November 30, 2021

The Honorable David N. Cicilline
The Honorable Ken Buck
Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law
United States House of Representatives
Washington, DC 20515

Re: Letter for the Record by the New Civil Liberties Alliance in connection with the Subcommittee on Antitrust, Commercial, and Administrative Law hearing, "The Administrative Procedure Act at 75: Ensuring the Rulemaking Process is Transparent, Accountable, and Effective"

Dear Chairman Cicilline, Ranking Member Buck, and Members of the Subcommittee,

On behalf of the New Civil Liberties Alliance ("NCLA"),[1] we submit this letter for the record in connection with the Subcommittee on Antitrust, Commercial, and Administrative Law hearing, "The Administrative Procedure Act at 75: Ensuring the Rulemaking Process is Transparent, Accountable, and Effective," which is scheduled to take place on December 1, 2021. NCLA's attorneys have decades of experience challenging unlawful rulemakings and defending against agency enforcement actions. It is from this experience that NCLA submits this letter for the record.

Since its adoption, it has been understood that the APA serves four basic purposes: (1) it "require[s] agencies to keep the public currently informed of their organization, procedures and rules"; (2) it "provide[s] for public participation in the rule making process"; (3) it "prescribe[s] uniform standards for the conduct of formal rule making … and adjudicatory proceedings…, i.e., proceedings which are required by statute to be made on the record after opportunity for agency hearing"; and, (4) it "restate[s] the law of judicial review."[2] Stated another way, the APA's purpose "is to regulate the

[1] NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses an especially serious threat to civil liberties. No other current aspect of American law denies rights to more people. Although Americans still enjoy the shell of their Republic, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent. *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014). This unconstitutional state within the United States is the focus of NCLA's attention.

[2] Attorney General's Manual on the Administrative Procedure Act 9 (1947).

procedures used by agencies, and in particular the procedures by which agencies issue orders and promulgate rules … Crucially, the APA … makes these limitations into rights enforceable by those injured by agency action."[3] However, despite the APA's promise, it often falls short of its laudable goals and in many ways has incentivized evasion of the law through administrative lawmaking. These shortcomings ultimately harm regulated individuals and entities and impermissibly encroach on their Constitutional rights.

It is easy to simply consider the success or failure of the APA through a review of the "notice and comment" rulemaking process. However, this ignores the fact that the APA has—intentionally or not—created numerous modes of administrative lawmaking, each with its own unique evasion of the law and encroachment on civil liberties.[4] And, what occurs after the rulemaking process is completed, *i.e.*, enforcement, is as important as how the rulemaking process occurs.

I. Rulemaking Often Ignores the Concerns of Regulated Entities

The APA's judicial review provisions are some of its most important. They provide that a person or entity "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action … is entitled to judicial review" of certain final agency actions.[5] Courts reviewing such actions are empowered to "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency actions, findings, and conclusions" that are legally impermissible for several reasons including that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" "contrary to constitutional right, power, privilege, or immunity[,]" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[6] But the availability of a future challenge and remedy under the APA does not correct agency decision-making that openly ignores or discounts the concerns of regulated entities during the rulemaking process. Given the costs and time associated with litigation, judicial review may not, in actuality, be available to all adversely affected or aggrieved individuals or entities because they cannot afford to litigate the unlawful agency action.[7]

For instance, NCLA is currently representing commercial and recreational fishermen in separate APA challenges to regulations promulgated by the National Marine Fisheries Service ("NMFS"). The first case, *Relentless Inc. v. Dep't of Commerce*, involves a challenge to a NMFS rule that mandates at-sea monitors on America's Atlantic herring fleet.[8] Throughout the development of the rule, our clients, fishing vessels operating out of Rhode Island, consistently raised issues with the proposed rule because the style of fishing they developed and have used for decades would be adversely impacted in comparison to the rest of the herring fleet and the rule would cause them

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[3] Mila Sohoni, *The Power to Vacate A Rule*, 88 Geo. Wash. L. Rev. 1121, 1134 (2020) (emphasis in original).

[4] *See* Hamburger *supra* note 1, at 112-131 (discussing how administrative agencies have developed various forms of administrative lawmaking including formal rulemaking, formal adjudication, informal rulemaking, hybrid rulemaking, negotiated rulemaking, interpretations, granting waivers, determinations, appropriating the law of nuisance, and licensing).

[5] 5 U.S.C. §§ 702, 704.

[6] 5 U.S.C. § 706.

[7] *See* Robert Barnes, *An Alaskan moose hunter beat the odds at the Supreme Court, It Cost $1.5 million.*, Wash. Post. (Nov. 3, 2019).

