U.S. Chamber of Commerce

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VIA ELECTRONIC SUBMISSION

August 3, 2026

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

**Re: Release Nos. 33-11421; 34-105572; File No. S7-2026-19;
Rescission of Climate-Related Disclosure Rules**

Dear Ms. Countryman:

The Chamber of Commerce of the United States of America ("the Chamber") appreciates the opportunity to comment on the Securities and Exchange Commission's ("the Commission") proposal to rescind in full the climate-related disclosure rule adopted in 2024.[1] The Chamber supports full rescission.

The Chamber is the world's largest business federation.[2] It represents companies of every size, in every sector, and across every region of the country. Many Chamber members are public companies directly subject to the 2024 climate rule,[3] while many others are private companies that would have borne indirect burdens through supply-chain, financing, assurance, and contracting pressures created by the rule.[4] The Chamber has long supported practical, flexible, predictable, and durable policies to address climate change.[5] But this rulemaking does

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[1] *See* Rescission of Climate-Related Disclosure Rules, 91 Fed. Reg. 33,296 (SEC June 3, 2026) ("Proposing Release") (proposing to rescind Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (SEC Mar. 28, 2024) ("2024 Adopting Release")).

[2] *About Us*, U.S. Chamber of Commerce, https://www.uschamber.com/about (last visited Aug. 3, 2026).

[3] Petitioners' Final Joint Opening Brief at 5, *Chamber of Commerce of U.S. v. SEC*, No. 24-1628 (8th Cir. Oct. 1, 2024), ECF No. 5441541; *see, e.g.*, Appendix to Emergency Motion for Stay, at App. 1397–1417, *Chamber of Commerce*, No. 24-1628 (Mar. 26, 2024), ECF No. 5377362.

[4] *See* Comments of the U.S. Chamber of Commerce, File No. S7-10-22, at 17, 25 (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf ("Chamber June 2022 Comments").

[5] *See Climate Change*, U.S. Chamber of Commerce, https://www.uschamber.com/climate-change (last visited Aug. 3, 2026); *see also* Chamber June 2022 Comments, *supra* note 4, at 1 (stating that "policy solutions addressing climate change should serve the goal of reducing emissions as much and as quickly as possible" and that "practical, flexible, predictable and durable market-based solutions . . . are at the core of efforts to address climate risk"); *see*

not ask whether climate change is an important public-policy issue. It asks whether the federal securities laws authorize the Commission to impose a sweeping, prescriptive, climate-specific reporting regime on virtually the entire public-company market, and whether the 2024 rule was justified by the administrative record. The answer to both questions is no.[6]

The Commission's proposal correctly recognizes that the climate rule exceeded the Commission's statutory authority and, independently, was unsupported by the record and unsound as a matter of policy.[7] The rule was unprecedented in scope and kind. It created an entire disclosure subpart devoted to one subject, climate-related matters, and required registrants to develop, assess, govern, quantify, and disclose information regardless whether that information would be financially material to a reasonable investor's investment or voting decision. The rule elevated climate above other risks, including risks that may be more significant to a particular registrant's business, and did so notwithstanding the existing disclosure framework's long-standing requirement that registrants disclose material risks and financial-statement impacts, including those related to climate when material.[8]

The detailed analysis below explains why full rescission is the only outcome this record supports. Part I explains why the climate rule exceeded the Commission's statutory authority. Part II explains why the rule was not the product of reasoned decision-making: it addressed no demonstrated investor-protection problem, rested on asserted benefits that do not withstand scrutiny, and would have imposed costs the 2024 adopting release understated. Part III explains why rescission should be complete, not partial; the defects are foundational, the rule never took effect, and existing disclosure obligations remain fully in force.

The Chamber supports the Commission's rescission of the climate rule in its entirety.

Respectfully submitted,

Mike Flood
Senior Vice President
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also Our Approach to Climate Change, U.S. Chamber of Commerce (Apr. 19, 2020), https://www.uschamber.com/climate-change/our-approach-to-climate-change.

[6] On authority, see Chamber June 2022 Comments, *supra* note 4, at 25–30, and Comments of the U.S. Chamber of Commerce, File No. S7-10-22, at 17–18 (Nov. 1, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20148911-315866.pdf ("Chamber November 2022 Comments"). On the record, see Chamber November 2022 Comments at 3–4, 16–17.

[7] Proposing Release, 91 Fed. Reg. at 33,298.

[8] *See* Comm'r Mark T. Uyeda, *A Climate Regulation Under the Commission's Seal* (Mar. 6, 2024), https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-mandatory-climate-risk-disclosures-030624 ("2024 Uyeda Dissent").

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Introduction

The 2024 climate rule was a fundamental departure from the Commission's traditional disclosure regime: it created a standalone, climate-specific set of reporting requirements. The rule required registrants to disclose, among other things, climate-risk governance and management processes,[9] climate-related risks and impacts,[10] transition plans,[11] scenario analysis,[12] internal carbon prices,[13] climate-related targets and goals,[14] Scope 1 and Scope 2 greenhouse-gas (GHG) emissions under certain circumstances,[15] attestation reports,[16] and climate-related financial-statement metrics concerning severe weather events and other natural conditions.[17] These requirements were housed in newly created Regulation S-K subpart 1500[18] and Regulation S-X Article 14.[19] No comparable issue-specific disclosure regime exists for ordinary business risks such as supply-chain fragility, geopolitical instability, labor constraints, inflation, technological disruption, product-liability exposure, or changes in consumer demand.[20]

The Commission's current proposal to rescind the 2024 rule correctly identifies the central problem: the 2024 Commission exceeded its statutory authority by treating general investor interest in climate-related information as a roving license to compel whatever climate disclosures some investors, intermediaries, or other stakeholders might find useful.[21] That is

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[9] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,713–16, 21,719–20, 21,916.

[10] *See id.* at 21,674, 21,691–93, 21,916.

[11] *See id.* at 21,674, 21,703–04, 21,916.

[12] *See id.* at 21,674, 21,707, 21,916.

[13] *See id.* at 21,674, 21,710–12, 21,916.

[14] *See id.* at 21,674, 21,720–24, 21,916–17.

[15] *See id.* at 21,674–75, 21,733–37, 21,917.

[16] *See id.* at 21,675, 21,759–67, 21,917–18.

[17] *See id.* at 21,675, 21,777–806, 21,912–13.

[18] *See id.* at 21,914–19.

[19] *See id.* at 21,912–13.

[20] *See* 2024 Uyeda Dissent, *supra* note 8.

[21] *See* Proposing Release, 91 Fed. Reg. at 33,298 (explaining that "it is not the Commission's role to require disclosure of particular information because it is useful for any one investment strategy or desired by some political interests for the purpose of influencing business practices," and that Commission-mandated disclosure should elicit information a reasonable investor would consider important in buying or selling securities); *id.* at 33,303 (stating that "protection of investors" does not empower the Commission to mandate any disclosure an investor may find useful or desirable and that investor demand, importance, consistency, and comparability are not freestanding statutory authorization); *id.* at 33,310–11 (stating that investors are not monolithic and that the Commission should not cater to the specific informational needs of every subset of investors about each emergent topic); *id.* at 33,312 (stating that it is not appropriate to burden all shareholders of almost all public companies to subsidize the informational demands of certain climate-focused investors or investors with interests other than

not the securities laws' design. The Commission's disclosure authority is limited by the text, structure, and purposes of the Securities Act and Exchange Act. Those statutes authorize the Commission to require disclosures of the same general character as the disclosures Congress specified—information concerning a registrant's business and financial characteristics that bears on the value of securities and the financial returns of an investment.[22] The Commission may not convert the public-company reporting system into a general-purpose mechanism for eliciting information on contentious social, political, or environmental questions merely to satisfy the specialized interests of a narrow subset of investors.

Nor did the record support the climate rule as a matter of reasoned decision-making. The 2024 Commission did not identify a demonstrated investor-protection problem.[23] It did not identify enforcement actions, investor complaints, class actions, market failures, or losses showing that public companies were omitting material climate-related information under the existing regime. It discounted evidence that climate-related disclosures were already widespread and growing, particularly among companies and industries for which climate issues were most likely to be material.[24] It relied on asset-pricing and academic literature that, at most, showed that market prices *already* incorporate material climate-related risks from available information.[25] It ignored event-study evidence finding no statistically significant stock-price or trading-volume reaction to the very greenhouse-gas disclosures that the rule required.[26] It exaggerated the benefits of alleged uniformity[27] while understating the reality that climate disclosures depend on divergent assumptions, methodologies, organizational boundaries, data availability, and judgments.[28] And it understated costs, including the costs of determining whether disclosure is required, governance-distortion costs, audit and assurance costs, economy-wide costs, and costs imposed indirectly on private companies.[29]

The current Commission is not alone in recognizing that mandatory climate-reporting regimes have proven more complex, costly, and unstable than anticipated. Jurisdictions that moved first are now recalibrating. The European Union adopted the world's most ambitious corporate sustainability-reporting regime but has scaled back significant portions of its initial

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financial return); *id.* at 33,315 (identifying affected parties that would benefit from the climate rule as including investors using the information for particular investment strategies, financial intermediaries incorporating climate risks into investment analysis, and stakeholders using expanded climate disclosures for advocacy or political purposes).

[22] *See* pp. 6–8, *infra*.

[23] *See* pp. 11–18, *infra*.

[24] *See* pp. 18–21, *infra*.

[25] *See* pp. 21–22, *infra*.

[26] *See* pp. 22–24, *infra*.

[27] *See* pp. 24–28, *infra*.

[28] *See* pp. 24–28, *infra*.

[29] *See* pp. 28–34, *infra*.

proposals. In April 2025, the EU postponed the dates by which most companies must begin reporting.[30] In February 2026, it went further, narrowing the regime's scope by raising reporting thresholds, simplifying the required disclosures, postponing its limited-assurance standards, and abandoning the planned move to more demanding reasonable-assurance requirements.[31] California has likewise delayed implementation of its greenhouse-gas disclosure statute amidst questions about the law's scope and precise methodology.[32] These developments teach two lessons. First, mandatory climate reporting has proven far more difficult than its architects projected. Second, the reporting frameworks themselves remain in flux. The 2024 Commission bound public companies to a prescriptive climate code just as that instability was becoming undeniable. The current Commission is right not to preserve it.

The Commission should now correct those errors through full rescission.[33]

I. The Climate Rule Exceeds The Commission's Statutory Authority.

The Chamber agrees with the Commission's careful analysis of the statutory limits on its authority. Congress authorized the SEC to require disclosures tied to registrants' business and financial condition and to information material to investment and voting decisions.[34] Contrary to some commenters' claims,[35] it did not authorize the Commission to create a climate-reporting code for the public-company market. The Chamber is submitting with this comment its joint opening and reply briefs challenging the 2024 rule, incorporating by reference the statutory and constitutional arguments presented in those briefs.[36] Those arguments confirm what the proposal recognizes: the federal securities laws do not authorize the Commission to impose a sweeping, prescriptive, climate-specific disclosure regime of this kind.[37] The Commission should therefore rescind the climate rule in full.

The Commission cannot become a climate regulator by relying on general statutory language authorizing disclosure that is "necessary or appropriate in the public interest or for

[30] Directive (EU) 2025/794, recitals 1–4.

[31] Directive (EU) 2026/470, recitals 1–4, arts. 1–4.

[32] EY, Technical Line: A Closer Look At California's Climate Disclosure Laws, No. 2023-07, at 3–5 (Apr. 2, 2026), https://www.ey.com/content/dam/ey-unified-site/ey-com/en-us/technical/accountinglink/documents/ey-tl21228-231us-04-02-2026.pdf

[33] *See* pp. 34–36, *infra*.

[34] Proposing Release, 91 Fed. Reg. at 33,300.

[35] *See* John C. Coates et al., Comment Letter Regarding File No. S7-2026-19, at 3–5 (June 30, 2026), https://www.sec.gov/comments/S7-2026-19/s7202619-912279-2794556.pdf ("Coates Comment Letter").

[36] *See* Petitioners' Final Joint Opening Brief, *supra* note 3, at 47–67; Petitioners' Final Joint Reply Brief at 22–32, *Chamber of Commerce of U.S. v. SEC*, No. 24-1628 (8th Cir. Oct. 1, 2024), ECF No. 5441554.

[37] Proposing Release, 91 Fed. Reg. at 33,304.

the protection of investors."[38] That language is not, as some have argued,[39] an open-ended power to require any information that some investors, advocacy groups, intermediaries, or other market participants may happen to want.[40] It appears in statutory provisions focused on securities, issuers, financial statements, business descriptions, material contracts, and information bearing on the value of an investment.[41] Read in context, those provisions authorize disclosure of information of the same general character: information about the registrant's business and financial condition that is material to investors' investment or voting decisions.[42]

The climate rule departed from that framework. It required a dedicated climate-disclosure regime covering governance, strategy, risk management, emissions, assurance, targets and goals, transition plans, scenario analysis, internal carbon prices, offsets, renewable energy certificates or credits, and climate-related financial-statement effects.[43] That regime was not a neutral application of traditional materiality principles as some commenters have claimed.[44] It singled out climate, elevated it above other risks, and compelled disclosures because the subject was a topic at the forefront of public discourse, not because the required information was material to investment or voting decisions.[45]

The securities laws do not permit the Commission to convert investor protection into a mandate to satisfy any conceivable informational demand. Investors may want many kinds of information for many reasons.[46] But the Commission's statutory objective is to protect investors by requiring disclosure of material information in order to prohibit fraud and

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[38] 15 U.S.C. § 77g(a)(1).

[39] Coates Comment Letter at 6–7.

[40] *Cf. American Meat Institute v. Department of Agriculture*, 760 F.3d 18, 31–32 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("[I]t 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. . . . [G]overnments (federal, state, and local) would love to have such a free pass to spread their preferred messages on the backs of others. . . . [S]ome consumers might want to know whether their U.S.-made product was made by U.S. citizens and not by illegal immigrants. Some consumers might want to know whether a doctor has ever performed an abortion. Some consumers might want to know the political affiliation of a business's owners. These are not far-fetched hypotheticals, particularly at the state or local level. Do such consumer desires suffice to justify compelled commercial disclosures of such information on a product or in an advertisement? I think not, and history and tradition provide no support for that kind of free-wheeling government power to mandate compelled commercial disclosures.").

[41] *See* 15 U.S.C. §§ 77g(a)(1), 77aa, 78l(b)(1), 78m(a).

[42] 81 Fed. Reg. at 23,921.

[43] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,668, 21,671–73, 21,678–21,684, 21,692–21,699, 21,777–21,806.

[44] Coates Comment Letter at 7–9.

[45] *See* 2024 Uyeda Dissent, *supra* note 8.

[46] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976).

misleading statements.[47] It is not to socialize the cost of specialized climate information across all public companies and their shareholders.[48]

Congress knows how to require nontraditional disclosure when it chooses to do so. It has expressly directed the Commission to adopt particular disclosure regimes outside the ordinary financial-disclosure framework, including disclosures concerning conflict minerals.[49] Congress has not done that here, nor has it assigned climate regulation to the SEC. To the extent Congress has authorized federal regulation of greenhouse-gas emissions and climate-related environmental matters, it has done so through environmental statutes administered by agencies that have environmental expertise, unlike the SEC.[50] The Commission cannot use residual disclosure language in the securities laws to assume that role.

The history of environmental disclosure confirms the point. The Commission has long recognized that "[i]f environmental . . . information is material to investors, the Commission's rules already require disclosure."[51] And when the Commission considered broader environmental-disclosure mandates in the 1970s, it rejected them because the securities laws do not authorize disclosure for the purpose of promoting social goals unrelated to investment decisions.[52] The climate rule broke from that settled understanding; rescission would restore it.

The conclusion that Congress did not authorize the climate rule does not depend on the major-questions doctrine. The text, structure, history, and settled purpose of the securities laws are sufficient to show that Congress did not authorize the Commission to create a prescriptive climate-reporting code for the public-company market. In rescinding the rule, the Commission should be clear that it would do so even in the absence of the major-questions doctrine. That doctrine does, however, independently confirm that Congress did not authorize the climate rule through general disclosure provisions.[53] Contrary to the arguments of some commenters,[54] the rule imposed a sweeping climate-specific regime on a significant portion of the American

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[47] H.R. Rep. No. 73-85, at *2 (1933), 1933 WL 983; *see also* 81 Fed. Reg. at 23,924 ("materiality" is the "cornerstone" of the "securities laws").

[48] *Cf.* Ann M. Lipton, *Not Everything Is About Investors*, 37 Yale Journal on Regulation 499, 572 (2020) (advocating a new "system of corporate transparency . . . [r]ather than warp[ing] the securities laws to serve purposes for which they were never intended").

[49] *See, e.g.*, 15 U.S.C. § 78m(p) (directing the Commission to require companies to disclose the use of "conflict minerals"); *see also Nat'l Assn. of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (holding unconstitutional the requirement that issuers state in SEC reports and on their websites that products had "not been found to be 'DRC conflict free'").

[50] *See* 42 U.S.C. § 7414(a)(1); *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

[51] Opening Brief of Securities and Exchange Commission at 2, *NRDC v. SEC*, No. 77-1761 (D.C. Cir. Oct. 1977).

[52] 40 Fed. Reg. 51,656, 51,660 (Nov. 6, 1975).

[53] *See generally West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022).

[54] Coates Comment Letter at 9–11.

economy,[55] carried multibillion-dollar compliance consequences,[56] and addressed one of the most politically fraught public policy issues of the day.[57] The Commission cannot find authority for that regime in residual phrases such as "other information" or "necessary or appropriate." The Supreme Court has rejected agency efforts to discover transformative regulatory power in modest, ancillary, or catchall language.[58] If Congress intended to give the SEC authority to regulate climate policy through public-company filings, it would have spoken clearly.[59] It did not.

The rule also raised serious First Amendment concerns. It would compel companies to speak on climate change, a matter of contested public concern,[60] and require them to make judgment-laden disclosures about climate-related risks, governance, transition planning, targets, assumptions, and financial effects.[61] Those disclosures were not merely ministerial facts appended to commercial advertising.[62] They would require companies to make predictions, frame their business activities through a climate-specific lens, and speak on a subject many companies may prefer not to address.[63]

At minimum, constitutional avoidance counsels against reading the securities laws to authorize that result.[64] The Commission need not (and should not) adopt a strained interpretation of its disclosure authority that would raise grave constitutional questions. The

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[55] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,831.

[56] *See id.* at 21,896, 21,908.

[57] *See Janus v. AFSCME*, 585 U.S. 878, 913–14 (2018).

[58] *See, e.g.*, *Alabama Association of Realtors v. Department of Health & Human Services*, 594 U.S. 758, 761 (2021) (per curiam).

[59] *West Virginia*, 597 U.S. at 732.

[60] *See Janus*, 585 U.S. at 913–14.

[61] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,674–75 (summarizing required disclosures concerning climate-related risks, transition plans, scenario analysis, internal carbon prices, governance, risk management, targets and goals, GHG emissions, and financial-statement effects); *id.* at 21,713, 21,716 (requiring disclosure concerning board and management oversight of climate-related risks); *id.* at 21,724 (requiring disclosure concerning climate-related targets and goals, progress toward those targets or goals, and related impacts on business, results of operations, financial condition, expenditures, estimates, and assumptions); *id.* at 21,776 (recognizing that disclosures concerning transition plans, scenario analysis, internal carbon pricing, and targets and goals are likely to involve a "complex mixture of estimates and assumptions" and "assumptions, judgments, and predictions about future events"); *id.* at 21,913 (requiring financial-statement-effect disclosures to include contextual information describing "significant inputs and assumptions used" and "significant judgments made").

[62] *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985) (addressing a requirement that an attorney's advertisement disclose a client's potential liability for litigation costs).

[63] *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (the freedom of speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid").

[64] *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 578 (1988).

better reading is the straightforward one: the securities laws authorize the Commission to require disclosure of material financial information for investors, not to compel climate-policy speech.

For these reasons, the Commission should conclude that the climate rule exceeded its statutory authority. That conclusion alone supports full rescission.

II. The Climate Rule Was Not The Product Of Reasoned Decision-making.

The Chamber also agrees with the Commission's sound policy judgment. The proposal correctly recognizes that the 2024 rule was unnecessary, inconsistent with a registrant-specific and materiality-based disclosure framework, and unjustified by the costs it would impose. That analysis is an independent basis for rescission. Even if the Commission had authority to adopt some climate-related disclosure requirements, it was not free to impose a sweeping, prescriptive, and extraordinarily costly climate-disclosure regime without demonstrating a real failure in the existing securities-disclosure framework. The 2024 adopting release did not make that showing. As the Chamber explained in its opening and reply briefs challenging the rule, which it submits with this comment, the release assumed a problem the record did not prove,[65] credited benefits the record did not substantiate,[66] and discounted costs the record showed would be substantial.[67]

The current record confirms that rescission is the right course. Existing SEC rules already require disclosure of climate-related risks and financial impacts when material.[68] Public companies already provide climate-related information where it is material, and many voluntarily provide additional information.[69] And developments since adoption of the rule further demonstrate that its asserted marginal benefits were overstated,[70] while the burdens it would impose are real and growing.[71] The Commission can and should conclude that the climate rule is a costly solution to an unproven problem. That judgment, wholly independent of the Commission's statutory-authority analysis, fully supports rescinding the rule in its entirety.[72]

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[65] *See* Petitioners' Final Joint Opening Brief, *supra* note 3, at 20–33; Petitioners' Final Joint Reply Brief, *supra* note 36, at 5–13.

[66] *See* Petitioners' Final Joint Opening Brief, *supra* note 3, at 33–37; Petitioners' Final Joint Reply Brief, *supra* note 36, at 13–16.

[67] *See* Petitioners' Final Joint Opening Brief, *supra* note 3, at 38–44; Petitioners' Final Joint Reply Brief, *supra* note 36, at 16–21.

[68] *See* pp. 13–16, *infra*.

[69] *See* pp. 11–12, 16–18, *infra*.

[70] *See* pp. 18–28, *infra*.

[71] *See* pp. 28–34, *infra*.

[72] *See New York Stock Exchange LLC v. SEC*, 962 F.3d 541, 556–57 (D.C. Cir. 2020) ("Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address.").

A. The Climate Rule Purports To Address A Problem That Does Not Exist.

The Commission found no investor harm for the climate rule to remedy. It identified no investor loss, no body of investor complaints, no enforcement gap, no litigation record, and no category of material climate-related information that existing rules failed to capture. That is the threshold failure. The arbitrary-and-capricious standard of the Administrative Procedure Act[73] requires an agency to ground a change in settled policy in the rulemaking record, and courts apply a "presumption . . . *against* changes in current policy that are not justified by the rulemaking record."[74] The 2024 adopting release did not overcome that presumption, rather, it replaced the existing materiality-based disclosure regime with a sweeping climate-specific mandate without showing that the existing regime was failing investors.

1. The Record Shows No Investor Harm Or Enforcement Gap.

The final release should state plainly that there is no evidence of investor harm that would warrant the 2024 climate rule. The 2024 adopting release identified[75] no investor harmed by the absence of the mandated disclosures, no quantified loss the rule would have prevented, no body of complaints showing a systemic climate-disclosure failure, no enforcement gap in the existing disclosure or antifraud framework, and no category of material climate-related information that registrants were systematically withholding from investors. As then-Judge Kavanaugh explained, "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision-making."[76]

The Commission's enforcement experience confirms the absence of a disclosure gap. The Commission created a Climate and ESG Task Force specifically to identify material gaps or misstatements in issuers' climate-risk disclosures under existing rules.[77] If registrants were systematically concealing material climate risks, that effort by the Task Force should have produced a record of such failures.[78] It did not. The cases that the Commission brought involved

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[73] *See* 5 U.S.C. § 706(2)(A).

[74] *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983).

[75] *See* Final Consolidated Brief for Respondent Securities and Exchange Commission at 66, *Chamber of Commerce of U.S. v. SEC*, No. 24-1628 (8th Cir. Oct. 1, 2024), ECF No. 5441523 (acknowledging that the climate rule is "not" intended to "serve . . . antifrau[d] goals").

[76] *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Kavanaugh, J.).

[77] *See* SEC, Press Release No. 2021-42, SEC Announces Enforcement Task Force Focused On Climate And ESG Issues (Mar. 4, 2021), https://www.sec.gov/newsroom/press-releases/2021-42 (announcing creation of Climate and ESG Task Force within the Division of Enforcement, with 22 members, and stating that its "initial focus" would be to identify "material gaps or misstatements in issuers' disclosure of climate risks under existing rules" and that it would also analyze "disclosure and compliance issues relating to investment advisers' and funds' ESG strategies").

[78] *Cf. National Fuel Gas Supply Corp.*, 468 F.3d at 844 ("If abuse arising from the relationship between pipelines and *non-marketing* affiliates were . . . rampant, FERC likely would have been inundated with complaints . . . .")

ESG-labeled investment products or affirmative misstatements addressed under existing antifraud and reporting provisions.[79] After more than three years, the Commission under the prior Administration disbanded the task force.[80] That record confirms that the Commission's existing antifraud and reporting tools are sufficient to reach material climate-related omissions and misstatements.

