No. 23-60255

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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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*.

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

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# BRIEF *AMICUS CURIAE* OF MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS AND VACATUR

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Helgi C. Walker
Jeffrey Liu
*Counsel of Record*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
jyliu@gibsondunn.com

Jennifer L. Mascott
R. Trent McCotter
SEPARATION OF POWERS CLINIC
Gray Center for the Study of the Administrative State
Antonin Scalia Law School
George Mason University
3301 Fairfax Dr.
Arlington, VA 22201
Telephone: (202) 706-5488
rmccotte@gmu.edu

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
Telephone: (212) 599-7000
ishapiro@manhattan.institute

*Counsel for Amicus Curiae*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), counsel for *amicus* certifies that (1) *amicus* does not have a parent corporation, and (2) no publicly held company holds 10% or more of the stock or ownership interest in *amicus*. The Manhattan Institute is a nonprofit corporation exempt from income tax under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3).

## Supplemental Statement of Interested Parties

Pursuant to Fifth Circuit Rule 29.2, counsel for *amicus* certifies that, in addition to the interested parties identified by Petitioners in their opening brief, the following listed persons and entities have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus Curiae***

Manhattan Institute

**Counsel for *Amicus Curiae***

Helgi C. Walker

Jeffrey Liu

GIBSON, DUNN & CRUTCHER LLP

Jennifer L. Mascott

R. Trent McCotter

SEPARATION OF POWERS CLINIC, ANTONIN SCALIA LAW SCHOOL

Ilya Shapiro

MANHATTAN INSTITUTE

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## INTEREST AND IDENTITY OF *AMICUS CURIAE*[1]

The Manhattan Institute is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach. *Amicus* has an interest in opposing regulations that exceed a governmental agency's statutory authority and interfere with constitutionally protected liberties, as the Final Rule challenged here does.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the U.S. Securities and Exchange Commission's unprecedented effort to impose invasive disclosure requirements on companies that repurchase their own shares. *See Share Repurchase Disclosure Modernization*, Release No. 34-97423, Dkt. 2 (Final Rule). As Petitioners explain, stock repurchases are a routine practice that allow

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

companies to flexibly return profits to their shareholders when efficient investment opportunities are absent, thereby enhancing value for shareholders. Petrs. Br. 6-7. But the Commission seeks to chill this practice through two central requirements embodied in the Final Rule: (1) the rationale-disclosure requirement, which forces companies to disclose their rationale for each individual repurchase, and (2) the daily-data requirement, which forces companies to disclose repurchase data aggregated on a daily basis. The Final Rule is outside the scope of the SEC's authority, violates First Amendment precedent, is not adequately justified, and suffers procedural irregularities under the Administrative Procedure Act ("APA").

*Amicus* submits this brief to highlight the *ultra vires* nature of the Final Rule. Construed against the backdrop of the Constitution's commitment to federalism, no provision of the SEC's organic statutes authorizes the Final Rule's core requirements. Governance of a corporation's internal affairs is traditionally regulated under the state law of the company's place of incorporation. And state law uniformly leaves day-to-day management decisions—like whether to engage in a stock repurchase—to a corporation's board of directors. By forcing management to, among other things, publicly "compar[e] the repurchase with other investment opportunities" and "discuss the factors driving the repurchase," Final Rule 79, the Final Rule gives shareholders new opportunities to second-guess management. Congress has not "expressly" authorized this degree of interference with corporate governance, a creature of state law, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977), and it's a bad policy idea too. None of the provisions the Commission has identified (such as Sections 12 and 13 of the Securities Exchange Act of 1934) can sustain the Final Rule.

The Commission's failure to evaluate the soundness of the Final Rule's statutory underpinnings is unsurprising. As Petitioners explain, the Commission violated contemporary APA norms by providing only narrow windows for comment on a highly complex rule, failing to provide interested parties with a meaningful opportunity to engage with the Commission's proposal consistent with the Commission's past practice for similar or even less complex rules. The Commission's high-handed and peremptory attitude toward public participation suggests that it proceeded without genuine interest in commenters' input and ultimately failed to undertake the mature consideration that APA precedent requires.

On either ground, as well as those urged by Petitioners, the Final Rule should be vacated.

