No. 23-60255

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; LONGVIEW CHAMBER OF COMMERCE; TEXAS ASSOCIATION OF BUSINESS,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review of an Order of
the Securities and Exchange Commission
Release Nos. 34-97424; IC-34906

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CERTIFICATE OF INTERESTED PERSONS

No. 23-60255, Chamber of Commerce of the United States of America et al. v. United States Securities and Exchange Commission

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Petitioner **Chamber of Commerce of the United States of America** has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Petitioner **Longview Chamber of Commerce** has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. Petitioner **Texas Association of Business** has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The Commission's brief confirms that the Buyback Rule violates both the First Amendment and the APA. Remarkably, the SEC abandons its original justification for the Rule—to "expos[e]" opportunistic buybacks. Br. 2. Now, its lawyers claim that "[t]he 'problem' addressed by the rule" is not really "improperly motivated buybacks" themselves, but investor "uncertainty" over the motives behind buybacks. Br. 39-40. But this artificial distinction contradicts the record and defies common sense. The SEC cannot just declare, contrary to its own staff's recent findings, that a practice may potentially stem from improper motives and then use the uncertainty it has manufactured to regulate securities issuers. Indeed, it is difficult to imagine *any* limits on the agency's ability to regulate in this area—including through compelling issuer speech—if such bootstrapping were allowed.

The SEC's remaining arguments are no more persuasive. Stock buybacks are one of the most politicized decisions a business can make today. And yet, according to the agency, forcing companies to give a detailed justification for every single one of these choices is a run-of-the-mill securities regulation that survives "any" level of scrutiny. Br. 14. The

First Amendment squarely forecloses that remarkable assertion, which would have sweeping implications for our capital-markets system.

The APA also requires scrapping the Rule. The SEC claims that the Rule will help investors value issuers more generally, but it still cannot reconcile its contradictory claims that the Rule will produce the benefit of making nonpublic information available to *investors* while somehow avoiding any costs of making that same information available to *competitors*. Nor can it wave away its unexplained failure to quantify the Rule's effects, inadequate consideration of the buyback excise tax, and flawed weighing of the Rule's overall costs and benefits. Each of these defects independently compels vacatur of the Rule.

These substantive errors predictably follow from the Rule's inexcusably truncated, start-stop comment period—itself unlawful under the APA. Notice and comment is not a game of "red light, green light." The SEC never gave the public a meaningful chance to comment on this complex Rule, for which the agency admittedly lacked key data, and it cannot now blame commenters for failing to do the agency's own job.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES VACATING THE RULE'S CORE DISCLOSURE REQUIREMENTS.

A. The Rationale-Disclosure Requirement Violates The First Amendment.

Despite admitting that the rationale-disclosure requirement forces issuers to speak when they "would prefer to remain silent," *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023), the SEC claims it is "content-neutral." Br. 14. But "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech" and thus qualifies "as a content-based regulation." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988). As a "[c]ontent-based" rule, the requirement "presumptively" triggers, and fails, "strict scrutiny." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018). It also flunks any less exacting test.

1. The requirement cannot escape strict scrutiny.

a. The SEC first seeks refuge (Br. 14-25) from strict scrutiny in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which "does not apply outside of" "purely factual and uncontroversial information" in certain "commercial speech." *NIFLA*, 138 S. Ct. at 2372. That does not describe a company's rationale for repurchases of its stock.

i. For starters, far from being "purely factual," any disclosure of why an issuer is repurchasing its stock will reveal its *opinion* on business matters related to that decision. Pet. Br. 24. While the SEC claims that disclosure of an "opinion … does not make it any less factual that the issuer undertook the repurchase to achieve the stated objective," Br. 17-18, that renders the "purely factual" element meaningless. Disclosing any opinion also reveals the fact that the speaker "hold[s] the belief stated," *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092 (1991), but that does not mean the government can start forcing speakers to reveal opinions on any issue without having to satisfy strict scrutiny. That the SEC claims such power only underscores the stakes here.

The SEC fares no better in asserting that "[n]othing in the rule requires issuers to opine on the merits of a share repurchase." Br. 17. The agency never explains *how* an issuer could, consistent with its duties to shareholders, authorize a buyback and disclose its true "purpose" *without* revealing its "opinion" on the buyback's "merits," *id.*, especially when the Rule forbids "relying on boilerplate language," Final Rule 80. The other "purpose"-oriented disclosure requirements cited by the SEC, by contrast, may not require revelation of business opinions. Br. 17 n.4.