[8] The case is currently pending review in the U.S. Court of Appeals for the First Circuit. *See* NCLA, Case Page, *Relentless Inc., et al. v. U.S. Dept. of Commerce, et al.* (last visited Nov. 30, 2021), https://nclalegal.org/relentless-inc-et-al-v-u-s-dept-of-commerce-et-al/.

substantial and unstainable financial losses. NMFS's response? That is the cost of doing business, and our clients were free to leave the fishery. This callous response to a job-provider is emblematic of the differences between bureaucratic policymaking and on-the-ground realities of American industry. This response is also deeply troubling because the Magnuson-Stevens Act ("MSA") specifically envisions a cooperative process between the Department of Commerce and its subagencies and America's fisheries, many of which, like the herring fishery, pre-date the country's founding. An agency free to disregard the purposes of the statutes it enforces and permitted to be nonresponsive to the needs of regulated parties is neither accountable nor effective.

The second case, *Mexican Gulf Fishing Company v. Nat'l Oceanic and Atmospheric Admin.*, involves a challenge to a NMFS rule that requires all recreational reef fishing vessels operating in the Gulf of Mexico to purchase, install, and operate NMFS-approved vessel monitoring systems ("VMS") every time they leave the dock even if the vessel is being used for purely private non-regulated activities.[9] This is a gross violation of the Fourth Amendment's prohibition on unlawful searches and seizures. Numerous commentators raised this precise issue in comments to the agency—that they thought the collection of GPS data of their locations violated the Fourth Amendment—but these constitutional concerns were ignored in the final rule. [10] According to NMFS, the agency "interpreted" the Fourth Amendment objections as raising concerns about future disclosures to other agencies, not the collection of location data in the first instance.[11] NMFS's justification for this massive privacy invasion? Lack of resources. The agency, in its view simply did not have enough people to collect all the information it would like to collect.[12] But bureaucratic efficiency cannot justify constitutional harms.

In both cases, the final rules at issue were subject to notice-and-comment rulemaking and numerous comments were received from regulated individuals and entities raising numerous objections to the proposed rules. Despite these objections, the final promulgated rules were substantially similar, if not identical, to the proposed rules. This raises a concern that even though the APA contemplates public input, that input may be illusory. Thus, the main mechanism available to curb harmful agency rulemaking is the courts, not the notice-and-comment process. But as noted above, the cost and time associated with challenging an agency action should be considered in reviewing the APA's successes and shortcomings. And this point is also notwithstanding the development of pro-agency biases, by and through application of judge-made deference doctrines, that further stack the deck against aggrieved individuals and entities in favor of the government during challenges made under the APA.[13]

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[9] The case is currently pending before the U.S. District Court for the Eastern District of Louisiana. *See* NCLA, Case Page, *Mexican Gulf Fishing Company, et al. v. National Oceanic and Atmospheric Administration, et al.* (last visited Nov. 30, 2021), https://nclalegal.org/mexican-gulf-fishing-company-et-al-v-national-oceanic-and-atmospheric-administration-et-al/.

[10] In a curious development during the pendency of the litigation, the agency proceeded to implement its rule and invited our clients to petition the agency under the APA to delay the effective date of the rule, which was granted. *See* 50 C.F.R. 60,374 (Nov. 2, 2021).

[11] Brief for Federal Defendants at 25, Mexican Gulf Fishing Co. v. Nat'l Oceanic and Atmospheric Admin., No. 2:20-cv-2312 (E.D. La. Sept. 24, 2021).

[12] Arguably, this is a resources issue best remedied through the Congressional appropriations process.

[13] Under certain circumstances, these doctrines require judges to defer to an agency's interpretation of a statute or regulation thereby abandoning their duty of independent judgment. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Application of deference doctrines also violates due process because they require the judiciary

II. Rulemaking Can Silence Important Voices Necessary to Inform Robust Policy Debates

Rules can also be used to silent critics. Both the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") have adopted so-called housekeeping rules that require targets of agency enforcement actions that settle with those agencies to be bound by a gag order in perpetuity.[14] Housekeeping rules are typically rules promulgated by agencies that only bind the agency. However, because neither SEC nor CFTC will enter a settlement without including their gag provisions, these gag rules necessarily bind individuals outside of the agency and silence them permanently.[15]

These gag rules are impermissible prior restraints on speech in violation of the First Amendment. Indeed, Congress itself could not pass a law that would permit agencies to restrict speech in the ways these gag rules do. While data is not readily available for the CFTC, it is estimated that SEC settles some 98% of its cases.[16] Thus, these gag rules unconstitutionally silence nearly all criticism of the agencies by those in the best position to shine a light on improper or abusive enforcement actions or problematic policy determinations—the targets of the enforcement actions themselves.

