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June 15, 2022

Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Submitted Electronically via SEC Internet Comment Form

**Re: Comments on Proposed Rule Amendments titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" by the Attorneys General of the States of West Virginia, Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming (SEC File No. S7-10-22)**

Dear Secretary Countryman:

The Attorneys General of the States of West Virginia, Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming submit these comments on the Securities and Exchange Commission's proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors." 87 Fed. Reg. 21,334 (Apr. 11, 2022) ("Proposed Rule").

The Proposed Rule seeks to recast the Commission's statutory role and remake the federal securities disclosure regime, all in an ill-advised misadventure into environmental regulation. Though "Congress created the SEC to protect investors and financial markets,"[1] the Proposed Rule does nothing to "protect" either. Instead, it pushes naked policy preferences far afield of the Commission's market-focused domain.

This effort reflects agency mission creep of the worst kind. The administration has tried and failed to impose regulation directly, and it now appears content to use back-door financial

[1] *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 895 (5th Cir. 2019).

regulatory actions to implement its political will. But it is up to lawmakers to decide major policy questions like these, not unelected agency administrators.

Worse still, the Commission seems to be redefining itself at the behest of political interests bent on destroying industries central to the American economy—building blocks like energy companies, traditional automakers, and more. The Commission proposes to compel registered companies to create, gather, and disclose a crushing amount of material divorced from the type of basic financial information that investors need. The Commission thus looks to be trying to regulate disfavored industries into oblivion.

Let's be clear: the Proposed Rule appears to be an intentional step toward a command-and-control economy in which investors, as a practical matter, are permitted to invest only in companies palatable to massive shadow banks and federal government functionaries.[2] As things stand now, companies are properly focused on profits and maximizing returns to shareholders. But through the Proposed Rule, the Commission is now trying to intimidate boardrooms into reordering these priorities—profit will become secondary to political interests, and capitalism will fall by the wayside.

If the SEC finalizes the Proposed Rule, then we expect the Commission will use it as a precedent for asserting many new powers in extra-statutory ways. Freed from any pretense of constraint, the Commission can work to mold the market to its will. But powerful forces in Washington and New York don't lead our free-market economy. Publicly listed companies are not agents of the state. And we oppose any effort to use the Commission to lock out the blue-collar enterprises and Main Street investors that actually drive this country.

The States thus object to the Proposed Rule on three fundamental bases. *First*, the Commission lacks statutory authority to issue it. *Second*, the rule would violate First Amendment rights. And *third*, the rule does not reflect reasoned decisionmaking and so would fail arbitrary-and-capricious review. Standing alone any one of these problems would be reason enough to reject the Proposed Rule. That the Proposed Rule implicates all three underscores its misguided nature. The Commission must suspend this unnecessary and destructive effort.

## BACKGROUND

From his first days in office, President Biden has insisted that *all* federal government agencies must advance his administration's climate-related agenda. "The full capacity" of these "agencies," he ordered, must be "organize[d] and deploy[ed]" to "implement a Government-wide

[2] *See*, *e.g.*, Marianne M. Jennings, *The Social Responsibility of Business Is Not Social Responsibility: Assume That There Are No Angels and Allow the Free Market's Touch of Heaven*, 16 BERKELEY BUS. L. J. 325, 333 (2019) ("Those behind the destruction of business autonomy are leading it to its own demise through the clever ploys of perceived public demand.").

approach."[3] The President expected federal agencies to take "bold" steps reaching "every corner of our Nation, every level of government, and every sector of our economy."[4]

Since this edict, "[t]he climate change debate has been untethered from its traditional political sphere and is having implications across unique federal agencies."[5] It is not yet obvious what, if any, actual benefit this all-encompassing administrative campaign will produce. As we have seen in the past, "federal regulatory strategies may remain more time-consuming, conflict-ridden, and legally vulnerable than [other] measures."[6]

Even so, the Commission (although purportedly an independent agency[7]) has quickly leapt to implement the President's mandate. In the first few months of 2021 alone, the agency hired a "Senior Policy Advisor for Climate and ESG,"[8] directed its Division of Corporation Finance to focus on climate-related disclosures in securities filings,[9] and created a "Climate and ESG Task Force" in its Division of Enforcement.[10] Then-incoming Chair Gary Gensler likewise announced that climate disclosures would be "one of [his] top priorities" and "an early focus during [his] tenure."[11] The Commission then sent "dozens" of letters to public companies questioning the sufficiency of their climate-related disclosures in prior public filings.[12]

Most relevant here, the then-Acting Chair requested public input just over a year ago on a series of new potential climate-change disclosures.[13] She got input back in spades: The Commission received *hundreds* of unique comment letters, many of them critical of any proposed disclosures. Several of our States, for instance, explained that mandatory, broad, climate-related

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[3] *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7,619, 7,622 (Jan. 27, 2021).

[4] *Id.*

[5] Avi Wolasky, *The Climate Debate Is Reaching Untraditional Places As A Result of Biden's Aggressive Policy, and These Changes Can Become More Common*, GEO. L.: GEO. ENV'T L. REV. (Apr. 18, 2022), https://bit.ly/3mEe0jA.

[6] Jonathan H. Adler, *The Legal and Administrative Risks of Climate Regulation*, 51 ENV'T L. REP. (ELI) 10,485, 10486 (2021).

[7] *See*, *e.g.*, *Zelaya v. United States*, 781 F.3d 1315, 1331 (11th Cir. 2015) ("The SEC is an independent agency, created by the Securities Exchange Act of 1934 to regulate the securities markets and protect investors through its enforcement of that and other statutes.").

[8] Press Release, SEC, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (Feb. 1, 2021), https://www.sec.gov/news/press-release/2021-20.

[9] Statement from Allison Herren Lee, Acting Chair, SEC, on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

[10] Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[11] Andrew Ramonas, *SEC Readying New Company Workforce Disclosures, Gensler Says*, BLOOMBERG LAW: SECURITIES LAW (May 13, 2021, 5:48 PM), https://bit.ly/3FdN3Ma.

[12] Paul Kiernan, *SEC Asks Dozens of Companies for More Climate Disclosures*, WALL ST. J. (Sept. 22, 2021, 4:14 PM), *available a*t https://perma.cc/GZA8-CVCV; *see also* Cydney Posner, *In Most Recent Comments on Climate Disclosure, SEC Drills Down on Materiality*, COOLEY PUBCO (Mar. 4, 2022), https://cooleypubco.com/2022/03/04/sec-comments-climate-disclosure/.

[13] Statement from Allison Herren Lee, Acting Chair, SEC, on Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

disclosures could make meaningless the materiality standard that underlies existing disclosure regulations.[14] We also noted it would likely violate the Constitution's protections against compelled speech.[15] Many others questioned the agency's broader statutory authority and the significant burdens that such regulations would create.[16]

In response to these concerns, the Commission doubled down. One commissioner declared that materiality—at least as a limit on the Commission's authority to mandate disclosures—is a "myth."[17] Another insisted that the SEC is merely "step[ping] in" to solve a problem[18]—no matter that the agency had once recognized that it could *not* advance environmental disclosure matters absent a "specific congressional mandate."[19] But reports suggest that the Commission was not as confident privately as it advertised publicly. Commissioners evidently wrestled over key subjects like whether to require auditors to sign off on the proposed disclosures and how to deal with the existing materiality standard.[20]

Apparently dissatisfied that climate-related disclosure rules were not immediately forthcoming, Senator Elizabeth Warren informed the Commission that she considered it "unacceptable" to delay any further in "releas[ing] the strongest requirements possible."[21] The Commission issued the Proposed Rule just a few weeks later.

Spanning more than 500 pages, the Proposed Rule yields to President Biden's (and Senator Warren's) demands to take a maximally aggressive regulatory approach. The proposal would amend both Regulation S-K (generally governing qualitative descriptions in securities filings) and Regulation S-X (governing financial reports). Together, these amendments will create a vast new set of required disclosures pertaining to climate change and greenhouse-gas emissions.

Under the proposed amendments to Regulation S-K, companies will have to make a variety of exhaustive and overlapping narrative disclosures. Among other things, companies will need to:

- Describe the role of the company's board and management in overseeing, assessing, and managing climate-related risk, including the names of specific individuals charged with

[14] Letter from Eric Schmitt, Missouri Attorney General, to Gary Gensler, Chairman, SEC (June 14, 2021), https://perma.cc/8AAT-U9N8; Letter from Patrick Morrisey, West Virginia Attorney General, and 15 Other State Attorneys General to Gary Gensler, Chairman, SEC (June 14, 2021), https://perma.cc/ME49-9P6H.

[15] *Id.*

[16] *See*, *e.g.*, Letter from Western Energy Alliance, et al. to Gary Gensler, Chairman, SEC (June 12, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911630-244372.pdf.

[17] Allison Herren Lee, Commissioner, SEC, Keynote Remarks at the 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions about "Materiality" (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421.

[18] Gary Gensler, Chair, SEC, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), https://www.sec.gov/news/speech/gensler-pri-2021-07-28.

[19] *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,970 (Apr. 22, 2016).

[20] Robert Schmidt & Benjamin Bain, *SEC Bogs Down on Climate Rule, Handing White House Fresh Setback*, BLOOMBERG (Feb. 8, 2020, 10:00 AM), https://bloom.bg/3vKcv9c.

[21] Letter from Elizabeth Warren, U.S. Senator, to Gary Gensler, Chairman, SEC (Feb. 9, 2022), https://bit.ly/3ycfp88.

that responsibility and their expertise, processes, reporting responsibilities, what activities they undertake, and more.[22]

- "Describe any climate-related risks reasonably likely to have a material impact on the registrant, … which may manifest over the short, medium, or long term."[23] This requirement includes highly specific disclosures about the nature of each risk, how it might manifest, and how the company would assess it. For example, a registered company would need to "disclose the percentage of the registrant's total water usage from water withdrawn" in "regions of high or extremely high water stress."[24]

- "Describe the actual and potential impacts of any climate-related risks … on the registrant's strategy, business model, and outlook."[25] Here again, the proposed regulation includes painstaking requirements including discussions of specific types of effects and their time horizons, how the company will account for them in various aspects of the business plan, how they could affect financial statements, how the company sets internal carbon prices, and whether the company's business strategy is "resilient."[26]

- "Describe any processes the registrant has for identifying, assessing, and managing climate-related risks," as well as "whether and how [those processes] are integrated into the registrant's overall risk management system or processes."[27] Relatedly, companies must provide extended discussions of any climate-related "transition plans."[28]

- Disclose any targets or goals related to the reduction of greenhouse-gas emissions, including a detailed breakdown of methodology, plans, updates, data, and use of offsets and credits.[29]

Perhaps most oppressively, registrants will need to disclose *all* of their direct "Scope 1" greenhouse gas emissions (from the registrant's own operations), indirect "Scope 2" emissions (from the generation of the power its operations consume), and, for many registrants, other material indirect "Scope 3" emissions (from all "upstream and downstream activities of a registrant's value chain").[30] Companies will also have to calculate their greenhouse gas "intensity"—that is, the ratio of $CO_2e$ per unit of total revenue and per unit of total production.[31] And companies must

[22] 87 Fed. Reg. at 21,467.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 21,467-68.

[27] *Id.* at 21,468.

[28] *Id.*

[29] *Id.* at 21,471.

[30] *Id.* at 21,466, 21,468-69.

[31] *Id.* at 21,469.

disclose this information for the present fiscal year and every historical year included in their financial statements.

It is an understatement to call these emission disclosure requirements broad. For example, emissions might include gases emitted during "[b]usiness travel by a registrant's employees" or during "[u]se by a third party of the registrant's sold products."[32] The company will also have to provide detailed information on *how* it calculates emissions.[33] But accuracy and not just breadth is key, as the Proposed Rule requires many filers to obtain an "attestation report" from a greenhouse-gas attestation provider for its Scope 1 and Scope 2 emissions.[34] This attestation requirement carries with it additional detailed disclosures specific to the attestation.[35]

There's still more. Under the proposed amendments to Regulation S-X, registered companies will have to include certain quantitative metrics and disclosures in a separate footnote to their audited financial statements. Generally, companies will need to disclose three categories of information: impacts, expenditures, and estimates. As for impacts, companies would disclose the consequences of severe weather events and natural disasters, financial fallout from "transition" activities, and the results of identified climate-related risks or opportunities.[36] As for expenditures, companies will similarly need to disclose what they are paying to mitigate the risk of either severe weather events or "transition risks."[37] Lastly, companies will need to explain how severe weather events and transition activities affected any estimates or assumptions in the financial statements.[38] These disclosures are more complicated than even this sounds, as the regulations will also require companies to provide more "contextual information" and descriptions of methodology for every single metric they disclose.[39]

Although some commissioners believe that these all-encompassing provisions will "modernize and standardize" disclosure rules,[40] at least one commissioner concluded that the Proposed Rule in fact "turns the disclosure regime on its head."[41] In her view, the Proposed Rule "forces investors to view companies through the eyes of a vocal set of stakeholders, for whom a company's climate reputation is of equal or greater importance than a company's financial

[32] *Id.* at 21,466.

[33] *Id.* at 21,469.

[34] *Id.* at 21,469-70.

[35] *Id.* at 21,470-71.

[36] *Id.* at 21,464-65. This requirement attaches for any impact greater than one percent of the total line item for the relevant fiscal year. *Id.* at 21,464.

[37] *Id.* at 21,464-65.

[38] *Id.* at 21,465.