Private litigation confirms the same point. The record still does not show a body of securities cases premised on registrants' failure to disclose material climate-related risks under existing requirements. The climate-related securities suits that have been brought generally involve alleged affirmative misstatements—purportedly overstated environmental claims followed by an alleged corrective disclosure—and are litigated under the existing antifraud provisions, including Exchange Act Section 10(b) and Rule 10b-5.[81] Those cases prove the opposite of what the rule assumed: existing law already reaches material climate-related misstatements. Further, even in those cases, plaintiffs have struggled to show that the alleged misstatements affected stock prices, undermining the premise that investors were suffering harm requiring a new climate-disclosure regime.[82]

2. Existing Rules Confirm There Is No Disclosure Gap To Fill.

Existing rules already require disclosure of material financial information, and environmental or climate information—when truly material to investors—is already encompassed by those requirements. The Commission has said for decades that material environmental information is already required. In 1976, it rejected broader environmental-disclosure mandates because, "[i]f environmental . . . information is material to investors, the

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[79] *See, e.g.*, *In re BNY Mellon Inv. Adviser, Inc.*, Investment Advisers Act Release No. 6032, Investment Company Act Release No. 34591, Admin. Proc. File No. 3-20867 (May 23, 2022) (ESG-process misstatements concerning mutual funds); *In re Goldman Sachs Asset Mgmt., L.P.*, Investment Advisers Act Release No. 6189, Admin. Proc. File No. 3-21245 (Nov. 22, 2022) (policies-and-procedures violations involving ESG investment products); *In re DWS Inv. Mgmt. Americas, Inc.*, Investment Advisers Act Release No. 6432, Admin. Proc. File No. 3-21709 (Sept. 25, 2023) (misstatements regarding ESG integrated mutual funds and separately managed account strategies); *SEC v. Vale S.A.*, No. 1:22-cv-02405 (E.D.N.Y. filed Apr. 28, 2022) (affirmative false and misleading statements regarding dam safety in sustainability disclosures and public filings); *In re Keurig Dr Pepper Inc.*, Exchange Act Release No. 100983, Admin. Proc. File No. 3-22100 (Sept. 10, 2024) (inaccurate recyclability statements in annual reports).

[80] Andrew Ramonas, SEC Abandons ESG Enforcement Group Amid Broader Backlash, Bloomberg Law (Sept. 12, 2024), https://news.bloomberglaw.com/esg/sec-quietly-dissolves-climate-and-esg-enforcement-task-force.

[81] *See, e.g.*, *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111-K, 2023 WL 5415315, at *5 (N.D. Tex. Aug. 21, 2023) (describing claims under Exchange Act Section 10(b) and Rule 10b-5 based in part on alleged misstatements regarding Exxon's proxy cost of carbon); *Fanucchi v. Enviva Inc.*, No. 8:23-cv-01647, 2024 WL 3302564 (D. Md. July 3, 2024) (dismissing securities claims alleging that officers misled ESG-focused investors about the environmental sustainability of wood-pellet products); *In re Danimer Scientific, Inc. Securities Litigation*, No. 21-cv-02708, 2023 WL 6385642, at *4 (E.D.N.Y. Sept. 30, 2023) (addressing Section 10(b) claims based on allegedly misleading biodegradability statements).

[82] *See Ramirez*, 2023 WL 5415315, at *19 (finding no evidence that the market connected certain alleged corrective disclosures to the carbon-proxy-cost theory and no statistically significant negative price impact from disclosures explicitly concerning Exxon's use of carbon proxy costs).

Commission's rules already require the disclosure of such information."[83] It has likewise recognized that registrants must disclose information "not otherwise specifically required, of which the average prudent investor ought reasonably to be informed," including "information concerning environmental compliance, impact, expenditures, plans, or violations."[84] The 2010 climate guidance confirmed the same point: existing rules governing the description of business, legal proceedings, risk factors, MD&A, and financial statements already require climate-related disclosure when climate matters are material.[85] The 2024 adopting release itself "agree[d] with . . . commenters who asserted that registrants are already required to disclose the financial statement effect of material climate risks under existing rules."[86]

That should have ended the matter. If a specific piece of climate-related information is material, existing rules already require it. If it is not material, the Commission's longstanding disclosure policy cuts the other way: immaterial information should not be forced into SEC filings. The Commission has repeatedly warned that excessive immaterial disclosures obscure important information and burden investors rather than protect them.[87]

The 2024 rule contravened the Commission's longstanding policy against requiring immaterial disclosure in five related ways.

First, it made climate governance a prescribed disclosure topic. Existing disclosure and antifraud rules already require governance-related information when it is material or necessary to make other statements not misleading.[88] The climate rule went further. It required registrants to describe climate-specific board oversight: the board's oversight of climate-related risks, any board committee or subcommittee responsible for that oversight, the processes by which the board or committee is informed about those risks, and whether and how the board oversees progress against disclosed climate targets, goals, or transition plans.[89] Those disclosures made board processes a mandatory SEC filing topic because the subject was climate change, not because the information was material to a reasonable investor.

Second, the rule substituted mechanical climate thresholds for materiality in the financial statements. The rule required registrants to identify and disclose certain severe-

[83] Opening Brief of Securities and Exchange Commission, *supra* note 51, at 2.

[84] 41 Fed. Reg. 21,632, 21,635 (May 27, 1976).

[85] 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010).

[86] 2024 Adopting Release, 89 Fed. Reg. at 21,797.

[87] *See, e.g.*, 81 Fed. Reg. 23,916, 23,919 (Apr. 22, 2016) ("high levels of immaterial disclosure can obscure important information"); 84 Fed. Reg. 44,358, 44,383 (Aug. 23, 2019) ("amendments may reduce search costs for certain investors by eliminating information that is not material"); *see also* FAST Act, Pub. L. No. 114-94, § 72003, 129 Stat. 1312, 1785 (2015) (directing Commission to "explore methods for discouraging . . . disclosure of immaterial information").

[88] *See* 17 C.F.R. §§ 229.407(h), 240.12b-20; *see also* Proposing Release, 91 Fed. Reg. at 33,305 & nn.116–18 (discussing existing environmental and board-risk-oversight disclosure requirements).

[89] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,915–16.

weather and other natural-condition effects using mechanical thresholds, rather than traditional materiality.[90] For example, a registrant with billions of dollars in revenue but $12 million in pretax income in a particular year could be required to disclose $150,000 in severe-weather-related expenses because that amount exceeds both the rule's $100,000 *de minimis* threshold and one percent of pretax income.[91] To make that disclosure, the registrant would have to identify the expense, determine whether the severe weather event or natural condition was a significant contributing factor, track the amount through its accounting systems, disclose where it appears in the income statement, provide contextual information, and subject the disclosure to audit—even though $150,000 may be immaterial to the company's financial condition, results of operations, or enterprise value. That is not materiality. It is a climate-specific reporting threshold substituted for materiality. Worse, a registrant could spend several times the amount disclosed merely to build the systems and controls needed to identify and report it.

Third, the rule used internal-company triggers that are not the same as investor materiality. Existing law already requires disclosure if matters would be material to investors or if statements about them would otherwise be misleading.[92] The climate rule instead used climate-specific triggers and, in several places, a different kind of "materiality." It required disclosure when an internal carbon price was "material" to how the company evaluated and managed a climate-related risk, when offsets or renewable energy certificates or credits were a "material" component of a plan to achieve a disclosed climate target or goal, and when financial-statement estimates or assumptions were "materially" affected by severe weather events, natural conditions, targets, or transition plans.[93] However, those tests ask whether information is important to a subordinate company plan, segment, methodology, estimate, assumption, or risk-management process, not whether the information actually rises to the level of materiality under the reasonable-investor standard.

Fourth, the rule used the "reasonably likely" standard as a gateway to a climate-specific reporting regime.[94] The "reasonably likely" standard is broader than traditional materiality—the Commission has long acknowledged that it is not the materiality test the Supreme Court

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[90] *See id.* at 21,675, 21,794–96, 21,799–803, 21,912–13.

[91] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,793–95 (explaining that Article 14 retained a one-percent disclosure threshold for capitalized costs, expenditures expensed, charges, and losses incurred as a result of severe weather events and other natural conditions, with de minimis thresholds of $100,000 for income-statement amounts and $500,000 for balance-sheet amounts); *id.* at 21,795 (requiring disclosure of expenditures expensed as incurred and losses if the aggregate amount equals or exceeds one percent of the absolute value of income or loss before income tax expense or benefit).

[92] *See* pp. 10–13, *supra*.

[93] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,674–75, 21,703–04, 21,707, 21,710–12, 21,720–24, 21,776, 21,916–17.

[94] 2024 Adopting Release, 89 Fed. Reg. at 21,695.

approved.[95] The result is disclosure unmoored from investor materiality: a broadened trigger multiplied across a sprawling set of prescribed line items, compelling registrants to surface speculative, contingent climate matters that may never materialize and that a reasonable investor would not consider important in deciding how to invest or vote—while exposing companies to hindsight-based second-guessing over predictions that do not come to pass.

Fifth, the governance provisions created a bootstrapping problem. The rule required companies to describe board oversight of climate-related risks,[96] and the Commission acknowledged that this requirement could prompt companies to consider climate issues at a level where they otherwise would not.[97] The Commission then stated that "any risks elevated to the board level will be material to the company."[98] The rule thus pressured companies to create board-level climate processes and then treated the existence of those processes as a basis for mandatory climate disclosure.[99] Board attention may reflect prudence, regulatory uncertainty, stakeholder pressure, reputational sensitivity, voluntary commitments, or ordinary business planning. It does not, by itself, mean that the underlying issue belongs in an SEC filing.

The common defect is that each provision used climate as the disclosure trigger. Sometimes the rule did so directly, by prescribing climate-specific governance disclosures. Sometimes it did so indirectly, by using mechanical thresholds, internal planning triggers, a broader "reasonably likely" standard, or board-level attention as substitutes for ordinary investor materiality, but the result was the same: the rule made disclosure turn on the subject matter, climate, rather than on whether the information was material to investors.

That is not how SEC disclosure is supposed to work. The securities laws require disclosure of material information, not mandatory reporting by favored (or disfavored) subject matter. The climate rule either duplicated information that existing law already requires or compelled information that existing law correctly leaves out. The first adds nothing; the second violates the Commission's longstanding policy against immaterial disclosure. Both points support the same conclusion: there was no gap for the rule to fill, and rescission properly restores the Commission's longstanding materiality-based framework.

3. Investors Who Value Climate Information Can Obtain It Without Forcing All Shareholders To Subsidize It.

Even where some investors value climate-related information beyond what materiality requires, that demand does not justify a market-wide mandate. The securities laws protect the

[95] *See* 54 Fed. Reg. 22,427, 22,430 n.27 (May 24, 1989) (acknowledging that the "reasonably likely" standard is *not* the "test for materiality approved by the Supreme Court"); *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046, 1055 (9th Cir. 2014) (the "reasonably likely" standard is "much broader" than the traditional test for materiality).

[96] *See supra* note 89 and accompanying text.

[97] *See id.* at 21,856.

[98] *Id.* at 21,713.

[99] *See* Petitioners' Final Joint Opening Brief, *supra* note 3, at 36–37.

reasonable investor, not every investment strategy. As the proposal recognizes, "[i]nvestors are not monolithic and have differing risk appetites, investment strategies, and analytical methods—and in some cases non-financial interests—that affect their particular investment decisions," and "the Commission should not seek to cater to the specific informational needs of every subset of investors about each emergent topic."[100] The governing question is "whether the reasonable investor would consider the information important in buying or selling securities."[101] Demand from a subset of investors, particularly investors pursuing objectives other than financial return, is not a substitute for a showing of materiality.

Nor does rescission leave climate-focused investors without access to the additional climate information they seek. The market already supplies it. Voluntary climate and sustainability reporting is near-universal among large issuers—99% of the S&P 500 and 94% of the Russell 1000 reported on sustainability for fiscal 2024.[102] A robust private market of climate-data providers, ratings firms, and reporting frameworks—CDP, MSCI, Sustainalytics, ISS, and others—aggregates and sells this information to the investors and intermediaries who demand it.[103] And registrants that wish to attract climate-focused capital remain free to disclose; as the proposal puts it, "individual registrants may want to attract climate-focused investors and choose to provide additional information," and "[t]hey should be free to do so."[104] Investors who want this information can obtain it through engagement, voluntary disclosure, and the data market that already exists to serve them.

The climate rule also inverted the proper allocation of costs.[105] It required issuers—and therefore all shareholders—to fund the production of specialized climate information that is valuable, principally to a subset of investors pursuing climate-focused strategies or other particularized objectives. The Commission has now correctly identified the problem with that approach: it is not "appropriate to burden all shareholders of almost all public companies with

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[100] Proposing Release, 91 Fed. Reg. at 33,310.

[101] *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

[102] *See* Governance & Accountability Inst., 2025 Sustainability Reporting in Focus, https://ga-institute.com/research/reporting-trends/2025-sustainability-reporting-in-focus/.

[103] *See* Proposing Release, 91 Fed. Reg. at 33,333–34 (explaining that ESG data providers, climate analytics firms, environmental consulting firms, and other professional advisory services "process and analyze corporate disclosures to produce research reports, ratings, or datasets" used by other affected parties, and that firms providing emissions accounting tools, climate-risk modeling, ESG analytics, and environmental consulting were expected to benefit from increased demand for climate-related data and analytics); 2024 Adopting Release, 89 Fed. Reg. at 21,843 (stating that "[m]ultiple third-party reporting frameworks and data providers have emerged over the years to facilitate and encourage the reporting of climate-related information by companies"); *see also* CDP, Use CDP Data, https://www.cdp.net/en/data; MSCI, Climate Solutions, https://www.msci.com/data-and-analytics/climate-solutions; Morningstar Sustainalytics, Climate Solutions Resource Center, https://www.sustainalytics.com/esg-research/climate-solutions-resource-center; ISS STOXX, Climate & Nature Analytics, https://www.iss-stoxx.com/data-analytics/climate-nature-analytics/.

[104] Proposing Release, 91 Fed. Reg. at 33,312.

[105] *See generally* Ronald H. Coase, *The Problem Of Social Cost*, 3 J.L. & Econ. 1 (1960); George J. Stigler, *The Economics Of Information*, 69 J. Pol. Econ. 213 (1961).

the high costs of the [climate rule] in order to subsidize the informational demands of certain investors who choose to focus their investment strategies on climate-related matters or who have interests other than the pursuit of a financial return."[106] That is a cross-subsidy, not investor protection. Investors "bear all sorts of costs to search for and verify information based on their chosen strategy."[107] But "the entire market should not be forced to bear the costs of providing more particularized information than what the reasonable investor needs for an investment decision."[108] "Market-based solutions to demands for particular information are more appropriate."[109] Rescission restores that allocation: it shifts the cost of producing climate information from issuers—and thus from all shareholders—to the investors who actually want it.

Nor is issuer-level mandatory disclosure necessarily the lowest-cost way to produce the information. The 2024 adopting release assumed that issuers are the least-cost producers of climate information because they possess internal company data, but the climate rule did not merely ask issuers to transmit information they already had in usable form. It required registrants to create SEC-filing-grade systems, controls, documentation, legal review, audit trails, XBRL tagging, and, for some disclosures, assurance.[110] Those requirements substantially increased the costs for issuers to provide the information.

Most importantly, the assumption ignored comparative advantage. Public companies are generally experts in their own businesses, assets, operations, and financial condition; they are not necessarily the lowest-cost experts in climate science, geospatial modeling, physical-risk analytics, emissions estimation, or transition-risk forecasting. Specialized data providers, consultants, and analytics firms can analyze information already available through public filings, facility-location databases, regulatory records, and other commercial sources—without requiring issuers to create new datasets or build new reporting systems.[111] Because those firms can spread their fixed data and modeling costs across many companies and clients, investors

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,674–75 (summarizing required disclosures under new Regulation S-K subpart 1500 and Regulation S-X Article 14); *id.* at 21,679–80 (explaining that climate-related information included in Commission filings would be subject to disclosure controls and procedures and related filing rigor); *id.* at 21,825–26, 21,870 (requiring Inline XBRL tagging and explaining that tagging would permit automated extraction, aggregation, comparison, filtering, and analysis); *id.* at 21,869–70, 21,913 (explaining that Article 14 disclosures would appear in audited financial-statement notes and require audit procedures); *id.* at 21,759–67, 21,881–82, 21,917–18 (adopting GHG-emissions attestation requirements and discussing assurance costs).

[111] *See, e.g.*, MSCI, GeoSpatial Asset Intelligence, https://www.msci.com/data-and-analytics/climate-solutions/geospatial-asset-intelligence (describing asset-level physical-risk and nature analytics across millions of locations and hundreds of thousands of companies); S&P Global, Physical Risk Dataset, https://www.marketplace.spglobal.com/en/datasets/physical-risk-(148) (describing asset- and company-level physical-risk exposure scores and financial-impact metrics for portfolios, operational assets, and supply chains).

seeking specialized climate analysis can purchase it at lower cost. That is especially true where the information is not material to the reasonable investor but is useful to particular climate-focused strategies. In that setting, market-based production places the cost on the investors who want the analysis, rather than requiring every issuer—and therefore all shareholders—to build parallel climate-reporting infrastructure within the SEC filing system.

B. The Asserted Benefits Of The 2024 Rule Do Not Withstand Scrutiny.

The asserted benefits of the climate rule do not support retaining it. The 2024 adopting release treated investor interest in climate information and a body of academic literature as proof that a prescriptive, all-registrant mandate would improve decision-making, reduce information asymmetry, lower search costs, improve comparability, and reduce the cost of capital.[112] That inference does not follow.

The cited literature does not show that existing rules fail to elicit material climate information, that standardized climate disclosures would produce reliable or comparable information, or that any incremental benefits would justify the rule's substantial costs. At most, it shows that climate information may matter in particular settings, for particular companies, industries, or investors. That is not enough to justify a prescriptive market-wide mandate. The Commission must determine whether the rule's asserted benefits are real, incremental, and sufficient to justify its costs. The 2024 record did not make that showing, and nothing since has.

1. Demand From A Subset Of Investors Does Not Establish A Disclosure Gap.

The 2024 adopting release treated existing climate disclosure as a market failure because a subset of investors wanted more standardized climate information. Its premise was that, absent a new SEC mandate, registrants would underproduce the information those investors sought, investors would incur excessive search and processing costs, and markets would misprice climate risk.[113] But demand from some investors did not establish that the existing disclosure regime was failing the market as a whole, nor did it justify requiring every public company—and all of its shareholders—to bear the cost of producing that information. The record did not support that conclusion.

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[112] *See, e.g.*, 2024 Adopting Release, 89 Fed. Reg. at 21,849–50 (stating that inclusion of climate disclosure in Commission filings would reduce search costs and improve reliability, and citing academic literature on disclosure, information asymmetry, liquidity, and cost of capital).

[113] *See id.* at 21,669–70 (asserting that existing climate-related disclosure was inconsistent, difficult to find, and difficult to compare); *id.* at 21,680 (stating that voluntary climate reporting was lacking in quality and completeness and that investors incurred costs and inefficiencies); *id.* at 21,842–43 (stating that standardized disclosure would mitigate investor challenges, reduce information asymmetry, lower risk premia and cost of capital, improve liquidity, promote efficient capital allocation, and support capital formation); *id.* at 21,849–50 (discussing search costs, information asymmetry, liquidity, and cost-of-capital literature); *id.* at 21,899–900 (discussing asserted market inefficiencies and pricing of climate-related risks).

In truth, the market evidence pointed the other way. Voluntary climate disclosure was already widespread and growing when the rule was adopted,[114] and the latest available data show that growth continued.[115] That is not what one would expect if the market were failing to supply information investors value. It is what basic disclosure economics predicts; when investors value information and companies benefit from providing it, companies have incentives to disclose it.[116] The 2024 adopting release's own cited literature did not prove that a mandate was superior to market ordering. Christensen, Hail, and Leuz cautioned that mandatory sustainability reporting is not "a priori" better or cheaper than market-based disclosure, warned of regulatory capture and agency information disadvantages, and described the net effects as uncertain.[117] That caution applies with particular force here, where climate information is salient, issuers already have incentives to disclose value-enhancing information, and private providers already collect, analyze, and sell such information to the investors and intermediaries who want it.

The fact that some investors asked for more climate information did not demonstrate that the climate rule was necessary. The 2024 adopting release relied heavily on comments from institutional investors, asset owners, advisers, and some retail investors who said they wanted more climate information. The final rescission release should address those comments and that record directly.[118] The answer is not that no investor wanted the information. The answer is that investor demand, without more, is not the legal or economic standard for imposing a market-wide disclosure mandate. The securities laws protect the reasonable investor, not every investor's preferred strategy, stewardship objective, or informational

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[114] *See* Governance & Accountability Inst., 2020 Flash Report S&P 500, https://ga-institute.com/research/reporting-trends/2020-flash-report-sp-500/ (documenting that the share of S&P 500 companies publishing sustainability reports rose from approximately 20% in 2011 to roughly 90% by 2019 and has remained near-universal since).

[115] *See* Governance & Accountability Inst., 2025 Sustainability Reporting in Focus, *supra* note 102 (99% of the S&P 500 and 94% of the Russell 1000 published sustainability reports for fiscal year 2024).

[116] *See* Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & Econ. 461 (1981) (a seller with favorable private information about product quality will disclose it, because a buyer rationally interprets nondisclosure as concealment of unfavorable information, so disclosure unravels toward full revelation), *cited with approval in* 2024 Adopting Release, 89 Fed. Reg. at 21,847 n.2734.

[117] *See* Hans B. Christensen, Luzi Hail & Christian Leuz, *Mandatory CSR And Sustainability Reporting: Economic Analysis And Literature Review*, 26 Rev. Acct. Stud. 1176, 1198–99, 1231 (2021) (explaining that mandatory disclosure regimes are costly to design, implement, and enforce; that it is "not a priori obvious" that they would achieve better outcomes or be cheaper than a market solution; that regulators and standard setters can be captured and face substantial information problems because firms are likely better informed about disclosure cost-benefit tradeoffs; and that the net effects of a mandate are largely empirical and under-researched), *cited in* 2024 Adopting Release, 89 Fed. Reg. at 21,849 n.2748.

[118] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,669–73 (discussing investor demand for climate-related information and the Commission's asserted need for enhanced disclosure); *id.* at 21,677–80 (summarizing comments supporting mandatory climate disclosure); *id.* at 21,842–43 (describing affected parties and asserted investor benefits).

appetite.[119] Demand from a subset of investors does not establish that the information is material to the reasonable investor across the registrant population.

The 2024 release also did not adequately distinguish between stated preferences and revealed preferences. Investors who genuinely value climate information beyond materiality already pay to obtain it through the voluntary disclosure and commercial data market described above. The fact that some investors would prefer issuers to produce climate-related information for them in Commission filings is a preference about who bears the cost, not evidence of a market-wide need. The climate rule would have shifted the cost of specialized climate information from the investors who want it to all issuers and all shareholders.

The 2024 adopting release's market-failure theory also has no limiting principle. If generalized investor interest, search costs, and non-uniform disclosure were enough to justify a prescriptive mandate, the Commission could impose line-item regimes for every emerging risk category—geopolitical risk, supply-chain risk, labor risk, cybersecurity risk, artificial intelligence risk, and more.

The 2024 adopting release therefore measured the existing disclosure regime against the informational preferences of climate-focused investors, rather than the needs of the reasonable investor. It asked whether the existing regime enabled investors to evaluate companies using climate-related information that was consistent and comparable. But the reasonable investor does not evaluate potential investments through a side-by-side comparison of their climate records. Instead, the investor considers a company's expected risks and returns as a whole, and compares alternative investments on the same terms. For this reason (among others), the securities laws do not require uniform disclosure on every subject that some investors may find useful. They require disclosure of material information. Measured against that benchmark, the disclosure of material information, the existing regime was working. Climate-related disclosure was concentrated in sectors and companies for which climate issues were more likely to be material.[120] Large issuers were already providing substantial climate information.[121] Companies facing material climate-related risks, regulatory developments, capital expenditures, or financial impacts were already required to disclose them. And the 2024 adopting release identified no investor loss from a material climate omission.

Variation in disclosure is not itself a defect. Under a materiality-based regime, variation is expected. Companies differ by industry, geography, business model, regulatory exposure, capital intensity, supply chain, and physical-risk profile. A utility, an energy producer, a financial institution, a software company, and a retailer do not face the same climate-related risks in the same way. A disclosure regime that produces different disclosures for different companies is not failing. It is doing what materiality requires.

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[119] *See Basic*, 485 U.S. at 231–32, 238; *TSC*, 426 U.S. at 449.

[120] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,669–70, 21,842–43.

[121] *See id.*; Proposing Release, 91 Fed. Reg. at 33,317–27.

The 2024 climate rule treated that variation as a problem to be solved. The Commission should recognize instead that such company-specific variation confirms that the existing regime is appropriately tailored to registrants' circumstances. Investor interest may support voluntary disclosure, private ordering, or commercial data markets. It does not establish a disclosure gap that necessitates Commission-mandated climate disclosures.