More fundamentally, the SEC identifies no case upholding any of these rules as constitutional, and its "past practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (cleaned up).

ii. In any event, a company's reason for repurchasing shares is "anything but an 'uncontroversial' topic," *NIFLA*, 138 S. Ct. at 2372, thanks to the opprobrium heaped on this practice by politicians, including current and former SEC Commissioners, Pet. Br. 8-10, 24-26. Indeed, the agency all but admits that "the broader practice of share repurchases could be viewed as controversial." Br. 19.

The SEC nevertheless likens (Br. 20) this case to *Zauderer*, which treated the factual details of a lawyer's contingency-fee arrangements as uncontroversial even though they occurred in an advertisement linked to a "current public debate"—namely, the Dalkon Shield litigation. 471 U.S. at 637 n.7. But no one claims otherwise uncontroversial facts would fall outside *Zauderer* merely by being *included* in a disclosure about buybacks. Rather, the point is that a justification for a buyback is *itself* a freighted matter. Much like telling a schoolchild "explain yourself" in front of the class, requiring a public defense of every buyback necessarily implies the practice is a suspicious one requiring justification. Pet. Br. 31.

That is particularly true given that myriad other business practices do not come with the baggage of a government-mandated explanation.

Falling back, the SEC insists that the "disclosure of the reason for" a "particular" buyback "does not require issuers to wade into th[e] debate." Br. 19. But again, an issuer necessarily enters the fray simply by making the disclosure, *see supra* at 5-6, and in any event, a disclosure need not require *expressly* taking sides to fall outside *Zauderer*. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2372 (holding "*Zauderer* has no application" to a requirement merely "to disclose information about" the availability of controversial "*state*-sponsored services"). Otherwise, a company's forced explanation for why it has (or has not) engaged in *any* politicized practice—from moving manufacturing overseas to ESG investing—would be denied full constitutional protection. That is not the law. *See Nat'l Ass'n of Manufacturers v. SEC (NAM)*, 800 F.3d 518, 555 (D.C. Cir. 2015).

iii. Lacking a foothold in first principles, the SEC leans heavily on its claim (Br. 18-20) that this Court must apply *Zauderer* here because it did so in *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022). But although *NetChoice* treated a law requiring social-media platforms "to explain their content removal decisions" as involving "'purely factual and

uncontroversial information,'" that classification was not disputed by the platforms, probably because they "already" provided those disclosures "for large swaths of content they transmit" and merely objected that it would "be difficult to scale up" to cover the rest. *Id.* at 485-87; *see id.* at 487-88 (rejecting *other* theories for why *Zauderer* did not apply). Here, by contrast, many issuers do not disclose the reasons behind their buybacks, as the SEC emphasizes. Br. 9-10. Nor do they wish to, in part because politicians have made this practice and the reasons for it so controversial. So while *the SEC* may deem "social media companies' moderation policies" to be "subjective" and "controversial," Br. 19-20, *this Court* and the *NetChoice* parties did not. *NetChoice* did not implicitly resolve this case.

Overreading *NetChoice* would be particularly unwise given that it "will plainly merit [the Supreme] Court's review." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting from vacatur of stay). Moreover, by vacating this Court's earlier stay of a preliminary injunction against the social-media law, the Supreme Court has signaled the platforms have a "substantial likelihood of success on the merits." *Id.* at 1716. While the Justices may ultimately conclude otherwise, this counsels against extending *NetChoice* to unrelated contexts now.

b. As a fallback, the SEC urges (Br. 26-30) this Court to review the requirement under the general test for commercial speech in *Central Hudson v. Public Service Commission*, 447 U.S. 557 (1980). But the agency ignores that "*Zauderer* is best read simply as an application of *Central Hudson*, not a different test altogether." *Am. Meat Inst. v. USDA* (*AMI*), 760 F.3d 18, 33 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in judgment); *see* Pet. Br. 26-27; *NIFLA*, 138 S. Ct. at 2377 (using *Central Hudson* and its progeny to specify *Zauderer*'s demands).

The SEC likewise fails to show that the requirement even covers commercial speech in the first place. Pet. Br. 27. The agency admits (Br. 16) the disclosures do not involve "speech that *proposes* a commercial transaction, which is what defines commercial speech." *Bd. of Trustees v. Fox*, 492 U.S. 469, 482 (1989). Instead, it relies on a "broad[er]" definition of "'expression related solely to the economic interests of the speaker and its audience.'" Br. 16. But the Supreme Court has declined to apply that "broader definition" in later cases, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993), and in any event, the reasons underlying buybacks have plainly become of wider interest.