[39] *Id.* at 21,464.

[40] Statement from Caroline A. Crenshaw, Commissioner, SEC, Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/statement/crenshaw-climate-statement-032122.

[41] Statement from Hester M. Peirce, Commissioner, SEC, We are Not the Securities and Environment Commission - At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

performance."[42] Meanwhile, the Proposed Rule will require corporate managers to follow the lead of "*regulators*, doing the bidding of an array of non-investor stakeholders" rather than their own shareholders.[43]

Unsurprisingly, the Proposed Rule has already spurred hundreds of comments. Among them is another letter from Senator Warren (and others) encouraging the Commission to wield its newly conceived powers even more aggressively.[44] Those senators believe that the rule "must require disclosures about corporate lobbying and other influencing activities" because there is purportedly an "orgy" of anti-climate lobbying in Congress.[45] In contrast, dozens of members of Congress have cautioned the Commission that the Proposed Rule, as already written, will take the SEC "outside its historical purview" and into the area of "climate-related policy"—which is reserved to Congress.[46] Likewise, 16 state governors decried the Proposed Rule as another "part of an ongoing effort across the federal government to penalize companies involved in traditional energy development."[47] We are adding our States to this well-justified outcry.

## DISCUSSION

For many independent reasons, the Proposed Rule is legally indefensible. The Commission should not finalize it.

### I. The SEC Does Not Possess Legal Authority To Adopt The Proposed Rule.

The first question behind any rulemaking goes to the agency's power to act. Because an agency may not confer power upon itself,[48] "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[49] And an agency may not act beyond the scope of its congressionally conferred authority "even in pursuit of desirable ends."[50] "That an agency's improvisation might be thought by some more expedient than what the law allows, does nothing to commend it …, for lawful ends do not justify unlawful means."[51]

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[42] *Id.*

[43] *Id.* (emphasis in original).

[44] Letter from Sheldon Whitehouse, U.S. Senator, et al. to Gary Gensler, Chairman, SEC (Mar. 15, 2022), https://bit.ly/3OW3elU.

[45] *Id.*

[46] Letter from Ted Bud, U.S. Representative, et al. to Gary Gensler, Chairman, SEC (Apr. 11, 2022), https://bit.ly/3OY4qFb; *see also* Letter from John Hoeven, U.S. Senator, et al. to Gary Gensler, Chairman, SEC (June 10, 2022), https://bit.ly/3tC3EVg.

[47] Letter from Spencer Cox, Utah Governor, et al. to Joseph Biden, U.S. President, et al. (May 31, 2022), https://bit.ly/3Q1Dt4f.

[48] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986).

[49] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

[50] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

[51] *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 n.* (2018) (internal citation omitted).

Here, Congress has not given the Commission authority to implement the measures in the Proposed Rule.

### A. Enabling Statutes: Text, Purpose, Context, and History

The Proposed Rule invokes the Commission's statutory power to mandate disclosures that are "necessary or appropriate in the public interest or for the protection of investors."[52] In deciding whether a requirement is necessary or appropriate, the Commission must also conclude that it "will promote efficiency, competition, and capital formation."[53] And as the Proposed Rule further acknowledges, "Section 23(a)(2) of the Exchange Act [separately] requires the Commission … to consider the impact that the rules would have on competition."[54] Lastly, at least in the past, the Commission has understood that it has no power to demand disclosure "solely" for the purpose of "hav[ing] some indirect effect on corporate conduct."[55]

Though the Commission cites these statutes, it offers no relevant analysis of them, and thus seems to have mistakenly assumed that its enabling statutes give it effectively limitless power to compel disclosures. But as courts have told the Commission before, "'public interest' is never an unbounded term," and the phrase "must be limited to the purposes Congress had in mind when it enacted the legislation."[56] Similarly, authority to take "necessary or appropriate" actions grants an actor powers that "have their limits"; those powers "can only be exercised within the confines" of the relevant statute.[57] Simply claiming "broad authority" and moving on, as the Commission has done here, is not enough.[58]

A closer read shows that Congress did not empower the Commission to issue anything like the Proposed Rule. The "purposes" that "limit" the Commission's authority simply are not broad enough to embrace these disclosures. The Acts of 1933 and 1934 share the same "primary purpose … to eliminate serious abuses in a largely unregulated securities market."[59] Congress sought to fight "misrepresentations"[60] and "manipulation of stock prices,"[61] such that "dealing in securities [would be] fair and without undue preferences or advantages among investors."[62] These

[52] 87 Fed. Reg. at 21,335 n.3 (citing Section 7 of the Securities Act of 1933, 15 U.S.C. § 77g, and Sections 12, 13, and 15 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78*l*, 78m, and 78o).

[53] *See* Section 2(b) of the Securities Act, 15 U.S.C. § 77b(b); Section 3(f) of the Exchange Act, 15 U.S.C. § 78c(f).

[54] 87 Fed. Reg. at 21,412 n.723 (citing 17 U.S.C. § 78c(f)).

[55] *See* Commission Conclusions and Rule Making Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11733, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 80,310, 85,713 (Oct. 14, 1975).

[56] *Bus. Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990) (cleaned up).

[57] *In re Cajun Elec. Power Co-op., Inc.*, 185 F.3d 446, 453 n.9 (5th Cir. 1999).

[58] 87 Fed. Reg. at 21,340.

[59] *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975).

[60] *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995).

[61] *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 193 (2d Cir. 2021).

[62] *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

statutes and their accompanying regulations should therefore "protect the public from inaccurate, incomplete and misleading information."[63]

At the time Congress passed the '33 Act, it was accepted that its new requirements would "not provide disclosure of *all* facts necessary to a sound investment judgment."[64] Many things might matter to different investors based on their individual preferences and beliefs, so disclosures "cannot go much further" than general and objective parameters allow "without falling hopelessly within the realm of opinion rather than fact."[65] The Exchange Act did not change that. Legislators passed that second Act and created the SEC in response to complaints from investors regarding fraudulent securities deals.[66]

The Proposed Rule's disclosures do not go to price manipulation, misrepresentation, or the other kinds of "serious abuses" the Acts target. Nor do they show much concern for additional matters the Commission must expressly consider like competition and market efficiency. Instead, the Commission champions disclosure for disclosure's sake, touting benefits like "standardization" and "verification" that would be true for *any* mandatory disclosure regime.[67] In pushing that approach, the Commission has largely failed to identify any actual, existing manipulation or misleading-disclosure problem within the market. It describes a problem that could theoretically exist and then praises mandated disclosure as the solution to the imagined concern.[68]

The Commission also seems to want to compel companies to *act* in a more environmentally conscious way—rather than stop with disclosing existing business practices—or else forfeit any claim that the company has genuine concern for the environment.[69] But "[s]ecurities laws do not guarantee sound," let alone socially optimal, "business practices."[70] And these regulations are just the sort of attempt to regulate "corporate conduct" that the Commission disclaimed nearly half-a-century ago.[71] Nothing relevant has changed since then; Congress has not tasked the Commission

[63] *Kahan v. Rosenstiel*, 424 F.2d 161, 173 (3d Cir. 1970).

[64] William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L. J. 171, 188-89 (1933) (emphasis added).

[65] *Id.* at 189.

[66] Elisabeth A. Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L. J. 329, 331 (1988); *see also United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975) ("The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market.").

[67] 87 Fed. Reg. at 21,429.

[68] *Id.* at 21,430 (imagining how the lack of mandatory disclosures "might" encourage managers to cherry-pick data to disclose). The SEC overlooks the benefits of voluntary disclosure regimes. For instance, one expert has noted how the choice to *not* disclose certain information "can offer a signaling function" that is itself "valuable." Letter from J.W. Verret, Associate Professor, GMU Antonin Scalia L. Sch., to Vanessa Countryman, Secretary, SEC (June 5, 2022), https://bit.ly/3xAnsuB.

[69] 87 Fed. Reg. at 21,429.

[70] *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).

[71] *See* Commission Conclusions and Rule Making Proposals, *supra* note 55, at 85,713; *see also In the Matter of Franchard Corp.,* 42 S.E.C. 163 (July 31, 1964) ("The [Securities] Act does not purport, however, to define Federal

with environmental or social-consciousness regulation. Nor does the Proposed Rule's focus on rendering sunny, near-term forecasts about climate impact actionable under the securities laws shoehorn the Proposed Rule into the SEC's mandate.[72] Even assuming a recurring problem that those forecasts are less than complete, Congress did not "intend to provide a broad federal remedy for all fraud."[73] The securities laws in particular were not built to deal with indefinite statements of hope or optimism.[74]

Courts "construe statutes, not isolated provisions," so context matters, too.[75] That context confirms that the Commission has taken on more than Congress allowed.

In a Securities Act provision, for instance, Congress specifically described the categories of information that it anticipated companies would include in their registration statements.[76] Those areas all go to the heart of a company's business: the names and places of those involved in its enterprise, the nature of the business, key financial figures, specific financial information pertaining to the sale of a security, and certain organizing documents.[77] The Commission itself has noted how these items "are largely financial in nature and … intended to help investors assess a security's value." To be sure, the statute goes on to say that the Commission may require registration statements to include additional information that is "necessary or appropriate in the public interest or for the protection of investors."[78] But because "words" in statutes "are known by their companions,"[79] this provision is a catch-all for "financial" disclosures aimed similarly at the company's core activities, not any disclosures the SEC wishes to compel.

The Exchange Act is much the same. One provision provides, for example, that the Commission may implement "necessary or appropriate" disclosure regulations for registration on an exchange "*in respect of the following*"; it then lists 11 categories all tied to specific financial aspects of the business, such as securities outstanding, pay and bonuses owed, current contracts, balance sheets, and profit-and-loss statements.[80] A last category gives the Commission power to require only "further *financial* statements."[81] Likewise, in a provision empowering the SEC to require periodic reports, the "form of report" description consists of only accounting items, such

standards of directors' responsibility in the ordinary operations of business enterprises and nowhere empowers us to formulate administratively such regulatory standards.").

[72] 87 Fed. Reg. at 21,430.

[73] *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982).

[74] *In re Int'l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102, 108 (2d Cir. 1998).

[75] *Graham Cnty. Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010).

[76] 15 U.S.C. § 77aa; *see also id.* § 77g(a)(1) (referencing Schedule A requirements).

[77] Concept Release, SEC, *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,921 (Apr. 22, 2016).

[78] 15 U.S.C. § 77g(a)(1).

[79] *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000).

[80] 15 U.S.C. § 78*l*(b).

[81] *Id.* § 78*l*(b)(1)(L) (emphasis added).

as "the items or details to be shown in the balance sheet and the earnings statement" or "the appraisal or valuation of assets and liabilities."[82]

The disclosures found in the Proposed Rule are nothing like these dollars-and-cents, revenues and capitalization disclosures. The proposal demands disclosure of forecasts, risk assessments, business structures, measures of emissions, and far more than the ordinary items on a balance sheet or a profit-and-loss statement. It asks the company to consider *its* effect on the world-at-large, rather than asking how the world-at-large has affected the company. Not only are the Proposed Rule's disclosures novel, they are also not "financial" disclosures in any real sense. Indeed, many are not even specific to the registered company; Scope 3 emission disclosures, for instance, aim at capturing emission rates up and down the company's entire distribution chain.[83] And the disclosures' sheer volume and nitpicking nature distinguishes them still more. Rather than top-level financial data, the Commission is demanding extraordinarily granular disclosures pertaining to essentially anything touching climate change that has almost any tie to the company's business.

When Congress has recognized a need for disclosures outside the usual financial matters it delegated to the SEC, it has called for them expressly. (Executive compensation is a good example there.[84]) It has not done so here.

Still more evidence against the Proposed Rule's legality comes in the Acts' legislative histories. At least to some, "[l]egislative history can be a legitimate guide to a statutory purpose obscured by ambiguity."[85] Although the statutes here are unambiguously *against* the Commission's position, how they came to be reaffirms that Congress never wanted the Commission to mandate the type of broad, non-financial disclosures the Proposed Rule envisions.

The House Report to the Securities Act, for example, explains that the bill was meant to mandate "*essential* facts concerning the property in which [an investor] is invited to acquire an interest," and "*essential* facts concerning the identity and the interests of the persons with whom he is dealing or to whom the management of his investment is entrusted."[86] In using the word "essential" (and then listing basic characteristics of the business), Congress signaled its intent for businesses to disclose *fundamental* facts going to the heart of the business that were central to an investor's decision whether to invest. In other words, Congress wanted companies to disclose "distribution profits, watered values, and hidden interests that usually have not been revealed to

[82] *Id.* § 78m(b)(1); *see also id.* § 78o(d)(1) (imposing same requirement on certain issuers).

[83] Scope 3 disclosures are not just costly; they also invite a form of "double-counting" for those trying to derive some kind of aggregate carbon footprint from securities filings. Every public company that is also a part of another publicly traded company's supply chain will have its emissions counted twice: once in its own Scope 1 or Scope 2 emissions and a second time in the other company's Scope 3 emissions. *See* Stephen Bainbridge, *The Problem of Disclosing Scope 3 Emissions of Greenhouse Gases*, PROFESSORBAINBRIDGE.COM (Feb. 19, 2022), https://bit.ly/3zfxAu3 (describing same).

[84] 81 Fed. Reg. at 23,922 (describing disclosure requirements implemented through statutory mandates and other "instances" in which "Congress has mandated disclosure that is not necessarily financial in nature").

[85] *Burlington N.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987).