These gag rules also highlight another of the APA's shortcomings. While the APA specifically permits "interested person[s] the right to petition for the issuance, amendment, or repeal of a rule" there is no procedure or requirement that the agencies act on the petitions they receive, let alone act on the petitions within a reasonable time.[17] NCLA submitted petitions to the SEC and CFTC requesting the agencies amend their gag rules. [18] The petition to the SEC was submitted in 2018 and the petition to the CFTC was submitted in 2019. To date, neither petition has been acted on. While the right to petition for the issuance, amendment, or repeal of a rule could be a valuable tool, it is worthless unless there is a mechanism requiring agencies to act on such petitions.

III. Abusive Regulatory Enforcement Is Often the Rule Not the Exception

Another issue to consider in ensuring transparent, accountable, and effective rulemaking is to look at how agencies enforce their regulations after they have been promulgated. In NCLA's experience, agency enforcement is often overly broad, unduly burdensome, and coercive.[19]

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to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

[14] There are challenges pending in the U.S. Courts of Appeals for the Second and Fifth Circuits. *See* NCLA Case Page, *Romeril v. SEC* (last visited Nov. 30, 2021), https://nclalegal.org/romeril-sec/; NCLA Case Page, *U.S. Securities and Exchange Commission v. Novinger* (last visited Nov. 30, 2021), https://nclalegal.org/sec-v-novinger/.

[15] *See* Peggy Little, Op-Ed, *How the SEC Silences Criticism*, Wall St. J. (Nov. 14, 2018).

[16] *See* Priyah Kaul, Note, *Admit or Deny: A Call for Reform of the SEC's "Neither -Admit-Nor-Deny" Policy*, 48 U. Mich. L.J. 535, 536 (2015).

[17] 5 U.S.C. § 553(e).

[18] *See* NCLA Petition to Amend to the Securities & Exchange Comm'n (Oct. 30, 2018), *available at* https://bit.ly/SECGagRulePet; NCLA Petition to Amend to the Commodity Futures Trading Comm'n (July 18, 2019), *available at* http://bit.ly/CFTCGagRulePet.

[19] For an extended discussion of the ways agency enforcement and adjudication harm regulated individuals and entities *see* NCLA, Comment to OMB, *Improving and Reforming Regulatory Enforcement and Adjudication, Docket Number OMB-2019-0006* (Mar. 16, 2020), *available at* https://bit.ly/NCLAOMBComment.

Take for example *Consumer Financial Protection Bureau v. Law Offices of Crystal Moroney, P.C.*, where the CFPB has effectively harassed NCLA's client to respond to multiple Civil Investigative Demands ("CID") over several years.[20] Despite some objections, Ms. Moroney's law firm substantially complied with the CIDs and only withheld information which she could not disclose without violating attorney-client privilege or ethical doctrines.[21] Despite no allegations of wrongdoing on the part of Ms. Moroney's law firm, substantial compliance with the prior CIDs was not enough to satiate the agency's enforcement attorneys, and in September the CFPB issued another CID this time requiring oral testimony from Ms. Moroney. However, due in large part to CFPB's serial CIDs Ms. Moroney's law firm is now insolvent. There is something deeply perverse about agency enforcement practices that can make a lawful business insolvent without so much as an allegation of wrongdoing. Agency regulations that permit such enforcement practices should be disfavored.

Years-long investigation and enforcement actions are not unusual. In *SEC v. Spartan Securities Group, LTD*, NCLA's clients were subjected to a nearly decade-long investigation and enforcement action, which culminated in a three-week jury trial.[22] Throughout the investigation and civil enforcement case, the SEC pursued a theory of liability that relied on an expansion of the applicable securities rules via guidance that was provided in a *proposed* rule. The jury did not believe the SEC's expansive theory. Our clients ultimately prevailed on thirteen of fourteen counts. One of our clients, David Lopez, was fully exonerated by the jury and is likely one of the few individuals in the country who can freely talk about the SEC's abhorrent enforcement practices.[23]

IV. Conclusion

The APA has offered regulated and aggrieved parties the opportunity to be involved in the development of regulations and mechanisms to challenge or amend them. While this is a good start, experience has shown that there is much more work to be done to protect individuals and entities from improper and unlawful agency actions.

Respectfully,

NEW CIVIL LIBERTIES ALLIANCE

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[20] NCLA, Case Page, *Consumer Financial Protection Bureau v. Law Offices of Crystal Moroney, P.C.* (last visited Nov. 30, 2021) https://nclalegal.org/moroney-cfpb/.

[21] To date, the CFPB has not accused Ms. Moroney's law firm of violating any law or regulation, but under its own regulations the CFPB is permitted to issue CIDs. *See* 12 C.F.R. § 1080.6.

[22] NCLA, Case Page, U.S. Securities and Exchange Commission v. Spartan Securities Group, LTD., et al. (last visited Nov. 30, 2021) https://nclalegal.org/u-s-securities-and-exchange-commission-v-spartan-securities-group-ltd-et-al/.

[23] Had Mr. Lopez settled, he would have been subject to the SEC's Gag Rule and silenced in perpetuity.