2. The Empirical Record Does Not Support A Market-wide Mandate.

The empirical record did not support the 2024 adopting release's conclusion that a market-wide climate-disclosure mandate would provide material, decision-useful information to investors. The release cited asset-pricing and academic literature to support the view that emissions levels, transition risk, or physical climate exposure may be reflected in securities prices or returns,[122] but that premise did not support a new mandate. To the extent markets *already* use existing disclosures, public data, voluntary reporting, and third-party estimates to price material climate-related risks, there is no disclosure gap for the climate rule to close. The 2024 release could not reasonably claim both that climate information is decision-useful because markets price it and that a mandate is necessary because markets lack it.[123]

The "carbon premium" literature illustrates the problem. That literature asks whether investors require higher expected returns to hold shares of companies with higher greenhouse-gas emissions. The theory is that higher-emitting companies may face greater transition risks—such as carbon taxes, regulation, technological change, or reduced demand—and that investors therefore may demand higher returns as compensation for bearing those risks. Of course, on that theory, evidence that higher-emitting companies earn higher returns would not show that emissions information is missing from the market. It would show the opposite: that the market already possesses information that enables it to price perceived carbon risk into securities.

In any event, the evidence did not support the 2024 adopting release's reliance on that theory. The release relied on Bolton and Kacperczyk, who reported that firms with higher emissions earned higher returns and interpreted that result as compensation for carbon-related risk.[124] But subsequent work undermines that inference. Aswani, Raghunandan, and Rajgopal found that the association appears when returns are related to vendor-estimated emissions—estimates that largely reflect firm size and fundamentals—but not when actual emissions are

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[122] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,842–43 (asserting capital-market benefits from standardized climate disclosure); *id.* at 21,849–50 & nn.2743–45 (discussing asset-pricing literature, including Bolton and Kacperczyk and contrary evidence); *id.* at 21,891 & nn.3157–58 (discussing carbon-emissions and physical-risk expected-return literature); *id.* at 21,899–900 (discussing whether climate-related risks are reflected in asset prices).

[123] *Cf. Chamber of Commerce of U.S. v. SEC*, 85 F.4th 760, 778 (5th Cir. 2023) ("The SEC cannot have it both ways. It is illogical for the rule simultaneously to accept and to reject the reasoning underlying the price discovery benefit.").

[124] *See* Patrick Bolton & Marcin Kacperczyk, *Do Investors Care About Carbon Risk?*, 142 J. Fin. Econ. 517 (2021); 2024 Adopting Release, 89 Fed. Reg. at 21,849 & nn.2744–45.

used.[125] Zhang likewise found that the apparent carbon premium depends on a timing problem.[126] Emissions data are released to investors only after substantial delay and are closely tied to contemporaneous sales.[127] Earlier studies therefore risked matching returns with emissions information that investors did not yet have and which reflected the firm's performance during the same period.[128] Once Zhang accounted for when emissions data actually became available and controlled for the sales information embedded in emissions, the positive carbon premium disappeared: carbon-intensive firms underperformed in the United States, and the global return spread was insignificant.[129] That means the prior "carbon premium" evidence does not show a stable expected-return premium for carbon risk. Instead, it largely reflects ordinary firm-performance information already available through financial and industry data.

The record's event-study evidence points in the same direction. Event studies are a standard way to test whether a disclosure conveys information that investors treat as important.[130] A stock-price reaction indicates that investors updated their valuation of the company. A trading-volume reaction can indicate that investors viewed the information as important enough to trade on, even if the market did not move uniformly in one direction. The absence of both forms of reaction is therefore probative evidence that the disclosed information did not contain new information that was, on average, material for investors.

In comments on the proposed climate rule, Dr. Daniel Taylor submitted a study that tested that question directly. He examined Forms 8-K filed between January 2021 and March 2022 that disclosed greenhouse-gas emissions.[131] Those were highly visible SEC filings, so if greenhouse-gas emissions disclosures ordinarily conveyed materially new information to investors, one would expect to observe some statistically significant reaction in stock price,

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[125] *See* Jitendra Aswani, Aneesh Raghunandan & Shiva Rajgopal, *Are Carbon Emissions Associated With Stock Returns?*, 28 Rev. Fin. 75 (2024).

[126] Shaojun Zhang, *Carbon Returns Across The Globe*, 80 J. Fin. 615 (2025).

[127] *See id.* at 615–16, 622–26 (explaining that emissions data are available to investors only with significant lags; reporting median release lags of 10 months in the United States and 12 months internationally).

[128] *See id.* at 622–23, 634–38 (explaining that lags used in prior carbon-return studies can introduce forward-looking bias; that Bolton and Kacperczyk, *supra* note 124, related stock returns to emissions before the actual release of emissions and accounting information for the emitting period; and that the resulting analysis was effectively contemporaneous).

[129] *See id.* at 627–30, 633–38, 643 (finding that carbon-intensive firms underperformed less carbon-intensive firms in the United States; that global carbon-return spreads were statistically insignificant; that the positive relation between returns and contemporaneous emissions disappears after controlling for sales information; and concluding that the previously documented carbon premium stems from forward-looking bias rather than a true ex ante carbon-risk premium).

[130] *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 280 (2014) (discussing event-study evidence in securities cases); Daniel J. Taylor, Comment Letter Regarding File No. S7-10-22, at i–ii, 3–7 (June 2022). ("Taylor Comment Letter").

[131] Taylor Comment Letter, *supra* note 130, at i–ii, 3–7.

trading volume, or both.[132] Dr. Taylor found no statistically significant stock-price or trading-volume response.[133] In ordinary securities-law terms, that finding indicates that, on average, investors did not update their views of firm value in response to the disclosed GHG-emissions information.

That evidence is especially important because it addressed the relevant disclosure category directly. Much of the literature invoked by the 2024 adopting release relied on more attenuated proxies, including ESG ratings, vendor-estimated emissions, non-U.S. regimes, or studies of voluntary sustainability reporting.[134] Dr. Taylor's study instead examined actual company disclosures of GHG emissions in Commission filings.[135] It therefore bore directly on the 2024 release's asserted premise that mandatory emissions disclosure would provide material, decision-useful information to investors.

The record also showed that the emissions mandate would add limited incremental information to what investors already could determine from public-company data. Dr. Taylor explained that approximately 90 percent of variation in GHG emissions can be explained by observable company characteristics, including industry, size, sales growth, earnings growth, property, plant, and equipment, capital expenditures, and profitability.[136] That evidence directly undermined the 2024 adopting release's incremental-benefits theory. If emissions levels can largely be predicted from ordinary, publicly available information, mandatory emissions disclosure is unlikely to produce substantial new information for investors on average.

In sum, the record did not support the 2024 Commission's premise that emissions disclosures are generally material across the issuer population or that a broad emissions-disclosure mandate would generate capital-market benefits sufficient to justify its costs. The empirical evidence was contested, attenuated, and, in the case of direct GHG-disclosure evidence, negative.

3. Standardization Would Not Produce Comparable Or Reliable Information Of Value To The Reasonable Investor.

The 2024 adopting release overstated the rule's purported comparability and reliability benefits because standardized forms do not make judgment-laden climate inputs comparable. The release asserted that the climate rule would make climate disclosures more consistent, comparable, and reliable.[137] But climate disclosures depend on variable assumptions,

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[132] *Id.*

[133] *Id.*

[134] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,849–50 & nn.2743–75, 21,891 & nn.3157–58.

[135] *See* Taylor Comment Letter, *supra* note 130, at i–ii, 3–7.

[136] Taylor Comment Letter, *supra* note 130, at 6–7 (June 2022).

[137] *See* 2024 Adopting Release, 89 Fed. Reg. at 21,669–70 (asserting current climate disclosure was inconsistent, difficult to find, and difficult to compare); *id.* at 21,677–80 (discussing comments and the Commission's claimed

methodologies, organizational boundaries, time horizons, emissions factors, estimation techniques, scenario assumptions, and judgments about attribution.[138] Two companies could report climate-related information under the same SEC line item while using different organizational boundaries, operational boundaries, calculation approaches, emissions factors, assumptions, and tools. Standardized presentation may make those disclosures look comparable; it does not make the underlying inputs comparable.

Comparable climate metrics also are not necessarily decision-useful. Investors do not value companies by comparing one climate number against the same climate number at another company in isolation. They value companies holistically, based on expected cash flows, profitability, growth, assets, capital expenditures, competitive position, industry dynamics, regulatory exposure, management strategy, discount rates, and many other factors. Climate-related information may affect that analysis for particular companies or industries, but it is one potential input among many.[139] A disclosure regime that elevates selected climate metrics into standardized SEC line items risks overstating their significance to enterprise valuation and encouraging investors to treat superficially comparable numbers as more meaningful than they are.

Alignment with the framework established by the Task Force on Climate-Related Financial Disclosures (TCFD) did not solve these problems. The 2024 adopting release relied heavily on TCFD concepts in designing the rule.[140] But similarity to an existing framework does not establish that mandatory SEC disclosures will be comparable, reliable, or worth their cost. TCFD was not an SEC rule, and it was not designed exclusively for the federal securities-law disclosure system. It was a voluntary framework developed by a Financial Stability Board task force for a broad audience—including investors, lenders, insurance underwriters, and other market participants—seeking climate-related financial information for different purposes. A framework meant to serve banks underwriting credit, insurers underwriting risk, and investors allocating capital necessarily sweeps more broadly than information material to investment or voting decisions in public-company securities. TCFD also was intended to be flexible, adaptable across sectors and jurisdictions, and usable through existing reporting processes. Companies could decide how to apply it, how to phase it in, and how to tailor it to their own facts.

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benefits from more consistent, comparable, and reliable disclosure); *id.* at 21,842–43 (asserting consistency, comparability, reliability, and capital-market benefits).

[138] *See id.* at 21,776 (recognizing that transition plans, scenario analysis, internal carbon prices, and targets and goals may involve complex mixtures of estimates, assumptions, judgments, and predictions about future events); *id.* at 21,777–806, 21,912–13 (financial-statement disclosures and contextual information, including significant inputs, assumptions, and judgments).

[139] *See* James A. Overdahl, The SEC's Proposed Rule for The Enhancement and Standardization of Climate-Related Disclosures for Investors at 17–19 (June 16, 2022).

[140] *See* Adopting Release, 89 Fed. Reg. at 21,672–74 (discussing the TCFD framework and the Commission's decision to build from TCFD concepts).

The climate rule did something very different. It took selected TCFD concepts from a voluntary framework designed for a broad market audience and converted them into mandatory SEC filing obligations for public companies. That conversion attached federal securities-law liability, disclosure controls, XBRL tagging, audit-adjacent financial-statement processes, and, for some disclosures, third-party assurance. It also changed the legal significance of the information. Disclosure that may be useful to lenders, insurers, data vendors, or other market participants for their own purposes is not necessarily material to investors under the federal securities laws. The Commission should preserve that distinction not only in rescinding the climate rule, but also when considering whether to endorse other international or third-party frameworks, including standards developed by the International Sustainability Standards Board (ISSB).[141] What may be useful as voluntary, flexible guidance for a broad audience does not automatically become a justified mandatory securities-law rule.

The 2024 adopting release's own cited literature shows that increased ESG disclosure—a category that encompasses climate-related disclosure—does not necessarily make the information clearer or lead users to the same conclusions. Major ESG-ratings firms often reach different conclusions about the same company. Berg, Kölbel, and Rigobon found that ESG ratings correlate far less closely than credit ratings, and that the differences are driven by three basic choices: what topics the rater includes, how the rater measures those topics, and how much weight the rater gives each topic.[142] Christensen, Serafeim, and Sikochi found that greater ESG disclosure does not necessarily bring ESG ratings closer together; it can give raters more information to interpret, measure, and weight differently.[143] The climate rule would have imported the same problem into SEC filings. Scenario analysis, transition plans, internal carbon prices, offsets, renewable energy certificates or credits, Scope 1 and Scope 2 emissions, and climate-related financial-statement effects all involve assumptions and methodologies that can vary across registrants. The rule would have forced those disclosures into a common format, but the underlying information would still reflect different judgments.

The rule also did not provide the reliability it claimed, rather, it would have required companies to build systems, controls, and assurance processes around information that may be uncertain, estimated, or dependent on third-party inputs.[144] Assurance can test process; it cannot convert assumptions into facts. The same point undermines the Commission's search-cost rationale. The 2024 Commission asserted that the climate rule would reduce investor

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[141] https://www.uschamber.com/assets/documents/240617_Comments_ClimateReporting_SEC-Gensler.pdf.

[142] *See* Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence Of ESG Ratings*, 26 Rev. Fin. 1315 (2022); *see also* Letter from Mike Hilgers, Att'y Gen. of Neb., et al., to Ian Linnell, President, Fitch Ratings, Inc., et al. 3 (Apr. 22, 2026), https://ago.nebraska.gov/sites/default/files/doc/Letter_7.pdf (arguing that ratings agencies' ESG methodologies permit "wide-ranging discretion" and produce arbitrary ratings outcomes).

[143] Dane M. Christensen, George Serafeim & Anywhere Sikochi, *Why Is Corporate Virtue In The Eye Of The Beholder? The Case Of ESG Ratings*, 97 Acct. Rev. 147 (2022).

[144] See 2024 Adopting Release, 89 Fed. Reg. at 21,679–80 (disclosure controls and procedures); *id.* at 21,759–67, 21,881–82, 21,917–18 (GHG-emissions attestation and assurance costs); *id.* at 21,869–70, 21,913 (financial-statement audit and ICFR consequences for Article 14 disclosures).

search costs and information-processing burdens.[145] But in truth, the rule would also add lengthy, prescriptive, and often immaterial disclosures to SEC filings. Investors do not benefit when decision-useful information is buried under standardized detail that appears comparable but is not.

Nor was a separate climate-disclosure code needed to address greenwashing or misleading climate claims. Existing law already prohibits material climate-related misstatements and omissions.[146] A registrant that makes false or misleading statements about material climate risks, emissions, targets, transition plans, offsets, products, or financial impacts already faces liability under the antifraud provisions and the periodic-reporting framework. The SEC's enforcement record confirms the point: where the agency identified actionable ESG or climate-related misconduct, it brought cases under existing authority.[147]

The same answer applies to the claim that investors needed the climate rule to assess companies' climate commitments. If a company chooses to announce a climate target, net-zero commitment, transition plan, emissions goal, or offset strategy, existing law already requires the company to speak accurately and not omit material facts necessary to make its statements not misleading. And if the commitment later becomes material to the company's business or financial condition, existing disclosure and antifraud requirements already address that development. The Commission did not need a separate climate-disclosure code to require truthful disclosure about material climate commitments.

4. Intervening Developments Confirm the Benefits Were Overstated.

The 2024 adopting release described the climate rule's asserted benefits largely in conditional terms: the rule "could" improve comparability, "may" reduce search costs, "may" reduce information asymmetry, and "may" lower the cost of capital.[148] Mere possibilities are not benefits. The release did not quantify the likelihood or magnitude of those asserted gains. It did not show that any such gains would exceed the costs. Nor did it establish that the rule would add meaningful benefits beyond the climate information already available through existing disclosure rules and market channels.

Developments since adoption reinforce those defects. The latest available data show that voluntary climate and sustainability reporting continued to expand despite the rule never going into effect, which weakens the claim that mandatory SEC reporting is needed to supply

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[145] See *id.* at 21,849–50 (asserting that Commission-filed climate disclosures would reduce search costs and improve reliability); *id.* at 21,869–70 (stating that Inline XBRL tagging would reduce search costs and improve information processing).

[146] *See* 17 C.F.R. §§ 229.101, 229.103, 229.105, 229.303, 240.12b-20; 15 U.S.C. §§ 77k–77l, 78j(b); 17 C.F.R. § 240.10b-5.

[147] *See supra* note 79.

[148] *See id.* at 21,842–50, 21,890–91.

climate-related information to investors.[149] Investor demand has also become less pronounced. Large asset managers and other investors have withdrawn from or reduced participation in major climate-investor initiatives, including Climate Action 100+ and the Net Zero Asset Managers initiative.[150] BlackRock formally withdrew from the Net Zero Asset Managers initiative in January 2025.[151] The Net Zero Asset Managers initiative then suspended activities to track signatory implementation and reporting while it reviewed the initiative.[152]

The point is not that no investors want climate information. Rather, the 2024 release's premise of strong, durable, market wide demand for standardized climate reporting is weaker now than the 2024 release assumed. Yet the rule's great costs would remain unchanged if the rule is not rescinded.

The search-cost rationale has weakened as well. Investors increasingly have access to public filings, sustainability reports, commercial datasets, ratings, and specialized climate-risk analytics. AI-enabled tools make those sources more useful by extracting, synthesizing, comparing, and modeling climate-related information across issuers without requiring every registrant to reproduce that information in SEC filings. The change since March 2024 on this score is hard to overstate. When the climate rule was adopted, generative artificial-intelligence tools were a novelty for most investors. Today they are embedded in mainstream research platforms and used routinely to extract, summarize, and compare disclosures across thousands of companies at negligible cost. Whatever force the search-cost rationale had in 2024, it has less now—and it will have less still by the time any retained mandate took effect. To the extent some investors want climate information beyond what materiality requires, those tools reduce the marginal value of forcing the information into Commission filings for every registrant.

The current record therefore confirms what the 2024 record already showed. The climate rule did not solve a demonstrated disclosure gap, did not rest on reliable empirical support, did not ensure true comparability, and did not produce benefits sufficient to justify its costs. Its asserted benefits were speculative, overstated, and insufficient to support retention.

C. The Climate Rule's Costs Were Understated And Have Grown.

A rule's costs are central to reasoned decision-making, and the Commission bears a particular statutory obligation to assess them. The securities laws require the Commission to

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[149] *See supra* notes 114–115.

[150] *See* Lamar Johnson, More Than 70 Investors Have Left Climate Action 100+ Since GOP Probe Began, ESG Dive (Dec. 2024); Lindsey Stewart, Climate Action 100+ Departures Put Proxy Voting In The Spotlight, Harvard Law School Forum On Corporate Governance (Apr. 28, 2024); Net Zero Investor, CA100+ Grapples With New Exits Ahead Of US Elections (Sept. 2024).

[151] BlackRock, BlackRock's Decision To Leave NZAM (Jan. 2025), https://www.blackrock.com/corporate/newsroom/announcement/blackrock-withdraws-from-nzam.

[152] *See* Net Zero Asset Managers Initiative, Update From The Net Zero Asset Managers Initiative (Jan. 13, 2025).

consider whether a rule will promote efficiency, competition, and capital formation,[153] and a failure to evaluate economic consequences adequately is itself arbitrary and capricious.[154] As explained in the Chamber's opening and reply briefs challenging the 2024 rule, which the Chamber is submitting with this comment, the 2024 adopting release did not satisfy that obligation.[155] The 2024 release understated the rule's costs, relied on flawed and downward-skewed inputs, discounted record evidence showing that its own estimates were too low, and failed to account for significant categories of direct and indirect burden.

The 2026 proposal properly recognizes that rescission would generate substantial cost savings. It estimates approximately $7.9 billion in avoided initial costs and annual savings ranging from approximately $1.7 billion to $5.6 billion over the relevant period.[156] But those estimates should not be treated as a complete measure of the economic benefits of rescission. The proposal starts from the 2024 adopting release's cost estimates and updates them for inflation.[157] That approach is reasonable as far as it goes, but it carries forward the 2024 estimate's significant defects. The final rescission release should therefore make clear that the quantified savings are a conservative floor. The actual avoided costs are materially higher because the 2024 estimates rested on flawed inputs, current-practice benchmarks that understated mandatory-compliance costs, and an incomplete accounting of whole categories of cost. Rescission also avoids locking registrants into an expensive SEC reporting architecture while climate-reporting standards are still evolving.

1. The 2024 Cost Estimates Rested On Flawed Inputs And Understated The Rule's Costs.

The Commission had concrete, quantitative evidence that its cost estimates were too low. Commenters repeatedly told the Commission, with company-specific and survey-based support, that the rule would cost far more than projected. The adopting release acknowledged that many commenters asserted that the proposed rules' direct costs would be "much greater" than the Commission had estimated and that individual companies and industry groups supplied quantitative estimates "considerably higher" than the Proposing Release estimates.[158]

The recorded evidence included both broad survey data and specific company cost estimates. One industry survey reported that 79% of non-smaller-reporting-company respondents believed the Commission had underestimated compliance costs, 73% expected

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[153] *See* 15 U.S.C. §§ 77b(b), 78c(f).

[154] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011); *see also Michigan v. EPA*, 576 U.S. 743, 752–53 (2015); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[155] *See* Petitioners' Final Joint Opening Brief, *supra* note 3, at 38–44; Petitioners' Final Joint Reply Brief, *supra* note 36, at 16–21.

[156] Proposing Release, 91 Fed. Reg. at 33,334.

[157] *See id.* at 33,327.

[158] Adopting Release, 89 Fed. Reg. at 21,871.

their costs to exceed the Commission's estimates, and 41% expected ongoing compliance costs above $1 million.[159] Another trade-association survey found that 56% of respondents expected the Rules to be more expensive than the Commission estimated, with 40% expecting costs between $500,000 and $1 million.[160] Company submissions provided the same warning in more concrete terms. Some companies estimated annual costs of $50,000 to $1.35 million for outside advisers and consultants. Companies also estimated third-party assurance costs ranging from $10,000 to $600,000. One company reported an initial cost of approximately $1.3 million just to establish a baseline for Sustainability Accounting Standards Board (SASB) and TCFD reporting. Another estimated that new or enhanced systems, controls, audit work, and related costs would exceed $1 million.[161]

The Commission's treatment of that record evidence reflected three related errors. First, the Commission used estimates of companies' *current* voluntary climate-disclosure spending as inputs for estimating the cost of a mandatory SEC filing regime.[162] That was not a like-for-like comparison. In voluntary sustainability reports, companies could choose whether, how, and where to report, and could tailor their disclosures to their own circumstances. The climate rule would have changed that by making selected climate disclosures mandatory, placing them in SEC filings, and subjecting them to securities-law liability. It also would have required registrants to implement internal and disclosure controls across their worldwide operations, tag the disclosures in XBRL and obtain assurance—including pre-assurance—for certain emissions disclosures. Current voluntary spending therefore was not a reliable proxy for the cost of converting varied voluntary practices into mandatory SEC filings.

Second, the Commission did not adequately explain why it gave equal or greater weight to commenters who would not have to comply with the rule than to companies that would. The relevant question was what the rule would cost registrants to implement. Public companies and their trade associations were best positioned to answer that question. Environmental advocacy groups were not. *As You Sow* is illustrative. It supported mandatory climate disclosure, but it was not a registrant, would not have to do the work required by the rule, and would not be responsible for the resulting SEC filings. Yet the release cited *As You Sow* and other non-registrant commenters, for example, for the view that climate-reporting costs would decline

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[159] *Id.*; *see* NASDAQ Comment Letter Regarding File No. S7-10-22, at 8, 10 (June 14, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131426-301608.pdf.

[160] Adopting Release, 89 Fed. Reg. at 21,871; *see* Biotechnology Innovation Organization Comment Letter Regarding File No. S7-10-22, at 10 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132154-302645.pdf.

[161] Adopting Release, 89 Fed. Reg. at 21,871; *see* Society for Corporate Governance Comment Letter at 8 (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914283-244663.pdf; Society for Corporate Governance Comment Letter Regarding File No. S7-10-22, at 51–52 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132044-302525.pdf.

[162] *Compare* Adopting Release, 89 Fed. Reg. at 21,872 (citing "ERM survey"), *with* Comments of ERM, File No. S7-10-22, survey at 8 (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131623-301999.pdf (surveying "current average spend").

over time.[163] The Commission never explained why an environmental advocacy group was a reliable source on registrant compliance costs, much less why its views should offset evidence from companies that would actually have to comply.

Third, after combining those heterogeneous inputs, the Commission generally selected median values that compressed substantial high-cost evidence. The Commission did not determine which estimates best reflected the costs that actual registrants—especially those with global operations—would incur under a mandatory SEC filing regime. Instead, it pooled actual company estimates, anonymous company estimates, foreign-rulemaking analogues, current voluntary-spend data, and lower estimates from vendors or other non-neutral sources, and then selected median values.[164] That approach drove the final estimates downward without showing that the resulting medians were representative of large, complex, multi-line, global, or less-prepared registrants.

The resulting gaps were substantial. For governance, strategy, and risk-management disclosures, the Commission used an annual estimate of $183,000 and a first-year estimate of $327,000. But the record included company-specific estimates for TCFD-style reporting that were far higher: approximately $1.9 million, $2.2 million, and $8.5 million for particular companies.[165] Those estimates likely understated the burden of the climate rule. Existing TCFD reporting was voluntary and selective. Companies could decide which parts of the framework to use, how much detail to provide, and where to provide it. The climate rule would have turned selected TCFD concepts into mandatory SEC-filed disclosures. If companies already incurred multimillion-dollar costs for voluntary, company-tailored TCFD reporting, the Commission needed to explain why mandatory SEC reporting would cost only a fraction of that amount.

The same downward bias appeared in the Commission's estimates of the costs of complying with the emissions-disclosure provisions. For Scope 1 and Scope 2 emissions, the Commission used an annual estimate of $67,000 and a first-year estimate of $151,000, even though the record included estimates of $100,000, $300,000, and more than $10 million—with the highest estimate reflecting incremental Scope 1-only costs, not even the full cost of Scope 1 and Scope 2 compliance.[166] For limited assurance, the Commission used a median estimate of $50,000, even though the record included assurance-cost estimates of $400,000, $550,000,

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[163] *See* Adopting Release, 89 Fed. Reg. at 21,774 & n.1665.