[86] H.R. Rep. No. 73-85, at 18-19 (1933) (emphasis added).

the buyer despite their indispensable importance in appraising the soundness of a security."[87] This information is "of a character comparable to that demanded by competent bankers from their borrowers."[88]

Likewise, the House Report for the Exchange Act stresses that Congress did not intend to "giv[e] the Commission unconfined authority to elicit any information whatsoever."[89] Rather, the Commission would require disclosures in periodic reports "of appropriate information of a comparable character" to the financial information the Act specifically described.[90] "The purpose" of these disclosures "is to give some assurance that reports will not hide the true condition of the company"—that is, to provide "essential" information to investors.[91] Disclosures thus offer "modest" protection: "a fair report of corporate assets and profits."[92] Congress did not contemplate that the Commission would require disclosing any information related to a company that the Commission might find helpful or interesting in some way.

In short, the Commission has no power to implement the Proposed Rule under its enabling statutes.

### B. Materiality: A Fundamental Requirement

The Proposed Rule is also beyond the Commission's authority because it sidesteps the materiality requirement. "[M]ateriality runs through and appears practically everywhere in the Securities Act and the Securities Exchange Act"—making it "absolutely essential" for the SEC "to distinguish between what is trivial and what is significant to an investor."[93] After all, if information is not material, then it hardly seems "necessary" for a reasonable investor to know.

Congress first addressed the concept of materiality in the Securities Act. More than just including it as a consideration, Congress incorporated materiality into all of the '33 Act's primary liability provisions. For instance, Section 17(a)(2) makes unlawful in the sale of securities any "untrue statement of a *material* fact or any omission to state a *material* fact necessary in order to make the statements made … not misleading."[94] Section 11(a) is similar, imposing liability if a registration statement "contained an untrue statement of a *material* fact or omitted to state a *material* fact required to be stated therein or necessary to make the statements therein not misleading."[95] And Section 12(a)(2) imposes liability on anyone who "offers or sells a security"

[87] *Id.* at 7; *see also id.* at 3 (matters to be disclosed "are items indispensable to any accurate judgment upon the value of the security").

[88] *Id.* at 4.

[89] H.R. Rep. 73-1383, at 23 (1934).

[90] *Id.*

[91] *Id.* at 24.

[92] *Id.* at 13.

[93] Philip A. Loomis, Jr., Commissioner, SEC, Presentation Before the Third Annual National Conference of the National Investor Relations Institute, Materiality and the SEC (October 2, 1972), https://bit.ly/38bl3wz.

[94] 15 U.S.C. § 77q(a)(2) (emphases added).

[95] *Id.* § 77k(a) (emphases added).

"by means of a prospectus or oral communication, which includes an untrue statement of *material* fact or omits to state a *material* fact necessary in order to make the statements made … not misleading."[96] In short, the Securities Act "was designed to provide investors with full disclosure of *material* information."[97]

Likewise, Section 14(a) of the Exchange Act makes it unlawful for proxies to contain statements on "*material* fact[s]" that are "misleading" or involve "any fraudulent, deceptive, or manipulative acts or practices."[98] And Rule 14a-9, promulgated under the same section, says that no proxy solicitation will be made "which … is false or misleading with respect to any *material* fact, or which omits to state any *material* fact necessary in order to make the statements therein not false or misleading."[99] Rule 10b-5, promulgated under Section 10(b), uses parallel language. That rule makes it unlawful "to make any untrue statement of a *material* fact or to omit to state a *material* fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[100] Finally, Section 14(e)—regulating statements made in connection to tender offers and invitations for tenders—makes it unlawful to "make any untrue statement of *material* fact or omit to state any *material* fact necessary in order to make the statements made … not misleading."[101] So like the '33 Act, the '34 Act was written "to ensure full disclosure of information *material* to investment decisions."[102]

These examples illustrate how pervasive the materiality requirement is throughout both Acts. Congress made materiality a prerequisite for mandating disclosures in registration statements, prospectuses, tender offers, invitations for tenders, oral communications, proxies—indeed, all statements. This requirement remains part of the SEC's statutory boundaries today.

In fact, the Supreme Court has said that "the notion of materiality assumes heightened significance" in the securities-disclosure context.[103] There is "universal[]" agreement that "the question of materiality" is "an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."[104] Thus, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[105] This definition of materiality still controls.[106] And it confirms the rule lower courts applied even before the Supreme Court spoke: Companies "need not detail every corporate event,

[96] *Id.* § 77*l*(a)(2) (emphases added).

[97] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (emphasis added).

[98] 15 U.S.C. § 78n (emphasis added).

[99] 17 C.F.R. § 240.14a-9(a) (emphases added).

[100] 17 C.F.R. § 240.10b-5 (emphases added).

[101] 15 U.S.C. § 78n(e) (emphases added).

[102] *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (emphasis added).

[103] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976).

[104] *Id.* at 445.

[105] *Id.* at 449.

[106] *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 187 (2015) (citing *Northway*, 426 U.S. at 445, and explaining that the materiality test is "objective" and turns on whether a statement is "misleading to an ordinary investor").

current or prospective, which has or might have some effect upon the accuracy of an earnings forecast."[107]

But what then would a "reasonable shareholder" consider significant? The answer involves a "delicate assessment[] of the inferences" that the "reasonable shareholder would draw from a given set of facts," as well as the "significance of those inferences to him."[108] At all times, the Court has refused to set the materiality bar too low. An overly "minimal standard might bring an overabundance of information within its reach"—resulting in an "avalanche of trivial information" a reasonable investor does not need and likely could not effectively use.[109] Instead, the Court has interpreted "materiality" to the reasonable shareholder—or reasonable investor as the concept has become more commonly known—to mean a fact-based inquiry into whether there is "a substantial likelihood that the ... fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[110] In the past, the SEC agreed with the Supreme Court and tracked this definition in its own rules when defining "material" under both the '33 Act[111] and the '34 Act.[112]

Investors' base concern is the profitability of the company in which they are investing; in the Supreme Court's words, investors purchase securities because they "expect profits."[113] As a result, materiality must be an objective standard that looks at the historical performance and value of a security—it considers whether a given fact's "impact" on a company's "fortune" is "certain and clear" or "contingent and speculative."[114] Materiality's financial focus is intuitive. After all, the very definition of "invest" is to "put money into financial schemes, shares, or property with the expectation of achieving a profit."[115]

The standard of materiality is a guiding principle for SEC disclosures, and any *new* disclosures must be based around it. In a report to the SEC, the Congressional Advisory Committee on Corporate Disclosure once called "materiality … the cornerstone of the disclosure system established by the federal securities laws."[116] Before the Proposed Rule, even the SEC agreed—at least in the Management's Discussion and Analysis of Financial Condition and Results of Operations context—that companies should disclose only material information. "Immaterial information," the Commission recognized, "does not promote understanding of companies' financial condition, liquidity and capital resources, changes in financial condition and results of

[107] *Marx v. Computer Scis. Corp.*, 507 F.2d 485, 491 (9th Cir. 1974).

[108] *Northway*, 426 U.S. at 450 (quotations omitted).

[109] *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (adopting the *Northway* standard of materiality in the context of Rule 10b-5 securities fraud cases).

[110] *Northway*, 426 U.S. at 449.

[111] 17 C.F.R. § 230.405.

[112] 17 C.F.R. § 240.12b-2.

[113] *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

[114] *Basic*, 285 U.S. at 232.

[115] *Invest*, CONCISE OXFORD ENGLISH DICTIONARY (11th ed. 2008).

[116] H. COMM. ON INTERSTATE AND FOREIGN COM., 95TH CONG., REP. OF THE ADVISORY COMM. ON CORP. DISCLOSURE TO THE SEC (Comm. Print 1977).

operations."[117] Materiality is vital and the Commission cannot wish it out of its governing laws. Without materiality's backdrop, the SEC lacks any meaningful limiting principle in its rulemaking authority.[118]

The Proposed Rule casts aside these well-understood notions of materiality. Just last year, one commissioner stated outright that the requirement was a "myth."[119] So perhaps unsurprisingly, the SEC has done little to hide that the Proposed Rule will require disclosures of *immaterial* facts.

Many of the new requirements lack any materiality requirement,[120] and those that reference materiality at all employ a warped understanding.[121] For instance, the Proposed Rule requires both a disclosure and a third-party assurance of Scope 1 and Scope 2 emissions regardless whether they are material or not.[122] The Commission never tries to justify this choice beyond vague claims that this information is part of "a registrant's climate-related risks."[123] The Proposed Rule also requires companies to calculate and disclose the "GHG intensity" of Scope 1 and 2 emissions—again without any materiality consideration. Yet how these emissions or their intensity affect a company's "fortune" is far from "certain and clear."[124] It is no wonder, then, that the SEC does not even feign an explanation.

The Proposed Rule manages Scope 3 emissions with even less logic. At first blush, the Commission purports to require Scope 3 disclosures only "if material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions."[125] But the Commission then assumes that "for many registrants, Scope 3 emissions may be material"; it also embraces a presumption that any question about their materiality must "be resolved in favor of" disclosure.[126] The Proposed Rule thus effectively mandates Scope 3 emission disclosures. Again, the Commission requires these disclosures without genuine regard for traditional materiality, and the predictable result will be the "avalanche of trivial information" the Supreme Court has warned against.[127]

Piling on, the Proposed Rule does not stop at just numerical data. It also requires disclosure of "information concerning the [company's] oversight of climate-related risks, and management's

[117] 68 Fed. Reg. 75,056, 75,057 (Dec. 29, 2003).

[118] *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (When delegating power to agencies, Congress must supply "an intelligible principle to guide the delegee's use of discretion.").

[119] Living in a Material World, *supra* note 17.

[120] *See*, *e.g.*, 87 Fed. Reg. at 21,468-69 (explaining the Scope 1 and 2 emission disclosure requirements with no mention of materiality).

[121] *See*, *e.g.*, *id.* at 21,351 (incorrectly claiming that all possible future events must undergo a materiality determination of probability compared to magnitude).

[122] *Id.* at 21,345, 21,392-96.

[123] *Id.* at 21,334.

[124] *Basic*, 485 U.S. at 232.

[125] 87 Fed. Reg. at 21,345.

[126] *Id.* at 21,377-78.

[127] *Basic*, 485 U.S. at 231.

role in assessing and managing those risks."[128] The Commission claims that these narrative expositions are similar to disclosures for "other financially material matters."[129] If that is true, though, then the rule is unnecessary: Companies must already disclose all financially material matters.[130] And as with the rest of its proposed requirements, the Commission provides little empirical support for the notion that these disclosures are material,[131] instead citing the wishes of a few vocal investors and non-governmental organizations.[132] Yet there is no statutory support for redefining "materiality" as a response to a subsection of powerful, institutional investors. These investors "do not necessarily consider risk and return of a particular security in isolation but also in terms of the security's effect on the portfolio as a whole, which requires comparable data across registrants."[133] In other words, even when their desires may be valid, they are not a stand-in for those of the reasonable investor. And "investing based on non-financial climate change disclosures is a matter of investor preference, not one of investor protection."[134]

Indeed, meeting the wants of idiosyncratic investors at the expense of market efficiency and competition is not what securities disclosures are meant to do. And attempting to satisfy the supposed wants of these investors is infeasible. Companies need not meet the individual and specific demands of every one of their investors.[135] In fact, the Supreme Court rejected a definition of materiality that would "include[] all facts which a reasonable stockholder might consider important."[136] And remember: it is not enough for shareholders just to think something is important. A fact is only material "if there is a substantial likelihood" that its omission would "have a significant propensity to affect the voting process" of a reasonable investor.[137]

Perhaps recognizing the weakness of its position, the SEC tries to say that these new requirements are "similar to what is required when preparing the MD&A section in a registration or annual report."[138] The Commission stops short of saying how they are similar. If they are similar in that they require disclosing *material* climate-related information, then the new

[128] 87 Fed. Reg. at 21,359-60.

[129] *Id.* at 21,359.

[130] *See*, *e.g.*, 15 U.S.C. § 77k(a) (stating that registration statements must not "contain[] an untrue statement of a material fact" or "omit[] to state a material fact … necessary to make the statements therein not misleading).

[131] JOSEPH P. KALT & L. ADEL TURKI, POLITICAL, SOCIAL, AND ENVIRONMENTAL SHAREHOLDER RESOLUTIONS: DO THEY CREATE OR DESTROY SHAREHOLDER VALUE? 44, 47 (2018) (concluding that the effect of further environmental disclosure was "statistically insignificant").

[132] *See* Letter from Lawrence Cunningham, Professor, George Washington Univ. L. Sch., et al. to SEC (Apr. 25, 2022), https://bit.ly/3kOdZZF (describing how the SEC has confused demand from a few powerful factions with a genuine need for investor protection).

[133] 87 Fed. Reg. at 21,336.

[134] Bernard S. Sharfman, *Non-Material Mandatory Climate Change Disclosures*, 2021 OHIO ST. BUS. L. J. ONLINE 1, 11 (2021).

[135] *See*, *e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 (2011) (explaining that materiality turns on only what a "reasonable investor might consider material").

[136] *Northway*, 426 U.S. at 445 (citing *Northway, Inc. v. TSC Indus., Inc.*, 512 F.2d 324, 330 (7th Cir. 1975)).

[137] *Id.* at 449.