## ARGUMENT

### I. The Rationale-Disclosure and Daily-Data Requirements Exceed the Commission's Statutory Authority.

The Final Rule's central requirements exceed the Commission's statutory authority. It is blackletter law that "[a]gencies have only those powers given to them by Congress." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). And "[t]o determine 'the authority that Congress has provided,' we examine an agency's authorizing statutes." *Midship Pipeline Co., L.L.C. v. FERC*, 45 F.4th 867, 876 (5th Cir. 2022) (quoting *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022)).

In support of the Rule, the Commission points to Sections 12, 13, 15, and 23(a) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 78*l*, 78m, 78o, 78w(a); *see* Final Rule 178; *id.* at 65 (justifying disclosure mandates of "additional data" based on "authority under the Exchange Act").

But three of those provisions—Sections 12, 15, and 23(a)—have no relevance at all, and a fair reading of the fourth cannot sustain the Rule's core requirements. That is especially so in light of the federalism and First Amendment concerns raised by the Commission's proposal.

**1.** Three of the Commission's cited provisions are plainly inapposite.

To start, Section 23(a)(1) of the Exchange Act authorizes the Commission "to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter." 15 U.S.C. § 78w(a)(1). But this provision simply sets forth the SEC's "general rulemaking authority"—it "does not mean that [any] specific rule . . . is a valid exercise" of the Commission's authority. *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). Section 23(a), in other words, confirms generally that the SEC may act through the process of rulemaking, but it does not expressly authorize any particular rule the Commission may propose. Unless *another* statutory provision "explicit[ly] author[izes]" the Final Rule as a matter of substance, Section 23(a) does little work on its own to justify the action here. *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 553 (D.C.

Cir. 2020) (vacating an SEC rule and noting that Section 23(a) could not serve as explicit authority for the rule).

If anything, far from authorizing the Final Rule, Section 23 affirmatively prohibits it. Section 23 provides that the SEC "shall not adopt any . . . rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]." 15 U.S.C. § 78w(a)(2). Here, the Commission acknowledged that the Rule "could result in adverse effects on competition," Final Rule 145, but made no finding that it was actually necessary to advance the Act's purposes. *See* Petrs. Br. 60; *N.Y. Stock Exchange*, 962 F.3d at 553 (noting that the challenged SEC rule would "impose significant burdens on competition," and holding that the rule could not be upheld because the Commission made no "determination" that the rule's requirements "were necessary or appropriate to further the purposes of the Exchange Act"). That alone is fatal.

The Commission fails to identify any other provision that could independently authorize the Final Rule. The Commission nods at Section 12, 15 U.S.C. § 78*l*, but that section lends the Commission no support. Section 12(a) bars the trading on a stock exchange of any securities that are not registered with the exchange. 15 U.S.C. § 78*l*(a). Section 12(a) says nothing about disclosure. And Section 12(b) simply specifies the requirements for registration. *Id.* § 78*l*(b). One such requirement is that the issuer must "fil[e] an application with the exchange" containing certain information and "any further financial statements which the Commission may deem necessary." *Id.* § 78*l*(b)(1)(L). Although this provision may at first blush appear relevant, the provision by its terms applies to information "contain[ed]" in "an application" for registration—not information about purchases made *after* the securities were registered. *Id.* § 78*l*(b)(1). Section 12's text does not tell us anything about post-purchase disclosures.

Section 15 does not apply either. The only potentially relevant provision in Section 15 simply extends to certain issuers the provisions of Section 13 of the Exchange Act—discussed in greater detail below. *See* 15 U.S.C. § 78o(d)(1) (requiring "[e]ach issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933" to file periodic reports "as may be required pursuant to section 78m of this title," *i.e.*, Section 13 of the Exchange Act). Section 15 therefore has no independent force here.

**2.** The underbrush cleared away, only Section 13 remains—the only remotely on point provision. Section 13 still fails to authorize the SEC's significant action here.

Section 13 of the Exchange Act requires issuers of registered securities to file "annual" and "quarterly" reports "in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." 15 U.S.C. § 78m(a)(2). Though broad, that provision incorporates real limits: Any reports the Commission requires must be "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." *Id.* In construing the terms "necessary or appropriate," courts must be sensitive to the numerous constitutional considerations that the Final Rule raises. Fairly read against the "backdrop" of well-established legislative "presumptions," Section 13 does not authorize the Final Rule's rationale-disclosure and daily-data requirements. *Bond v. United States*, 572 U.S. 844, 857 (2014).