Invoking *SEC v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988), the agency also insists that the forced disclosure of "'information regarding securities'" automatically gets "lesser scrutiny." Br. 30. But the D.C. Circuit has confined that case to securities regulations addressing "consumer-deception," *NAM*, 800 F.3d at 555—a limitation likewise present in the Supreme Court decisions the SEC cites, Br. 14. Contrary to the SEC's pretensions, speech compulsions do not "face relaxed review just because" the government uses "the 'securities' label." *NAM*, 800 F.3d at 555. Otherwise, the SEC could "regulate otherwise protected speech using the guise of securities laws," such as by forcing issuers to reveal "the political ideologies of their board members." *Id.* Simply put, there is no "securities exception" to the First Amendment.

c. "Other than a conclusory assertion that" the rationale-disclosure requirement "satisfies any standard of review," the SEC "does not explain how" this compulsion of speech could survive strict scrutiny. *NIFLA*, 138 S. Ct. at 2377 n.3; *see* Br. 14. Since the agency essentially concedes that this mandate is both "under-inclusive" and not "the 'least restrictive means'" of "address[ing] a problem," its suggestion that the Rule is narrowly "tailor[ed]" cannot be taken seriously. Br. 23-24, 30.

2. The requirement fails any level of review.

a. In all events, the rationale-disclosure requirement flunks any exception to strict scrutiny. Even under *Zauderer*, the SEC has failed to carry its "burden to prove" that the requirement is "neither unjustified nor unduly burdensome." *NIFLA*, 138 S. Ct. at 2377.

i. As to justification, the SEC has not shown that the problems the requirement aims "to remedy" are "more than 'purely hypothetical,'" *id.*, or that it will "in fact alleviate the harms … to a material degree," *NAM*, 800 F.3d at 527 (cleaned up). Perhaps accepting the force of its own 2020 study, the SEC essentially abandons any defense on the basis of smoking out opportunistic buybacks, now claiming only that it needs to give investors "information" to correct a "market failure" resulting from "uncertainty." Br. 21-22. This novel theory is triply flawed.

First, it is "not enough for the Government to say simply that it has a substantial interest in giving consumers information," as "[t]hat circular formulation would drain" the First Amendment "of any meaning." *AMI*, 760 F.3d at 31-32 (Kavanaugh, J., concurring in judgment). "Some consumers might want to know the political affiliation of a business's owners," for instance, but that is not grounds for the forced disclosure of

that information. *Id.* Instead, the SEC must identify a "historically rooted interest," such as combatting "deception." *Id.* at 31-32. It has not done so.

Second, even if consumer interest alone could be enough, the SEC has not shown there is, in fact, a "market failure" stemming from investor "uncertainty." Br. 21; *see* Kothari Br. 5-14. Instead, it merely speculated that "uncertainty" about opportunistic buybacks occurring "*may* have adverse effects on investors." Final Rule 18 (emphasis added). Similarly, it mused that "even efficient repurchases have *the potential* to negatively affect investor confidence" because informational "asymmetries *may* exist between issuers and investors" and investors therefore "*may* be more reluctant to trade." *Id.* at 24 (emphases added). Thus, like the SEC's earlier "concern that some repurchases *may* be motivated by executive self-interest," Br. 22 (emphasis added), these latest theories are "entirely unproven and rest[] on pure speculation." *NAM*, 800 F.3d at 525.

Third, even if the SEC had shown a traditional harm, it still failed to "prove[]" the requirement "will work … to the degree required." *Id.* at 527. As the agency admits, it "was unable to quantify any benefits of the forced disclosure." *Id.* at 526; *see* Br. 33 (similar). And it conceded that the Rule's "benefits" "could be limited" given that "some investors are

able to infer the purpose … of repurchases from other public information." Final Rule 128-29. Ultimately, the basis for this edict appears to be no more than a desire to give "all investors equal access to this information," without any hint as to how many, if any, are actually disadvantaged. Final Rule 128. The First Amendment requires stronger stuff.

ii. "Even if" the SEC could show "a justification" for this mandate, it still has failed to prove that the requirement does not "unduly burden[] protected speech." *NIFLA*, 138 S. Ct. at 2377. The agency suggests that the only relevant burden is whether the requirement "limit[s]" speech, Br. 24, but neglects to consider the inherent burden of *compelling* speech a company would not otherwise make. By the same token, compelled speech remains constitutionally unacceptable even when it is not "government-drafted." Br. 25. Otherwise, the *303 Creative* designer could have been ordered to create websites for marriages she did not endorse merely because each "'unique'" website would use "her own words" rather than those supplied by the state. 143 S. Ct. at 2313.