[138] 87 Fed. Reg. at 21,352.

disclosures are unnecessarily duplicative and will have no real effect. And if the disclosures are similar in some other way—meaning that they do not require material disclosures—then they must concern information that is, by definition, *immaterial*. Insisting on materiality for all SEC disclosures is not only the Commission's legal duty, but it serves the purpose of separating useful information from that "of such dubious significance that insistence on its disclosure may accomplish more harm than good."[139]

Finally, the Commission also suggests that climate disclosures are material because they involve events that are either probable or that will have a high magnitude of impact—without presenting convincing evidence of either factor.[140] In any event, although the Supreme Court has endorsed a "probability/magnitude approach," it did so for the risks arising from financial transactions, not outside conditions.[141] The case at issue considered whether a corporation needed to disclose preliminary merger negotiations.[142] The Court held that "a merger in which it is bought out is the most important event that can occur" to a corporation because it leads to its "death," so "inside information … can become material at an earlier stage."[143] The Court even held that factfinders must "assess the magnitude of the *transaction*."[144] The probability/magnitude test thus deals with financial transactions. It does not require assessing the possibility of every contingent event that could happen throughout the world that might affect the company in some way.

The Proposed Rule's disconnect from long-held—and statutorily required—understandings of materiality further show that it exceeds the Commission's delegated authority.

### C. Canons of Construction

Finally, if there were any ambiguity about the Commission's lack of authority to implement requirements like these, canons of construction would dispel it.

*First*, the Commission's vast understanding of its power offends the major questions doctrine.

The Securities Acts do not empower climate disclosures like those in the Proposed Rule, and they go well beyond what Congress intended the SEC to regulate. Congress does not delegate massive and economy-defining power to an agency without speaking clearly. By abandoning the SEC's statutory limitations, the Proposed Rule reflects a view of delegated power that has "literally no guidance," and that could allow the agency to "protect" investors from anything it chooses.[145]

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[139] *Northway*, 426 U.S. at 448.

[140] 87 Fed. Reg. at 21,352.

[141] *Basic*, 485 U.S. at 238-39.

[142] *Id.* at 227.

[143] *Id.* at 238 (citing *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 47-48 (2d Cir. 1976)).

[144] *Id.* at 239 (emphasis added).

[145] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

In reality, an unelected body like the SEC is not the appropriate instrument to address major questions like those in the Proposed Rule.

Major questions involve complex and competing interests and priorities that "should be made by the national legislature, the branch best equipped by its structure and constituency" to do so.[146] In turn, the major-questions doctrine is a clear statement canon that responds to "the danger posed by the growing power of the administrative state."[147] "[T]wo overlapping and reinforcing presumptions" are at play.[148] First, Congress "intends to make major policy decisions itself."[149] Second, Congress *should* make those decisions under a "separation of powers-based" default against delegating "major lawmaking authority."[150] Without a clear statement that Congress intended for the agency to handle a specific major question, the Commission cannot presume that Congress delegated that decision.[151]

Here, the SEC's "unprecedented" interpretation would give it a "breathtaking amount of authority."[152] Determining what powers Congress delegated to the Commission starts with "the nature of the question."[153] Is the power interstitial and administrative, or is it great and industry-changing? Congress can delegate the former through ambiguous text, but unfortunately for the SEC, its new, supposed authority is neither routine nor simple.[154] Instead, the Proposed Rule seeks to make "decisions of vast economic and political significance."[155] This means that Congress would have to "speak clearly" to assign the power the SEC claims, thus providing a clear statement that it intends the Commission to tackle the major question.[156] The SEC identifies none. This is no surprise: No clear statement in the Securities Acts justifies its power grab.

Other factors confirm that the Proposed Rule walks in major-questions territory. First, the Commission bears the burden of showing that climate disclosures are within its gamut. It has staked out a "claim to extravagant statutory power over the national economy," and it must explain why the Securities Acts "compel[]" the interpretation that climate issues are relevant to its statutory mission.[157] Further, there is no way to describe the Proposed Rule as "less than [a] radical or

[146] *United States v. District of Columbia*, 669 F.2d 738, 744 (D.C. Cir. 1981).

[147] *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[148] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[149] *Id.*

[150] *Id.*

[151] *See Gundy*, 139 S. Ct. at 2141-42 (Gorsuch, J., dissenting); *see also*, *e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.").

[152] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

[153] *Brown & Williamson*, 529 U.S. at 159.

[154] *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007).

[155] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*") (cleaned up).

[156] *Id.*

[157] *UARG*, 573 U.S. at 324.

fundamental change" to its current regulatory scheme.[158] The proposed climate disclosures are well beyond the kind that the Commission has required in the past.

Climate change is also an issue beyond the expertise of the SEC. "Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to [an] agency."[159] But because major questions like climate change implicate many subjects and fields of expertise, they are beyond the ken of any one agency. Not only that, but the SEC is not—and has never purported to be—an expert in the area of climate change, the subject it is so eager to regulate now.

Because of this, the SEC's position here is even weaker than other agencies' arguments in cases in which the Supreme Court found there was no clear delegation. At least there, the agencies were regulating in their own spheres and the major effects outside those spheres were secondary.[160] In *Gonzales v. Oregon*, for example, physician-assisted suicide fell outside the United States Attorney General's authority—even though he was prescribing criminal conduct—in part because the issue involved "quintessentially medical judgments" beyond his "expertise."[161] So too here. The SEC is making judgments on a topic well beyond its proficiency by proposing to intentionally regulate climate issues. The agency has shown no reason to suspect that Congress sought to install it as a two-headed Cerberus guarding both securities markets and the environment.

The Proposed Rule also imposes new regulatory burdens on entire classes of filers. The Supreme Court is "reluctant to read into ambiguous statutory text" such expansions.[162] The Proposed Rule's scope, coupled with the SEC's effort to extend its reach into climate, is telling of a major question. The Court has specifically warned against expanding agency jurisdiction into new "portion[s] of the American economy."[163] For nearly a century, the SEC has been concerned with truthful markets and preventing fraud. Now, it attempts to use a "decades-old statute" to justify entirely new powers and control.[164]

Yet another factor shows that the Proposed Rule involves a major question: "Climate change has staked a place at the very center of this Nation's public discourse."[165] It is a

[158] *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

[159] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (cleaned up).

[160] *See*, *e.g.*, *King v. Burwell*, 576 U.S. 473, 486 (2015) (IRS lacked authority to determine applicability of Affordable Care Act tax credits that involved billions in spending and affected millions of people); *MCI*, 512 U.S. at 231-32 (FCC lacked authority to excuse non-dominant long distance carriers from rate-filing requirements in part because it would be a "fundamental revision"); *Whitman*, 531 U.S. at 468 (EPA could not consider implementation costs when setting national ambient air quality standards because this took on more power than Congress's "modest words" intended in that area).

[161] 546 U.S. 243, 266-67 (2006).

[162] *UARG*, 573 U.S. at 324.

[163] *Brown & Williamson*, 529 U.S. at 159-60.

[164] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

[165] *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari).

"controversial subject[]," and there is no clear answer how to address it.[166] The "earnest and profound debate" surrounding the issue demonstrates that the SEC has waded too deep into the realm of major questions.[167]

And lastly, we cannot forget the scale of the burdens the proposal would set. As discussed below, the Proposed Rule will cost individual registrants *at least* half a million dollars per year to comply.[168] Across all registrants, the price tag amounts to hundreds of millions of dollars, if not billions. These substantial costs are unconscionable given that the Securities Acts do not even contemplate climate change as a proper avenue of SEC regulation. If the SEC can rely on its general empowering statutes to take actions of this scale, then "[i]t is hard to see what measures this interpretation would place outside [its] reach."[169] The Proposed Rule thus takes on major policy decisions that belong to Congress.

*Second*, the Proposed Rule would inappropriately upend the balance between federal and state powers in the corporate sphere, with (again) no clear statement from Congress that it intended that result. Congress must provide a "clear statement" if it wants to alter the "usual constitutional balance of federal and state powers."[170] Put differently, it must use "exceedingly clear language."[171]

Traditionally, state law predominates in corporations law.[172] Thus, "state-law standards create the boundaries within which a corporation must operate both internally and externally."[173] Although federal securities laws reach into that realm to some degree, neither the '33 nor '34 Act positioned the SEC as an overseer of corporate conduct. Quite the opposite. In construing the Acts, the Supreme Court has been "reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden."[174] The Court will not permit that result "absent a clear indication of congressional intent."[175] So for example, the Court has resisted interpretations of the Securities Acts that would trump state laws on the same subjects.[176]

Here, the Proposed Rule will effectively compel a reordering of corporate priorities at the expense of a substantial body of state law.[177] As the Proposed Rule acknowledges, part of the

[166] *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018).

[167] *Gonzales*, 546 U.S. at 249.

[168] 87 Fed. Reg. at 21,439-40.

[169] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

[170] *Bond v. United States*, 572 U.S. 844, 858 (2014) (citations omitted).

[171] *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020).

[172] *See*, *e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

[173] *Freedman v. magicJack Vocaltec Ltd.*, 963 F.3d 1125, 1132-33 (11th Cir. 2020) (cleaned up).

[174] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977).

[175] *Id.*

[176] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 85 (1987).

[177] Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1844-45 (2012) ("[W]hen the SEC has done this in the past, the behavioral changes sought have been at least ostensibly

motivation for its disclosures is a wish to drive non-financial "effects on firm behavior," including "reduced aggregate reported emissions among affected firms."[178] The Commission presses this priority even though, by its own admission, "this could also come with the potential cost of lower productivity, profitability, or market share" in nearer-term periods.[179] Yet prioritizing perceived social responsibility over shareholder wealth maximization chafes with many state-law schemes. States have long advanced a "legitimate and traditional[]" interest in "protect[ing] corporate shareholders."[180] They have emphasized "shareholder primacy," and "[c]ase law since the 1980s shows that courts have embraced the concept," too.[181] Indeed, many courts trace shareholder primacy back more than a century.[182] In short, traditional state law says that a business has a responsibility "to increase its profits so long as it stays within the rules of the game."[183]

The Proposed Rule would subordinate this longstanding state preference to the SEC's new perception of environmental desirability. States will no longer be able to impose predictable decisionmaking schemes on officers and directors. Now, corporate officials will need to make predictions about speculative matters of social concern and then factor them into decisions at the corporate level. The Commission has not identified any clear statement from Congress that would greenlight this rearrangement of *state*-directed priorities. Nor has the Commission identified a

compatible with underlying principles of state corporate law. For example, it is a breach of fiduciary duty under Delaware corporate law for directors and officers to knowingly cause the company to violate positive law. The behavior sought to be promoted by ESG disclosure, by contrast, conflicts with Delaware corporate law to the extent it promotes the prioritization of non-shareholder constituencies in corporate decision-making.").

[178] 87 Fed. Reg. at 21,447.

[179] *Id.* Even proponents of more aggressive disclosure acknowledge that evidence linking ESG investing with economic performance is thin. *See*, *e.g.*, Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923, 925 (2019) ("The extent to which corporations should incorporate sustainability objectives into their operational decisionmaking is highly contested, as is the relationship between societal impact and economic value.").

[180] *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 (1978). For instance, in *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010), the Court of Chancery of Delaware explained how shareholder wealth maximization must always remain the focus for corporations:

> [Two company founders] believe [the company] should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities … The corporate form in which [the company] operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. [The founders] opted to form [the company] as a for-profit Delaware corporation …. Having chosen a for-profit corporate form, the [company] directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.

[181] Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 2016 (2018). The doctrine has become so entrenched that scholars believe that "[a]ny reform that significantly modified shareholder primacy in corporate governance would have to be made through federal preemption of the state law of corporate chartering, or at least federal imposition of minimum governance standards on state charters." David G. Yosifon, *Is Corporate Patriotism A Virtue?*, 14 SANTA CLARA J. INT'L L. 265, 293 n.105 (2016).

[182] *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 669 (Mich. 1919).

[183] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-36 (2002).

"statutory purpose" sufficient to overcome the "presumption favoring the retention of long-established and familiar principles" like profit-maximization and shareholder primacy.[184]

*Third*, if the SEC's understanding of its powers were right, then the statutes providing it that authority would offend the non-delegation doctrine. This doctrine requires Congress to provide agencies sufficient guidance how to exercise their delegated power, as only Congress can make "fundamental policy decisions."[185] Non-delegation is "vital to the integrity and maintenance" of our constitutional structure and ensures that agencies like the SEC remain within constitutional bounds.[186]

For Congress to delegate its power, there must be "specific restrictions" in the statute that "meaningfully constrain[]" the agency's discretion.[187] Congress cannot give "literally no guidance" or be too vague when setting an agency's agenda.[188] It must instead provide at least "an intelligible principle to which [the agency] is directed to conform."[189] And while agencies can fill in statutory gaps with "judgments of degree,"[190] they cannot set "the criteria against which to measure" their own decisions.[191] If Congress wants an agency to make policy, its directive to do so must be "sufficiently definite and precise."[192] And the level of discretion allowed "varies according to the scope of the power."[193] When delegations "affect the entire national economy," for instance—as here—the Constitution demands "substantial" guidance.[194]

Any attempt to implement the Proposed Rule would violate these principles. Start with the nature of the SEC's claimed power. The SEC has historically respected the limits Congress put in its enabling statutes: materiality and preventing fraud. No more. Without these constraints, the SEC is left with virtually unlimited power to regulate for whatever purpose and in whatever way it sees fit. The "public interest" and "protection of investors" are not magic words that the SEC can use to enact any regulations it wants.[195] Indeed, the Proposed Rule shows that when the agency

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[184] *Nken v. Holder*, 556 U.S. 418, 433 (2009). The Commission's proposal also directly conflicts with certain state statutes. For example, Idaho amended Idaho Code § 67-2345 to specify that "[n]o entity engaged in investment activities shall consider environmental … characteristics in a manner that could override the prudent investor rule." But the Proposed Rule creates a regime built on the premise that characteristics like these are directly relevant to investment decisions.