**a.** Section 13 does not give the Commission *carte blanche* to impose "a sweeping disclosure requirement that is largely untethered" from any true investor-protection or fair-dealing rationale. *Merck & Co. v. U.S. Dept. of Health & Human Servs.*, 962 F.3d 531, 533 (D.C. Cir. 2020).

As Petitioners have well explained, neither the rationale-disclosure nor daily-data requirement is necessary to protect investors or to insure fair dealing. *See* Petrs. Br. 43-50. The Commission asserted that these requirements would allow investors to better identify "value-destroying or opportunistic repurchases" and reduce "information asymmetries" between issuers and investors. *Share Repurchase Disclosure Modernization*, 87 Fed. Reg. 8443, 8456-57 (Feb. 15, 2022) (proposed rule). But the Commission could muster only speculation in support of these theories—ultimately confessing that the marginal value of additional disclosures "above and beyond" current information is potentially "limited" and at best "unclear," Final Rule 128, 134, and suggesting only that "personal benefit *may* be a factor in determining whether to undertake a share repurchase," Final Rule 17 (emphasis added). In the end, faced with empirical data (including findings by its own staff), the Commission admitted that "'most' repurchases are consistent with shareholder value maximization." Final Rule 23.

"Worse still," the Commission acknowledged concerns that "the disclosure could just as well backfire." *Merck*, 962 F.3d at 540. That is because, as commenters observed, the additional disclosures compelled by the Final Rule could "result in an overload of information that would be too disaggregated for retail investors to easily parse," while empowering professional traders "to exploit arbitrage opportunities and actually increase information asymmetry." Final Rule 32. The SEC offered no persuasive response. *See* Petrs. Br. 51-52. These considerations "unlas[h] the disclosure [requirement] from its claimed administrative mooring," confirming the lack of any "actual and discernible nexus between the rule" and Section 13's statutory goals. *Merck*, 962 F.3d at 538, 540. The Rule is thus not only arbitrary and capricious, but it also exceeds the Commission's statutory authority under Section 13.

**b.** Carefully observing the limits on the Commission's statutory authority is especially vital where, as here, the Rule would effectively regulate boardroom decisions and intrude on a corporation's internal affairs—areas traditionally governed by state law. *See* Final Rule 65 (acknowledging concern raised by Cato Institute).

Specifically, the rationale-disclosure requirement effectively forces a corporation's board to disclose how it structures its stock repurchase decisions at the management level. To meet the demands of this requirement, a company may not rely on "boilerplate," but must offer individualized discussion of "other possible ways to use the funds allocated for the repurchase," comparison to alternatives, and "objectives" for the repurchase. Final Rule 79. These unprecedented disclosures—pertaining to the *whether* and *how* of board decision making—leave the board vulnerable to second-guessing and public criticism by shareholders who often lack the experience and skill to make informed decisions. As *amicus* elsewhere has explained, that is bad policy.[2]

[2] *See* James R. Copland, *Against an SEC-Mandated Rule on Political Spending Disclosure: A Reply to Bebchuk and Jackson*, 3 Harv. Bus. L. Rev. 381, 391-92 (2013) (arguing for importance of centralizing decision-making in management to "avoi[d] the high costs of heterogeneous collective decision-making by" shareholders).

More fundamentally, however, the Commission's compelled disclosures interfere with how state law generally treats corporate governance. Under state law, power over corporate affairs is lodged in the corporation's board of directors, which is responsible for managing the company's day-to-day decisions, *see, e.g.*, Del. Code Ann. 8 § 141(a), including for share buybacks and corporate dividend policies, *e.g.*, *id.* § 160; Ohio Rev. Code § 1701.35; New York Bus. Corp. Law § 505; Fla. Stat. 607.0631. The Final Rule's compelled disclosures could chill the board's ability to act freely in structuring the company's decision-making processes, threatening to mark a significant shift in the usual balance of decision-making authority from the board to shareholders.[3]

Because "[c]orporations are creatures of state law," the Supreme Court has repeatedly admonished that "except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the

[3] As a general matter, therefore, the State of incorporation has the primary responsibility for regulating a corporation's internal affairs. But for all the reasons explained in text, *amicus* does not suggest that any State should—or may, with respect to out-of-state corporations—further regulate stock repurchases.

corporation." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (emphasis added) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)); *Business Roundtable v. SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990) (same). That ordinary-meaning interpretive rule reflects basic principles of constitutional federalism. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (constitutional concerns are "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accounting for this basic "presumptio[n]" is "[p]art of a fair reading of statutory text." *Bond*, 572 U.S. at 857.