The SEC therefore retreats (Br. 25) to trying to minimize the specific harms from the compulsion here. Although the requirement forces issuers to publicly defend why they have dared to engage in

buybacks—a politicized practice recently singled out for condemnation in the President's State of the Union address, Pet. Br. 9—the SEC claims these disclosures are not "inherently stigmatizing" because Petitioners believe repurchases are "ordinary business decisions." Br. 25. But what *issuers* think about buybacks is irrelevant given that a chorus of *politicians* have politicized them. By way of analogy, had the SEC compelled companies to explain any decision to use "conflict minerals" in their products, the fact that an issuer "disagree[d] with" the implication that "its products are ethically tainted" would not eliminate the First Amendment harm. *NAM*, 800 F.3d at 530. There, as here, issuers still would be compelled to justify their use of a practice stigmatized by others. And there, as here, the edict would violate issuers' constitutional right to "convey" their disagreement with that implication "through 'silence.'" *Id.*

The SEC likewise misses the point about the requirement's "business costs," Br. 24, which include the revelation of "valuable private information to competitors." Final Rule 120; *see* Pet. Br. 31-32 (discussing costs). Whether or not these burdens are relevant standing alone, they "threaten[] to chill protected speech." *NetChoice*, 49 F.4th at 487. By requiring "a detailed justification for every" buyback, the Rule "not only

imposes potentially significant implementation costs but also exposes [issuers] to massive liability" for not providing a "sufficiently 'thorough' explanation." *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1230-31 (11th Cir. 2022). Companies will be forced to include more details than they would prefer in a disclosure they otherwise would not make or simply stop engaging in buybacks altogether to avoid this compelled speech, with the latter likely the SEC's ultimate aim.

That chill on issuers' freedom on whether or how to speak is "unduly burdensome." *Id.*; *see NetChoice*, 49 F.4th at 489 (suggesting agreement with the Eleventh Circuit that Florida's law may "chill" speech by keying "liability to vague terms like 'thorough'"). Indeed, having just told the Supreme Court that forcing businesses "to provide an individualized explanation each time" they moderate content "impose[s] heavy burdens" under the First Amendment, U.S. Amicus Br. 18-19, *Moody v. NetChoice LLC*, Nos. 22-277 et al. (U.S. *filed* Aug. 14, 2023), it is a bit rich for the government to now dismiss this Rule as "merely" forcing businesses "to disclose the aim of a repurchase in their own words," Br. 25.

Making matters worse, the rationale-disclosure requirement does not even impose these unwarranted burdens in a reasonably tailored

fashion. Although the SEC defends the requirement's overinclusiveness on the theory that it will help investors "rule[] out" whether a buyback had an "opportunistic motivation," Br. 22, *Zauderer* does not allow such "broad prophylactic rules," *NIFLA*, 138 S. Ct. at 2377—especially when the agency's own staff has concluded that "most repurchase activity" does not stem from improper motivations. Staff Study 42. And if improper buybacks ever do occur, the SEC never explains why "derivative suits" would be an insufficient "substitute" in tackling that concern. Br. 23 n.5.

Nor does the SEC seriously deny that the requirement is "under-inclusive," claiming instead that *Zauderer* allows this. Br. 24. But even under *Zauderer*, a "curiously narrow" rule is cause for concern. *NIFLA*, 138 S. Ct. at 2377. Learning the bases of all sorts of decisions made by issuers based on internal information likewise could "facilitate 'more informed investment decisions,'" Br. 24, yet the SEC has curiously trained its fire on buybacks alone. That suggests its true goal is not to help investors, but "to stigmatize and shape behavior." *NAM*, 800 F.3d at 530. While that may be "a more 'effective' way" of deterring buybacks than political denunciation has proven to be so far, that just "makes the requirement more constitutionally offensive, not less so." *Id.*

b. Even if *Central Hudson* embodies a "more exacting" test than *Zauderer*, Br. 26, which it does not, the requirement's inability to survive *Zauderer* means *a fortiori* it cannot pass muster under any stricter framework. Pet. Br. 33-34. For example, even if *Zauderer* would tolerate the requirement's underinclusivity, *but see supra* at 15, *Central Hudson* would not. *See FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) ("underinclusiveness" shows a law "'provides only … remote support for the government's purpose'"). This edict thus fails any test.

B. The Daily-Disclosure Requirement Must Also Fall.

Once the Rule's unconstitutional rationale-disclosure requirement falls away, its daily-disclosure requirement is left without a reasoned basis and thus cannot stand under the APA. Pet. Br. 34-37. While the SEC invokes (Br. 31-32) the Rule's severability clause, an agency cannot salvage an arbitrary provision through mere *ipse dixit*. Rather, applying such a clause must "leave a sensible regulation in place." *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 735 (D.C. Cir. 2001).