[185] *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment).

[186] *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1982); *see also Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

[187] *Touby v. United States*, 500 U.S. 160, 166-67 (1991).

[188] *Whitman*, 531 U.S. at 474.

[189] *Gundy*, 139 S. Ct. at 2123 (Gorsuch, J., dissenting) (cleaned up).

[190] *Whitman*, 531 U.S. at 475 (cleaned up).

[191] *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

[192] *Yakus v. United States*, 321 U.S. 414, 426 (1944).

[193] *Whitman*, 531 U.S. at 475.

[194] *Id.*

[195] 87 Fed. Reg. at 21,335.

rips these terms from the statute's materiality and fraud limits, they become meaningless. The SEC's proposed interpretation would thus cast grave doubt on the constitutionality of the Securities Acts' disclosure requirements, potentially eradicating any otherwise worthwhile goals they might serve.

In short, every relevant tool of statutory construction confirms that the agency lacks authority to implement the Proposed Rule.

## II. The Proposed Rule Would Violate The First Amendment.

Several of our States have raised the alarm before that disclosures like the Proposed Rule's would violate the First Amendment.[196] The federal government typically cannot "tell people that there are things they must say."[197] Even "requiring content-neutral speech may violate the First Amendment, although it will be subject to a different level of scrutiny than content-based requirements."[198] And applying compelled-speech requirements to for-profit businesses is not a constitutional shield, either.[199] Thus, courts and commentators alike generally agree that First Amendment protections apply in the securities-regulation context.[200] Even so, the Commission completely fails to address the significant First Amendment concerns inherent to its proposal.

At a minimum, the SEC would need to justify its proposed regulations under intermediate scrutiny.[201] That standard requires the Commission to identify a "substantial" "governmental interest," then establish that the Proposed Rule "directly advances" it and "is not more extensive than is necessary to serve that interest."[202] The Commission "must have drawn reasonable conclusions, and the evidence must fairly support the [regulatory] judgment."[203] Indeed, even under this somewhat relaxed standard the Commission must summon "*substantial* evidence."[204]

The SEC has seen disclosure regulations fail under this framework before. In *National Association of Manufacturers v. SEC*, the D.C. Circuit held that an SEC regulation compelling certain companies to declare their products not "DRC conflict free" (that is, not free of inputs from

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[196] *See*, *e.g.*, *supra* note 14; *accord* Peirce, *supra* note 41 (raising First Amendment concerns with the Proposed Rule).

[197] *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 170 (2d Cir. 2020) (cleaned up).

[198] *Miller v. Mitchell*, 598 F.3d 139, 151 n.14 (3d Cir. 2010).

[199] *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) ("[A]s the Supreme Court has recognized, for-profit businesses may bring compelled speech claims."), *cert. granted* 142 S. Ct. 1106 (2022)

[200] *See generally* Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789 (2007) (summarizing various views of how the First Amendment applies to securities regulation and concluding that "[t]he arguments that the First Amendment should not apply to securities regulation … are unpersuasive, particularly since there are viable alternatives to a mandatory federal securities regime").

[201] *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) ("*NAM II*") (applying intermediate scrutiny in invalidating SEC disclosure requirements).

[202] *United States v. Edge Broad. Co.*, 509 U.S. 418, 424 (1993) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

[203] *Duncan v. Bonta*, 19 F.4th 1087, 1108 (9th Cir. 2021) (cleaned up).

[204] *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (emphasis in original).

the war-torn Democratic Republic of Congo) did not satisfy intermediate scrutiny.[205] Among other problems, the Commission "provided no … evidence" that "less restrictive means would fail."[206] Though the rule's defenders insisted that the disclosures aided the sale of securities, the court stressed that this justification gave insufficient respect to the First Amendment:

> [That argument] would allow Congress to easily regulate otherwise protected speech using the guise of securities laws. Why, for example, could Congress not require issuers to disclose the labor conditions of their factories abroad or the political ideologies of their board members, as part of their annual reports? Those examples, *obviously repugnant to the First Amendment*, should not face relaxed review just because Congress used the "securities" label.[207]

Like the "conflict diamonds" disclosure *NAM* felled, the Proposed Rule appears to rest solely on "speculation and conjecture."[208]

For one thing, the Commission has not identified—let alone proven—how the Proposed Rule advances any substantial government interest.[209] At most, the Commission's "interest" is in providing investors more information. As then-Judge Kavanaugh explained, however, "it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information. After all, that would be true of any and all disclosure requirements."[210] And even that interest is tenuous here, as the Commission largely leans on a few loud voices pressing for ESG measures, not market-wide demand for additional investor-protection measures.

For another thing, the Commission has not shown how the Proposed Rule *directly* advances a government interest within the Commission's ken. As explained before, compelling issuers to disclose information immaterial to financial performance is outside the agency's mandate. Indeed, the Proposed Rule presents bigger problems than the conflict-diamonds disclosure in that the SEC at least issued that rule under an express congressional mandate.

That authority problem aside, the Commission has not shown, with evidence, how the specific information it has in mind will inform investors' judgments in some meaningful way—especially when the Proposed Rule would often force issuers to speculate, guess, and forecast based on incomplete data.[211] Indeed, one expert has noted that the estimates the SEC proposes to

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[205] *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 373 (D.C. Cir. 2014) ("*NAM I*").

[206] *Id.* at 372.

[207] *Id.* (emphasis added).

[208] *Cornelio v. Connecticut*, 32 F.4th 160, 171 (2d Cir. 2022).

[209] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377 (2018) ("*NIFLA*") (rejecting a "purely hypothetical" governmental interest).

[210] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment).

[211] Camden D. Burton, *An Inconvenient Risk: Climate Change Disclosure and the Burden on Corporations*, 62 ADMIN. L. REV. 1287, 1299-300 (2010) ("With respect to climate change, the greatest concern to corporations is the incredible uncertainty found in environmental risk. Quantifying environmental risks is difficult in all circumstances. …

require are "too speculative and subjective to comport with fundamental principles of accounting and finance that underl[ie] the existing federal securities laws and financial reporting structure."[212] Speculative future changes like legislative enactments or international shifts that may occur decades into the future are simply not the kinds of risks that advance investor understanding.

Lastly, less restrictive means are available to achieve the Commission's desired ends. This is why the Proposed Rule would *still* not suffice even if the agency moves forward boldly assuming the mantle of fighting climate change (regardless of its actual, markets-focused mandate). More direct measures—including direct regulation of emissions, carbon taxes, or other regulatory action by the EPA—would seem obvious. Many alternative measures exist *within* the SEC's sphere of authority, including enforcing existing SEC regulations,[213] regulations from other agencies,[214] and voluntary disclosures. The Commission's embrace of burdensomely duplicative regulation would prove fatal in any legal challenge.

Some suggest that courts should apply a more deferential standard of scrutiny to SEC disclosure requirements.[215] That view runs headlong into the D.C. Circuit's view in *NAM*. Even so, several uniquely problematic aspects of the Proposed Rule would mean that the more permissive *Zauderer* standard could not salvage it.[216] The Proposed Rule is "ineligible" for *Zauderer* review because (1) it engages in viewpoint discrimination by compelling corporations to disclose information based on hotly disputed premises; (2) it stems from regulatory capture—that is, it serves the interests of asset managers and financial institutions at the expense of individual investors; and (3) it changes the meaning of key regulatory terms, including materiality.[217] We see another problem with applying *Zauderer* beyond even these: The new disclosures do not directly relate to the securities sales the SEC purports to regulate, but pertain to climate-related matters in society-at-large.[218]

Quite simply, *Zauderer* was meant to give the government the benefit of the doubt when it requires commercial entities to disclose a little factual information in connection with their

Many SEC disclosure obligations contain an element of uncertainty. It is rare, however, for every aspect of the risk to be uncertain.").

[212] Verret, *supra* note 68, at 13.

[213] Comm'n Guidance Regarding Disclosure Related Climate Change, Securities Act Release No. 33-9106, Exchange Act Release No. 34-61469, 17 CFR Release No. FR-82, Fed. Reg. 6,290 (Feb. 2, 2010), *available at* https://bit.ly/3mGz4Gn (summarizing "obligations under existing federal securities laws and regulations to consider climate change and its consequences").

[214] *See*, *e.g.*, 40 C.F.R. §§ 98.1, *et seq*. (EPA regulations imposing "mandatory greenhouse gas (GHG) reporting requirements for owners and operators of certain facilities that directly emit GHG as well as for certain suppliers").

[215] *See*, *e.g.*, Emma Land, *Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of National Association of Manufacturers v. Sec*, 69 OKLA. L. REV. 519, 538 (2017).

[216] *Zauderer v. Off. of Disciplinary Council*, 471 U.S. 626 (1985).

[217] *See* Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment*, WORKING PAPER 57-68 (May 2022), *available at* https://bit.ly/3H1ofrX.

[218] *NIFLA*, 138 S. Ct. at 2372 ("The *Zauderer* standard does not apply here. … The [required] notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic.").

products and in service of some acknowledged governmental interest. But that's no fair description of what the SEC means the Proposed Rule to do.

Anyway, the Proposed Rule could not survive even if the *Zauderer* standard applied. Courts applying *Zauderer* must evaluate whether a required disclosure is "(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome."[219] The Proposed Rule fails on all three scores. It is not factual in that it often requires predictions, judgments, and qualitative assessments.[220] Because these matters of opinion are subject to reasonable disagreement, they are not the kind of statements *Zauderer* contemplates.[221] The Proposed Rule is also controversial in that it forces companies to stake out positions—sometimes expressly, sometimes implicitly—on the controversial subject of climate change.[222] "Controversial" disclosures are "inflammatory," "matter[s] of opinion" or relate to a "dispute about simple factual accuracy."[223] Even the Supreme Court has recognized that "climate change" is a "controversial subject."[224] And as explained throughout this comment, the Proposed Rule is both unjustified *and* unduly burdensome. It purports to address problems that fall outside the agency's wheelhouse, all while saddling issuers with enormous expense[225] and investors with more information than they can reasonably use.[226]

Beyond all that, the Commission might have to justify its overreach under an even more demanding standard: strict scrutiny. The Proposed Rule would stand no chance. "[R]egulation compelling speech is by its very nature content-based, because it requires the speaker to change

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[219] *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019).

[220] *See*, *e.g.*, 87 Fed. Reg. 21,345 (describing how issuers must disclose "financial estimates and assumptions" related to future climate-related events); *id.* at 21,359 (requiring companies to disclose "climate-related targets or goals"); *id.* at 21,362 (noting how required transition planning disclosures will require "judgments and predictions about the future").

[221] *Kimberly-Clark Corp. v. District of Columbia*, 286 F. Supp. 3d 128, 140 (D.D.C. 2017) (explaining that a disclosure is "factual" if there can be "no debate" about the accuracy of the statement).

[222] *See* John. P. Anderson, *Is the SEC Proposing A "Loaded Question" Climate Disclosure Regime?*, BUS. L. PROF BLOG (Apr. 15, 2022), https://bit.ly/3x6dUpP ("If the disclosure questions are loaded, don't they (at least implicitly) dictate the content of the response—particularly if the questions are carefully designed to elicit 'standardized,' 'consistent,' 'comparable,' and 'clear' answers?"); *See*, *e.g.*, Richard J. Shinder, *Mission Creep at the SEC*, CITY JOURNAL (Apr. 5, 2022), https://bit.ly/3arYFjg ("The goal, the SEC says, is 'to assess a registrant's exposure to, and management of, climate-related risks, and in particular transition risks.' But this assumes facts not in evidence. The notion of an inevitable 'energy transition' may be championed by policymakers and opinion leaders, but it's not foreordained.").

[223] *Kimberly-Clark Corp.*, 286 F. Supp. 3d at 141 (cleaned up).

[224] *Janus*, 138 S. Ct. at 2476; *see also Mann*, 140 S. Ct. at 346 (Alito, J., dissenting from the denial of certiorari) (noting the "controversial nature of the whole subject of climate change"); *cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 417 n.2 (2011) (refusing to endorse any "particular view of the complicated issues related to carbon-dioxide emissions and climate change").

[225] *See infra* part III.

[226] *See* Celia R. Taylor, *Drowning in Disclosure: The Overburdening of the Securities & Exchange Commission*, 8 VA. L. & BUS. REV. 85, 112-19 (2014) (describing the increasing requirements for securities disclosure and how these excessive requirements can harm investors through overwhelm); *see also NIFLA*, 138 S. Ct. at 2378 (finding that a required disclosure was unduly burdensome that "drown[ed] out" the speaker's own message).

the content of his speech or even to say something where he would otherwise be silent."[227] And when a policy "imposes a content-based burden on speech," it "is subject to strict-scrutiny review."[228] As Justice Stephen Breyer explained, "governmental regulation of securities" of this sort necessarily "involve[s] content discrimination."[229] Thus, strict scrutiny could apply.[230]

Strict scrutiny is the "most demanding" test in constitutional law.[231] The standard "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[232] "If a less restrictive alternative would serve the Government's purpose," then Congress must use it.[233] And in all cases, "the government cannot be excused from the obligation to identify *evidence* that supports its restriction of a constitutional right."[234] In other words, to survive strict scrutiny the SEC will need to "specifically identify [and prove] an actual problem in need of solving, and the curtailment of the constitutional right must be actually necessary to the solution."[235]

The problem is that the Commission has not presented evidence of any genuine interest, let alone one so compelling that it would effectively require government interference with free speech. It has not shown fraud in the market pertaining to these disclosures. It has not shown market distortions resulting from their absence. At most, the Commission has suggested that some market participants might wish for more climate-related information from the companies in which they invest. Yet no court has ever suggested that this minimal interest would be enough—especially when it is already satisfied by extensive, pre-existing voluntary disclosure frameworks and mandatory disclosure requirements that sweep in material risks.