Here, there is little reason to think that Congress intended to upset the "usual constitutional balance" by unsettling state law norms regarding corporate governance through the means of a simple reporting provision in Section 13. *Gregory*, 501 U.S. at 460 (courts must be "certain" that Congress intended to displace usual federal-state balance of authority). Indeed, while the Commission routinely imposes run-of-the-mill *factual* reporting requirements on regulated parties, the Rule's *rationale*-disclosure requirement is the first of its kind. The Rule would not merely compel disclosure of, say, a company's "financial statements," SEC Form 10-Q, but require companies to delve deeply into their decision making process—again, to "discuss[] other possible ways to use the funds," "compar[e] the repurchase with other investment opportunities," and "discuss the factors driving the repurchase." Final Rule 79. Given the federalism concerns the Rule raises, the lack of historical analogues for the Rule is an especially "telling indication that the mandate extends beyond the agency's legitimate reach." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 666 (2022) (cleaned up).

Ultimately, Section 13 does not allow the Commission "to command the disclosure to the public at large of . . . information that bears at best a tenuous, confusing, and potentially harmful relationship" to the statutory goal of protecting investors. *Merck*, 962 F.3d at 541.

**c.** Two other provisions of Section 13 on which the Commission may rely offer even flimsier support. First, Section 13(a)(1) authorizes the Commission to require issuers to "keep reasonably current the information and documents required to be included in or filed with an application" under Section 12. 15 U.S.C. § 78m(a)(1). As noted above, an "application" under Section 12 is an application for registration. It is hard to see how the disclosure of the rationale for a stock repurchase keeps current the factual information disclosed in the stock's registration application.

Second, the Commission may also point to Section 13(e), but that provision, too, is inapposite. Section 13(e) bars an issuer from "purchas[ing] any equity security issued by it if such purchase is in contravention" of Commission rules defining fraudulent, deceptive, or manipulative practices, or prescribing means "reasonably designed" to prevent such practices. 15 U.S.C. § 78m(e)(1). This statutory provision implicitly recognizes the Commission's authority to prescribe rules "reasonably designed" to prevent fraudulent or manipulative practices. But the Commission has never represented that fraud or manipulation prevention are the intent or effect of the rule. To the contrary, the Commission avers that the rule is *not* "intended to deter share repurchases." Final Rule 65. To the extent the Commission seeks to curb *opportunistic* share repurchases, the administrative record (including previous staff reports) undercuts the notion that there is any such problem. *See* Petrs. Br. 10-11; SEC Staff, *Response to Congress: Negative Net Equity Issuance* 30-31, 37-38 (2020).

At an even more basic level, Section 13(e)'s core prohibition applies only to *the purchase* of stock in contravention of a Commission rule. The Final Rule, by contrast, imposes obligations triggered *after* an issuer has purchased stock. So Section 13(e) cannot possibly ground the Final Rule.

Section 13(e) expressly provides an example of an authorized rule that confirms this reading. Under Section 13(e), "[s]uch rules and regulations may require such issuer to provide holders of equity securities . . . with . . . information relating to the reasons for [the stock] purchase, the source of funds, the number of shares to be purchased, the price to be paid for [the] securities, the method of purchase, and such additional information, as the Commission deems necessary." 15 U.S.C. § 78m(e)(1). This provision speaks explicitly in the future tense—describing the disclosure of the price "*to be* paid" and the number of shares "*to be* purchased." That describes a *pre-purchase* disclosure. If an issuer fails to make the appropriate disclosure, then the *subsequent* purchase would be made in contravention of SEC rules. *See, e.g.*, 17 C.F.R. § 240.13e-1(a)(1) (prohibiting an issuer from purchasing its own securities in connection with a tender offer "unless the issuer *first* . . . [f]iles a statement with the Commission" disclosing, among other things, the "number of securities *to be* purchased" (emphases added)). But that provision has no application to post-purchase disclosure requirements.