More fundamentally, the SEC does not deny that a failure to determine whether a requirement "will promote efficiency, competition, and capital formation" renders it "arbitrary and capricious." *Chamber of*

Com. of U.S. v. SEC, 412 F.3d 133, 140 (D.C. Cir. 2005). Nor does the agency dispute that it never found that the daily-disclosure requirement would achieve these objectives *by itself*. Rather, the SEC addressed the two requirements in tandem during the rulemaking process and found that, "[t]aken together," the requirements "may contribute to" those goals. Final Rule 144; *see id.* at 144-47. Each depends on the other. While the SEC claims it "assessed the two requirements independently" with respect to *other* issues, Br. 31, that cannot make up for its failure to justify the daily-disclosure requirement alone under its "organic statute[s]," *Chamber*, 412 F.3d at 140. As one goes, so goes the other.

II. THE COMMISSION FAILED TO ENGAGE IN REASONED DECISIONMAKING.

A. The Commission Did Not Reasonably Explain Its Failure to Quantify the Rule's Economic Effects.

In addition to its threshold constitutional defect, the Rule is riddled with arbitrary reasoning. To start, the SEC violated its "unique obligation … to quantify the certain costs" and benefits of the Rule "or to explain why [they] could not be quantified." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011). As long as "available" "empirical evidence" makes it "possible" "to estimate and quantify" a rule's economic

effects, the SEC must do so, *id.* at 1150, even if the agency "can determine only the range within which [they] will fall," *Chamber*, 412 F.3d at 143; *see* Final Rule 98 (committing "to quantify the economic effects" "wherever possible"). Yet the SEC concedes that it quantified none of the Rule's benefits and almost none of its costs. Br. 33-35. And, by its own admission, it neither responded to the Chamber's proposals on how to quantify the benefits nor explained its failure to quantify costs. *Id.*

Faced with these failures, the SEC claims that the Chamber's comments merited no consideration because they did "not identify any specific data already available." Br. 33 (cleaned up). That is demonstrably false. Among other data, the Chamber flagged (1) academic databases collecting executive-compensation statistics; (2) earnings-per-share statistics from existing SEC disclosures; and (3) disclosures and stock-price information from jurisdictions that require more frequent disclosures. Comment II Addendum 10-11, 16-17. It also explained how the SEC could use these data to quantify the Rule's effects. *Id.*; *see* Pet. Br. 40-41. That was more than enough to oblige the SEC to at least "provide a reasoned response." *Bloomberg L.P. v. SEC*, 45 F.4th 462, 472, 477 (D.C. Cir. 2022) (SEC acted arbitrarily by not addressing requests

"to quantify the … costs" of its proposed action). Yet the only "data" the agency discussed were "existing Item 703" disclosures on buybacks. Final Rule 104 n.390. And it is indefensible for the SEC to wave off commenters' proposals as underdeveloped when it was responsible for the truncated opportunity to comment in the first place. *Infra* Part III.

On costs, the SEC, invoking *Huawei Techologies USA, Inc. v. FCC*, 2 F.4th 421 (5th Cir. 2021), complains that Petitioners did not identify any "data the agency ignored." Br. 35. But regardless of what *commenters* submit, *the SEC* has a "unique" "statutory obligation to determine as best it can the economic implications of the [R]ule," which encompasses the duty "to quantify [its] certain costs or to explain why those costs could not be quantified." *Bus. Roundtable*, 647 F.3d at 1149. *Huawei*, by contrast, concerned *the FCC*, which is not subject to the same "unique obligation." *Id.* at 1148. And in any event, the FCC in *Huawei* did not refuse, without any explanation, to quantify a cost it recognized as relevant. Rather, it deemed irrelevant "speculative costs identified by comments" but not supported by a "factual … basis." 2 F.4th at 454.

For the few direct costs the SEC did estimate quantitatively, it admits it did not take them into account in the Rule's Economic Analysis

section other than to state that it had estimated them. Br. 35 (citing Final Rule 133 n.469); *see* Pet. Br. 41-42. That is not reasoned decisionmaking.

B. The Commission Did Not Adequately Justify the Rule's Purported Benefits.

The SEC premised the Rule on two alleged benefits—primarily, uncovering opportunistic buybacks; and, secondarily, helping investors value issuers generally. It failed to substantiate either.

1. The SEC failed to show that investors have a genuine problem determining issuers' motives behind buybacks and, if so, that further action is needed to address this problem given other recent rulemakings.

a. The SEC agrees it issued the Rule to "help investors 'better evaluate whether a share repurchase was intended to increase the value of the firm' or" for an improper purpose like "'providing additional compensation to management.'" Br. 36. Yet it also claims that it is *irrelevant* whether the "'improperly motivated buybacks" the Rule was intended to help investors detect "'regularly occur' in 'significant numbers.'" Br. 39. This astonishing claim is not reasoned decisionmaking.