[164] *See id.* at 21,877–80 & tbls. 8–11.

[165] *See id.* at 21,877 tbl. 8 (showing TCFD-disclosure cost estimates, including Society for Corporate Governance estimates of $1,918,080, $8,524,800, and $2,237,760 before adjustments, and adjusted costs of $1,784,829, $8,445,564, and $2,104,509); *id.* at 21,880/1 (using a median adjusted cost of $183,135 and estimating $327,000 for the first year and $183,000 for subsequent years).

[166] *See id.* at 21,880 tbl. 11 (listing Scope 1 and Scope 2 assessment-cost estimates, including $100,000 from IDFA, $10,162,035 from Energy Transfer LP, and $300,000 from Society for Corporate Governance Company 4); *id.* at 21,881/1 & tbl. 11 n.6 (stating that the Energy Transfer estimate was only incremental, was therefore understated as to the full cost, and was specific to Scope 1 emissions only; using a median ongoing cost of $66,600 and estimating $151,000 for the first year and $67,000 for subsequent years).

$600,000, and $800,000.[167] And for Regulation S-X, the Commission used $500,000 as the estimated initial direct cost of compliance, while acknowledging that this was a "significant reduction from the median cost estimate provided by commenters."[168] Across categories, the Commission selected estimates far below the company-specific evidence before it without adequately explaining why.

These comparisons show why the 2026 proposal's monetized savings understate the true benefits and warrant closer examination. Because the proposal begins with the 2024 cost estimates, it necessarily inherits the 2024 estimates' downward bias. The final rescission release should recognize that the actual costs avoided by rescission are materially higher than the proposal's quantified estimates.

2. The 2024 Release Also Omitted Major Categories Of Cost.

The 2024 adopting release understated costs not only because its numerical inputs were too low, but also because it failed to account adequately for whole categories of burden the climate rule would impose.

First, the release credited the requirement to report certain specified information only "when material" with eliminating large portions of the compliance burden. It did not. A conditional disclosure obligation is not costless. Before a registrant could determine whether an item was material, it would have to divert finite legal, finance, and compliance resources from other public-company obligations to reconcile overlapping frameworks, collect and evaluate the relevant information, document its judgment, and prepare to defend that judgment under SEC-filing liability standards. That work would have been required even where the information was highly unlikely to matter to a reasonable investor and the ultimate conclusion was that no disclosure was required. The Scope 1 and Scope 2 requirement illustrates the problem. Even if emissions disclosures were required only when material, a covered registrant would first have had to build emissions-measurement tools and climate-specific reporting systems across its global operations, determine organizational and operational boundaries, select or adapt a reporting protocol, identify emissions sources, gather data, apply emissions factors, assess reliability, evaluate materiality, and document the analysis. Only after doing that work could the registrant decide whether disclosure was required. This problem was not limited to emissions. Registrants would also have had to spend time and resources deciding whether disclosure was required under the rule's new financial-statement requirements and other climate-related provisions, even if they ultimately concluded that no disclosure was required.

Rescission avoids not only the cost of preparing disclosures ultimately deemed material, but also the recurring threshold costs of collecting information, building processes, testing data,

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[167] *See id.* at 21,882 tbl. 12 (listing limited-assurance cost estimates including $400,000, $550,000, $600,000, and a Salesforce-derived $800,000 estimate, while using a $50,000 median); *id.* at 21,881–82 (explaining that assurance estimates varied in coverage and assurance level, that unspecified assurance levels were assumed to be limited assurance, and that the $50,000 median was used to extrapolate reasonable-assurance costs).

[168] *Id.* at 21,885.

documenting judgments, and defending annual materiality determinations for disclosures that may never be required.

Second, the release understated the systems, controls, audit, and assurance costs the rule would require. Compliance with the climate rule would not have been merely a reporting exercise. It would have required registrants to build and maintain the infrastructure needed to generate, test, control, tag, and assure climate information across their worldwide operations.[169] In many cases, that infrastructure would have extended beyond the registrant's own operations: companies would have needed to obtain emissions and other data from third parties, including private businesses in their supply chains, and then validate and control information they did not generate. Covered registrants would have had to compile greenhouse-gas inventories, create disclosure controls for climate information, develop internal accounting processes for climate-related financial-statement disclosures, coordinate the work across many corporate functions, and obtain third-party pre-assurance and assurance over emissions disclosures. Those are largely fixed and recurring infrastructure costs, not marginal data-reporting costs. The 2024 adopting release itself recognized that reasonable assurance could cost two to three times more than limited assurance and that mandatory climate disclosure could increase demand for third-party services[170] and, at least in the short term, increase prices for those services.[171] Rescission avoids those system-building and third-party-service costs before companies are required to incur them.

Third, the release vastly understated litigation, governance, and capital-formation costs. The climate rule would have required companies to make SEC-filed statements about uncertain, forward-looking, and judgment-dependent climate matters. That would have invited hindsight-driven litigation by an active plaintiffs' bar focused less on material omissions than on technical disclosure missteps. Companies would predictably spend more on legal review, controls, documentation, insurance, litigation defense, and stakeholder engagement. The rule also risked distorting corporate governance, contrary to the claims of some commenters.[172] By requiring climate-specific board-oversight disclosures and stating that "any risks elevated to the board level will be material to the company,"[173] the 2024 adopting release created pressure either to elevate climate issues to satisfy the rule or to avoid ordinary board-level attention because such attention could create disclosure consequences. Either way, the rule would have diverted board and management time from strategic planning, oversight of material risks, capital allocation, operational improvements, investor engagement, and other legal and business priorities. Moreover, because public-company status already carries substantial fixed costs, requiring companies to make, document, and defend recurring materiality judgments—and manage the

[169] *See id.* at 21,675–76, 21,679–80, 21,825–26, 21,869–70, 21,912–13, 21,916–18.

[170] *See id.* at 21,882.

[171] *See id.* at 21,887.

[172] Coates Comment Letter at 12.

[173] *Id.* at 21,713.

resulting litigation exposure—the rule would have increased the cost of remaining public, especially for companies for which climate-related information is immaterial.

The record also contained evidence of broader, economy-wide costs that could not readily be quantified. Commenters submitted analyses estimating that the climate rule could reduce GDP and employment by increasing regulatory costs without generating offsetting public revenues, productivity gains, or capital-allocation benefits.[174] The 2024 adopting release did not adequately account for those broader economic consequences.

Fourth, the release failed to account adequately for investor costs. By requiring lengthy, prescriptive climate disclosures even where the information was not material to a reasonable investor, the climate rule would have forced investors to process information that obscured rather than informed. Investor attention is scarce, and decision-useful information becomes harder to identify when it is buried in mandated detail.[175] Chairman Atkins recently made the same point: disclosure requirements can become "instruments to obscure," and the Commission should help reasonable investors "separate the wheat from the chaff," with materiality as its "north star."[176] The climate rule moved in the opposite direction. Existing rules already require disclosure when climate-related matters materially affect a registrant's business, results of operations, or financial condition. Requiring additional climate-specific detail beyond that baseline would force all investors to bear processing costs created for information that many reasonable investors do not need.

Finally, intervening experience confirms that mandatory climate-disclosure costs are substantial and difficult to contain. Since adoption of the climate rule, various regulators and standard setters have delayed, narrowed, amended, or phased in mandatory climate and sustainability regimes because implementation has proven costly, complex, and difficult.[177]

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[174] *See, e.g.*, Comments of Professor Matthew Winden, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022-20132304-302836.pdf.

[175] *See* Kristina Impink, Mari Paananen & Annelies Renders, *Regulation-Driven Disclosures: Evidence Of Information Overload?*, 58 Abacus 432 (2022); Haifeng You & Xiao-jun Zhang, *Financial Reporting Complexity And Investor Underreaction To 10-K Information*, 14 Rev. Acct. Stud. 559 (2009); Troy A. Paredes, *Blinded By The Light: Information Overload And Its Consequences For Securities Regulation*, 81 Wash. U. L.Q. 417 (2003). AI-enabled tools may reduce the cost of locating and comparing information, but they do not eliminate the distinct problem of information overload. Nor are such tools a substitute for clear, materiality-focused disclosure that is accessible to the reasonable investor.

[176] Paul S. Atkins, Chairman, SEC, Prepared Remarks Before SEC Speaks (Mar. 19, 2026), https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-sec-speaks-031926-prepared-remarks-sec-speaks.

[177] *See* Directive (EU) 2025/794 of the European Parliament and of the Council of 14 Apr. 2025, O.J. L, 2025/794, recitals 1–4 (postponing the dates from which Member States must apply certain corporate sustainability reporting and due-diligence requirements); Directive (EU) 2026/470 of the European Parliament and of the Council of 24 Feb. 2026, O.J. L, 2026/470, recitals 1–4, arts. 1–4 (amending EU audit, accounting, CSRD, and CSDDD directives to narrow and simplify certain sustainability reporting and due-diligence requirements, including by raising reporting thresholds, postponing limited-assurance standards, removing the required adoption of reasonable-assurance

Those developments show why an SEC-specific climate regime would have undermined, rather than advanced, comparability and flexibility. Many registrants already face, or may face, state or foreign climate-reporting frameworks, or may encounter new reasons to adopt voluntary frameworks. The climate rule would have required those companies to translate similar but not identical information into a separate SEC architecture. The SEC regime would have had its own deadlines, legal standards, and filing obligations, imposing additional costs and consequences for financial reporting and assurance. Companies therefore would have needed additional work to reconcile overlapping regimes, review the disclosures, and support them under the federal securities laws. A principles-based, materiality-focused regime avoids that rigidity: it requires disclosure of material climate information and otherwise allows voluntary practices and external frameworks to develop over time.

III. The Climate Rule Should Be Rescinded In Its Entirety.

The Commission should rescind the climate rule in full. The defects are foundational, not provision-specific. The reasons the rule fails apply to the regime as a whole. There is no demonstrated problem for any part of it to solve. The costs were understated and the benefits overblown, across the board. The lack of legal authority permeates the entire climate-specific mandate. These are not arguments that the Commission drew a few lines in the wrong place, as some have suggested.[178] These are arguments that the premise of the regime is unsound. When the rationale for a rule fails at its foundation, the remedy is rescission.

Partial retention would be a new rule the Commission never proposed or assessed. A pared-down climate-disclosure regime is not a lesser-included version of rescission. It is a different regulatory choice—with a different scope, a different cost-benefit profile, and different competitive and reliance effects—none of which the Commission has proposed, analyzed, or put out for comment. The proposal before the Commission is *rescission*. To adopt instead a narrower mandate, the Commission would have to perform the reasoned cost-benefit analysis it has not performed and provide the notice it has not given.[179] A partial-retention rule is not a logical outgrowth of a proposal to rescind, and the Commission could not adopt one on this record without fresh notice and comment.

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standards, and adjusting third-country reporting requirements); EY, Technical Line: A Closer Look At California's Climate Disclosure Laws, No. 2023-07, at 3–5 (Apr. 2, 2026), https://www.ey.com/content/dam/ey-unified-site/ey-com/en-us/technical/accountinglink/documents/ey-tl21228-231us-04-02-2026.pdf (summarizing California's phased implementation of climate-disclosure requirements, including initial Scope 1 and Scope 2 reporting, enforcement discretion, and unresolved issues concerning reporting tools, organizational boundaries, methodology, Scope 3 emissions, and assurance).

[178] Coates Comment Letter at 1–2.

[179] *See* 5 U.S.C. § 553; *see also Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (vacating rule because "the Commission relied on extra-record material critical to its costs estimates without affording an opportunity for comment"); *id.* at 899 (explaining that "technical studies and data upon which the agency relies" "must be revealed for public evaluation").

The Commission should resolve the proposal before it—full rescission—rather than adopt a new disclosure mandate no commenter had a fair opportunity to address. If by chance there are reasonable grounds for *any* climate-specific rule—and that is unlikely—that question should be considered after rescission, in a new rulemaking file.

Other potential alternatives to rescission also fail on their merits, and the Commission should reject each. Retaining the greenhouse-gas-emissions provisions would preserve the costliest and least justified component of the regime: mandatory, assured emissions data are expensive to produce and show no robust relationship to pricing or decision-usefulness. Overlaying a materiality qualifier on the existing provisions would not save them either. If the qualifier means traditional materiality, the climate-specific provisions become redundant of Items 105 and 303 and the antifraud rules, which already require disclosure of material climate information; the new regime would add nothing but cost. If the qualifier means something looser, it reintroduces the very defect that doomed the rule. Deferring or phasing in the rule would cure nothing; a delayed rule that exceeds the Commission's authority still exceeds it, and a delayed rule that fails cost-benefit review still fails it. Furthermore, narrowing the rule to a subset of registrants would not address the absence of a demonstrated problem, the failure of the asserted benefits, or the authority defect. A smaller unjustified rule is still unjustified.

No reliance interest counsels partial retention. An agency changing course must consider the reliance interests its prior action engendered.[180] Here that analysis is straightforward, and it favors full rescission. The Commission stayed the final rule in April 2024, before any compliance date, and its requirements have never taken effect. Existing disclosure obligations remain fully in force for material climate matters, so no investor loses access to information the securities laws require. And to the extent any registrant prepared voluntarily, those efforts transfer readily to the voluntary frameworks and overlapping regimes that remain available. There are no settled practices built around the rule for the Commission to consider—only the decades-old materiality-based regime, which rescission restores.

* * *

Full rescission is the only outcome this record supports, and it is independently required by each ground for rescission. Retaining any portion of the climate rule would perpetuate a mandate that (1) addresses no demonstrated problem, (2) rests on purported benefits the record does not substantiate, and (3) imposes costs the record shows are substantial—and it would do so through a regime the Commission never proposed or evaluated.

Conclusion

For all of these reasons, full rescission is the only lawful and reasoned outcome. Congress did not authorize the Commission to create a mandatory climate-disclosure regime, and the administrative record did not justify one. The rule addressed no demonstrated

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[180] *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

disclosure failure, rested on unsubstantiated benefits, and imposed substantial costs. The Commission should rescind the climate rule in its entirety.

Nos. 24-1628, 24-2173

In the United States Court of Appeals for the Eighth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent,

DISTRICT OF COLUMBIA, ET AL.,
Intervenors.

NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petitions for Review of an Order of the
Securities & Exchange Commission

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SUMMARY OF THE CASE

These consolidated cases challenge the most expensive disclosure requirement the Securities and Exchange Commission has ever adopted. The climate rule creates an entirely new regulatory scheme for one topic—climate change. It requires companies to provide prescriptive, forward-looking disclosures of the risks of climate change to the company's strategy, business model, and outlook. And it demands an explanation of climate-related expenses that exceed one percent of income before taxes and an analysis of significant contributing factors to those expenses. The rule requires disclosure of climate-related targets and goals and, in many instances, a company's greenhouse-gas emissions—requirements with no analogue in the existing securities-disclosure regime. The rule is unlawful several times over. It is arbitrary and capricious under the Administrative Procedure Act, exceeds the SEC's statutory authority, and violates the First Amendment. It should be vacated.

Given the significance of the SEC's rule, the many weighty issues, and the number of parties involved, petitioners respectfully submit that oral argument would be beneficial and that 45 minutes per side would be adequate to address the issues.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, petitioners the Chamber of Commerce of the United States of America, Texas Association of Business, Longview Chamber of Commerce, and National Center for Public Policy Research make the following disclosures:

The Chamber of Commerce of the United States of America has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Texas Association of Business has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Longview Chamber of Commerce has no parent corporation, and no publicly held company owns 10% or more of its stock.

The National Center for Public Policy Research has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The Executive Branch has repeatedly vowed to make national climate-change policy with or "without Congress," 24-1628 Stay Mot. Appendix (Stay App.) 893 (Mar. 26, 2024), and has repeatedly overstepped limits on its authority under environmental laws, *e.g.*, *West Virginia* v. *EPA*, 597 U.S. 697 (2022). Unable to achieve its "climate agenda" that way, the Executive promised to advance its environmental aims "using every tool at [its] disposal"—and has resorted to other, increasingly inapt legal frameworks to make climate policy through the back door. Stay App. 892.

While there are many responsible and lawful ways to combat climate change, this is not one of them. The Securities and Exchange Commission's climate rule is the latest, most egregious example of the Executive's no-holds-barred, "we don't need Congress" (Stay App. 893) approach. Under the guise of investor protection, the SEC invoked 90-year-old securities statutes to mandate sweeping, unprecedented disclosures on a single topic: climate. This effort to micromanage businesses looks nothing like the traditional disclosures required of public companies, advances no recognizable *securities*-law objective, and represents a clear departure from settled corporate-governance precedent. Far from filling any genuine information gap, the climate rule would inundate investors with data that the Commission has not shown is needed by anyone, let alone Main Street investors, all while making it more difficult for investors to make informed investment decisions. It is the quintessential rule "in search of [a] regulatory proble[m]." *NYSE LLC* v. *SEC*, 962 F.3d 541, 556 (D.C. Cir. 2020).

This overreaching climate rule is unlawful several times over. It is arbitrary and capricious under the Administrative Procedure Act (APA). The rule requires businesses to spend billions of dollars gathering, processing, and reporting massive amounts of non-material climate-related information that the SEC claims just some investors want. But companies *already* must disclose climate-related information material to investors' decisions, and the Commission utterly failed to show that forcing companies to disclose massive amounts of additional, often-immaterial climate data would yield any securities-law benefit.

The Commission does not and cannot cite a single example of an investor who was defrauded because a public company failed to disclose climate-related information—nor any case it has brought against a company for failing to disclose material climate-related risks. As then-Judge

Kavanaugh put it, "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." *National Fuel Gas Supply Corp.* v. *FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006).

Yet despite the demonstrated lack of benefits, the SEC's climate rule imposes the most expensive disclosure mandate in the SEC's history. Even by the SEC's own understated estimate, the rule would cost public companies more than $2.3 *billion* each year. See App. 681 (Certified List 4 at 21,908). But the record is replete with data establishing that the true costs of compliance would be orders of magnitude greater. The SEC cannot and does not come close to justifying that extraordinary burden.

The rule is independently unlawful both because Congress never authorized the SEC to mandate sweeping climate-related disclosures, and because the First Amendment forbids it. The securities laws concern information that is financial in nature and *material* to an investor's investment and voting decisions. The Commission conflates the securities laws' objective of "*protect*[*ing*] investors" with mollifying some "investors' * * * *demand*[*s*]." App. 457 (Certified List 4 at 21,684) (emphases added). Those are different things. And the First Amendment "prohibits the government from telling people what they must say." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 61 (2006). Yet that is exactly what the rule does, by design—forcing companies to engage in costly speech against their will on matters of contentious societal debate.

The SEC's misconceived climate rule is irredeemable. This Court should set it aside in its entirety.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the SEC's climate rule under 15 U.S.C. § 77i(a). *Twin Rivers Paper Co.* v. *SEC*, 934 F.3d 607, 617 & n.1 (D.C. Cir. 2019). On March 14 and April 29, 2024, respectively, petitioners timely petitioned for review within 60 days of the entry of the Commission's March 6, 2024, order adopting the rule. See 24-1628 Pet. for Review (Mar. 22, 2024); 24-2173 Pet. for Review (Apr. 29, 2024); 89 Fed. Reg. 21,668, 21,920 (Mar. 28, 2024); 17 C.F.R. § 201.140(c). The petitions were transferred to and consolidated in this Court under 28 U.S.C. § 2112(a). 24-1628 Consolidation Order (Mar. 22, 2024); 24-2173 Transfer Order (June 10, 2024).

Article III jurisdiction exists because "[a]t least one" petitioner—the Chamber of Commerce of the United States of America—undisputedly has standing to challenge the rule. *Town of Chester* v. *Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017). Many Chamber members are public companies directly subject to the rule's requirements. App. 1368, 1377 (Certified List 3688 at 1, 10); see, *e.g.*, Stay App. 1397-1417. Those members would have standing to challenge the rule in their own right. *American Farm Bureau Federation* v. *EPA*, 836 F.3d 963, 968 (8th Cir. 2016). The Chamber's purpose is to protect the legal and economic interests of its members, and neither the claims asserted nor the relief requested requires the participation of individual members, as petitioners seek only equitable relief. *PhRMA* v. *Williams*, 64 F.4th 932, 946, 948 (8th Cir. 2023).

STATEMENT OF ISSUES

I. Whether the rule is arbitrary and capricious.

- *Motor Vehicle Manufacturers Ass'n of United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)

- *Menorah Medical Center* v. *Heckler*, 768 F.2d 292 (8th Cir. 1985)

- *Business Roundtable* v. *SEC*, 647 F.3d 1144 (D.C. Cir. 2011)

- *American Equity Investment Life Insurance Co.* v. *SEC*, 613 F.3d 166 (D.C. Cir. 2010)

II. Whether the rule exceeds the Commission's statutory and constitutional authority.

– *West Virginia* v. *EPA*,
597 U.S. 697 (2022)

– *National Institute of Family & Life Advocates* v. *Becerra*,
585 U.S. 755 (2018)

– *National Ass'n of Manufacturers* v. *SEC*,
800 F.3d 518 (D.C. Cir. 2015)

III. Whether the rule should be vacated.

– *Citizens to Preserve Overton Park, Inc.* v. *Volpe*,
401 U.S. 402 (1971)

– *North Dakota* v. *EPA*,
730 F.3d 750 (8th Cir. 2013)

– *National Ass'n of Private Fund Managers* v. *SEC*,
103 F.4th 1097 (5th Cir. 2024)

STATEMENT OF THE CASE

A. The Administration Announces "We Don't Need Congress" To Implement A Climate-Change Agenda And Launches A "Government-Wide Approach"

Within days of taking office, the President announced his Administration's "policy" to "deploy the full capacity of its agencies to combat the climate crisis" through "a Government-wide approach." Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7622 (Jan. 27, 2021). The President promised foreign leaders that "the United States will continue to push" on climate-change issues, Stay App. 924, and he unilaterally adopted a "target of a net-zero emissions economy by no later than 2050," Exec. Order No. 14,030, 86 Fed. Reg. 27,967, 27,967 (May 20, 2021).

The Administration has made clear that Congress's cooperation is irrelevant. White House officials explained that "[t]he President will advance his climate agenda using * * * every tool at his disposal" and that, if Congress declines to authorize the President's climate agenda, "we'll just continue to do the whole-of-government approach * * * without Congress" because "we don't need Congress." Stay App. 892-893, 904. The President specifically instructed agencies to pursue his 2050 net-zero-emissions goal by mandating "climate-related" disclosures. 86 Fed. Reg. at 27,967. And by committing the United States to the Glasgow Climate Pact, the Administration endorsed that Pact's assertion that urgent action is needed "to make finance flows consistent with a pathway towards low greenhouse gas emission and climate-resilient development in a transparent and inclusive manner." Stay App. 933. The United States agreed with other countries to "accelerate the alignment of their financing activities with the goals of the Paris Agreement." *Ibid.*

B. The SEC Answers The Administration's Call

In 2022, the SEC proposed an unprecedented new regulation that would require companies to disclose massive amounts of non-financial climate information. App. 281-420 (Certified List 1).

The proposed rule would have required companies to calculate the impacts of severe weather events, transition activities, and other climate-related risks on every line item on their financial statements, and then disclose, on a line-by-line basis, any impacts that aggregated to 1% or more of a line item. App. 411-412 (Certified List 1 at 21,464-21,465). And it would have required each company to report all emissions from the company itself ("scope 1"); its utility providers ("scope 2"); and, in many instances, its customers and suppliers ("scope 3"). App. 415-416 (Certified List 1 at 21,468-21,469). Rather than requiring the disclosure of core financial information, such as a profit and loss statement, that is "indispensable to any accurate judgment upon the value of a security," H.R. Rep. No. 73-85, at 3 (1933), 1933 WL 983, at *4, the proposal would have required companies to disclose environmental information—such as the level of sulfur hexafluoride released, not just by the firm itself, but by the utility provider supplying energy for the firm's operations, or even the firm's customers and suppliers. App. 413, 415-416 (Certified List 1 at 21,466, 21,468-21,469).

C. Commenters Urge The SEC To Reconsider

A groundswell of comments from stakeholders urged the SEC to retreat from its proposal. *E.g.*, App. 2250-2262 (Certified List 4413 at 5-17). As the Chamber explained in its comments, the Chamber supports policies that reduce greenhouse-gas emissions as much and as quickly as reasonably possible, consistent with the pace of innovation and the feasibility of implementing large-scale technical change. App. 1368 (Certified List 3688 at 1); U.S. Chamber of Commerce, *The Chamber's Climate Position: 'Inaction is Not an Option'* (Oct. 27, 2021), bit.ly/3RnChKv.

1. Commenters told the SEC that the proposed rule was entirely unnecessary, as additional climate-related information is immaterial to investors. The SEC's own former chief economist James Overdahl explained that climate-related information can already "be extracted from publicly-available information," App. 1469 (Certified List 3688, Annex A ¶ 38); see App. 1064 (Certified List 3381 at 7), and suggested the use of "well-known 'event study' techniques to assess the price or volume responses to climate-related disclosures" to see if such information even informed investors' decisions, App. 1469 (Certified List 3688, Annex A ¶ 37).