Section 13(e) also makes clear that, when Congress wanted to compel issuers to disclose "the reasons" for a stock purchase, 15 U.S.C. § 78m(e)(1), "it knew how to say so," *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). Congress may have done so for certain pre-purchase disclosures, but the Exchange Act includes no analogous provision for post-purchase disclosures.

**d.** Finally, were there any remaining doubt about the scope of the Commission's authority, First Amendment concerns counsel in favor of construing that authority narrowly. *See generally Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (constitutional avoidance canon). As Petitioners have explained, if Section 13 were interpreted to authorize the rationale-disclosure and daily-data requirements, it would raise grave concerns under First Amendment precedent. *See* Petrs. Br. 21-37. The Final Rule's central requirements compel speech on controversial matters of opinion, and they cannot survive strict scrutiny or even the lower standard of review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *See* Petrs. Br. 21-37. This Court should avoid reading the statute in a generous and flexible manner that "presents a significant risk that the First Amendment will be infringed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *Merck*, 962 F.3d at 540 (vacating agency disclosure rule where it "at least implicates a substantial constitutional question" under the First Amendment).

## II. The Commission Deprived the Public of a Meaningful Opportunity to Comment under Past Commission Practice and APA Precedent.

The numerous legal errors that plague the Final Rule are the unsurprising byproduct of a truncated comment period that failed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

The APA's "opportunity to participate" requirement means that the agency must provide a "time period sufficient for interested persons to *meaningfully* review a proposed rule and provide informed comment." *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (emphasis added). This Court has observed that notice-and-comment serves the critical purpose of "assur[ing] fairness and mature consideration of rules having a substantial impact on those regulated" and to "allo[w] the agency to educate itself before adopting a final order." *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011) (cleaned up). The "meaningful"-opportunity-to-comment requirement is consistent with ensuring that "the agency maintains a flexible and open-minded attitude towards its own rules." *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012); *see Coal. for Workforce Innovation v. Walsh*, 2022 WL 1073346, at *7 (E.D. Tex. Mar. 14, 2022) ("[C]ourts require that agencies provide a 'meaningful' opportunity for comment.").

Here, as Petitioners underscore, the Final Rule's comment process was marked by technical errors and an abrupt start-stop cadence that gave interested persons an insufficient opportunity to meaningfully participate in comparison to past agency practice. For starters, the Commission's initial 45-day comment period was a relatively short window contravening the Commission's self-professed policy of providing market participants "at least two months" to comment on rule proposals. House Appropriations Subcomm. on Fin. Servs., *Hearing on the Fiscal Year 2023 SEC and Federal Trade Commission Budget Request* 7 (May 18, 2022) (statement of Chairman Gensler). The Executive Branch generally follows, and the Administrative Conference of the United States recommends, the same well-established practice of providing interested parties "at least 60 days" to comment. *Memorandum for the Heads of Executive Departments and Agencies*, 86 Fed. Reg. 7223 (Jan. 20, 2021), tinyurl.com/bdebx8b9 (reaffirming Executive Order 13563); Administrative Conference of the United States, Recommendation No. 2011-2 (June 16, 2011), tinyurl.com/33aappcr. And "[w]hile there is no bright-line test for the minimum amount of time allotted for the comment period . . . at least one circuit has recognized that 90 days is the 'usual' amount of time allotted for a comment period[.]" *Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1176-77 (N.D. Cal. 2019) (quoting *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 453 (3d Cir. 2011)).

The Commission here offered commenters only *half* of that "usual" period. *Id.* That falls well outside of past norms given the context here. *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021). The proposed rule was not "small" or "discrete," but a "multi-faceted" proposal that implicated a number of difficult empirical questions underlying share repurchases and that "altered long-established policy and practice." *Centro Legal de* *la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021). Indeed, the allotted 45 days was shorter than even the 60 days—the minimum per Commission and executive branch practice—budgeted for the far more modest 2003 Rule that the Final Rule amended. *See Rule 10b-18 and Purchases of Certain Equity Securities by the Issuer and Others*, 67 Fed. Reg. 77,594 (Dec. 18, 2002) (comment period ending February 18, 2003); *N. Carolina Growers' Ass'n*, 702 F.3d at 770 (noting that comment period discrepancies indicate lack of opportunity for comment).

