th Cir.) (orally argued Dec. 13, 2023); C.A. Doc. 34 (filed June 7, 2023), *SEC v. Keener*, No. 22-14237 (11th Cir.) (oral argument not yet calendared); D.Ct. Doc. 169.1, *SEC v. Carebourn Capital LP*, No. 0:21-cv-2114 (D. Minn.). And in those matters, it has been represented by esteemed

lawyers of some of the finest law firms in the country, such as Debevoise & Plimpton, Jenner & Block, and Gibson, Dunn & Crutcher, each of which has penned thoughtful briefs of exceptional quality.

Nevertheless, the concern that petitioners might be including NAPFM in this litigation to assist it with forum shopping is palpable and inescapable, in much the same way that a tricky plaintiff might play fast-and-loose by fraudulently joining a domestic defendant to thwart otherwise diverse defendants from removing a case to federal court. *E.g.*, *Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (*en banc*) (describing fraudulent joinder doctrine). Such tactics are conceivable, of course, for the stakes are high, and only the truly faint-hearted would actually be "shocked, shocked to find that gambling is going on in here!" *Casablanca* (Warner Brothers 1942), *at* http://tinyurl.com/vee5avbx (visited Dec. 22, 2023). But it's in precisely that respect that caution and rectitude are judicial virtues that simply never go out of style.

Thus, if the Court were to have any concerns about standing or venue that the petitioners' and respondent's briefs hadn't adequately addressed, it should consider *sua sponte* issuing jurisdictional questions to

give the parties (not *amici*) an opportunity to answer them. For instance, some of those jurisdictional questions could include the following:

- Is NAPFM a nonprofit association or a nonprofit corporation, and how would that affect the standing and venue analysis?
- Who are NAPFM's members and shareholders, where are they located and domiciled, how many assets do they have under management, and when did they join?
- Who is Matt Stewart, what is his title or role with NAPFM, and where is he located and domiciled?
- Does NAPFM have any employees, executives, directors, or other personnel who work and are domiciled in Texas, and if so, who are they, do they work on a W-2 or contract basis, and when did they begin working?
- Why doesn't NAPFM have a federal employment identification number, or if it has now acquired one, when did it acquire it?
- How exactly does NAPFM's personnel in Fort Worth, if any, physically share a suite with Haynes & Boone, or is it just an address for NAPFM to receive mail?
- Why does NAPFM's website's whois information list Florida rather than Texas as the registrant contact's location?
- Does NAPFM have a bank account into which it deposits member dues and from which it pays its personnel and legal counsel, and if so, when was it opened, where is it located, and who has signing authority?

CONCLUSION

The petition should be transferred or denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rules of Appellate Procedure 29(a)(5)'s type-volume limitation. As determined by Microsoft Word 2010's word-count function, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,267 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

December 22, 2023

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six paper copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 22d day of December, 2023, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 22d day of December, 2023, to all counsel of record.

December 22, 2023

/s/ Thomas Burns
Thomas A. Burns