Professor Daniel Taylor, a leading expert in corporate disclosure who routinely performs that kind of statistical analysis of price and trading data, conducted such a study. App. 1056-1057 (Certified List 3381 at i-ii). Professor Taylor compiled a sample of all Forms 8-K filed between January 2021 and March 2022 that disclosed greenhouse-gas emissions. App. 1061 (Certified List 3381 at 4). Form 8-K disclosures are "highly visible disclosures," so if *any* greenhouse-gas disclosures are material, it would be these. App. 1060 (Certified List 3381 at 3). Using well-established event-study techniques, Professor Taylor analyzed whether there was a statistically significant change in stock price or trading volume in response to the greenhouse-gas disclosures. App. 1060 (Certified List 3381 at 3). His study revealed that no such correlation existed—a powerful indication that "investors do not update their beliefs about value (upward or downward) in light of [greenhouse-gas] emissions data." App. 1063 (Certified List 3381 at 6). Professor Taylor submitted his study to the SEC as direct empirical evidence that greenhouse-gas emissions disclosures—the exact type of disclosures the Commission proposed to require—typically do "not contain material information" for investors. App. 1063 (Certified List 3381 at 6).

Moreover, although the SEC's proposal repeatedly cited demands for climate-related disclosure made by select institutional investors, App. 287-288, 371-372 (Certified List 1 at 21,340-21,341, 21,424-21,425), many of those same investors, after reviewing the proposed rule, warned in comments that key aspects of it were unnecessary. One institutional investor, for example, explained that the line-by-line reporting contemplated by the proposal would produce information that is "far too granular to inform investment decisions" and would be a huge "operational burden" for companies. App. 1556 (Certified List 3726 at 5).

Numerous other investors agreed. One stated that the requirement would not "result in meaningful or comparable climate disclosures." App. 1193 (Certified List 3479 at 8). Others warned that the information would "not be useful to investors" and would risk "overloading" them with "inconsequential information that [would] complicate their analysis of [a] company's operations and financial condition." App. 1319 (Certified List 3657 at 28). The resulting disclosures would "dilute the materiality of [other] climate-related financial disclosures and potentially mislead investors into assuming that [the] data [were] more relevant or reliable than [they] actually [would be].” App. 2093 (Certified List 4021 at 19).

2. Commenters further explained that the proposed rule could not reasonably be implemented and that significant aspects of the proposal were infeasible and unduly costly. Public companies that would be directly subject to the proposal, for example, explained that they would not be able to calculate the impacts of severe weather events, transition activities, and other climate-related risks on every line item on their financial statements, as the Commission proposed. App. 2253-2254 (Certified List 4413 at 8-9). “From a practical standpoint,” they explained, “the processes and procedures necessary to conduct the financial statement analysis that would be required under the proposed rule simply do not exist.” App. 856 (Certified List 2378 at 29).

Commenters also showed that the detailed analysis required by the proposal “would effectively require detailed tagging of financial impacts at the invoice level.” App. 856 (Certified List 2378 at 29). “Companies would be required to count every single financial impact that could plausibly be attributable to climate risks, weather events, or transition activities, somehow determine the degree of climate causation associated with each, and then aggregate these impacts to determine if they meet the proposed 1% threshold—for *each* line item in the consolidated financial statements." App. 856 (Certified List 2378 at 29). "Companies' existing systems do not currently track data at such a granular level." App. 856-857 (Certified List 2378 at 29-30). And independent auditors warned that they would not have sufficient information to "be able to perform sufficient procedures to audit" the company's resulting disclosures anyway. App. 1549 (Certified List 3695, Appendix at 3).

D. The SEC Adopts A Final Rule That Differs Dramatically From The Proposal Yet Still Suffers The Same Fundamental Flaws

Confronted with objections from nearly every quarter, the Commission re-tooled its proposal. But as its own Inspector General reported, the Commission has been relying on "shortened timelines" to rush through an "aggressive" agenda. App. 2278 (Certified List 4413, Exhibit A at 3). So, rather than design proposed fixes and put them out for public comment, the Commission jammed through an 886-page final rule—over two vigorous dissents—that preserved the proposal's fundamental flaws. See Stay App. 1-886; App. 441-694 (Certified List 4 at 21,668-21,921); see App. 695-709 (Peirce, dissenting); App. 710-714 (Uyeda, dissenting).

1. Although the rule diverges in various ways from the proposal and omits some of the most extreme features, it adheres to the proposal's basic approach of dictating climate-related disclosures far beyond what existing law requires on any other topic and disregarding core corporate governance precedents.

The final rule adopts "entirely new" parts of SEC regulations "for one topic—climate change—applicable to all public companies." App. 711 (Uyeda, dissenting); see App. 685-694 (Certified List 4 at 21,912-21,921). "In no other context is a company required to provide an explanation of expenses that exceed one percent of income before taxes and analyze the significant contributing factor to the expense." App. 711 (Uyeda, dissenting); see App. 685-686 (Certified List 4 at 21,912-21,913). And for "no other risk does the Commission require prescriptive, forward-looking disclosure of the risk's impacts on the company's strategy, business model, outlook, financial planning, and capital allocation." App. 711 (Uyeda, dissenting); see App. 687-689 (Certified List 4 at 21,914-21,916). The climate rule "requires disclosure of climate-related targets and goals"—which the SEC has never required, even for far more salient, bread-and-butter issues like "financial performance" and "market expansion." App.

711 (Uyeda, dissenting); see App. 689 (Certified List 4 at 21,916). And "the requirement to disclose [greenhouse-gas] emissions and obtain an attestation report on such disclosure is in a class of its own without comparison in the Commission's disclosure regime." App. 711-712 (Uyeda, dissenting); see App. 689-691 (Certified List 4 at 21,916-21,918).

2. Commissioners Peirce and Uyeda dissented.

Commissioner Uyeda warned that the rule's purported "emphasis" on investor concerns was a sham: "By the time you finish reading all 886 pages of today's release, you will conclude that this rule is climate regulation promulgated under the Commission's seal." App. 710.

The rule, Commissioner Uyeda explained, "elevates climate above nearly all other issues facing public companies"; it "is the culmination of efforts by various interests to hijack and use the federal securities laws for their climate-related goals." App. 710-711. The Commission lacked statutory authority for this "extraordinary exercise of regulatory authority," Commissioner Uyeda warned, and had failed adequately to consider the rule's effects on dictating to "companies' boards and management" a requirement to "spend more time and resources to think about, assess, and discuss climate change," at the expense of other, more central business concerns. App. 711-712.

Commissioner Peirce agreed that the Commission lacked authority for the new rule. App. 695-709. And she criticized the rule's "insistence that climate issues deserve special treatment and disproportionate space in Commission disclosures." App. 695. According to Commissioner Peirce, the "existing disclosure regime already requires companies to inform investors about material risks and trends—including those related to climate—by empowering companies to tell their unique story to investors." App. 695. And the Commission, she explained, lacked a "persuasive reason to reject [this] existing principles-based, materiality focused approach to climate risk." App. 695.

SUMMARY OF ARGUMENT

I. The climate rule does not reflect reasoned decisionmaking and is arbitrary and capricious under the APA. The rule is irrational because it purports to solve a 'securities' problem that the SEC failed to show exists. In reality, it is a climate rule, not a securities regulation. The securities laws *already* require the disclosure of material information, so the rule is necessarily duplicative and of no value. The SEC has not shown that investors need additional climate-related information, and it arbitrarily ignored significant evidence that they do not.

The Commission also failed to justify, or even acknowledge, its departure from decades of agency precedent limiting disclosures to "material" information. And it had no serious response to the rule's massive costs. Instead, the SEC cooked its own books, relying on biased, flawed information from environmental activists to slash its estimate of the rule's costs. Further confirming that providing material information to investors was not the rule's objective, the Commission failed to consider reasonable, less-burdensome alternatives that would have achieved that purported aim at far less cost.

II. The rule is independently unlawful because it exceeds the SEC's statutory and constitutional authority. Congress never authorized the Securities and Exchange Commission to mandate *climate* disclosures in this fashion. The rule sweeps far beyond the type of material, financial disclosures Congress authorized the Commission to require. And it does not advance the only objectives that the SEC is authorized to pursue. Further, the rule abridges the freedom of speech by forcing thousands of companies to speak against their will on a contentious political issue. If the SEC can press-gang all of corporate America into a discussion about climate change, it can do so for virtually anything.

III. This Court should vacate this deeply flawed rule.

STANDARD OF REVIEW

Under the APA, this Court "shall * * * hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations," or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C).

APA review is "searching and careful." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). It reviews legal issues de novo, *Hennepin County Medical Center* v. *Shalala*, 81 F.3d 743, 748 (8th Cir. 1996), and is skeptical of agency reaches for "'transformative expansion in [their] regulatory authority'" without clear congressional authorization, *West Virginia* v. *EPA*, 597 U.S. 697, 724 (2022). The Court must ensure agency decisions are "'reasonable and reasonably explained,'" *Grayscale Investments, LLC* v. *SEC*, 82 F.4th 1239, 1245 (D.C. Cir. 2023), and that the Commission fulfills its special statutory duty to account for rules' effects on "efficiency, competition, and capital formation," 15 U.S.C. §§ 77b(b), 78c(f).

ARGUMENT

The climate rule is the most expensive disclosure requirement the Commission has ever adopted. Yet the alleged justification—that investors need more climate-related information—is "pretextual." *National Ass'n of Private Fund Managers* v. *SEC*, 103 F.4th 1097, 1113 (5th Cir. 2024). The SEC's solution to this problem it never substantiated exceeds its statutory authority. And the rule flouts the First Amendment by compelling thousands of companies to make controversial, opinion-laden statements on the hotly contested, politically salient issue of climate change.

I. THE CLIMATE RULE IS ARBITRARY AND CAPRICIOUS

The SEC's climate rule "elevates climate above nearly all other issues facing public companies" and imposes unprecedented obligations—all to address a purported investor-information problem that the Commission failed to show exists. App. 711 (Uyeda, dissenting). The complete disconnect between the agency's approach and that ersatz problem—and the SEC's abrupt, unexplained departure from its approach to other issues—is textbook arbitrary action under the APA.

A. The Rule Is Irrational Because It Purports To Solve A Problem That The SEC Failed To Show Exists

Under the APA, an agency issuing a new rule must show a "genuine proble[m] * * * warrant[ing] the rule." *Chamber of Commerce of United States* v. *SEC* (*Chamber III*), 85 F.4th 760, 777 (5th Cir. 2023). It must overcome "a presumption * * * *against* changes in current policy that are not justified by the rulemaking record." *Motor Vehicle Manufacturers Ass'n of United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). And under the SEC's organic statutes, the agency must use rigorous economic analysis to overcome that presumption. See 15 U.S.C. §§ 77b(b), 78c(f), 78w(a)(2); *Business Roundtable* v. *SEC*, 647 F.3d 1144, 1148-1149 (D.C. Cir. 2011).

1. Here, the Commission insisted that there was a securities-law justification for the rule because investors have a "need" for "more" information related to climate change. *E.g.*, App. 446 (Certified List 4 at 21,673/2). But the SEC could not show that the rule was needed to fill any alleged gap because companies are "already require[d]" to disclose material information under "existing" law. *Business Roundtable*, 647 F.3d at 1155; see App. 695-696 (Peirce, dissenting); App. 1387-1390, 1470-1471 (Certified List 3688 at 20-23, Annex A ¶ 40); App. 1058-1059

(Certified List 3381 at 1-2); App. 2126 (Certified List 4090 at 3); cf. *American Equity Investment Life Insurance Co.* v. *SEC*, 613 F.3d 166, 178-179 (D.C. Cir. 2010) (SEC's analysis was "incomplete because it fail[ed] to determine whether, under the existing regime, sufficient protections existed").

As the Commission previously recognized in rejecting similar proposals from the same environmental groups that advocated the present rule (*e.g.*, App. 2108 (Certified List 4062 at 2)), "[i]f environmental * * * information is material to investors, the Commission's rules *already* require the disclosure of such information." Stay App. 1192 n.1 (emphasis added); see 41 Fed. Reg. 21,632, 21,635/2 (May 27, 1976). It has acknowledged, for example, that "registrants are already required to disclose the financial statement effect of material climate risks under existing rules" and have an "ongoing responsibility to consider material impacts, whether climate-related or not, when preparing their financial statements and related disclosures." App. 570-571 (Certified List 4 at 21,797/3-21,798/1); see 86 Fed. Reg. 2080, 2081/2 n.9 (Jan. 11, 2021); 75 Fed. Reg. 6290 (Feb. 8, 2010).

But in adopting the climate rule, the Commission glossed over these "existing" requirements. *American Equity*, 613 F.3d at 179. And, unsurprisingly, it cited "no evidence" that any investor has ever been harmed by a lack of climate-related disclosures—a hallmark of irrational agency action, see, *e.g.*, *National Fuel Gas Supply Corp.* v. *FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Kavanaugh, J.), and a stark deviation from the Commission's usual practice, cf. 88 Fed. Reg. 63,206, 63,226/2-3 (Sept. 14, 2023) (justifying disclosure rule based on "enforcement actions related to * * * disclosure"); 75 Fed. Reg. 49,234, 49,237/3 & n.48 (Aug. 12, 2010) (similar); 88 Fed. Reg. 38,146, 38,172/3 (June 12, 2023) (similar).

2. The Commission speculated that climate-related information is nevertheless "underreported," App. 470 (Certified List 4 at 21,697/1), but the Commission's evidence "failed to substantiate [the] conclusion" that this supposed underreporting is "a problem [that] ever existed," *Menorah Medical Center* v. *Heckler*, 768 F.2d 292, 295 (8th Cir. 1985).

a. The Commission suggested that "many companies do not discuss any climate-related risks in response to existing disclosure requirements." App. 471 (Certified List 4 at 21,698/3). But that suggestion does not mean that climate information is *under*reported. "This would follow only if the [Commission] showed that" the unreported information was *material* to investors. *Menorah Medical*, 768 F.2d at 296. But the Commission "made no attempt * * * to examine" the materiality of that information. *Ibid.*

All the Commission could muster was conjecture about the "*potential*" for "underreporting"—*i.e.*, companies "*may* strategically omit information." App. 614 (Certified List 4 at 21,841/1) (emphases added). But that is "pure speculation," *Grace Healthcare of Benton* v. *HHS*, 603 F.3d 412, 422 (8th Cir. 2009); the Commission "presented no evidence that such [underreporting] is ever seen in practice," *Business Roundtable*, 647 F.3d at 1150.

To the contrary, if "underreporting of material climate-related information" were a regular occurrence, App. 614 (Certified List 4 at 21,841/1), the Commission "likely would have been inundated" with enforcement matters, *National Fuel*, 468 F.3d at 844, as it has in other contexts, see p. 22, *supra*. Yet despite "regularly evaluat[ing]" climate-related disclosures under existing rules, App. 423 (Peirce, dissenting), the Commission apparently has never brought a *single* case against *any* company for failing to disclose material climate-related risks, App. 1407 (Certified List 3688 at 40); App. 1879 (Certified List 3902 at 44). It has not cited a single penny lost, nor a single shareholder harmed, to warrant this new multi-billion-dollar burden. The Commission made no effort to "explain [this] discrepancy." *Defenders of Wildlife* v. *U.S. Department of Interior*, 931 F.3d 339, 359 (4th Cir. 2019); see *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002).

b. Instead, the Commission pointed to existing "literature," which (the Commission said) showed that climate-related information was "importan[t] * * * to investors." App. 614 (Certified List 4 at 21,841/3). But most of that literature is not in the record, and all of it suffers significant defects ignored by the Commission and undermines the agency's position anyway.

Of the 41 putatively relevant articles the SEC cited, App. 614 n.2659 (Certified List 4 at 21,841/3), 30 are outside the administrative record, as the Commission failed to expose them to public comment, see App. 619 n.2721, 620 nn.2728-29, 621-622 nn.2738-46 (Certified List 4 at 21,846/3, 21,847/2, 21,848/2-21,849/1). Most of the SEC's academic support is thus disqualified as legitimate support for the rule. See, *e.g.*, *Chamber of Commerce of United States* v. *SEC* (*Chamber II*), 443 F.3d 890, 901 (D.C. Cir. 2006).

The articles are flawed, too. As experts warned, the existing literature does not use event studies, the "standard" test "for materiality commonly employed and accepted by academics, legal practitioners, and US courts"—and by the SEC itself. App. 1060 (Certified List 3381 at 3); see App. 1469 (Certified List 3688, Annex A ¶ 37); App. 2261-2262 (Certified List 4413 at 16-17). It relies instead on data concerning irrelevancies such as mine safety, App. 1059 (Certified List 3381 at 2 & n.4); see, *e.g.*, Hans B. Christensen et al., *Mandatory CSR and Sustainability Reporting*, 26 Review of Accounting Studies 1176, 1214 (2021), cited in App. 622 (Certified List 4 at 21,849/2 n.2748)—or "[t]hird party ESG ratings," which are a "hodgepodge of various environmental, social, and governance factors," App. 1059 (Certified List 3381 at 2); see, *e.g.*, App. 621 (Certified List 4 at 21,848/3 n.2743) ("nonpecuniary preferences")—largely unrelated to climate change. The Commission ignored these deficiencies. See *Menorah Medical*, 768 F.2d at 295-296 (failure to respond to "significant criticism" of study is arbitrary and capricious).

The SEC also disregarded an "important aspect of the problem" that rebuts its conclusion. *State Farm*, 463 U.S. at 43. The Commission stated that, "[c]ollectively," this existing literature showed that climate-related risks are "priced into the value of a firm." App. 622 (Certified List 4 at 21,849/1). But that literature is based on information that is *already* publicly available, proof that sufficient information is already at investors' fingertips. See App. 1577 (Certified List 3787 at 6). For example, the Commission cites "research [that] finds an increase in stock price volatility around the day when [greenhouse-gas] or carbon emissions are disclosed" as evidence that "investors find such disclosures to be informative." App. 614 (Certified List 4 at 21,841/3). But the Commission misses the relevant point: "This study finds *no evidence of a difference in valuation* between [greenhouse-gas] emissions voluntarily disclosed by the company * * * *and the valuation of* [*greenhouse-gas*] *emissions inferred from publicly-observable information*." App. 1064 (Certified List 3381 at 7) (emphases added); cf. *ibid.* ("90% of the variation in [greenhouse-gas] emissions can be inferred from information that is already publicly available"); App. 1381, 1469 (Certified List 3688 at 14, Annex A ¶ 38) (similar). Thus, the Commission's own evidence shows that, if the SEC's true objective were to provide investors with material climate-related information, this rule would not be needed.

c. The Commission looked, too, to "investo[r]" statements of a "need" for more climate-related information. See, *e.g.*, App. 552 & n.1741 (Certified List 4 at 21,779/2). But in doing so, and as in *Business Roundtable*, the Commission repeatedly relied on investors who are "motivated *differently*" and not interested "in seeking to increase shareholder value over the long term," App. 1413 (Certified List 3688 at 46) (emphasis added); see also App. 1374, 1379, 1398 (Certified List 3688 at 7, 12, 31); cf. *Business Roundtable*, 647 F.3d at 1151-1152 (faulting the Commission for failing to recognize that "union and state pension funds" had interests "unrelated to shareholder value").

The Commission admitted begrudgingly, and with considerable understatement, that "there coexist investors who exhibit *nonpecuniary* preferences involving this type of information." App. 621 (Certified List 4 at 21,848/3 n.2743) (emphasis added). But the Commission neglected to acknowledge that, in justifying the rule, it relied repeatedly on comments from precisely that group of investors. Its principal example of investor demand was a letter from "climate activist 'As You Sow,'" App. 798-799 (Certified List 671 at 7-8), whose "stated aim" is nonpecuniary and unrelated to shareholder value, App. 1674 n.45 (Certified List 3814 at 19); see App. 547, 550, 552, 564, 577 (Certified List 4 at 21,774/2 nn.1664-1665, 21,777/2 n.1715, 21,779/2 n.1741, 21,791/1 n.1961, 21,804/1 n.2132). As You Sow is notorious for filing climate-related shareholder proposals, see App. 798 (Certified List 671 at 7), that are "[c]oordinated by" the climate-activist group "Follow This," *Resolution at 2020 AGM of Royal Duty Shell plc*, As You Sow (Jan. 13, 2020), bit.ly/45mpyOd. In its own words, this effort is a "Trojan Horse," *For Investors*, Follow This, bit.ly/3VIghwL, contrived to "stop climate change, *not to make a financial profit*," *FAQ*, Follow This, bit.ly/45tJZZt (emphasis added) (click "Can I buy more than one share?"). These "nonpecuniary" preferences are outside the Commission's purview, but the Commission relied on As You Sow nonetheless. And it cited and relied on the "Climate Action 100+," which concededly has "'always been" about "'actio[n]'"—"'*more than disclosure*.'" App. 2349 (Certified List 4536 at 2) (emphasis altered); see App. 446, 480, 627 (Certified List 4 at 21,673/2 n.44, 21,707/1 n.562, 21,854/3 n.2798).

3. Finally, the Commission "completely discounted" contrary evidence. *Business Roundtable*, 647 F.3d at 1151; see *Menorah Medical*, 768 F.2d at 295-296. For example, the Commission ignored companies' responses to Commission inquiries explaining that certain climate-related information was not included in SEC disclosures because it was "largely immaterial" and thus "inappropriate for inclusion." App. 423 (Peirce, dissenting); see App. 1059 (Certified List 3381 at 2) (noting companies' explanation "that 'climate risk *wasn't* a material issue'" (emphasis added)); App. 1769 (Certified List 3852 at 6) ("In each of these situations, the subject company appears to have provided justification to the Staff for its belief that the type of additional information alluded to in the Staff's comments * * * was not material."). And it had no serious answer to expert analysis indicating that industry sectors leading in climate disclosures are the ones "where climate-related factors are more likely to have a material impact"—strong evidence that the existing regime "is working successfully." App. 1462 (Certified List 3688, Annex A ¶ 20); see App. 800 (Certified List 671 at 9).

The Commission ignored evidence from Dr. Daniel Taylor, a leading expert on public-company disclosure, who examined the market reaction to corporate disclosures of climate-related information—the exact type of information the rule requires to be disclosed. He did so by performing an event study—the "standard" method of testing whether information would have "altered a reasonable investor's valuation of the company." App. 1060 (Certified List 3381 at 3); see App. 1469 (Certified List 3688, Annex A ¶ 37); App. 772 (Certified List 450, attachment at 35). "Event studies are often used to establish materiality" because "the market 'is the most accurate and unbiased measure of whether reasonable investors found the information to be material.'" *Laurie Bebo*, 2020 WL 4784633, at *87 (SEC ALJ Aug. 13, 2020). The Commission itself routinely relies on event studies to assess the materiality of information subject to proposed disclosure requirements. See, *e.g.*, 81 Fed. Reg. 49,360, 49,405/1 (July 27, 2016) ("We carefully considered each of these [event] studies[.]"); 81 Fed. Reg. 7928, 7949/1 (Feb. 16, 2016); 83 Fed. Reg. 66,344, 66,422/1 n.1262 (Dec. 26, 2018).

Dr. Taylor's event study reported "*no evidence*" of a stock-price or trading-volume response. App. 1057 (Certified List 3381 at ii). In any other SEC rulemaking, that empirical result would have weighed heavily against adoption of the proposed rule. Cf., *e.g.*, 84 Fed. Reg. 5202, 5290/1 (Feb. 20, 2019) (SEC event study "suggest[ed] that the market did not expect" event "to affect stock prices of companies"); *In re Application of Securities Industry & Financial Markets Ass'n*, 2018 WL 5023228, at *25

(SEC Oct. 16, 2018) (rejecting proposal where proponent did "not offer an event study"), vacated on other grounds sub nom. *NASDAQ Stock Market, LLC* v. *SEC*, 961 F.3d 421 (D.C. Cir. 2020).

But the Commission inexplicably—and arbitrarily—failed even to *consider* Dr. Taylor's findings, or those in other event studies that were consistent with his results. See, *e.g.*, App. 736 (Certified List 450 at 2). The Commission's "complet[e] discount[ing]" of studies "that reached the opposite result" is the quintessence of arbitrariness and caprice. *Business Roundtable*, 647 F.3d at 1150-1151; see *Chamber III*, 85 F.4th at 776; *Menorah Medical*, 768 F.2d at 295-296 ("Since these criticisms cast serious doubt on the premise grounding the [agency's] explanation, [its] failure to respond to them was arbitrary and capricious.").

The Commission, likewise, ignored comments from other investors that should have been given weight. Unaddressed empirical evidence showed that environmental disclosures are "irrelevant to retail investors' portfolio allocation decisions." App. 1468 (Certified List 3688, Annex A ¶ 36); see App. 797 (Certified List 671 at 6); App. 1870 (Certified List 3902 at 35). "[L]ess than 2% of mutual fund money is invested in [environmental, social, governance] funds," and environmental issues, according to surveys, are retail investors' "*least important consideration*." App. 1576 (Certified List 3787 at 5); cf. App. 797 (Certified List 671 at 6) (a quarter of investors think "ESG" [(environmental, social, governance)] "stands for 'earnings stock growth'").