What's more, if the Commission were right that investor demand for this information is overwhelming, then one would expect to see the market at work providing it. After all, listed companies have incentives to provide information that potential investors want, and nothing stops investors from shunning companies that refuse to provide it. If it turns out that the market already provides for disclosure, then the Proposed Rule is redundant. If it doesn't—which seems more

[227] *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014).

[228] *McClendon v. Long*, 22 F.4th 1330, 1337-38 (11th Cir. 2022) (cleaned up) (compelled speech case).

[229] *Reed v. Town of Gilbert*, 576 U.S. 155, 177 (2015) (Breyer, J., concurring in the judgment); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in part) ("[T]he regulatory spheres in which the Securities and Exchange Commission … operate[s] [are] defined by content.").

[230] *See*, *e.g.*, Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 251-52 (2021) (explaining how recent Supreme Court decisions have "intensifie[d] concern that a heightened level of scrutiny might apply to mandatory ESG disclosure").

[231] *Reed*, 576 U.S. at 182 (Kagan, J., concurring in the judgment).

[232] *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (cleaned up).

[233] *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

[234] *Cornelio*, 32 F.4th at 177 (emphasis added).

[235] *Mance v. Sessions*, 896 F.3d 699, 705 (5th Cir. 2018) (cleaned up).

likely—then that gap undermines the inference that the market is clamoring for this sort of information.[236] Either way, the Commission is wrong that there is any demonstrated need to act.

And even if the Commission could show a compelling "information" interest, it has not shown how the Proposed Rule's extremely broad disclosure requirements would be "narrowly tailored" to advance it. There are many obvious and narrower alternatives, including requirements focused on material risks, encouraging continuing voluntary disclosures, or targeted enforcement efforts in cases of actual fraud or misrepresentation.

No matter which level of scrutiny a court might apply, the Proposed Rule will fail. The Commission should therefore decline to implement these unconstitutional requirements.

## III. The Proposed Rule Is Arbitrary And Capricious.

If the SEC finalizes the Proposed Rule it will undoubtedly draw legal challenges under the Administrative Procedure Act. That Act "requires agencies to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary or capricious."[237] Courts will ask whether the Commission based the Proposed Rule "on a consideration of the relevant factors and whether there has been a clear error of judgment."[238] Among other things, the Commission will need to show that it "examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made."[239] "Unsubstantiated or bare assumptions will not be credited."[240]

For several reasons, the Proposed Rule could not survive this review. Any final rule resembling the Commission's proposal would not reflect reasoned decionmaking—and therefore would fall in any APA challenge.

*First*, the Commission has not appropriately considered the Proposed Rule's costs and benefits. This assessment is not optional: many legal provisions require the SEC to analyze the economic effects of its rules. The National Securities Market Improvement Act ("NSMIA"), for instance, requires the SEC to consider whether an action "will promote efficiency, competition, and capital formation" whenever it is "engaged in rulemaking and is required to consider or

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[236] *See* Morrisey, et al., *supra* note 14, at 3 ("An internal review of the 2020 Form 10-K annual reports of the Fortune 150 revealed that none of these reports included statements quantifying the direct or indirect greenhouse gas emissions associated with the issuer. … The fact that none of the companies included quantified metrics regarding the extent of issuer-associated greenhouse gas emissions strongly indicates that information is not necessary to protect investors who are considering securities purchases."); *see also* THOMAS SINGER, THE CONF. BD., SUSTAINABILITY DISCLOSURE PRACTICES IN THE RUSSELL 3000, S&P 500, AND S&P MIDCAP *400* at 3 (2022), *available at* https://bit.ly/3aht6Zz ("[S]ustainability disclosure in S&P 500 and Russell 3000 companies is underwhelming and patchy: 54 percent of the S&P 500 and less than a third of the Russell 3000 report on climate issues.").

[237] *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (cleaned up).

[238] *Id.* (cleaned up).

[239] *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up).

[240] *Nat. Res. Def. Council v. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022) (cleaned up).

determine whether an action is necessary or appropriate in the public interest."[241] Because protecting the public interest is the Commission's purported basis for regulation here,[242] this NSMIA requirement applies.[243] Another statute requires the SEC to consider a rule's impact on "competition," too.[244] Beyond these statutory mandates, "SEC Chairmen have [also] made a commitment to Congress that the SEC will conduct cost-benefit or economic analyses in connection with its rulemaking activities."[245] Still other SEC officials have said that they "intend to more consistently follow the best practice principles in Executive Order 128664,"[246] which details the required elements of an agency's cost-benefit analysis. And the SEC has issued a memorandum committing to the same.[247]

Courts have condemned the Commission for gaming this mandatory cost-benefit process before. For example, in *Business Roundtable v. SEC*, the D.C. Circuit concluded that the Commission had "inconsistently and opportunistically framed the costs and benefits"[248] of a new rule on proxy access. Benefits aside, the Commission also "failed adequately to quantify the certain costs or to explain why those costs could not be quantified."[249] And through the rule at issue there, the Commission had "neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[250] *Business Roundtable* was hardly the first example—it noted two other cases when the Commission "failed once again … adequately to assess the economic effects of a new rule."[251] Still another case reversed an SEC regulatory effort in which "the Commission abdicated its statutory responsibility to investors" by failing to

[241] 15 U.S.C. § 77b(b).

[242] 87 Fed. Reg. at 21,335 n.3.

[243] *See* Opening Statement of Thomas J. Bliley, Jr., U.S. Representative, on H.R. 3005, The Securities Amendments of 1996, 1996 WL 270857 (F.D.C.H. May 15, 1996) ("The substitute [NSMIA] maintains the provision requiring cost benefit analysis in SEC rulemaking, which we think is very important in light of the enhanced Congressional role mandated for SEC and SRO rules under the Small Business Regulatory Enforcement Act of 1996."); Opening Statement of Jack Fields, U.S. Representative, on H.R. 2131, The Capital Markets Deregulation and Liberalization Act of 1995, 1995 WL 706020 (F.D.C.H. Nov. 30, 1995) ("This is an important provision of the bill because it will introduce an element of explicit cost benefit analysis into SEC rule making. We want to encourage the SEC to take efficiency, competition, and capital formation into account in its rulemaking. We view these goals as complementary to the important goal of investor protection."); Securities and Exchange Commission: Market Issues Weighed in Rulemaking; Investor Protection is First, Levitt States, 29 S.R.L.R. 297 (Mar. 7, 1997) (reporting on then-SEC Chairman Arthur Levitt's remarks regarding the NSMIA's explicit cost-benefit analysis requirement).

[244] 15 U.S.C. § 78w(a)(2).

[245] CONGRESSIONAL RESEARCH SERVICE, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 18 (2014), https://sgp.fas.org/crs/misc/R41974.pdf.

[246] OFF. OF INSPECTOR GEN., SEC, AUDIT NO. 347, RULEMAKING PROCESS (2002), https://bit.ly/3Me5Pox (discussing the SEC's rulemaking process).

[247] Memorandum from Risk, Strategy & Financial Innovation (RSFI) and the Office of the General Counsel (OCG) to Staff of the Rulewriting Divisions and Offices on Current Guidance on Economic Analysis in SEC Rulemakings 1 (Mar. 16, 2012), https://bit.ly/3NNIVGn.

[248] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

[249] *Id.*

[250] *Id.*

[251] *Id.* (citing *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 167 (D.C. Cir. 2010); *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005)).

meaningfully consider costs.[252] Together, these decisions "suggest[] that the SEC ought not to be able to institute new regulation of securities markets and corporate affairs unless the Commission either provides a full, quantified cost-benefit analysis demonstrating that the regulation is net beneficial or else explains why quantification is impossible."[253]

Here, the Commission's cost-benefit analysis is woefully unfinished. The Commission concedes the incompleteness right from the start, proclaiming that it is "unable to reliably quantify these potential benefits and costs" in "many cases."[254] But it never explains *why* it is unable to provide accurate quantitative metrics. And most incredibly, the Commission seems to think this self-assessed impossibility is a pass to skip the analysis altogether. Instead of providing an alternate cost-benefit framework, the Proposed Rule does not make *any* specific determination that its benefits will, in fact, outweigh the costs.

Starting with benefits, the agency offers up largely amorphous results like "consistency," "comparability," and "reliability."[255] Elsewhere, the Commission touts matters like "transparency" and "comprehensive[ness]."[256] But these purported benefits could be claimed for just about any mandated disclosure. The SEC needs to explain why these specific and onerous disclosure requirements will produce benefits that are greater than their alternatives. "The SEC cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of [one]."[257] The Commission could say that about *any* rule.[258] And even when it comes to these "benefits," the Commission largely speaks in conditional terms, suggesting only that they "could" or "may" or "might" follow. Reasoned decisionmaking requires more than guesswork to rejigger the entire system of securities disclosure.[259]

The agency handles costs no better. Mostly relying on the estimates of accounting and other service providers with incentives to push for broad disclosure requirements, the Commission finds that companies will spend roughly $500,000 to $650,000 on these new disclosures in the first *year* of compliance—not even including the hefty price tag of obtaining third-party assurance.[260] Later years will carry compliance costs between $400,000 and $550,000 per year.[261] In other words, by the Commission's own admission every registered issuer in America will spend millions to comply with the Proposed Rule. The aggregate result? Companies will spend more than *$10*

[252] *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 23 (D.D.C. 2013).

[253] Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 435 (2015).

[254] 87 Fed. Reg. at 21,428.

[255] *Id.* at 21,429-31.

[256] *Id.* at 21,432, 21,434.

[257] *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 177-78.

[258] *Id.*

[259] One can't simply assume that more disclosure is better. *See*, *e.g.*, Luca Enriques & Sergio Gilotta, *Disclosure and Financial Market Regulation*, pt. III, *in* THE OXFORD HANDBOOK ON FINANCIAL REGULATION (Eilís Ferran, Niamh Moloney & Jennifer Payne eds., Oxford: Oxford Univ. Press 2015), https://bit.ly/3NoxPHE.

[260] 87 Fed. Reg. at 21,439.

[261] *Id.*

*billion per year* paying accountants and other service providers to comply, and those same companies will burn more than *43 million hours per year* in meeting these requirements.[262] Even the SEC admits that companies will need to hire roughly 22,000 full-time employees to work full-time on climate disclosure just to meet the *internal* demands of the Proposed Rule.

Worse, these extraordinary estimates appear to soft-pedal the proposal's full consequences. Take, for instance, the SEC's assumption that the costs of a mandatory disclosure regime carrying a separate attestation requirement are comparable to the costs of *voluntary* disclosure programs with no similar legal exposure. No evidence supports that assumption. "Even companies that do currently utilize [a voluntary] framework when preparing sustainability reports would bear additional costs, because the process for preparing SEC filings is much more rigorous and involved."[263] We also see something of a tell in the level of expenditures that audit and accounting firms are already incurring as they prepare for the SEC's final rule and similar ESG initiatives. "Ernst & Young announced that it will spend $10 billion over the next three years on audit quality, sustainability, and technology, and KPMG is planning to spend more than $1.5 billion over the next three years on climate-change-related initiatives and training on ESG issues."[264] These aren't gratuitous expenditures; they are additional evidence of the substantial costs bound up with complying with the Proposed Rule—costs these firms will almost certainly shift onto their registered company clients.

Consider again the meticulous level of detail that the Commission proposes to demand: the Proposed Rule wants information on internal carbon pricing and breakdowns of scenario analysis, and sets ambiguous disclosure requirements for the use of carbon offsets, gas-by-gas breakdowns of Scope 3 emissions, zip-code specific disclosures of geographic risks, and much more.[265] The Commission has not identified any measurable or non-unique benefits from any of these requirements. Certainly, investors have not been clamoring for disclosure at this fine level; most investors could reasonably be overwhelmed by it. But each of these specific demands imposes additional costs.

Thus, the Commission appears to be making the same mistake it made when estimating initial costs of Sarbanes-Oxley compliance many years ago. The Commission thought then that companies would spend $91,000 a year, but they actually spent more than $2 million per year on audit fees alone.[266] Given that under the Proposed Rule registrants would need to craft new policies; train entire organizations how to make climate-related judgments; develop, test, and deploy new assessment tools; and enlist whole supply chains to track down necessary information

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[262] *Id.* at 21,461.

[263] Rose, *supra* note 177, at 1842.

[264] Shivaram Rajgopal & Bruce Usher, *What's Next for SEC's Proposed Climate Disclosure Regulation?*, BLOOMBERG LAW (May 2, 2022, 4:00 AM), https://bit.ly/3MngyNw.

[265] *See*, *e.g.*, Shinder, *supra* note 222 ("[T]he proposed rules fail to distinguish between macro and micro climate risks. … Such information is so general and far-reaching as to be effectively meaningless for assessing the risks to a specific company.").