To support this argument, the SEC's lawyers now claim that the Rule is aimed at investor "uncertainty" over the motives behind buybacks,

not "improperly motivated buybacks" themselves. Br. 39-40. But that distinction is illusory, and the authority such a claim would confer on the SEC is breathtaking. The Rule found that "investors cannot currently be certain" about the signals sent by buybacks *because of* "the evidence that some repurchases" are meant "to affect executive compensation" rather than maximize shareholder value. Final Rule 23. But if opportunistic buybacks are not a genuine problem, then there is no rational basis for investors to experience any of the uncertainty the SEC now claims warrants the Rule. Indeed, accepting the agency's argument would allow it to bootstrap a justification for nearly *any* measure based on little more than its own *ipse dixit* about phantom claims of investor "uncertainty," whether or not there is good reason to be uncertain. *See supra* at 1.

Even if investor uncertainty were a genuine problem, the SEC still could not "determine as best it can" the *degree* of the Rule's benefits without assessing how often opportunistic buybacks actually occur. *Chamber*, 412 F.3d at 143. The more improperly motivated buybacks that occur, the more "the signal sent by all repurchases is muddied," contributing to investor confusion. Final Rule 18. And the greater "the extent that … managerial self-interest" drives buybacks, the more the

Rule will "inform[] investors" of such "problems." *Id.* at 120. So, to intelligently weigh the Rule's costs and benefits, the SEC had to consider how often opportunistic buybacks occur. Despite having a wealth of studies at its disposal—including from its own staff—it did not do so.

The SEC protests (Br. 38-39) that exposing opportunistic repurchases was not the Rule's "sole" purpose, because the Rule is also supposed to promote price discovery generally. But that makes no difference. The agency's reliance on supposed uncertainty about opportunistic buybacks was arbitrary. Even if it *also* hoped (Br. 38) to promote price discovery generally, its stated concern about opportunistic buybacks "permeates" the Rule, so this Court cannot "find that prejudice" from this APA deficiency "was clearly absent." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001); *see, e.g.*, Final Rule 14-16, 19-26, 49-50, 53-54, 59, 112-17, 120-22, 124-26, 129, 148; *see also infra* at 32 (discussing harmless error). And in any event, the SEC's price-discovery rationale is itself arbitrary. *Infra* at 23-25.

b. Even if opportunistic buybacks or investor uncertainty were genuine problems, the SEC admits it did not consider whether the Insider Trading Rule obviated the need for the Buyback Rule. Br. 40. Instead, it

claims that the Insider Trading Rule, which concerns *executives'* trades, is not "relevant" to the Buyback Rule, which concerns *issuers'* trades. *Id.* But the Buyback Rule requires additional disclosures in part because "executives" supposedly are improperly "timing their sales to closely follow issuer purchases." Final Rule 16; *see* Scholars Br. 5 ("the meaning of the signal" sent by repurchases "depends on how insiders trade their own shares at the time of the repurchase"). That is precisely what the Insider Trading Rule addresses: "opportunistic trading" by executives based on "material nonpublic information." 87 Fed. Reg. 80,362, 80,369 (Dec. 29, 2022). The SEC's acknowledged failure to consider this issue is yet another flaw in its arbitrary adoption of the Rule.

2. The SEC also failed to substantiate the Rule's secondary purported benefit of promoting price discovery. It claimed issuers currently keep valuable information about themselves nonpublic and that by forcing its disclosure, the Rule will supposedly allow investors to price issuers' stock more accurately. This reasoning is flawed thrice over.

First, the SEC could not give a straight answer on whether new disclosures would actually reveal valuable private information about issuers, asserting they would reveal new information when discussing

the benefit of disclosure to investors but denying the same when discussing the cost of disclosure to competing firms. Pet. Br. 48-49. The SEC's *appellate counsel* now asserts that there is no contradiction, because "disclosed information may be of low competitive significance to *issuers*" while "being significant to *investors*." Br. 41. *The Rule*, however, undeniably equates the two, stating that issuers currently withhold information from investors because of "the potential costs of leaking valuable private information to competitors." Final Rule 120. "An agency must defend its actions based on the reasons it gave when it acted," *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020), and there is no escaping that the SEC, despite its novel litigating position, "inconsistently and opportunistically framed the costs and benefits of the rule," *Bus. Roundtable*, 647 F.3d at 1148-49.