The Commission failed to address evidence that, when professional investment analysts "determin[e] the value of securities," App. 1469 (Certified List 3688, Annex A ¶ 37), "other information, such as cash flows, profitability and industry," is "much more relevant to an investment decision," App. 1468 (Certified List 3688, Annex A ¶ 34), than information related to climate change, which the SEC acknowledged "very few" analysts even discuss, App. 614 (Certified List 4 at 21,841/2). The Commission nowhere reconciled these comments with its decision to adopt the rule.

* * *

Although the SEC's approach to climate disclosures is singular, its failures to substantiate the problem it purports to address and to confront contrary evidence are familiar. SEC regulations have repeatedly been invalidated on those grounds before. See, *e.g.*, *Chamber III*, 85 F.4th at

777; *Business Roundtable*, 647 F.3d at 1148; *American Equity*, 613 F.3d at 177-179.

B. The SEC Failed To Explain Its Departure From Decades Of SEC Precedent

The Commission's failure to show that there is a legitimate "securities" need for more climate-related information is particularly troubling because the rule marks an unexplained departure from SEC precedent. As the Commission admitted, the "existing framework of U.S. securities laws * * * call for disclosure about the *material* risks that companies face." App. 454 (Certified List 4 at 21,681/3) (emphasis added). Thus, for years, the Commission has stressed that companies should "eliminate immaterial information," 75 Fed. Reg. at 6294/3, because "high levels of immaterial disclosure can obscure important information" for investors, 81 Fed. Reg. 23,916, 23,919/1 (Apr. 22, 2016). See App. 1767 (Certified List 3852 at 4 n.3); see also 84 Fed. Reg. 44,358, 44,383/2 (Aug. 23, 2019) ("amendments may reduce search costs for certain investors by eliminating information that is not material"); FAST Act, Pub. L. No. 114-94, § 72003, 129 Stat. 1312, 1785 (2015) (directing Commission to "explore methods for discouraging * * * disclosure of immaterial information").

But the climate rule demands disclosure of information that is *not* material under well-settled standards. The Commission, therefore, needed to "display awareness" that it was departing from its prior position and "provide [a] reasoned explanation" for doing so. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But nowhere did the Commission offer a "satisfactory explanation" for its novel approach. *State Farm*, 463 U.S. at 43. Instead, the Commission simply purported to follow "traditional" materiality principles and "decorated the final rule with materiality ribbons." App. 696 (Peirce, dissenting). But the rule "embraces materiality in name only." *Ibid.*

Traditional materiality concerns the importance of information to investors' voting or investment decisions. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988); *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); App. 1397-1398 (Certified List 3688 at 30-31); App. 1664 (Certified List 3814 at 9). The final rule eschews that standard in several ways.

First, the rule imposes *no* materiality limitation for certain disclosures, including those about board oversight of climate-related risks and financial-statement disclosure related to severe weather events. App. 685-686, 688 (Certified List 4 at 21,912-21,913, 21,915).

Second, other parts of the rule require disclosure not only of risks that are *actually* material, but also climate-related risks that are "*reasonably likely* to have a material impact." App. 468 (Certified List 4 at 21,695/2) (emphasis added). The Commission describes this standard, and the attendant "materiality determination that a registrant will be required to make," as "the same as what is generally required when preparing the [management-discussion-and-analysis] section in a registration statement or annual report." App. 468 (Certified List 4 at 21,695/3). But the management-discussion-and-analysis rule "specifies its own standard" for disclosure, which the Commission has acknowledged for decades is *not* the "test for materiality approved by the Supreme Court in *Basic, Inc.* v. *Levinson*." 54 Fed. Reg. 22,427, 22,430/2 n.27 (May 24, 1989). The "reasonably likely" standard is "much broader." *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046, 1055 (9th Cir. 2014).

Third, the rule demands disclosure of other information that is "material" to subordinate company plans and activities, regardless whether that information would affect a reasonable *investor's* decisions. It requires disclosures, for example, if an internal carbon price is "material to" how a company evaluates or manages a climate-related risk, App. 689 (Certified List 4 at 21,916/1); if a carbon offset is a "material component" of a company's plan to achieve climate-related targets or goals, App. 689 (Certified List 4 at 21,916/3); if climate-related risks "material[ly] impact[ed]" the activities a company undertakes to mitigate or adapt to climate-related risks, App. 688 (Certified List 4 at 21,915/3); and if the estimates and assumptions a company used to produce its financial statements were "materially impacted" by severe weather events, App. 686 (Certified List 4 at 21,913/3). In these circumstances and others, "material" is used in a different, more granular sense that will require disclosing a range of information that is unlikely to be material in the conventional sense.

Finally, the rule announces a presumption that "any risks elevated to the board level *will be* material to the company." App. 486 (Certified List 4 at 21,713/3) (emphasis added). This is problematic in ways the Commission failed to consider. By forcing companies to "[d]escribe" the board's "oversight of climate-related risks," regardless of materiality (see pp. 22-37, *supra*), the rule "prompt[s]" companies to consider climate-related issues in circumstances, and at a level, where otherwise they typically would not. App. 629 (Certified List 4 at 21,856/1) ("recogniz[ing]" this "may" happen); see App. 711-712 (Uyeda, dissenting); App. 1711-1715 (Certified List 3814 at 56-60); App. 1850 (Certified List 3902 at 15); App. 2252-2253 (Certified List 4413 at 7-8). And then—having pressured boards to consider those climate-related issues—the rule *deems* them to be material. Through this bootstrapping the rule will compel companies to disclose vast swaths of information that is not material under settled law.

The rule thus refutes the SEC's claimed adherence to traditional notions of materiality. Indeed, in an earlier filing in a consolidated case, the SEC gave the game away. In attempting to show that the climate rule lies within its statutory authority, the SEC insisted that it is *not* limited to requiring disclosure of material information. See Stay App. 1292-1293. That is incorrect, see pp. 46-54, *infra*, but in any event, it only confirms that the disclosures the climate rule demands are unnecessary.

C. The SEC Failed Adequately To Consider The Rule's Economic Effects

The Commission had a statutory duty to justify the rule in light of its huge costs, and to consider whether the rule "will" promote "efficiency, competition, and capital formation." 15 U.S.C. § 77b(b). But the Commission fudged its figures to minimize the costs attributable to the rule—and thereby "failed once again" to fulfil its duty to adequately "'apprise itself'" of the "'economic consequences'" of its rules. *Business Roundtable*, 647 F.3d at 1148; see, *e.g.*, *American Equity*, 613 F.3d at 179; *Chamber of Commerce of United States* v. *SEC* (*Chamber I*), 412 F.3d 133, 140-144 (D.C. Cir. 2005).

On balance, the rule cuts *against* efficiency, competition, and capital formation. Its massive costs will deter companies from going (or staying) public, App. 1412-1413 (Certified List 3688 at 45-46), and will fall disproportionally on smaller firms, App. 1259 (Certified List 3645 at 1).

The Commission conceded that compliance with the proposed rule would cost more than double the costs of compliance with all major existing SEC disclosures *combined*. App. 2130 (Certified List 4090 at 7); see App. 1480-1481 (Certified List 3688, Annex A ¶ 69). The Commission claimed that the final rule reduced those costs "by almost 90%." App. 697

(Peirce, dissenting). But that calculation "duck[ed] serious evaluation of the costs," *Business Roundtable*, 647 F.3d at 1152, and rested on an economic analysis riddled with errors that public comments would have laid bare—had the SEC, as required, invited input on its massively revised final rule before adopting it, cf. *Mock* v. *Garland*, 75 F.4th 563, 584 (5th Cir. 2023) (where "comments indicated" proposal was "unworkable" and needed to be "replaced," "the proper process" was "to start the notice-and-comment process again"); App. 712 (Uyeda, dissenting) ("the Commission should have re-proposed this rule with an updated economic analysis and solicited additional public feedback"); Dissent of Commissioner Uyeda Regarding Proposed Rule on Conflicts of Interest Associated with Predictive Data Analytics (July 26, 2023), bit.ly/3U5G95e (objecting to the Commission's broader "pattern" of releasing proposals with "outlandish components," only to "pivo[t] to a different approach" without public input).

First, instead of grappling with the economic consequences of its action "'as best it can,'" *Business Roundtable*, 647 F.3d at 1148, the Commission utilized flawed, unvetted, and demonstrably biased data to knock hundreds of millions of dollars off its estimates arbitrarily.

For example, actual companies subject to this rule reported that scopes-1-and-2-emissions disclosures could cost up to $4 million per year for a single large company. See App. 652 (Certified List 4 at 21,879, tbl. 10 & n.5) (citing App. 909-913 (Certified List 3040)). But rather than rely on real-world estimates, the Commission turned to nonprofit environmental groups, padding the agency's data with activists' flawed surveys, see App. 652 (Certified List 4 at 21,879, tbl. 10 & nn.4, 6), and "telephonically" solicited lowball estimates, App. 2372-2380 (Certified List 4577); App. 2352-2371 (Certified List 4575), cited in App. 652-653 (Certified List 4 at 21,879-21,880, tbl. 10 & nn.7-8). Through this process, the Commission added estimates of $23,184, $40,000, and $50,000—a 99% savings compared to the public company's estimate—and then simply selected the "median" number. See App. 652 (Certified List 4 at 21,879 & tbl. 10).

The Commission's approach has no validity. The inputs are plainly biased and engineered to reach a preordained outcome. Cf. *National Ass'n of Private Fund Managers*, 103 F.4th at 1113 (SEC acted "pretextual[ly]"). And the SEC had no reason to believe that such data were representative of public companies subject to the rule. See *Friends of Boundary Waters Wilderness* v. *Bosworth*, 437 F.3d 815, 825-826 (8th Cir.

2006) ("we find it unreasonable to rely exclusively upon survey results, without analyzing the potential for bias" and where "there is no record evidence the [agency] * * * [tried] to determine which respondents, if any, would provide accurate and representative results").

In the face of clear errors, the Commission nonetheless rushed forward. For example, the Commission drew one datapoint from a survey touted by activist groups, see, *e.g.*, App. 645 (Certified List 4 at 21,872/2); App. 1635 (Certified List 3807 at 48), that purported to report "issuers' current average spend," App. 1018 (Certified List 3278 at 8). But, as commenters warned, "'*current* average spend'" is too low a benchmark, as the rule requires more and different disclosures than companies are currently making. App. 2258 (Certified List 4413 at 13) (emphasis added). Buried in a footnote, moreover, the same survey revealed that it calculated average costs by including responses of "'zero.'" *Ibid.* That, however, served only to depress artificially the survey's calculations. *Ibid.* Again, as commenters explained, survey respondents evidently "'marked zero'" to indicate that their responses did not "'reflect'" certain costs—even though those costs *should* have been included; the "'zero'" responses thus biased the results. *Ibid.* Yet the Commission ignored these deficiencies. That is arbitrary, and warrants vacatur. See *Menorah Medical*, 768 F.2d at 295-296 (failure to respond to criticisms that survey was untrustworthy makes reliance upon the survey arbitrary and capricious); *St. James Hospital* v. *Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir. 1985) (agency has "duty to establish the statistical validity of the evidence prior to reaching conclusions based on that evidence").

Second, the Commission "neglected to support its predictive judgments." *Business Roundtable*, 647 F.3d at 1148-1149. For example, the Commission assumed that, given the rule's "materiality qualifiers," only 65% of large accelerated filers and 35% of accelerated filers would have to comply with the scopes-1-and-2-disclosure requirements. App. 676-677 (Certified List 4 at 21,903-21,904). But as covered companies would have shown if allowed to comment on this new provision, companies will still incur costs to determine "whether" scopes-1-and-2 emissions are "material" and thus required, "even in cases where registrants ultimately determine they do not need to make disclosure." App. 648 (Certified List 4 at 21,875/3). The Commission failed even "'to hazard a guess'" as to that cost, which affects *every* public company—ignoring altogether an "'important aspect of the problem.'" *Business Roundtable*, 647 F.3d at 1150-1151.

Third, the Commission "inconsistently and opportunistically framed the costs and benefits of the rule." *Business Roundtable*, 647 F.3d at 1148-1149. In discounting the percentage of companies who would be required to report scopes-1-and-2 emissions, the Commission relied on "surveys of *current* climate-related disclosure practices." App. 675 (Certified List 4 at 21,902/2) (emphasis added). But it makes no sense to extrapolate the percentage of companies that would be affected by the rule from *current* reporting, when (in the Commission's view) "the current landscape * * * is inadequate." App. 603 (Certified List 4 at 21,830/1). "The SEC cannot have it both ways." *Chamber III*, 85 F.4th at 778. It is illogical for the rule simultaneously to *discount* the costs of the rule based on current reporting practices and claim as a benefit of the rule an *expansion* of those practices.

Finally, the Commission made no "attempt to understand the effect of the [rule] across the economy," or to "quantify these costs or even discuss what the impact might be." App. 2130 (Certified List 4090 at 7). It had no response to expert analysis showing that, each year, the rule would cost the broader economy billions of dollars in lost GDP, and hundreds of thousands of jobs. App. 2045 (Certified List 3981 at 7).

In addition, the SEC acknowledged that the rule *could* "lead companies to alter their governance structures in ways that are less efficient (*e.g.*, by diverting board or management attention from other pressing corporate matters or devoting internal resources and expertise to climate-related risks at the expense of other concerns)." App. 629 (Certified List 4 at 21,856/1). But the Commission made no attempt to estimate the "costs in the form of diminished shareholder value." *Ibid.* The Commission failed even to predict *whether* the rule would "prompt" companies to consider climate risks in inefficient ways, *ibid.*; cf., *e.g.*, App. 1715 (Certified List 3814 at 60) (it would), in clear violation of the Commission's duty to "make tough choices about which of the competing estimates is most plausible," *Business Roundtable*, 647 F.3d at 1150.

D. The SEC Ignored Reasonable, Less-Burdensome Alternatives

Confirming that providing investors with material information was not its real objective, the Commission failed to consider reasonable alternatives that would have furthered that aim at far less cost. This failure "violated the APA," *Chamber I*, 412 F.3d at 144, since "'[a]n agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives,'" *Spirit Airlines, Inc.* v. *U.S. Department of Transportation*, 997 F.3d 1247, 1255 (D.C. Cir. 2021). "This principle goes to the heart of reasoned decisionmaking," *ibid.*, and an agency's failure to consider reasonable "'alternatives has led uniformly to reversal,'" *City of Brookings Municipal Telephone Co.* v. *FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987); see, *e.g.*, *Menorah Medical*, 768 F.2d at 296-297.

Here, for example, the Commission could have required the reporting of greenhouse-gas emissions "at less frequency than annually," *e.g.*, "once every five years," as commenters suggested. App. 923 (Certified List 3162 at 10). By the Commission's own understated estimate, annual Form 10-K reporting of scopes-1-and-2 emissions would cost approximately $100,000,000 *per year*. See App. 654, 677 (Certified List 4 at 21,881, 21,904). But unrebutted expert evidence showed that the marginal, incremental benefit of *annual* disclosure, relative to, say, once every five years, was practically zero. See App. 2262 (Certified List 4413 at 17); App. 1064 (Certified List 3381 at 7). Greenhouse-gas "emissions are extremely highly correlated over time." App. 1064 (Certified List

3381 at 7). So if a company disclosed emissions in year one, the emissions in year two would be "almost the same," *ibid.*, and the second disclosure would yield "little" useful information, App. 2262 (Certified List 4413 at 17). Thus, as commenters explained, the Commission could have substantially eliminated a "huge burden"—a hundred million dollars a year—while still providing the same amount of potentially useful information, by simply requiring greenhouse-gas-emissions disclosures "less * * * than annually." App. 923 (Certified List 3162 at 10).

The Commission, however, "did not discuss" this "promising suggestion," in clear violation of the APA. *Menorah Medical*, 768 F.2d at 296; see, *e.g.*, *Chamber I*, 412 F.3d at 145 (where the "alternative was neither frivolous nor out of bounds," the Commission "had an obligation to consider it").

* * *

Ultimately, the SEC did not, and *cannot*, rationally justify its decision to impose billions of dollars of additional costs on companies, shareholders, and the broader economy. The SEC's current disclosure regime already requires the disclosure of material financial risks—climate or otherwise—and the SEC has not justified its idiosyncratic elevation of climate-related financial risks above all others. The rule should be vacated.

II. THE RULE IS CONTRARY TO LAW AND THE CONSTITUTION

A. The Rule Exceeds The SEC's Statutory Authority

The rule is independently unlawful because Congress never authorized the SEC to mandate climate disclosures in this fashion. The rule sweeps far beyond the type of material, financial disclosures Congress authorized the Commission to require. And it does not advance the only objectives that the SEC *is* authorized to pursue.

1. The Securities Laws Authorize The SEC To Require Disclosure Only Of Material, Financially Related Information

a. The Commission claims "'very broad'" authority to require unprecedently expansive climate-related disclosures based on generic provisions of 1930s-era securities statutes that authorize "'necessary or appropriate'" financial disclosures. App. 456-457 (Certified List 4 at 21,683-21,684 & n.181). But those provisions, "'read in their context,'" underscore the *limits* on the Commission's authority. *West Virginia*, 597 U.S. at 721.

The Commission relies primarily on a residual clause in Section 7(a)(1) of the Securities Act. App. 456 (Certified List 4 at 21,683). But that clause follows a list of enumerated disclosures and merely authorizes the Commission to require "such other information" it deems "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1). Such residual clauses are used "restrictively," *Washington State Department of Social & Health Services* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003), and reach "'only objects similar in nature to those objects enumerated by the preceding specific words,'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). The Commission's reading fails in two important ways.

First, as the Commission itself has previously acknowledged, the disclosures authorized by the Securities Act concern information that is both "financial in nature" and material to an investor's evaluation of "'a security.'" 81 Fed. Reg. at 23,921/3; see 15 U.S.C. §§ 77g(a)(1), 77aa; see also App. 454 (Certified List 4 at 21,681/3) (acknowledging that "the existing framework of U.S. securities laws * * * call for disclosure about the material risks that companies face"). That is worlds away from the rule's climate-related disclosures, which are not financial in nature and are largely unrelated to assessing the value of a security.

Other provisions the SEC invokes (App. 456, 458-459 (Certified List 4 at 21,683, 21,685-21,686)) reinforce the financially focused limits on its authority. Exchange Act Section 12(b), for example, authorizes the Commission to require disclosure of "information" "as necessary or appropriate in the public interest or for the protection of investors"—but only "*in respect of*" specific categories of information that are (again) *financial* and materially related to the company's financial condition. 15 U.S.C. § 78*l*(b)(1) (emphasis added). Likewise, Exchange Act Section 13(a)(2) addresses annual and quarterly "reports," *id.* § 78m(a)(2)—meaning companies' *financial* reports: It requires reports certified by "independent public accountants," which makes sense only in the financial-reporting context. *Ibid.* The statute presupposes that these "reports" concern "the balance sheet and the earnings statement," "the appraisal or valuation of assets and liabilities," and "depreciation and depletion," *id.* § 78m(b)(1)—again, all material financial information.

Securities Act Section 19(a), meanwhile, addresses "details to be shown in the balance sheet and earning statement," 15 U.S.C. § 77s(a), matters so far afield from the type of climate-related information in the rule that the Commission did not even mention this Section in the proposed rule. Balance sheets and earnings statements are "financial statements," *Checkosky* v. *SEC*, 23 F.3d 452, 470 (D.C. Cir. 1994); this ancillary provision about their "details" does not authorize transforming them into non-financial, climate-related reports.

Tellingly, when Congress *has* permitted the SEC to require disclosures outside that traditional, financial-information domain, it has expressly directed the SEC to require such disclosures. In 2010, for example, Congress directed the Commission to require companies to disclose use of "conflict minerals." 15 U.S.C. § 78m(p). Congress thus knows how to confer disclosure-requiring power outside the SEC's traditional ambit (though doing so may pose First Amendment problems, as the conflict-minerals rule demonstrates, see pp. 65-67, *infra*). But Congress conspicuously did *not* grant the SEC such authority in the provisions on which the climate rule relies. To the extent Congress has authorized regulations of climate-related matters—such as emissions reductions, the avowed goal of many of the rule's proponents, App. 1340-1344 (Certified List 3661 at 8-12)—Congress reserved those issues to the Environmental

Protection Agency. See 42 U.S.C. § 7414(a)(1); *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007).

Second, in attempting to shoehorn its rule into the securities statutes' limitations, the Commission conflates the objective of "protect[ing] investors" with responding to "investors' * * * demand[s]." App. 457 (Certified List 4 at 21,684/1-2). Those things are not the same. Certain investors "might" *demand* information for many reasons. *TSC Industries*, 426 U.S. at 449. But investors need *protection* only from fraud and latent material risks. See 81 Fed. Reg. at 23,924/3 ("materiality" is the "'cornerstone'" of the "securities laws"). The securities laws do not address every matter of "investor interest," Stay App. 1245 n.68; they echo their common-law antecedents, *Dura Pharmaceutical, Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005), which "'could not have conceived'" of imposing legal obligations "'without proof of materiality,'" *Universal Health Services, Inc.* v. *United States*, 579 U.S. 176, 193 (2016). As discussed above, the rule departs from traditional materiality principles, and the SEC has not shown the rule's disclosures are material. See pp. 22-37, *supra*.

The SEC similarly confuses the "public interest" under the securities laws, *e.g.*, 15 U.S.C. § 77g(a)(1), with promoting *any* social goal the

Commission favors. The public interest in this statutory context encompasses things like promotion of capital formation, *e.g.*, *id.* § 77b(b), but excludes ambitions "unrelated to the objectives of the federal securities laws," 81 Fed. Reg. at 23,970 n.663. The SEC cannot invoke abstract policy goals to aggrandize its authority beyond disclosure of "financial" information material to investors. *E.g.*, 15 U.S.C. § 78*l*(b)(1)(L).

b. Nor can the SEC draw support from past agency practice. Retreating from the statutory text, the Commission spends most of its "authority" section listing previous rulemakings that, it claims, shore up its claim of authority. App. 456-459 (Certified List 4 at 21,683-21,686). But this laundry-list argument is unpersuasive, misleading, and non-responsive to the lack of statutory authority for *this* rule. Indeed, it only underscores the aberrant nature of the climate rule.

The SEC cannot cite a *single* example of another disclosure requirement, among the "dozens" adopted "over the last 90 years," App. 456-457 (Certified List 4 at 21,683/3-21,684/1), that breaches the financially focused statutory guardrails on Commission authority the way this rule does. To the contrary, the new climate-related disclosures are different in kind from the 1933 form requiring disclosure of issuers' place and duration of business, or a 1982 rule requiring disclosure of investments' "risk factors," or a 1997 rule requiring quantitative disclosure of "'interest rate risk,'" for example. See App. 457 (Certified List 4 at 21,684). Every one of the previous disclosures—including those touching incidentally on "environmental matters," App. 458 (Certified List 4 at 21,685/1)—respected the bedrock statutory requirements that the information disclosed must be both "financial in nature" and material to an investor's evaluation of "'a security.'" See pp. 48-51, *supra*. In contrast, the climate rule flouts those requirements, and the SEC's failure to appreciate that fundamental distinction renders irrelevant its laundry list of old rules.

c. In short, this is a climate rule, not an investor rule. It unites two weapons that activists have long sought to deploy in the climate battle—the financial system and compulsory disclosure. Thus, the rule is a direct outgrowth of an Administration agreement with other nations "to make finance flows consistent with a pathway towards low greenhouse gas emission" and to "alig[n] * * * their financing activities with the goals of the Paris Agreement"—all without working through Congress to achieve this legislative objective. Stay App. 933; see App. 950-

951 (Certified List 3162 at 37-38) ("UN Principles for Responsible Investment" call for investors to "'engage on an explicit net-zero agenda'" and "'deliver real-world outcomes'").

Compulsory disclosure laws, meantime, are a familiar mechanism for deterring politically-disfavored activities. See, *e.g.*, *Americans for Prosperity Foundation* v. *Bonta*, 594 U.S. 595 (2021); *National Ass'n of Manufacturers* v. *SEC*, 800 F.3d 518 (D.C. Cir. 2015); see also App. 950 (Certified List 3162 at 37) (activists use disclosures to "pressur[e] financial institutions to divest" from oil companies). Shortly before this rule was adopted, California enacted two laws with many of the same requirements and applied them to all large companies, *regardless* whether they have public investors. See App. 2319 (Certified List 4522 at 2); App. 2313 (Certified List 4518 at 1). An author of one of those laws openly admitted that the climate "report[s]" were designed to pressure corporations "'to significantly decrease corporate emissions.'" App. 2319 (Certified List 4522 at 2).

As even some environmental activists have admitted, the securities laws are the wrong vehicle for fighting climate change. See, *e.g.*, Ann M. Lipton, *Not Everything Is About Investors*, 37 Yale Journal on Regulation

499, 572 (2020) (advocating a new "system of corporate transparency," "[r]ather than warp[ing] the securities laws to serve purposes for which they were never intended"), cited in App. 804 n.58 (Certified List 671 at 13). That battle should be fought elsewhere.