The problems run even deeper. The comment window "coincide[d] with comment periods for five other proposed Commission rules," leaving the public "with hundreds of questions on which [the Commission was] seeking input" in just 45 days. Comm'r Elad L. Roisman, *Dissenting Statement on Proposed Rules Regarding Share Repurchases* (Dec. 15, 2021), tinyurl.com/39db2bzk (Roisman Dissent). The "overlapping comment periods" on closely related SEC rulemakings were "particularly damaging" to the public's opportunity to meaningfully comment on the proposed rule. *Centro Legal De La Raza*, 524 F. Supp. 3d at 955 n.26. As the agency's Inspector General found in a recent report, the

Commission's "aggressive agenda" has led to less "feedback" during the comment period, limited the "time available for staff research and analysis," and left the Commission to rely on detailees "with little or no experience in rulemaking." The Inspector General's Statement on the SEC's Management and Performance Challenges 3 (Oct. 13, 2022), tinyurl.com/49ms69aj. While these concerns were brought to the Commission's attention, Petrs. Br. 63-64, the Commission offered no explanation for sticking to its preset timeline—yet another factor pointing to procedural inadequacy. *See Centro Legal de la Raza*, 524 F. Supp. 3d at 955 (underscoring that agency "did not identify any exigent circumstances requiring a compressed comment period," despite "numerous commenters" flagging concerns about "extremely limited" comment period).

Despite the Commission's reopening of the comment period on two occasions, the start-stop nature of the comment window only underscores the inadequacy of the Commission's approach. The Commission first re-opened the comment period only to address technical malfunctions with its own comment system, which had led to "a number of public comments" not being received at all. *Resubmission of Comments and Reopening of*

*Comment Periods for Several Rulemaking Releases Due to a Technological Error in Receiving Certain Comments*, 87 Fed. Reg. 63,016, 63,016 (Oct. 18, 2022). That extension was remedial; it did not effectively expand the 45-day comment period. And after Congress mandated a 1% excise tax on stock repurchases in the Inflation Reduction Act, the Commission again reopened the comment period to allow parties to address that important new development. But it did so for just 30 days—in December 2022, no less, producing a truncated window overlapping with numerous year-end holidays and year-end fiscal reporting deadlines for many public companies. *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 820 (N.D. Cal. 2020) (30-day comment period that "spann[ed] the holidays" was inadequate).

Marked by fits and starts, the Commission's "rushed schedule" hardly exemplifies a "well-functioning rulemaking process." Roisman Dissent. Far from the "mature consideration" the Commission must undertake, *Johnson*, 632 F.3d at 931, the Commission's approach to notice-and-comment suggests that the Commission viewed it merely as a technical box to be checked on its way to a predetermined outcome.

## CONCLUSION

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

Dated: July 17, 2023

Respectfully submitted,

/s/ *Jeffrey Liu*

Helgi C. Walker
Jeffrey Liu
*Counsel of Record*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
jyliu@gibsondunn.com

Jennifer L. Mascott
R. Trent McCotter
SEPARATION OF POWERS CLINIC
Gray Center for the Study of the Administrative State
Antonin Scalia Law School
George Mason University
3301 Fairfax Dr.
Arlington, VA 22201
Telephone: (202) 706-5488
rmccotte@gmu.edu

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
Telephone: (212) 599-7000
ishapiro@manhattan.institute

*Counsel for Amicus Curiae*

## Certificate of Service

I certify that, on July 17, 2023, a true and correct copy of the foregoing brief was served via CM/ECF on all counsel of record.

/s/ *Jeffrey Liu*
Jeffrey Liu

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because it was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. Fed. R. App. P. 29(a), 32(g)(1). This brief complies with the type-volume limitation of Rule 29(a) because it contains 4,219 words, excluding the parts exempted by Rule 32(f).

/s/ *Jeffrey Liu*
Jeffrey Liu