[266] *See*, *e.g.*, *Sarbanes Oxley Drives Up Large Companies' Audit Costs by $1.4 Billion*, INSURANCE JOURNAL (Apr. 28, 2005), https://bit.ly/3thYFct.

just to *begin* their compliance efforts, it is not hard to predict a repeat of the disastrous SarbOx estimate playing out again.[267]

And as hefty as all of these costs are, they say nothing about the Proposed Rule's indirect costs. These are an area of particular concern, too, yet the Commission dispenses with those very real worries in a few short sentences.[268] The Proposed Rule's new regime will significantly increase litigation risk for registered companies given both the volume of the information mandated and its difficult-to-capture nature. No doubt plaintiff-side securities law firms, like audit firms, are anxious to see this proposal go final.[269] Yet the Commission insists that a few narrow safe harbors and a few years of phase-in for some aspects of the Proposed Rule are enough to wave away these concerns.[270] Again, reasoned decisionmaking requires accounting fairly for costs like these.

Meanwhile, the Commission *entirely* ignores other obvious and expected indirect costs. Some public companies will likely delist and go private rather than undertake these onerous new responsibilities; other companies might avoid going public at all.[271] That shift will create costs for the economy and investors. The Commission does not mention them. Other public companies will be forced to reorder their entire business model just to let them make accurate emissions estimates—a possibility that the Commission expressly acknowledges in other parts of the Proposed Rule.[272] Yet the economic consequences of those expected shifts are nowhere to be found at the proposal's cost-benefit stage.

Though these costs will ripple throughout the economy, they will also bring disproportionate burdens to critical (and already vulnerable) sectors. More carbon-intensive

[267] Phillip Bantz, *Legal Chiefs Worried About Cost of SEC's Climate Disclosure Rules*, LAW.COM (Mar. 22, 2022, 2:45 PM), https://bit.ly/3xePavU (quoting a former SEC official noting that the "sheer quantity of information that would be required in Form 10-K and the third-party attestation requirements would dramatically increase climate-related disclosure obligations and the related costs").

[268] 87 Fed. Reg. at 21,443-44.

[269] *See* Richard Vandeford, *SEC Climate Disclosure Proposal Looms as Litigation Risk*, WALL ST. J.: RISK & COMPLIANCE J. (Mar. 26, 2022, 9:00 AM), https://on.wsj.com/38Qba7Y.

[270] 87 Fed. Reg. at 21,444.

[271] *See*, *e.g.*, Letter from Tyler Gellasch, Exec. Dir., Healthy Markets Association, to Gary Gensler, Chair, SEC (June 14, 2021), https://bit.ly/3Q16Gw3 ("By expanding its disclosure requirements and accountability apparatus for public companies, … the SEC would potentially be widening the gap in burdens between public and private companies. There is likely to be tremendous pressure to 'go dark' or stay 'private.'").

[272] 87 Fed. Reg. at 21,438 ("Companies may decide that it is an optimal strategy to bear the costs up front of shifting its operations to those that have fewer emissions or upgrading their equipment, rather than bearing the risk that these costs will be borne in an unpredictable and possibly disorderly way in the future."); *id.* at 21,377 ("[A] registrant could seek to reduce the potential impacts on its business of its upstream emissions by choosing to purchase from more GHG emission-efficient suppliers or by working with existing suppliers to reduce emissions. A registrant could also seek to reduce the potential impacts on its business of downstream emissions by producing products that are more energy efficient or involve less GHG emissions when consumers use them, or by contracting with distributors that use shorter transportation routes."); *see also, e.g.*, Meredith Fowlie, et al., *Indirect Emissions Disclosures Are Important But Tricky*, Resources (May 4, 2022), https://bit.ly/3O9KPRb ("[R]equiring Scope 3 emissions reporting for publicly traded US firms could induce a "reshuffling" of supply-chain relationships.").

activities will require more disclosure, creating a competitive disadvantage for that work.[273] But perhaps more importantly, the Proposed Rule could continue the stigmatization of whole industries, including traditional energy production, transport companies, manufacturing, transportation, and others.[274] Our economy can ill afford such disruptions right now. America needs energy independence, a strong manufacturing base, and healthy farms—not more bureaucratic burdens.

Industry and agriculture alike have echoed these concerns. The National Association of Egg Farmers notes that the Proposed Rule "could force egg farmers of all sizes … to report data they may be unable to provide, which would result in a costly additional expense or a loss of business to larger farms."[275] The Farm Bureau explains that the Proposed Rule will lead to "several substantial costs and liabilities [for farmers], such as reporting obligations, technical challenges, significant financial and operational disruption and the risk of financially crippling legal liabilities."[276] The National Association of Manufacturers observes that "sweeping disclosures could be counterproductive—requiring manufacturers to waste time and resources reporting irrelevant information that will not be decision-useful for shareholders."[277] And on and on.

Ultimately, the Commission must "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation."[278] All of these factors predict that the Proposed Rule will create serious and potentially disastrous market distortions. It would take much more than the Proposed Rule's feather-light purported benefits to reasonably set them aside.

*Second*, the Proposed Rule is redundant. Courts have reversed SEC action where the Commission failed to analyze already existing regulations covering the same ground before imposing additional burdens.[279] Here, other regulatory frameworks "reduce the need for, and hence the benefit to be had from," the Proposed Rule—which makes it even harder to justify the proposal's "greater costs" from the "disrupt[ion to] the [companies'] structure of …

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[273] *Cf. Nat'l Env't Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (reversing agency action where agency did not follow its own consistency regulation and could have acted "in several ways that would have avoided affording a competitive advantage to sources within the Sixth Circuit").

[274] Letter from Tawny Bridgeford, Deputy Gen. Couns. & VP, National Mining Association to Gary Gensler, Chairman, SEC (June 11, 2021), https://bit.ly/3NLh8WC ("NMA is concerned that mandatory disclosure rules—particularly related to non-material climate-related risks—could proliferate investment bias and practices by investors and financial institutions to exclude certain energy-intensive companies and sectors from investment portfolios or restrict access to or significantly increase the cost of capital.").

[275] Comment of Ken Klippen, President, National Association of Egg Farmers, to SEC (May 9, 2022), https://bit.ly/3xiuRPj.

[276] *SEC Proposed Climate Rule Could Intensify Farm and Ranch Consolidation*, AM. FARM BUREAU FED'N (May 6, 2022), https://bit.ly/3xj1nAU.

[277] *SEC Releases Climate Rule*, NAT'L ASSOC. OF MFRS. (Mar. 23, 2022, 11:07 AM), https://bit.ly/3NZsUNj.

[278] *Chamber of Com.*, 412 F.3d at 144.

[279] *See*, *e.g.*, *Am. Equity Life Ins. Co.*, 613 F.3d at 179 ("The SEC's failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency.").

governance."[280] In other words, if the Commission does not provide a fulsome analysis of existing regulations before moving forward, it would be imposing needless and economy-disrupting burdens to fill a regulatory void that may not even exist.[281]

SEC Commissioner Hester M. Peirce has already detailed the many existing requirements that require companies to disclose *material* environmental risks and information.[282] Without repeating her analysis of all the current rules implicated here, it is enough to say they are many and varied.[283] No wonder, then, that the Commission issued an interpretive release in 2010 describing how companies were already required to disclose certain *material* matters pertaining to climate change.[284]

The current principles-based standards appropriately allow for more flexibility on these issues—but they also have real teeth. In fact, the Commission's Division of Corporate Finance has recently been sending comment letters to various public companies questioning the adequacy of their climate-related disclosures under the existing rules.[285] But even though the SEC already has a path to enforce material disclosure requirements, it nevertheless proposes to impose additional burdens in the form of a "one-size-fits-all prescriptive framework."[286] The Commission has not explained why any of this is necessary. Instead, it vaguely promises that the Proposed Rule will "augment and supplement" the existing guidance—but to what end?[287]

The Commission also recognizes that companies have adopted a variety of disclosure frameworks on their own, but it does not convincingly explain why they are inadequate.[288] Instead, the Commission returns to its favored phrase: It believes that these frameworks do not provide

[280] *Business Roundtable*, 647 F.3d at 1154.

[281] *Id.* at 1155-56 (vacating rule because agency did "not adequately address the probability the rule will be of no net benefit as applied to investment companies"); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 841 (D.C. Cir. 2006).

[282] Peirce, *supra* note 41.

[283] *Id.*

[284] *See* Guidance, *supra* note 213; *see also* Rick E. Hansen, *Climate Change Disclosure by Sec Registrants: Revisiting the Sec's 2010 Interpretive Release*, 6 BROOK. J. CORP. FIN. & COM. L. 487, 491 (2012) ("[S]ince the issuance of the Interpretive Release, registrant disclosures concerning climate change in the registrant's SEC filings have matured and increased … [and] we can expect to see these disclosures continue to mature and increase over time.").

[285] *See*, *e.g.*, Elizabeth C. McNichol & Farzad F. Damania, *SEC Sample Letter to Companies Regarding Climate Change Disclosures*, CAPITAL MARKETS COMPASS (Katten Muchin Roseman LLP, Chi., Ill.), Oct. 14, 2021, at 6, https://bit.ly/3Qedzu2 ("Katten public company clients, like many other public companies, have been receiving comment letters [from the SEC] relating to climate change disclosure."); Mark Maurer, *SEC Asks Companies for Rationales Behind Disclosures of Climate Risks*, WALL ST. J. (Feb. 28, 2022, 5:30 AM), https://on.wsj.com/3Mj0Xic ("The SEC last year sent at least 43 letters to U.S. public companies on [climate-related risk matters].").

[286] Peirce, *supra* note 41.

[287] 87 Fed. Reg. at 21,338.

[288] *Id.* at 21,341-43; *see also* Cunningham, *supra* note 132, at 9 ("While the [Proposed Rule] presents the allocation of investment dollars to social and political funds as evidence supporting the case for mandating information, a more plausible interpretation is that investors have the information they need to make such choices.").

"consistent, comparable, and reliable" information.[289] Missing from this explanation, though, is why perfect consistency and comparability is needed across all climate disclosures for them to be useful. Allowing for variability might be more appropriate given the sheer diversity of companies to which the new disclosure requirements would apply. And the SEC has not shown any specific evidence that companies are producing unreliable or otherwise inaccurate climate disclosures under the current regime; it merely assumes that companies might cut corners without the fear of looming SEC enforcement action. Some of the SEC's preferred evidence even *undermines* the supposed need for additional disclosures. One cited report, for instance, notes that investors face "challenges" when parsing ESG disclosures in part because of "the sheer volume of information reported."[290] But the Proposed Rule would require companies to report still more.

The Proposed Rule also treats important aspects of existing frameworks inconsistently, creating the very "disruption" to existing schemes that courts have said agencies must justify expressly if they nevertheless choose to move ahead.[291] Specifically, the SEC claims that its new disclosure requirements build on the work of the Task Force on Climate-Related Financial Disclosures ("TCFD") and the Greenhouse Gas Protocol.[292] But scenario analysis is just one example of how the Proposed Rule creates additional burdens and problems for companies implementing those existing, voluntary regimes. Currently, TCFD recommends that companies use "hypothetical constructs" "not designed to deliver precise outcomes for forecasts."[293] Scenario analyses are meant to "allow an organization to explore and develop" how climate risks might affect "its business, strategies, and financial performance over time."[294] Yet the SEC proposes to require companies using scenario analyses to disclose an extremely granular set of data around the scenarios they consider—effectively demanding the precision that TCFD disclaims. These requirements include the "parameters, assumptions and analytical choices, and the projected financial impacts on the registrant's business strategy under each scenario," which must include "both qualitative and quantitative information."[295] Because scenario analysis remains voluntary, it seems likely that companies that performed scenario analyses in the past will no longer do so going forward in an effort to avoid liability and the extra burdens from the Proposed Rule's constraints. So the Proposed Rule will not only burden companies with unjustified additional costs, but will also disincentivize voluntary analyses that existing methods applaud.

Neither did the Commission adequately consider whether the Proposed Rule is consistent with other climate-disclosure frameworks abroad.[296] As the SEC itself notes, "[s]everal

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[289] *Id.* at 21,342.

[290] Rodney Irwin & Alan McGill, ENHANCING THE CREDIBILITY OF NON-FINANCIAL INFORMATION, THE INVESTOR PERSPECTIVE, WBCSD & PWC 6 (2018), https://bit.ly/3avcxJG (cited at 87 Fed. Reg. at 21,342 n.78).

[291] *Business Roundtable*, 647 F.3d at 1154.

[292] 87 Fed. Reg. at 21,343.

[293] TCFD, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 25 (2017), https://bit.ly/3973O01.

[294] *Id.*

[295] 87 Fed. Reg. at 21,468.

[296] *See Am. Petroleum Inst.*, 953 F. Supp. 2d at 20-23 (finding that the SEC acted arbitrarily and capriciously in failing to adequately account for certain obligations imposed by foreign laws when issuing regulation).

jurisdictions, including the European Union, are developing or revising their mandatory climate-related disclosure regimes."[297] But the Proposed Rule does not analyze those other rules in any substantive way. As a result, transnational issuers could be forced to compile and issue multiple, inconsistent sets of climate-related information. Costs will increase—and any inconsistencies could form the basis for potential liability.