2. The Major-Questions Doctrine And Constitutional Avoidance Also Weigh Strongly Against The SEC's Overbroad Statutory Reading

Even if the securities laws could plausibly be construed to authorize the climate disclosures mandated here, the Court should still reject the Commission's strained reading under the major-questions doctrine, and to avoid the First Amendment problems inherent in compelling corporate speech on such a controversial policy matter.

a. Congress does not authorize agencies to resolve major questions, and to work "transformative expansion[s] in [their] regulatory authority," through "modest words, vague terms, or subtle devices." *West Virginia*, 597 U.S. at 723-724 (brackets and internal quotation marks omitted). Such readings should be met with "'skepticism.'" *Id.* at 724. Yet that is precisely what the Commission claims Congress authorized here. The climate rule attempts to regulate a "'significant portion of the American economy,'" *id.* at 722, and would require "billions of dollars in [private] spending," *King* v. *Burwell*, 576 U.S. 473, 485 (2015). By the Commission's own estimate, the rule will impose $2.33 billion in direct costs *per year*—including three million "internal" hours of annual compliance work, plus numerous other costs, see pp. 37-44, *supra*.

The rule's "'political significance'" also makes it a major question. *West Virginia*, 597 U.S. at 716. The comment file may be the largest in SEC history. Commenters from trade associations, individual companies, public-interest organizations, environmental groups, individual investors, other governmental agencies, state and local governments, and members of Congress have an opinion on the proper handling of the climate-related issues addressed in the Commission's proposal. App. 2250-2255 (Certified List 4413 at 5-10). And 43 States are participating in this litigation. See Nos. 24-1522, 24-1627, 24-1631, 24-1634. All of this concerns a policy issue—climate—that is a flagrant "'mismatch'" with the SEC's expertise as a financial regulator. *Mandan, Hidatsa & Arikara Nation* v. *U.S. Department of Interior*, 95 F.4th 573, 580 (8th Cir. 2024); cf. *National Federation of Independent Business* v. *Department of Labor*, 595 U.S. 109, 117 (2022) (per curiam) (OSHA regulates "workplace safety," not "public health").

Had Congress intended the SEC to regulate issues of such "'earnest and profound debate across the country,'" it would have said so clearly. *West Virginia*, 597 U.S. at 732. But it did not. As explained above, the 1930s-era securities statutes on which the SEC relies are best read not to support its claim of power at all. They certainly do not *clearly* authorize the disclosures the climate rule demands.

Those statutes also have never been construed to confer such power. As the SEC once recognized, these laws ensure "that issuers provide investors with 'complete information relative to the *financial condition* of the issuer.'" 67 Fed. Reg. 44,964, 44,966 (July 5, 2002) (emphasis added). In the SEC's words, "providing investors with financial information concerning publicly-held corporations is the *raison d'etre* of the disclosure provisions of the securities laws." Stay App. 1245 n.68. The enormous power the SEC now asserts to mandate disclosures on other, non-financial topics has not been sitting in its back pocket—unused—for 90 years.

The circumstances surrounding the rule's adoption confirm that the SEC is not wielding authority clearly conferred by Congress, but seeks instead to circumvent Congress. Cf. *National Ass'n of Private Fund Managers*, 103 F.4th at 1113-1114 (the Commission cannot use "the guise" of the securities laws to circumvent "congressional design"). Like OSHA in adopting its unlawful vaccine mandate, *National Federation of Independent Business*, 595 U.S. at 113, and the Department of Education in adopting its equally unlawful student-loan forgiveness program, *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2373 (2023), the Administration could not muster congressional support for its climate agenda.

On "multiple" occasions, Congress has "'considered and rejected'" bills that would do exactly what the rule attempts. *West Virginia*, 597 U.S. at 731; see, *e.g.*, Climate Risk Disclosure Act of 2019, H.R. 3623; Climate Risk Disclosure Act of 2019, S. 2075. So the Administration once again "pored over the U.S. Code in search of authority, or a 'work-around,'" to "impos[e]" the desired measures unilaterally. *BST Holdings, LLC* v. *OSHA*, 17 F.4th 604, 612 (5th Cir. 2021), stay dissolved sub nom. *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021), stay granted sub nom. *National Federation of Independent Business*, 595 U.S. 109. The Administration has been unabashed in this approach, vowing to advance its "climate agenda using every tool at [its] disposal"—with or "without Congress"—and to "continue to do the whole-of-government approach" on its own if Congress does not cooperate. Stay App. 892-893. The vaccine-mandate, student-loan-forgiveness pattern is thus repeating: In response to Congress's decisions not to act, climate regulations are now "pop[ping] up" across the federal bureaucracy. Tr. of Oral Arg. 81, *National Federation of Independent Business*, *supra* (No. 21A244); see, *e.g.*, 87 Fed. Reg. 68,312 (Nov. 14, 2022) (proposing mandatory climate disclosures for federal contractors).

This illegitimate "work-around" did not work for COVID or student loans, and it does not work for climate. *BST*, 17 F.4th at 612. The Constitution does not permit the Executive to regulate "without Congress," Stay App. 892, merely because that co-equal Branch has not advanced the President's policy goals in the manner or at the pace he prefers.

b. The Court should also reject the Commission's reading of its disclosure authority to avoid weighty First Amendment issues. Federal law "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *Lucas* v. *Alexander*, 279 U.S. 573, 577 (1929). This Court and the Supreme Court thus routinely construe statutes to "obviat[e] deciding whether" the law "would violate the First Amendment." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 578 (1988); see *Phelps-*

Roper v. *Koster*, 713 F.3d 942, 952 (8th Cir. 2013). Accordingly, the Court should avoid a construction of the Commission's disclosure authority that would raise the grave First Amendment concerns discussed below. See pp. 59-67, *infra*.

B. The Rule Violates The First Amendment

The SEC's climate rule "abridge[s] the freedom of speech." U.S. Const. amend. I. This freedom "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and it "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid," *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 16 (1986) (plurality). The rule flouts that foundational principle by forcing companies to engage in costly speech against their will on matters of contentious political debate.

1. By requiring companies to wade into this debate, the rule infringes on companies' freedom "to remain silent," triggering strict scrutiny twice over. *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 586 (2023).

First, by "[m]andating speech that a speaker would not otherwise make," the rule "necessarily alters the content of the speech" and thus qualifies as "content-based regulation." *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988); see *Gralike* v. *Cook*, 191 F.3d 911 (8th Cir. 1999), aff'd, 531 U.S. 510 (2001). The rule requires companies to announce publicly their subjective judgments about future risks—requiring, for example, "determination[s] of" which risks to their businesses are "climate-related." App. 465 (Certified List 4 at 21,692/1). It thereby forces them into politically charged discussions about why they do or do not have certain climate-related policies or expertise. See, *e.g.*, App. 631 (Certified List 4 at 21,858/2) (predicting that these disclosures will be scrutinized and used to "deter potential greenwashing"). By treating companies' participation in public markets "as a trigger for compelling them to talk about a topic they would rather avoid"—climate change—the rule merits strict First Amendment scrutiny. *Telescope Media Group* v. *Lucero*, 936 F.3d 740, 753 (8th Cir. 2019).

Second, the rule more specifically compels "political speech." *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010). Climate change is a "sensitive political topi[c]" subject to robust debate and raises many contested questions, including climate change's long-term consequences and corporations' responsibilities to address it. *Janus* v. *AFSCME*, 585 U.S. 878, 914 (2018). The First Amendment protects each person's right to speak, or not, as that person chooses on climate change; the government can no more compel than prohibit speech on this matter of public debate. *Gralike*, 191 F.3d at 919. For this reason, too, the rule is subject "to strict scrutiny regardless of the government's" claim of "benign motive." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 165 (2015).

The rule cannot survive strict scrutiny. The Commission cannot "rest on 'speculation or conjecture.'" *National Ass'n of Manufacturers*, 800 F.3d at 526. It must prove that a compelling problem exists and that this restriction is essential to solve it. *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993). But the Commission failed to substantiate that a problem ever existed, see pp. 19-32, *supra*, or that the rule furthers any "compelling" government interest, *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 766 (2018) (*NIFLA*).

The only arguably compelling interest the Commission could identify was protecting investors from fraud or other material risks; there is no compelling interest "simpl[y]" in providing "additional relevant information" for its own sake. *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 348 (1995); see *American Meat Institute* v. *USDA*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("it is plainly not enough for the Government to say simply that is has a substantial interest in giving consumers information"); *International Dairy Foods Ass'n* v. *Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) ("We are aware of no case in which consumer interest alone was sufficient[.]"). But the SEC failed to show that investors are not *already* receiving climate-related information when material or that they are harmed by a lack of additional disclosures, let alone that the rule is necessary to fill any gap. Indeed, the rule is not even designed to supply missing *material* information. The securities laws "already" require disclosure of material climate-related information, and "there is no evidence"—the Commission has *never* found—that a company has "improperly" failed to disclose such information. *Wollschlaeger* v. *Governor*, 848 F.3d 1293, 1314 (11th Cir. 2017) (en banc); see pp. 19-32, *supra*. Nor has the Commission identified a single shareholder harmed by a lack of climate disclosure. Cf. *Junior Sports Magazines Inc.* v. *Bonta*, 80 F.4th 1109, 1117 (9th Cir. 2023) (the government may not burden speech "to prevent something that does not appear to occur").

Regardless, the rule is not narrowly tailored to that purported compelling interest. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). The SEC failed to show why disclosure requirements cannot be limited by traditional conceptions of materiality, or why Commission guidance and enforcement authority cannot suffice for its purposes. The Commission has not even "tried" these and other less-restrictive alternatives. *Bruni* v. *City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016). And the SEC's singling out of purported climate risks for heightened disclosure requirements, while "neglecting every other issue," also "fails strict scrutiny review because it is not narrowly tailored to achieve" the purported goal of investor protection. *Gralike*, 191 F.3d at 921.

2. Less stringent First Amendment standards have no application and cannot save the climate rule anyway.

The Supreme Court has subjected certain disclosure requirements to lesser scrutiny only in "exception[al]" circumstances, *Book People, Inc.* v. *Wong*, 91 F.4th 318, 338 (5th Cir. 2024), where disclosures involved (1) "commercial advertising" and (2) "purely factual and uncontroversial information," *National Ass'n of Manufacturers*, 800 F.3d at 522-523 (internal quotation marks omitted); see *NIFLA*, 585 U.S. at 768. Neither requirement is met here. The rule goes far beyond advertising or "commercial speech" that merely "propos[es] a commercial transaction." *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). And the required disclosures "are neither factual nor uncontroversial"; they require "[companies] to undertake contextual analyses, weighing and balancing many factors" that "ha[ve] already proven controversial" and are subject to vigorous debate. *Book People*, 91 F.4th at 338-340. The SEC is forcing companies to opine on hypothetical future risks, draw controversial connections between weather events and global climate change, and report misleading, inaccurate emissions figures. See, *e.g.*, pp. 13-16, *supra*; App. 2268-2269 (Certified List 4413 at 23-24); Stay App. 1416-1417 ¶ 55. As the Supreme Court has previously held in rebuffing another attempt by the SEC to regulate speech, "there can be no doubt" that market participants' "commentary on general market conditions" is constitutionally "protected." *Lowe* v. *SEC*, 472 U.S. 181, 210 (1985).

Moreover, "climate change" is the paradigmatic "controversial subjec[t]" requiring "'special protection'" at "'the highest rung of'" the First Amendment ladder. *Janus*, 585 U.S. at 913-914. Speech that the rule compels inevitably will be used to "stigmatize" companies and attempt to "shape [their] behavior"—the very features that doomed the Commission's compulsory conflict-minerals disclosure. *National Ass'n of Manufacturers*, 800 F.3d at 520, 530; see App. 1574 (Certified List 3787 at 3); App. 917-919 (Certified List 3162 at 4-6); App. 1108-1114 (Certified List 3461 at 6-12). Indeed, the SEC acknowledges that its rule is partly designed to reveal "greenwashing," anticipating that environmental activists will flyspeck the disclosures to criticize companies and call for increased regulation or other concerted action. *E.g.*, App. 630-631 (Certified List 4 at 21,857-21,858); see App. 2268 (Certified List 4413 at 23); App. 1408 & n.125 (Certified List 3688 at 41). The SEC's attempt to skew the debate by arming one side with ammunition for "'publi[c] condemn[ation]'" makes it even "'more constitutionally offensive.'" *National Ass'n of Manufacturers*, 800 F.3d at 530.

Regardless, the climate rule fails intermediate or "exacting" scrutiny because the Commission has not shown "narro[w] tailor[ing] to the government's asserted interest." *Americans for Prosperity*, 594 U.S. at. 608; see *National Ass'n of Manufacturers*, 800 F.3d at 556; *Calzone* v. *Summers*, 942 F.3d 415, 423 n.6 (8th Cir. 2019) (en banc). "Exacting scrutiny is just what its name says—exacting," *Dakotans for Health* v. *Noem*, 52 F.4th 381, 389 (8th Cir. 2022), and for all the reasons discussed above, the rule is far more extensive than necessary for the Commission's purpose, see pp. 44-46, *supra*. This "'dramatic mismatch'" between private burdens and asserted governmental interests, *Dakotans for Health*, 52 F.4th at 391, shows that the rule is "'unjustified,'" "'unduly burdensome,'" and "'broader than reasonably necessary'" to survive even lesser scrutiny, *NIFLA*, 585 U.S. at 776.

III. The Rule Should Be Vacated

In light of the climate rule's manifold defects, this Court should vacate it in its entirety. The APA directs that courts "*shall* * * * hold unlawful and set aside agency action" that is "arbitrary, capricious," or "contrary to law." 5 U.S.C. § 706(2)(A), (C) (emphasis added); see also 15 U.S.C. § 77i(a). The APA's plain text requires that "[i]n *all* cases," unlawful "agency action *must* be set aside." *Citizens to Preserve Overton Park*, 401 U.S. at 413-414 (emphases added); see *National Ass'n of Private Fund Managers*, 103 F.4th at 1113-1114; *North Dakota* v. *EPA*, 730 F.3d 750, 764 (8th Cir. 2013) (because agency's analysis "was arbitrary and capricious," its action "[wa]s therefore vacated"). The APA mandates the same remedy here: The climate rule must be vacated.

CONCLUSION

The Court should grant the petitions for review and vacate the climate rule.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2024, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

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I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f), it contains 12,893 words.

I certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point New Century Schoolbook LT.

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Nos. 24-1628, 24-2173

In the United States Court of Appeals for the Eighth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,
Petitioners,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent,
DISTRICT OF COLUMBIA, ET AL.,
Intervenors.

NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
Petitioner,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petitions for Review of an Order of the Securities & Exchange Commission

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INTRODUCTION

The SEC's brief confirms the fundamental flaw in its climate rule: its failure to justify the most expensive disclosure mandate in SEC history. The SEC claims (Br. 2) that the rule is about protecting investors, but it concedes (Br. 66) the rule is "not" about protecting investors from "[f]raud." The agency does not cite a single investor who was harmed, or a single penny lost, because a company did not disclose climate-related information, or even a single class action brought (much less won) on this ground.

Instead, the SEC stakes everything on its assertion that the mandated disclosures fill a gap in information investors need. But that rationale is refuted by the SEC's longstanding recognition that companies *already* must disclose material climate-related information—a position the SEC abruptly, and arbitrarily, abandons here. Its justification boils down to the fact that an unspecified subset of investors *want* more climate information—even information *not* material under existing law—and would prefer not to spend their own funds acquiring it. But that investor-curiosity justification contradicts the SEC's own precedent, and like the final rule, the SEC's brief does not acknowledge—much less explain—that swerve. And in any event, the SEC does not and cannot show that any purported benefit (SEC Br. 66-67) of sparing some investors supposed six-figure costs of obtaining climate information can justify the undisputed multi-*billion*-dollar burden the rule foists onto public companies.

The SEC's abandonment of its past positions and practice makes its appeal to "longstanding" practice (Br. 1) to support its claimed statutory authority perplexing. And the argument is unpersuasive even on its own terms, because the SEC never engages with the central flaw in its reading of the statute: The snippets of statutory language it clips from across the securities laws are *residual* clauses that under settled precedent must be construed in light of the enumerated items they follow. The SEC ignores that context and cites its prior disclosure rules. But those examples backfire; none required the disclosure of nonfinancial information immaterial to evaluating a security.

Those prior rules underscore how far the SEC has strayed in seeking to expand its authority here, confirming that the major-questions doctrine applies. But the SEC makes no serious effort to show that the securities statutes *clearly* authorize its climate rule. In truth, its interpretation flouts the Supreme Court's major-questions cases and puts the climate rule on a collision course with the First Amendment, which petitioners' reading properly avoids. The SEC bridles at the suggestion that the First Amendment limits its ability to compel speech—but when agencies take unprecedented liberties with powers granted by Congress, learning the Constitution's constraints on their ambitions is the price they sometimes pay.

In short, this rule fails because it obviously is *not* what the SEC proffers as its defense—a rule "about protecting investors," "consistent" with "decades" of "historical" SEC practice. Br. 2, 26, 43-44. The rule is in truth a sharp, unjustified, unauthorized, and ultimately unconstitutional deviation from that practice. Its mandates are *seven times* lengthier than those for other risks, such as cybersecurity, that the SEC and its *amici* cite. That is because this is a climate-policy rule, not an investor-protection rule. This Court should vacate the rule in its entirety.

ARGUMENT

I. THE COMMISSION FAILS TO SHOW THAT THE RULE IS THE PRODUCT OF REASONED DECISIONMAKING

The SEC's brief confirms the lack of justification for this rule. The SEC disclaims (Br. 19) making climate policy, and tacitly admits this is not a permissible rationale. Instead, the SEC invokes "the protection of investors," but it concedes (Br. 66) the rule is "not" about protecting investors from "[f]raud." The agency has "'no evidence' that any investor has ever been harmed by a lack of climate-related disclosures." *Ibid.* Its entire defense of the rule thus rests on the assertion that an unspecified subset of investors *wants* climate information. But that justification collapses because the SEC does not and cannot show that investors actually *need* it. The rule is arbitrary and capricious and falters on the "presumption * * * *against* changes in current policy that are not justified by the rulemaking record." *Motor Vehicle Manufacturers Ass'n of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983).

A. The Commission Does Not And Cannot Reasonably Explain Why The Rule Was Necessary

1. As petitioners demonstrated, the Commission has long recognized that "[i]f environmental * * * information is material to investors, the Commission's [existing] rules already require the disclosure of such information." Stay App. 1192 n.1. There is no informational gap for the climate rule to close. Chamber Br. 20-21.

Sacrificing its own longstanding, pro-investor position, the Commission asserts (Br. 66) that "existing rules" do *not* require disclosure "of all material information." But the Commission has long said the opposite. *E.g.*, 63 Fed. Reg. 67,174, 67,254/3 (Dec. 4, 1998) (discussing "our statutory mandate to require prospectuses to disclose fully and fairly all material information"). And though the regulations the Commission cites (Br. 66) call for "specific" disclosures, the agency has long acknowledged that to prevent those disclosures "from being misleading" (*ibid.*), companies *also* must disclose other information, "not otherwise specifically required, of which the average prudent investor ought reasonably to be informed," 41 Fed. Reg. 21,632, 21,635/2 (May 27, 1976). This includes—the Commission has said—"information concerning environmental compliance, impact, expenditures, plans, or violations." *Ibid.*

The Commission's *post hoc*, 180-degree reversal, that "no such requirement" exists (Br. 66), improperly contradicts what "the Commission itself" said in adopting the rule. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (rejecting *post hoc* rationalizations); see *State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). In the adopting release, the agency "agree[d] with * * * commenters who asserted that registrants are already required to disclose the financial statement effect of material climate risks under existing rules." App. 570 (Certified List 4 at 21,797/3). And it pointed, repeatedly, to its "2010 Guidance," *e.g.*, App. 554 (Certified List 4 at 21,781/1 n.1756), which detailed the "climate change related matters" that must be disclosed, "in addition to the information expressly required by Commission regulation," 75 Fed. Reg. 6290, 6293/1-2 (Feb. 8, 2010). The SEC until recently believed that existing rules offered robust investor protections—requiring all material information to be fully disclosed—but its litigating position now treats those same rules as narrow and inadequate.

The Commission's brief fails even to *acknowledge* these prior positions, let alone "explain *why* it * * * changed its mind." *National Ass'n of*

Manufacturers v. *SEC*, 105 F.4th 802, 812 (5th Cir. 2024). That the Commission must toss aside its own longstanding, pro-investor position confirms that providing investors with material information is not the Commission's true objective here. If it were, no new rule, and no position reversal, would be required.

2. The SEC fails to justify the rule anyway because as petitioners demonstrated (Chamber Br. 22-32), record evidence "cast[s] serious doubt" on the materiality of the rule's mandates, and the agency has no serious response to that evidence. *Menorah Medical Center* v. *Heckler*, 768 F.2d 292, 295 (8th Cir. 1985).

The Commission tacitly admits (Br. 70-71) it failed to respond to Dr. Daniel Taylor's study. Using the same event-study techniques the Commission usually does, Dr. Taylor found "*no evidence*" greenhouse-gas emissions were material to investors. App. 1057 (Certified List 3381 at ii); see Chamber Br. 30-31. The Commission concedes (Br. 71) that its adopting release failed even to "identify Professor Taylor by name," let alone mention his study. But nevertheless, the Commission asserts (Br. 70-71), it "address[ed] [Dr. Taylor's] concern[s]" *sub silentio* by "modif[ying]" the rule.

The Supreme Court rejected precisely this defense last Term—a change in a final rule may reflect "aware[ness]" of an adverse comment, but "awareness is not * * * an explanation" responsive to the commenter's evidence. *Ohio* v. *EPA*, 144 S. Ct. 2040, 2054 (2024). As in that case, moreover, the Commission rule change did not resolve the concern. If emissions are "not material," App. 1063 (Certified List 3381 at 6), the Commission cannot justify a rule *requiring* disclosure of such emissions, even with a "materiality qualifier," SEC Br. 71. The antecedent step of "assess[ing] and monitor[ing] the materiality of [companies'] emissions," App. 506 (Certified List 4 at 21,733/3), would *still* be pointlessly burdensome, and could be justified—the Commission itself said—only if emissions are often material, see App. 505-507 (Certified List 4 at 21,732-21,734). But Dr. Taylor's study—using a method ordinarily used by the Commission—"cast serious doubt on the premise" that emissions are often, if ever, material. The Commission's "failure to respond" to his findings is arbitrary and capricious. *Menorah Medical*, 768 F.2d at 295-296 & n.7.

The Commission asserts (Br. 88) event studies, such as Dr. Taylor's, are "unnecessary" anyway, given "support" in "peer-reviewed literature for the importance of climate-related disclosures to investors." But as in the adopting release, the Commission never engages with the flaws in those studies, Chamber Br. 25, many of which, the Commission concedes (Br. 93-94), were not cited in the proposing release, Chamber Br. 24. The Commission's continued failure to respond to "significant criticisms" of its cited studies is arbitrary and capricious. *Menorah Medical*, 768 F.2d at 295-296.

More fundamentally, the Commission continues to miss the larger point: Yes, "[e]xisting research find[s] an increase in stock price volatility around the day when [greenhouse-gas] or carbon emissions are disclosed." SEC Br. 88. But that volatility is the same as that observed from emissions "*inferred* from publicly-observable information." App. 1064 (Certified List 3381 at 7) (emphasis added). Thus, as petitioners explained, the Commission's own evidence shows the rule will "provide little *new* information beyond what can be inferred from observable aspects of the company's operations." *Ibid.*; see Chamber Br. 26. Aside from a conclusory assertion in its brief (Br. 68), the Commission has no response to this flaw in its justification for the rule.

Similarly, the Commission never engages with its own prior interactions with public companies on the materiality of climate-related information. Chamber Br. 28-29. The SEC does not dispute that it previously asked numerous companies *why* they did not make certain "disclosure[s] related to climate change," *Sample Letter to Companies Regarding Climate Change Disclosures*, SEC, https://tinyurl.com/38hxes8s (last updated June 26, 2024), and that each company told the Commission that such information was not material, Chamber Br. 28-29. If the Commission disagreed—if it thought that climate information *was* material—it surely would have demanded *some* additional climate disclosures from those companies, or pursued enforcement actions. But it did not, App. 1769 (Certified List 3852 at 6), and has since abandoned its ESG enforcement group, see Andrew Ramonas, *SEC Abandons ESG Enforcement Group Amid Broader Backlash*, Bloomberg Law (Sept. 12, 2024), https://tinyurl.com/3t97xdc9—discrepancies the Commission does not and cannot explain.

3. All the Commission has is its assertion (Br. 66-67) that some investors *want* more climate-related information—and would prefer not to spend their own money getting it. But investors might *demand* information for many reasons; that does not make it material. See *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). And "consistency" and "comparability" (SEC Br. 65) is a one-way ratchet the SEC could cite for "*any* rule." *American Equity Investment Life Insurance Co.* v. *SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010). The SEC does not exist to compel one set of institutions to prepare reports that another group of institutions believes would be profitable to obtain. (See the First Amendment discussion *infra.*) Regardless, the Commission cannot show that any purported benefit of sparing some investors the supposed six-figure costs of obtaining climate information (SEC Br. 66-67) can justify the rule's multi-*billion*-dollar mandate.