Second, the SEC has no answer to the concern that disclosures will overwhelm retail investors. It never responds (Br. 42-43) to the point that "knowing the appropriate level of detail at which to examine data *itself* requires sophistication that many retail investors lack." Pet. Br. 50-51; *see* Kothari Br. 16-18. Nor does it address (Br. 43-44) the incoherency in claiming that (1) retail investors can rely on sophisticated intermediaries

to explain data they cannot understand themselves and (2) the Rule promotes "equal access" by giving retail investors direct access to data formerly accessible only to sophisticated parties. Pet. Br. 51-52.

Third, whatever its benefits, reducing information asymmetries also reduces issuers' incentives to discover valuable information in the first place. Pet. Br. 52-54. The SEC claims it adequately considered that cost when it determined that *some* "asymmetries will remain" after the Rule goes into effect. Br. 44. But the agency must consider cost "at the margin." *Bus. Roundtable*, 647 F.3d at 1151. Even if issuers retain *some* incentive to discover new information, all agree that the incentive must decrease as the asymmetry decreases. To decide whether, at the margin, reducing asymmetries "will promote efficiency, competition, and capital formation," 15 U.S.C. §§ 78c(f), 80a-2(c), the SEC thus had to determine whether the benefits of disclosure exceed the costs of that reduced incentive. *See* Comment II Addendum 16 & n.25 (urging the SEC to make this determination). But as it essentially admits, it did not. Br. 44-45.

C. The Commission Did Not Adequately Assess the Effect of the Recently Enacted Excise Tax on the Rule.

The SEC recognized that it needed to "reexamine[]" the Rule's economic effects "in light of the" recently enacted "excise tax" on buybacks. Br. 45. The agency claimed that, by causing a reduction in the total number of repurchases, the tax would cause the Rule's "costs and benefits … to decrease," but without "chang[ing] the direction … of the economic effects of the amendments." Final Rule 107. For three reasons, this conclusion was arbitrary. Pet. Br. 54-58.

First, the SEC admits that some of the Rule's "costs" will stay "fixed" even as buybacks decline in number. Br. 46-47. Yet it never considered whether, as a result, the Rule's *net* benefits had decreased. *See id.*

Second, the SEC admits it refused to decide whether the tax would "have 'disproportionate impacts on 'opportunistic' … repurchases." Br. 47. If the tax independently deters the buybacks that most concern the agency, the Rule's net benefit will necessarily decrease. But the SEC never determined whether the Rule would still be justified in that event.

Third, the SEC relied on its Staff Memorandum to determine the tax's effects on the *Final* Rule, even though the Memorandum analyzed

the tax's effect on the substantially different *Proposed* Rule. Pet. Br. 57-58. The agency claims the Final Rule "conducted its own analysis," Br. 48, but that analysis directly incorporated the outdated Memorandum. *See* Final Rule 106 ("to the extent that the excise tax results in a decline in repurchase activity," the "Memorandum" considered "those effects"); *id.* at 105 & nn.392, 394-95, 107 & nn.396-37 (citing the Memorandum).

The SEC also points to its statement that the tax's effect would not differ from a decrease in repurchases caused by "other market conditions." Br. 48 (citing Final Rule 107). But if other conditions caused the Rule's benefits to decrease while some of its costs remained fixed, it would be just as necessary to reexamine whether the Rule is still justified. Nothing in the Final Rule's analysis indicates otherwise. *See* Final Rule 107.

D. The Commission Did Not Reasonably Determine the Rule's Overall Effect.

The SEC also did not adequately assess the Rule's overall effect in at least two respects. Pet. Br. 58-60. *First*, it did not reasonably consider the Rule's total costs. The SEC concedes (Br. 49) that, despite what the Rule says, nothing in Section V.C.1 addresses "mitigating factors" for the Rule's cost of "inefficiently decreas[ing] repurchases." Final Rule 146.

The SEC now claims (Br. 49) it meant to say Section V.C.2. But even if it did, that section discusses only the *daily-disclosure* requirement, Final Rule 135-40, leaving the effect of the *rationale-disclosure* requirement on efficient buybacks unaddressed.

The SEC also does not deny that it failed to consider any costs beside the loss of efficient buybacks in the Rule's section on its overall effects. Br. 50; *see* Final Rule 143-46. It points (Br. 50) to earlier sections discussing other costs, but those sections did not compare the magnitude of the costs to the benefits. And without a comparative analysis, the SEC cannot determine whether the Rule "will" on net "promote efficiency, competition, and capital formation." 15 U.S.C. §§ 78c(f), 80a-2(c).

Second, despite finding that the Rule burdens competition to the extent it affects small issuers more than large ones, Pet. Br. 60, the SEC never determined that this burden was "necessary or appropriate" as required by 15 U.S.C. § 78w(a)(2). The agency claims it found no burden, because it determined that the Rule "may have positive overall effects on competition." Br. 51 (cleaned up). But the Act requires a justification whenever the SEC finds "*a* burden on competition," not a *net* burden. 15 U.S.C. § 78w(a)(2) (emphasis added).