*Third*, the SEC failed to consider "reasonable alternatives."[298] Throughout the Proposed Rule, the Commission appears to treat the decision before it as a one-or-the-other choice: Adopt the proposal's burdensome, all-encompassing disclosure requirements or refuse to adopt anything at all. But "agency action is arbitrary and capricious when it considers *only* the binary choice" of whether to accept or reject a given program, "without also considering less disruptive alternatives."[299] Making matters worse, after disingenuously simplifying the task the Proposed Rule insists that its approach is required above all others for the sake "consistency," "transparency," and the like. Such "conclusory statements are not sufficient" to satisfy the APA.[300]

The Proposed Rule cannot escape the fact that the Commission could have employed many alternatives to achieve similar purported results. As we explained earlier, among other things the Commission could have encouraged continued use of voluntary disclosure frameworks, issued additional interpretive guidance to clarify how existing regulations apply in the climate context, or leaned on enforcement and review actions (like the recent comment letters) to ensure reliable disclosures of material, climate-related matters. Merely insisting that companies can do more is no reason to reject these less burdensome solutions, especially considering the extraordinary costs that everyone agrees the Proposed Rule will bring.

*Fourth*, the Proposed Rule appears to rest on pretextual and illusory grounds. Even as it relies on "investor demand" to justify its rulemaking, the Commission has cited surveys and comments from only a few large, institutional investors and international non-profit organizations.[301] The Commission largely overlooks the insights from ordinary, retail investors that do *not* support rulemaking on this scale. Large-scale institutional investors like investment firms have different incentives; they might clamor for more information on climate so as to better market their funds or satisfy their own political preferences.[302] But a wish for marketing material

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[297] 87 Fed. Reg. at 21,343.

[298] *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1004 (6th Cir. 1995) (explaining that an agency must consider alternatives); *see also*, *e.g.*, *Spirit Airlines, Inc. v. U.S. Dep't of Transp. & Fed. Aviation Admin.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) ("An agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.").

[299] *Texas v. Biden*, 20 F.4th 928, 992 (5th Cir. 2021) (cleaned up).

[300] *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990).

[301] *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405 (2020) (explaining that "large asset managers like BlackRock, State Street, and Vanguard" are the "chief supporters" of "corporate social responsibility" initiatives like climate disclosures).

[302] Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840, 844 (2021) ("The herding behavior of private fund managers, such as BlackRock, State Street, and Vanguard, toward ESG activism is puzzling if they are interested only in uncovering as-yet unpriced risks. Money managers who believe they have found an over or undervalued asset do not generally

is not evidence of a genuine problem *for investors*.[303] Thus, the Commission has not provided evidence that these onerous disclosures address any real problem—let alone evidence that the speculative disclosures would *solve* that problem. And where "no evidence of a real problem" exists, the action is pretextual.[304]

Rather than responding to empirical evidence and genuine market demand, the Commission seems to be reacting to the political influences of the present administration and its allies.[305] Witness how the agency moved in response to direction from the White House and Senator Elizabeth Warren. The Proposed Rule also cites a single institutional investor guided by progressive political motivations—BlackRock—more than a dozen times.[306] Consider too how the Commission has been so willing to dispense with central elements of its regulatory framework, such as materiality, in service of its new agenda. Each of these factors is a clue that the agency is not being forthright about the reasons for the Proposed Rule. Although "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," including political ones, a court may set aside agency action where the record demonstrates that "the sole stated reason" for the action is pretextual and "contrived."[307] We think a court would likely do so here. The Proposed Rule appears to be another step in the recent "politicization of agency expertise—a particular problem that, while not new, has steadily evolved into a more dangerous phenomenon."[308] It appears targeted against fossil-fuel companies and others like them as part of a larger partisan game. To be sure, presidents have considerable sway over many agencies' directions (though again, *this* agency is independent). But when a proposed regulation stumbles over itself providing an adequate justification beyond the administration's will, the agency has left reasoned rulemaking behind.

*Fifth*, the SEC has not properly accounted for other agencies' responsibilities. The Commission is not an environmental regulator. It does not possess the core competency to draft

broadcast that fact to the world and invite others to share in the investment opportunity. Political activism, by contrast, relies heavily on bandwagon effects."). Mahoney and Mahoney further detail the lack of evidence of any market failure to justify ESG disclosures. *Id.* at 847-51.

[303] *See* Cunningham, *supra* note 132, at 4-5 ("While index funds may be interested in using climate-friendly voting and engagement as a marketing device, they cannot afford to incur substantial new costs to do so. A mandatory climate disclosure regime requiring publicly traded companies to bear the cost of producing and standardizing the climate-related information would save such funds costs while advancing their agendas.").

[304] *See*, *e.g.*, *Nat'l Fuel Gas Supply*, 468 F.3d at 841.

[305] For instance, the "vocal investment managers [who] run state or union pension funds" (and praise climate disclosure measures like these) "are ultimately overseen by politically elected officials" who may act out of political interest, not the interest of their beneficiaries. Verret, *supra* note 68, at 8.

[306] *See* 87 Fed. Reg. at 21,337-38, 21,343, 21,346-47, 21,356, 21,361, 21,367, 21,375, 21,390, 21,425; Bernard S. Sharfman, *The Conflict Between Blackrock's Shareholder Activism and ERISA's Fiduciary Duties*, 71 CASE W. RES. L. REV. 1241, 1271-72 (2021) ("BlackRock's engagement strategy is arguably not appropriate for enhancing the financial benefits of its beneficial investors …. This strategy exhibits significant principal conflict and competency costs. If BlackRock's investment stewardship team were truly interested in enhancing the financial benefits provided to ERISA plan participants and beneficiaries, it is extremely doubtful that it would do so by becoming a third-party monitor and manager of its portfolio companies' stakeholder relationships.").

[307] *Dep't of Com.*, 139 S. Ct. at 2573-75.

[308] Jack Thorlin, *Can Agencies Lie?: A Realist's Guide to Pretext Review*, 80 MD. L. REV. 1021, 1075 (2021).

regulations, let alone evaluate the accuracy information provided, the completeness of emission-related disclosures, the abilities of attestation providers, the methods used to produce the disclosed information, and the myriad other technical judgments that must be made under this disclosure scheme.[309] Indeed, it likely does not even have the technical knowledge necessary to assess what facts would be of genuine interest to environmentally conscious investors. The Environmental Protection Agency, of course, is the agency charged with regulating environmental matters, including those pertaining to climate change. And Congress authorized the EPA—not the SEC—to collect emission information and disclose them to the public: The annual Greenhouse Gas Reporting Program covers thousands of facilities. Yet like other existing programs, the Commission dismissed the EPA's disclosure regime as incomplete.[310]

The Proposed Rule gives passing reference to its substantial intrusion into the EPA's domain,[311] but it is simply not enough. As the D.C. Circuit has explained:

> [A]n agency, faced with alternative methods of effectuating the policies of the statute it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime.[312]

The Proposed Rule provides *no* discussion of how its disclosures might affect the EPA's mandate—or whether the EPA's powers preclude the SEC from acting at all.[313] Certainly it does not explain how the Commission plans to "minimize" any intrusion. In fact, the Proposed Rule speaks as though the EPA's regulatory power and that agency's existing disclosure requirements present no constraint on the SEC's work. This inter-agency administrative blindness is arbitrary and capricious.

*Sixth*, the Commission has not justified its substantial shift from past practice. "Reasoned decision making … necessarily requires the agency to acknowledge and provide an adequate

[309] *See*, *e.g.*, Mahoney & Mahoney, *supra* note 302, at 842-43 ("The SEC has neither the expertise nor the political accountability to pursue climate, diversity, and other public policy goals.").

[310] 87 Fed. Reg. at 21,434.

[311] *Id.* at 21,414, 21,434.

[312] *N.Y. Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1370 (D.C. Cir. 1988); *cf. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 569 (1979) (explaining that certain pension plans' coverage under ERISA defeated the argument that the same plans were regulated by the SEC).

[313] *See* Joseph A. Grundfest, *The SEC Is Heading Toward A Climate Train Wreck*, WASH. POST (Apr. 5, 2022, 11:05 AM), https://wapo.st/38Wllbi (former SEC commissioner explaining why EPA's authority under the Clean Air Act likely precludes SEC from implementing the Proposed Rule).

explanation for its departure from established precedent."[314] The Proposed Rule marks one such unexplained departure.

As early as 1975, the Commission explained at length why requiring "comprehensive disclosure of the environmental effects of corporate activities" would be inappropriate.[315] Among other things, the Commission concluded that "both the costs to registrants and the administrative burdens involved in the proposed disclosure would be excessive."[316] Further, "there appear[ed] to be virtually no direct investor interest in voluminous information of this type."[317] Comprehensive environmental disclosure could have "dwarf[ed] the disclosure which the Commission [then] require[d]."[318] In later years, the Commission continued to take a circumscribed view of its authority to promulgate environmental requirements. "[D]isclosure relating to environmental and other matters of social concern should not be required of all registrants," the Commission insisted just a few years ago, "unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[319]

The Commission has not explained its about-face from these conclusions. Yes, the Proposed Rule claims that investor interest has increased—but it has not established that investors are now clamoring for the exhaustive requirements that the SEC wants to set. Nor has it explained how cost concerns from decades ago have improved; if anything, with the proliferation of data and ever-growing complexity and size of modern corporations, these concerns have likely *increased*. No new "congressional mandate" has appeared, but the Commission has nevertheless unmoored its proposed requirements from materiality. And individual investors are just as likely to be swamped by never-ending disclosures as they would have been before.

More generally, the Commission also appears poised to reject without explanation the principles-based approach that it championed just a few years ago. In 2016 (and in a prior study a decade before), staff agreed that the Commission should "emphasize a principles-based approach as an overarching component of the disclosure framework."[320] Staff did so despite the recognition that principles-based disclosure requirements sometimes undermine "comparability, consistency and completeness."[321] Now, though, the Commission seems to consider existing disclosure requirements wanting precisely *because* they are principles based.[322] And it cites favorably the

[314] *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009); *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (explaining that when an agency changes course from a prior policy, it must provide a "reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy").

[315] *Environmental and Social Disclosure*, 40 Fed. Reg. 51,656, 51,662 (Nov. 6, 1975).

[316] *Id.*

[317] *Id.*

[318] *Id.* at 51,660 n.27.

[319] 81 Fed. Reg. at 23,970.

[320] *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,927 (Apr. 22, 2016).

[321] *Id.*

[322] 87 Fed. Reg. at 21,413 ("A number of the Commission's existing disclosure requirements may elicit disclosure about climate-related risks; however, many of these requirements are principles-based in nature and thus the nature and extent of the information provided depends to an extent on the judgment of management.").

very interests that it found *insufficient* before, including concerns about "comparability and consistency."[323] The Proposed Rule explains this inconsistency nowhere.

*Seventh*, the Commission has not shown that registrants will be able to calculate the required emissions disclosures. The Proposed Rule does not explain with any specificity how companies can undertake on-the-ground efforts to meaningfully measure Scope 1 or Scope 2 emissions, let alone emissions from *outside* the company in Scope 3. Public companies do not have subpoena powers. They have no realistic way of compelling other entities within the distribution chain to disclose their emissions, even assuming those entities could calculate them. Thus, the Proposed Rule appears to be positioning registrants—especially large registrants—for failure. It creates an impossible-to-meet standard that will create guesswork figures that provide no information to investors and create significant litigation risk for the companies.

*Eighth* and finally, the Commission has not considered its statutory mandate to simplify disclosures. In two separate laws, Congress instructed the SEC to "modernize and simplify" disclosure requirements.[324] As should be obvious by this point, nothing about the Proposed Rule would "simplify" corporate obligations. The Commission proposes to saddle public companies with an unprecedented new form of disclosure running potentially hundreds of pages long at a cost of millions (or billions) each year. Even assuming the Commission *could* explain why this gross expansion is consistent with Congress's intent to make disclosure easier, not harder, the Proposed Rule doesn't make the attempt.

For any one of these reasons, finalizing the Proposed Rule would be arbitrary and capricious. The Commission should table it.

* * * *

Though the federal government should not stand as an obstacle to the success of American business, the Proposed Rule would do just that. The Commission should end this farce and give up its dalliance as an amateur environmental watchdog. It should return to its rightful role as a securities regulator focused on preventing fraud through requiring material disclosures that reasonable investors both want and need.

Sincerely,

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[323] *Id.* at 21,366; *see also id.* at 21,444 ("While a more principles-based approach would provide additional flexibility for registrants, it also may impose certain costs if they are unsure of what climate-related measures are needed to satisfy legal requirements. Such an approach could entail additional judgment on the part of management.").

[324] *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, sec. 108, 126 Stat. 306, 313-14 (2012); Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

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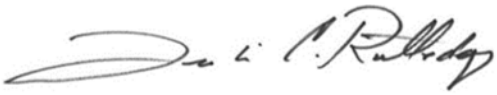

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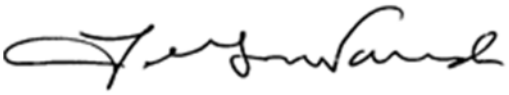

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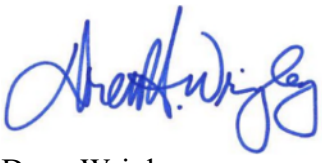

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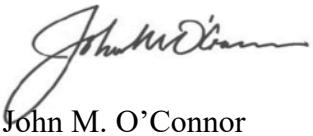

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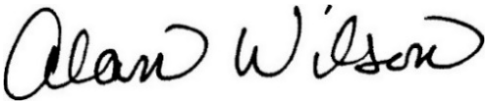

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