The Commission's own evidence shows (again) that the agency inappropriately relies on interests "unrelated to shareholder value." *Business Roundtable* v. *SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011); see Chamber Br. 26-27. For example, the Commission cites (Br. 66) a survey reporting institutional investors' costs "collecting climate data." But that survey *confirms* "[r]educ[ing] risk" and "[i]mprov[ing] financial performance"—*i.e.*, financial goals—are secondary to those survey respondents' "climate * * * goals." App. 1022 (Certified List 3278 at 12).

The Commission's "numerous commenters" (Br. 66), and virtually all its *amici*, reveal a similar mismatch. The Center for Climate and Energy Solutions' (Amicus Br. i) "mission is to secure a safe and stable climate." CalSTRS (App. 623 (Certified List 4 at 21,850/1 n.2754)) is operated by the State of California, whose "policy" is to "[a]chieve net zero greenhouse gas emissions," Cal. Health & Safety Code § 38562.2(c)(1); and CalPERS *admits* it wants to use disclosures to pressure companies to combat climate change, see CalPERS Letter 5-6 (June 12, 2021), https://tinyurl.com/45ay5ed6. Trillium (App. 453 (Certified List 4 at 21,680/1 n.138)), too, is "exclusively focused on sustainable and responsible investing." App. 2238 (Certified List 4390 at 1). "[A]dvanc[ing] humankind towards a global sustainable economy" may be a laudable goal, *ibid.*, but it is not a *securities*-law goal. Nor is there a legitimate, securities-law interest in compelling disclosures to help asset managers market ESG funds, cf. *Combating Climate Change by Investing in Innovation*, Wellington Management, https://tinyurl.com/mvamnkvv, or "construct efficient hedging portfolios" (SEC Br. 63). Yet *that* is the "demand" the Commission cites, repeatedly. Compare, *e.g.*, SEC Br. 63 (citing App. 445-446 (Certified List 4 at 21,672-21,673)), with App. 446 (Certified List

4 at 21,673 n.38) (citing Trillium and Wellington); see Law & Finance Professors Amicus Br. 11-12. The Commission never reckons with the fact those "narrow interests," "unrelated to shareholder value," underlie it all. *Business Roundtable*, 647 F.3d at 1151-1152; see Manhattan Institute Amicus Br. 18-19.

"Perhaps there is some explanation why" the cited demand supports the rule. *Ohio*, 144 S. Ct. at 2054. "But if there is an explanation, it does not appear in the final rule." *Ibid.* And particularly given the constitutional constraints at issue in this case, that shortfall is fatal.

B. The Commission Cannot Square Its Position With Agency Precedent

The Commission's investor-curiosity rationale is not only wrong and unsupported, but also conflicts with Commission precedent. Chamber Br. 33-37. Yet the Commission nowhere even "display[s] awareness" that it is departing from that precedent. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). On the contrary, it proffers the rule's supposed consistency with historical practice as the standard by which it should be judged (Br. 26, 43-44), a test it fails dismally.

The Commission *still* claims (Br. 76) adherence to "traditional materiality standards," even as it acknowledges (Br. 77) key aspects of the rule "contain [no] express materiality qualifiers" whatsoever. That is nonsensical, and the Commission's explanation makes it no less so. The agency insists (Br. 50-51), for example, that a board's consideration of an issue is *always* material, so a "materiality qualifier [is] not necessary." But the Commission never seriously engages with the reality that by forcing companies to "descri[be]" the board's "oversight of climate-related risks," regardless of materiality, App. 485 (Certified List 4 at 21,712/3), the rule pressures boards to consider climate-related issues that otherwise they typically would not—and then *deems* those immaterial issues to be material, Chamber Br. 36-37.

The Commission's lawyers deny (Br. 77) this pressure exists, but the adopting release *itself* conceded the rule may "prompt * * * companies [to] overse[e] climate-related risks" in "less efficient" ways, including "by diverting board * * * attention." App. 629 (Certified List 4 at 21,856/1). The Commission, to be sure, projected that such inefficiency would obtain only "[*t*]*o the extent that*" boards alter their oversight in response to the rule. *Ibid.* (emphasis added). But the Commission failed to then exercise its judgment to predict whether boards *would* do that. "The SEC cannot have it both ways," *Chamber of Commerce of United States* v. *SEC*, 85

F.4th 760, 778 (5th Cir. 2023), *refusing* in the rule to come to ground on whether boards will be pressured to consider immaterial information, and then *assuring* the Court they will *not*.

In the rule, the Commission also adopted a standard of materiality—"*reasonably likely* to have a material impact"—that it mischaracterized as consistent with traditional notions of materiality. App. 468 (Certified List 4 at 21,695/2) (emphasis added). But as petitioners demonstrated (Br. 34-35), the "reasonably likely" standard is "much broader." *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046, 1055 (9th Cir. 2014). Here, the Commission simply repeats (Br. 78-79) its conflation of the two standards, without addressing their differences. It thus invokes (Br. 78) the "traditional notions of materiality" in "*Basic*[*, Inc.* v. *Levinson*, 485 U.S. 224 (1988)]," but nowhere addresses its concession elsewhere that the "test for materiality approved * * * in *Basic* * * * is inapposite" to the Commission's "reasonably likely" standard, 54 Fed. Reg. 22,427, 22,430 n.27 (May 24, 1989).

Lastly, the Commission tacitly admits (Br. 79) that the rule *would* exceed traditional bounds of materiality if it required companies to disclose information that was "material" to subordinate company plans and activities, *regardless* whether that information would affect a reasonable investor's decisions. And the rule does exactly that. Chamber Br. 35-36. Disclosure is required, for example, "[i]f a registrant's use of an internal carbon price is material to how *it*," *i.e.*, the registrant, "evaluates and manages a climate-related risk." App. 482, 689 (Certified List 4 at 21,709/2, 21,916/1) (emphasis added). The rule itself refutes the SEC's claimed adherence to traditional notions of materiality.

C. Any Arguable Benefit Is Dwarfed By The Rule's Costs.

In all events, the Commission cannot show that the purported benefit (SEC Br. 66-67) of sparing some unspecified subset of institutional investors a supposed six-figure cost of obtaining climate information can possibly justify *this* rule.

1. The Commission denies (Br. 83) it artificially drove down the estimated costs, because it took "account of all cost estimates it received." But that is *how* the Commission cooked its books.

The Commission does not deny that after the comment period closed, "staff from the Chair's Office" conveniently "met telephonically" with environmental activists (App. 2352-2371 (Certified List 4575)) and sustainability-product vendors (App. 2372-2380 (Certified List 4577)), and then incorporated their low-ball cost estimates into memos to the file. Chamber Br. 39-40. Those unusual phone calls alone cut the "median" cost nearly in half, slicing it from $133,229 to $79,236. See App. 652 (Certified List 4 at 21,879, tbl. 10). But there is no "statistical validity," *St. James Hospital* v. *Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir. 1985), to loading up a tally with allies' responses and then "us[ing] [the] media[n]," SEC Br. 83. The Commission must "analyz[e] the potential for bias," and decide "which" commenters, "if any, would provide accurate and representative results." *Friends of Boundary Waters Wilderness* v. *Bosworth*, 437 F.3d 815, 825-826 (8th Cir. 2006). Simply estimating that everyone in America is retired because you selectively poll your grandparents and take the "median" age is not reasoned decisionmaking. Yet that is effectively what the Commission did here.

The Commission states (Br. 84) it "made adjustments" to the data it cited, but those adjustments were insufficient, "inconsisten[t]," and "opportunisti[c]." *Business Roundtable*, 647 F.3d at 1148-1149. They failed to account for commenters' "bias," discussed above. *Friends of Boundary Waters*, 437 F.3d at 826; see Chamber Br. 40-41. And the Commission "adjust[ed]" in only one direction: down. It "subtract[ed]" dollars from a survey's estimate. App. 652 (Certified List 4 at 21,879, tbl. 10 n.4). That is no answer to petitioners' objection (Br. 41) that the Commission failed to adjust for the fact that the cost estimate relied on "*current* average spend," whereas the rule requires *more* disclosure than companies currently make. The Commission never explains why it did not make an *upward* adjustment to account for this. And although the Commission denies (Br. 83-84) other data irregularities infected its work, none of its explanations "appear in the final rule," *Ohio*, 144 S. Ct. at 2054; see Chamber Br. 41.

2. In addition to fudging its figures, the Commission ignored other costs entirely. The SEC concedes (Br. 88) it did not consider expert estimates of the billions of dollars in lost GDP, and hundreds of thousands of jobs, the rule would cost across the broader economy. In no world is that an *unimportant* "aspect of the problem." *State Farm*, 463 U.S. at 43. And although the Commission downplays these negative effects, arguing (Br. 89) it "change[d]" the proposal to "lowe[r] the [overall] burdens," the costs and benefits of a rule must be "justified" against "current policy," *State Farm*, 463 U.S. at 42, not proposed policy. The SEC cannot justify a wasteful rule by pointing out it was even more wasteful when first proposed.

Likewise, the Commission's contention (Br. 85-86) that it was "[l]ogical" to limit its estimate of the number of companies that would be swept up by the rule to those "currently" providing climate-related disclosures falls short. The Commission complains (Br. 86) that it doesn't know what "other * * * methodolog[y]" to use, but the Commission must assess "the economic implications" of its rules "as best it can," *Chamber of Commerce of United States* v. *SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005). Using "curren[t]" (Br. 86) providers to estimate the number of filers that "*will* be required to provide the climate-related disclosures" (State Intervenors Br. 54 (emphasis added)) is *definitely* wrong, because the real number must be higher; the rule requires *more* disclosure. The Commission may not know precisely how much more, but "uncertainty" does "not excuse the Commission" from even "hazard[ing] a guess" as to the necessary adjustment, *Chamber of Commerce*, 412 F.3d at 143. Whatever it is, it is more than *zero*. Increasing disclosure is the rule's whole purpose.

3. The Commission arbitrarily wields uncertainty in its favor. How many *more* companies will the rule require to make climate-related disclosures than currently are? Chamber Br. 42-43. And what will be the cost to those companies of assessing whether information is "material"? *Id.* at 41-42. The Commission admits (Br. 85-86) it does not know any of this, and more, see Chamber Br. 43-44; SEC Br. 89-90. Unable to account for this uncertainty, it simply rammed through a rule anyway. Because the SEC must start from a "presumption * * * *against* changes in current policy that are not justified by the rulemaking record," *State Farm*, 463 U.S. at 42, it should instead have stayed its hand until it could determine from the record that the rule would *not* be catastrophically costly.

Simply "recogniz[ing]" (Br. 90) that "[t]o the extent" that predicate X obtains, good- or bad-thing Y "may" follow—as the Commission projected in the adopting release no fewer than 40 times—is not reasoned analysis. Such analysis requires assessing whether the predicate *actually exists*. The statement "to the extent pigs have wings, they could fly" does not invite the conclusion that pigs fly; it invites consideration of whether pigs have wings. The Commission repeatedly identified things it should estimate and substantiate, yet did not proceed to do so. Its conjecture, therefore, that the rule is "unlikely" (Br. 81) to deter companies from going public is unsupported. Its vague, indeterminate statements reflect an agency purposely dodging key issues and failing to come to ground on what the impact of its action "will" be. 15 U.S.C. §§ 77b(b), 78c(f).

D. There Are Reasonable, Less-Burdensome Alternatives

Although the Commission insists (Br. 19) that providing investors with material information is its objective, the agency fails to explain why it did not adopt reasonable alternatives that could have furthered that aim at far less cost.

The Commission does not dispute that requiring disclosure less frequently than annually would have saved hundreds of millions of dollars a year. Chamber Br. 45. The Commission says simply (Br. 73) that annual disclosure allows for "better" across-time comparisons than disclosure on "multi-year intervals." But that "single sentence * * * falls well short of what is needed to demonstrate the agency * * * [actually] considered" the alternative. *Spirit Airlines, Inc.* v. *U.S. Department of Transportation*, 997 F.3d 1247, 1255 (D.C. Cir. 2021). The SEC's explanation fails to weigh costs and benefits "at the margin"—*how much* better is annual disclosure, and at what cost? *Business Roundtable*, 647 F.3d at 1151. This "is illogical and, in an economic analysis, unacceptable." *Ibid.*

II. THE COMMISSION MISREADS THE LAW AND THE CONSTITUTION

A. The Commission Does Not Have The Boundless Authority It Claims

In claiming (Br. 28) virtually unbounded authority to require disclosure of anything the Commission determines is "necessary or appropriate" in "the public interest" or for the "protection of investors," the SEC embraces the central flaw in its reading of the statute: The snippets of statutory language it plucks (Br. 26-28) are *residual* clauses that, under settled precedent, cannot satisfy the major-questions doctrine and must in any event be construed in light of the enumerated items they follow, see *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001).

The clauses here cannot escape their context. They follow items that, even if not needed to combat "misleading" conduct (State Intervenors Br. 25 (quoting *TSC*, 426 U.S. at 463)), are all, as the SEC itself has said, both "financial in nature" and material to reasonable investors' evaluation of "'a security,'" 81 Fed. Reg. 23,916, 23,921/3 (Apr. 22, 2016). *That* is the type of disclosure the laws authorize, but the climate rule's mandates are anything but.

1. The SEC Ignores The Securities Laws' Material, Financially Related Limits

That there may be *some* ambiguity around whether the laws' enumerated disclosures are strictly "financial" (SEC Br. 47) does not give the Commission free rein to compel the disclosure of anything it wants. The "general character of the business," 15 U.S.C. § 77aa(8), or its "material contract[s]," *id.* § 77aa(24), may go "beyond 'financial figures'" (SEC Br. 47), strictly speaking, but they are simple, one-line disclosures that put the company's finances in context. The climate rule is something else entirely. And just as "[i]t does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple,'" the SEC's interpretation here "is clearly beyond the scope of any conceivable ambiguity." *United States* v. *Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring). While a reasonable investor may need to know what a company *does* to get a handle on its income and assets, few need to know what the company *emits*, or review detailed breakdowns of the costs of "weather" on its operations (SEC Br. 38).

The SEC's appeal (Br. 32-36) to past agency practice only underscores how far it has strayed in seeking to expand its authority here. None of its prior examples concerns reams of nonfinancial information, immaterial to evaluating a security. On the contrary, the closest the Commission has come to adopting anything resembling the climate rule was in 1975 when it proposed certain environmental disclosures. But, tellingly, the Commission "declined to adopt" them precisely because that "information would not be useful in 'investment decisions.'" SEC Br. 35. The Commission had it right then. The "record" (*ibid.*) now may be larger, but the bottom line is the same: The securities laws do not "permit the Commission to require disclosure for the sole purpose of promoting social goals unrelated to those underlying [the] Acts," 40 Fed. Reg. 51,656, 51,660/1 (Nov. 6, 1975), which is precisely what the Commission is doing here, cf. *Department of Commerce* v. *New York*, 588 U.S. 752, 785 (2019) (courts "are 'not required to exhibit a naiveté from which ordinary citizens are free'"); Law & Finance Professors Amicus Br. 11 (detailing SEC's reliance on "environmental activists" intending to use disclosures to address climate change).

The Commission retreats (Br. 29) to legislative "purposes," but the decades-old cases it cites are "from a 'bygone era of statutory construction'" in which courts *improperly* focused on "legislative purpose," *Food Marketing Institute* v. *Argus Leader Media*, 588 U.S. 427, 436-437 (2019).

Further, the purpose of the securities laws is to "protec[t]" investors, *i.e.*, from fraud—to ensure that material information is not "concealed from the buying public." H.R. Rep. No. 73-85, at *2 (1933), 1933 WL 983. The Commission, however, concedes the rule is "intended to serve informational, *not* antifraud, goals." Br. 66 (emphasis added). This is not what the securities laws are for. See Stay App. 1246 (SEC conceding that its "mandate of investor protection" does not include requiring disclosure of information "only of interest to some investors").

2. The Major-Questions Doctrine And Principles Of Constitutional Avoidance Apply

a. The SEC disputes (Br. 53-57) this is a major-questions case. But, here, a *securities* regulator is attempting to compel speech on a nonfinancial, nonmaterial, and politically charged topic—to the tune of billions of dollars a year—while forcing thousands of companies into a discussion about climate change, all against their will. That presents a major question, which is why virtually every State in the Union is participating in this litigation—and why Congress has been actively considering the issue (see Chamber Br. 57-58).

The SEC objects (Br. 56) that recently proposed bills would not have done *precisely* what the Commission does here. But that is the point.

Congress is tasked with making this policy choice. And the Court should be "skeptic[al]" of the SEC's claim that the securities laws have always meant something *different* from the status quo Congress recently and repeatedly declined to disturb. *West Virginia* v. *EPA*, 597 U.S. 697, 732 (2022). That is so, even *if* the specific alterations Congress rejected were slightly different from the one now being urged by the Commission. If Congress expected the SEC to speak to "decisions of [such] vast economic and political significance," it would have said so "clearly." *Id.* at 716.

But Congress did not. The SEC (again) points to its favorite residual clauses (Br. 57-58), and (again) tries to stretch them further than they can withstand. These are the exact type of "ancillary," or "modest," provisions that do *not* provide "clear" regulatory authority. *West Virginia*, 597 U.S. at 722-725. Indeed, the Supreme Court applied the major-questions doctrine to invalidate an agency's reliance on a similar, "other measures" residual clause in *Alabama Ass'n of Realtors* v. *Department of Health & Human Services*, 594 U.S. 758, 761 (2021) (per curiam). It was "a stretch" to read into such language a "breathtaking amount of authority," *id.* at 764-765; the same is true here.

Make no mistake, the SEC's theory would "effect a 'transformative expansion in [its] regulatory authority.'" SEC Br. 54-55 (quoting *West Virginia*, 597 U.S. at 724). The Commission purports to respect "'limit[s]'" on its newly claimed authority, *ibid.*, but those limits dissolve on examination of the rule's reasoning. What matters under the Supreme Court's major-questions cases is the "breadth of the Government's claimed authority" on its view of the governing statute, not any particular exercise thereof. *West Virginia*, 597 U.S. at 729. The Commission's claimed authority here necessarily implies a sweeping power to order speech on a range of topics, in furtherance of whatever other social causes next strike the Commission's fancy.

Congress did not specify thirty-two categories of narrow, tailored disclosures, see 15 U.S.C. § 77aa, only to hide in the mousehole of an "other information" clause, *id.* § 77g(a)(1), a vast power to compel disclosure of virtually anything the Commission wants, without even showing shareholder harm. Cf. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress * * * does not * * * hide elephants in mouseholes."). That is not a realistic "understanding of legislative intent." *West Virginia*, 597 U.S. at 723.

b. Regardless, the SEC does not dispute the Court must construe the securities laws to "obviat[e] deciding whether" the law "would violate the First Amendment." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 578 (1988). Whether or not the SEC's strained reading of its disclosure authority could survive the double gauntlet of ordinary statutory interpretation *and* the major-questions doctrine, the Court should reject it to avoid the grave First Amendment concerns it raises. See pp. 28-32, *infra*.

B. The Rule Violates The First Amendment

The Commission's defense (Br. 95-111) of the rule's constitutionality turns entirely on avoiding strict scrutiny. It cannot.

1. The SEC invokes (Br. 96-109) the lesser standard of *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985). But *Zauderer* applies only to mundane factual disclosures appended to existing commercial advertising, such as "whether a particular chemical is within any given product." *Entertainment Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). In *Zauderer* itself, a State required attorneys advertising contingent-fee arrangements to disclose simply "that the client may have to bear certain expenses even if he loses." 471 U.S. at 650. *Zauderer* is inapplicable here, where the rule applies outside the context of "only 'commercial advertising,'" and requires speech that goes well beyond "'purely factual and uncontroversial information about the terms under which * * * services will be available.'" *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*).

The Commission fails to show that the rule governs only commercial speech, let alone "only 'commercial advertising.'" *NIFLA*, 585 U.S. at 768. As petitioners explained (Br. 65), the rule does not involve "speech that *proposes* a commercial transaction, which is what defines commercial speech." *Board of Trustees of State University of New York* v. *Fox*, 492 U.S. 469, 482 (1989). The SEC does not contest that, instead retreating to a definition of commercial speech as "'expression related *solely* to the economic interests of the speaker and its audience.'" SEC Br. 98 (emphasis added). But the Supreme Court has declined to apply that "broader definition" because "'*the test* for identifying commercial speech'" is "the proposal of a commercial transaction." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 423 (1993). The rule here "regulates far more than mere commercial speech" because "a covered business must do far 'more than propose a commercial transaction.'"

NetChoice, LLC v. *Bonta*, __ F.4th __, 2024 WL 3838423, at *12 (9th Cir. 2024). And the rule does not relate "solely" to "economic interests" anyway—it has been championed for its perceived environmental benefits, as Commission *amici* such as the Sierra Club and Natural Resources Defense Council reflect. The rule concerns "sensitive, constitutionally protected speech" that the government cannot compel "without satisfying strict scrutiny." *X Corp.* v. *Bonta*, __ F.4th __, 2024 WL 4033063, at *8 (9th Cir. 2024).

The SEC fares no better in asserting (Br. 100) the rule requires only "'purely factual'" statements under *Zauderer*. As petitioners explained (Br. 64-65), the SEC is forcing companies to opine on hypothetical future risks (which would necessarily require predicting policy decisions of government officials) and drawing controversial connections between weather events and climate change. This "[b]alancing [of] a myriad of factors" is "anything but the mere disclosure of factual information." *Book People, Inc.* v. *Wong*, 91 F.4th 318, 340 (5th Cir. 2024). And all this is far afield from the "pur[e]," rote factual disclosures *Zauderer* permits. *NIFLA*, 585 U.S. at 768; cf. *NetChoice*, 2024 WL 3838423, at *12 ("a business's opinion about" how children might be exposed to harmful content "is not 'purely factual and uncontroversial'").

Zauderer also "has no application" because a company's climate-related risks and emissions are "anything but an 'uncontroversial' topic." *NIFLA*, 585 U.S. at 769. By design, the rule is "'an integral part of a live, contentious political or moral debate,'" SEC Br. 103 (emphasis deleted), designed to "facilitat[e] product boycotts" and "activist protests," Law & Finance Professors Amicus Br. 6. Strict scrutiny applies.

2. The Commission cannot show the requisite tailoring, or government interest, to withstand lesser scrutiny, anyway. A tailored rule would require companies to disclose material climate risks on the same terms as all others, as the law currently does with admirable success: not a single company is known to have violated this duty; not a single shareholder is known to have been harmed. But tailoring is the antithesis of this rule's purpose, which is to force companies' prolix engagement with a hot-button topic. As for governmental interest, the Commission concedes (Br. 107) the rule is not designed to "'protec[t] investors from fraud' or similar risks." The rule serves "informational" (SEC Br. 66) purposes. But "it is plainly not enough for the Government to say simply that it has a substantial interest in giving [individuals] information. After all, that would be true of any and all disclosure requirements." *American Meat Institute* v. *U.S. Department of Agriculture*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring). And the Commission's rule is too "underinclusive" anyway for there to be a "serious claim" that providing material information is the Commission's true goal. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993). There is *a lot* of information investors could want, but the SEC's "curiously narrow" rule applies *only* to climate, *NIFLA*, 585 U.S. at 777, "neglecting every other issue," *Gralike* v. *Cook*, 191 F.3d 911, 921 (8th Cir. 1999), aff'd, 531 U.S. 510 (2001).

That is because this rule is really about "convey[ing] moral responsibility" for climate change and "skew[ing] [the] public debate" in the government's preferred direction. *National Ass'n of Manufacturers* v. *SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015). This is "obviously repugnant to the First Amendment," and "should not face relaxed review just because [the Commission] use[s] the 'securities' label." *Id.* at 555.

III. The Rule Should Be Vacated

The Commission does not dispute that the APA's default remedy is vacatur. See Chamber Br. 67. Instead, the Commission argues (Br. 111-113) the Court should vacate only portions of the rule, or remand without vacatur. But "when a court holds that an agency rule violates the APA, it shall—not may—hold unlawful and set aside the agency action." *National Ass'n of Private Fund Managers* v. *SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024) (alteration and quotation marks omitted); see *Corner Post, Inc.* v. *Board of Governors of Federal Reserve System*, 144 S. Ct. 2440, 2469 (2024) (Kavanaugh, J., concurring).

The Commission argues (Br. 111) for remand without vacatur if this Court concludes the Commission "did not adequately consider an issue or explain its choices," but that exceptional course "is justifiable," if at all, "only in 'rare cases'" under "conditions" the Commission fails to satisfy here, *Chamber of Commerce of United States* v. *SEC*, 88 F.4th 1115, 1118 (5th Cir. 2023). There is no "'serious possibility' the agency will be able to correct the rule's defects on remand" given the fundamental and far-reaching problems undermining the Commission's reasoning at every step. *Ibid*.

Nor is there anything to "sever." SEC Br. 112. The Commission overlooks multiple overarching errors petitioners raised: The *entire* rule purports to solve a problem the SEC never substantiated and imposes burdens that dwarf purported benefits. Chamber Br. 20-33. And the rule as a whole exceeds the Commission's authority because neither the securities laws nor the First Amendment permit the Securities and Exchange Commission to make climate policy by dictating the terms of public debate. *Id.* at 46-67.

CONCLUSION

The rule should be vacated in whole.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2024, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f), it contains 6,500 words.

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