The SEC's reading assumes there is either a single overall burden or no burden. But "[t]he indefinite article 'a' says in plain language that there may be two or more [burdens]." *Comm'r v. Kelley*, 293 F.2d 904, 912 (5th Cir. 1961). Indeed, Section 78w(a)(2) goes on to equate "a" with "any," stating that the SEC must "include in the statement of basis and purpose" of each "rule" its justification for "any burden on competition imposed by such rule." And "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. BOP*, 552 U.S. 214, 219 (2008). The SEC thus violated Section 78w(a)(2) by finding *a* burden on competition without determining it was "necessary or appropriate."

III. PETITIONERS LACKED A MEANINGFUL OPPORTUNITY TO COMMENT.

These substantive errors are the predictable results of the Commission's procedural antics. Simply put, the SEC's unpredictable, start-stop process deprived the public of a meaningful opportunity to comment, thereby denying Petitioners the opportunity to aid the agency in discharging its statutory duties. Br. 61-66. While the SEC offers three excuses for its peripatetic rulemaking, this Court should not let it get away with *substantively* violating the APA (as discussed above) simply

because it also *procedurally* violated the APA. To the contrary, these procedural infirmities are an independent ground for invalidation.

First, the SEC suggests the comment period was longer than it actually was, either because the Proposed Rule was available online before it was published in the Federal Register or because the unpredictable, seriatim reopenings can be strung together. Br. 53-54. But this fuzzy math flunks both the law and common sense.

The APA's comment period is triggered only by "notice required by this section"—*i.e.*, "notice … published in the Federal Register"—not simply an alert on an agency website. 5 U.S.C. § 553(b), (c). Accordingly, commenters had just 45 days to comment. Then an unpredictable, separate 14. Then an unpredictable, separate 30.

Nor can the SEC claim any exigency that might justify a truncated comment period. While it cites (Br. 54) a case about "urgent necessity for rapid administrative action under the circumstances," *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30 (D.C. Cir. 1996), the SEC never invoked good cause for (or even tried to explain) the condensed comment period here.

As a practical matter, the Commission's mischaracterizations of the two reopenings as "extend[ing]" the initial comment period defy reason.

Br. 1, 3, 53. Given just 45 days to comment, the public had to decide at the outset what types of analyses could—and could not—be completed during that unduly short time frame. When making those assessments, commenters could not have anticipated that the agency would later decide to reopen the comment period due to two unforeseen issues—much less that it would accept comments on *any* topic during those reopenings. Casually lumping these periods together ignores the realities commenters faced. The meaningfulness of the opportunity to comment must be evaluated from *commenters'* standpoint, not based on *the agency's* later litigation positions.

Second, the SEC's attempt to justify its staccato process by suggesting the Rule posed no "difficult empirical questions" is simply not credible. Br. 54. Indeed, the Commission undercuts its own argument by complaining that a lack of data excuses its failure to fulfill its statutory duty to quantify and consider the Rule's economic effects. *See supra* at 17-19; Br. 47. Yet it was *the SEC* that prevented commenters from being able to provide such data (before declining to do the work itself). *See* Quaadman Decl.; Lewis Decl.; Kothari Br. It cannot have it both ways.

Third, the Commission flees (Br. 56-57) to the last redoubt of agency lawyers: harmless error. But "[a]gency mistakes constitute harmless error only where they 'clearly had no bearing on the procedure used or the substance of decision reached,'" *Sierra Club*, 245 F.3d at 444, so the Court "cannot assume that there was no prejudice," *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979). In other words, it is *the agency's* burden to establish harmlessness, and here, the Commission cannot. It has no answer for the declarations Petitioners submitted establishing the kinds of comments, data, and arguments they and others could have provided *but for* the truncated, stop-start comment period(s). Pet. Br. 65-66. Moreover, the Chamber repeatedly raised the alarm over the inadequacy of the comment period, along with the need for more time to aid the SEC. *See* Pet. Br. 61-66. Yet those pleas, like commenters' substantive objections, fell on deaf ears.

CONCLUSION

This Court should vacate the Final Rule, or at least its rationale-disclosure and daily-disclosure requirements.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 23, 2023, I served a copy of the foregoing on all counsel of record by CM/ECF.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) & (7)(B), and Fifth Circuit Rule 32.1 & 32.2. Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the brief contains 6,494 words and was prepared using Microsoft Word and produced in Century Schoolbook Standard 14-point font.

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