No. 23-5409

In the United States Court of Appeals for the Sixth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

BUSINESS ROUNDTABLE,
Plaintiff-Appellant,

TENNESSEE CHAMBER OF COMMERCE & INDUSTRY,
Plaintiff-Appellant,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee,

GARY GENSLER IN HIS OFFICIAL CAPACITY AS CHAIR OF THE COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Tennessee
(No. 3:22-cv-561) (The Hon. Aleta Trauger)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America, Business Roundtable, and the Tennessee Chamber of Commerce & Industry state that they are not subsidiaries of any other corporation. Appellants are nonprofit trade groups that have no shares or securities that are publicly traded.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), appellants respectfully request oral argument. This appeal presents several significant legal issues against the backdrop of two complex administrative records. Oral argument could materially assist this Court in understanding the legal issues and the record. Further, as explained in the parties' Joint Motion to Expedite (ECF No. 12), which was granted in part by the Court (ECF No. 13), the parties have agreed to expedite briefing in this case in the interest of allowing the Court to hold argument during its October sitting. Appellants believe that expeditious review of their appeal is warranted given the ongoing harms imposed by the challenged illegal rule, a parallel challenge to the rule pending in the Fifth Circuit, and the upcoming 2024 proxy season.

INTRODUCTION

There is likely no group in corporate America with more power but less oversight than proxy voting advice businesses (PVABs), often referred to as proxy advisors. Every year the shareholders of publicly traded companies are asked to vote on thousands of proposals addressing a wide range of issues, from core questions of corporate governance like executive compensation or risk management, to topics like climate change or political spending. The vast bulk of those votes are cast by large institutions (like mutual funds or pension funds) that own shares, or execute votes on behalf of individual retail investors who own shares, of hundreds of public companies. These institutions therefore must cast thousands of votes annually, largely during a three-month period in the spring known as proxy season.

Needless to say, individual and institutional investors alike do not have the time or resources to analyze each proposal for themselves. They have instead largely relied on PVABs for advice on voting, which typically occurs "by proxy" as opposed to in person at the shareholder meeting. Indeed, PVABs increasingly do not merely advise shareholders, but actually cast shareholders' votes through a process called "robo-voting." And the PVAB market is effectively a duopoly: two PVABs, Institutional Shareholder

Services (ISS) and Glass Lewis & Co., control 90% of the market. Thus, as a practical matter, two private entities exercise tremendous influence over the decisions of virtually every publicly traded company in America.

For decades, ISS and Glass Lewis exercised that influence with little regulatory oversight. Two obvious problems emerged. First, PVABs developed conflicts of interest as they began consulting on corporate governance for some of the same companies on which they were issuing proxy recommendations—meaning that they could both recommend a policy change and then recommend to shareholders how to vote on that change. That created obvious pressure to purchase PVABs' consulting services or face adverse recommendations come proxy season. Second, it became clear that PVABs' recommendations often contained inaccurate or incomplete information, and companies often had little time to react and reach shareholders before the votes. In short, the system was in need of greater transparency and accuracy.

Those arrived in 2020. After a decade of bipartisan study across Administrations, the Securities and Exchange Commission issued a rule and accompanying guidance that imposed modest regulations on PVABs. R. 35-2 (*Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg.

55,082 (Sept. 3, 2020)) (2020 Rule).[1] The 2020 Rule required PVABs to disclose potential conflicts of interest. It also required PVABs to provide their recommendations to companies and clients at the same time, and then alert their clients to any written response by the companies to those recommendations (the Notice and Awareness Conditions). Those common-sense reforms had wide support from public companies and retail investors, although ISS and Glass Lewis predictably objected to the curbs on their power.

Then the "political winds . . . shifted." R. 74 (Mem. Op.) at 2020. After defendant Gary Gensler became SEC Chair, he put a hold on enforcement of the 2020 Rule. His office then held a closed-door meeting with opponents of the 2020 Rule. What happened next was a lesson in what an agency should *not* do under the Administrative Procedure Act. On the basis of nothing new, the Commission proposed eliminating the Notice and Awareness Conditions it had just adopted after a decade of study. Despite the absence of *any* exigent circumstance, the Commission provided only 30 days for comment—from the Friday after Thanksgiving to the Monday after Christmas—and ignored

[1] Pursuant to Sixth Circuit Rule 28(a)(1), citations to the district court record correspond to the Page ID number of the referenced pages.

commenters' requests for more time. After receiving *one-tenth* the number of comments submitted for the 2020 Rule, the Commission quickly passed the 2022 Rescission by a 3-2 vote, with an abbreviated explanation for its reversal.

That type of agency flip-flopping is not and should not be permissible. When an agency "changes course" on a prior rulemaking, it must do *more*, not less. *Dep't of Homeland Sec.* v. *Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020). As always, the agency must allow for meaningful public participation through a sufficient comment process, but it also must provide a "more detailed" justification when it changes its view of the facts. *FCC* v. *Fox Television Stations*, 556 U.S. 502, 515-516 (2009). In the decision below, the district court turned that approach on its head. The court reasoned that because the Commission had undertaken a decade-long study resulting in the 2020 Rule, both the agency and the public were familiar with the topic. As a result, the court held, commenters needed less time to prepare comments, the Commission needed less reasoning to reach a different conclusion, and the Commission needed a less robust economic analysis. All of those conclusions are precisely backward: a thorough and reasoned rulemaking cannot justify a hasty and unreasoned reversal.

First, the Commission violated the APA's requirement that it provide a meaningful opportunity for public comment. The 30-day comment spanned the year-end holidays and fiscal reporting deadlines; it was half of the 60-day period provided for the 2020 Rule; and perhaps most damningly, it violated the Commission's own policy of allowing 60 days for public comment—something that the Commission has never explained. As evidence of the period's inadequacy, it yielded a fraction of the comments submitted on the 2020 Rule, and the Commission itself complained that commenters failed to provide necessary data. If *this* month was adequate, then any month will be.

Second, the resulting 2022 Rescission was arbitrary and capricious because the Commission failed to provide a reasoned justification, let alone a "more detailed" one, for rescinding the 2020 Rule's core components. *Fox*, 556 U.S. at 515. The district court correctly acknowledged that *Fox*'s heightened-justification standard applied, which should have been the end of the analysis. The Rescission conclusorily rejected the 2020 Rule's factual findings, without any meaningful explanation for why its views had changed. But the district court reasoned that because the Commission had done so much work for the 2020 Rule, it could simply look at the same record two years later and reach the opposite conclusion. That reasoning would gut *Fox*'s more

detailed justification requirement, because it would allow agencies to say less rather than more when they change positions.

Third and finally, the 2022 Rescission was arbitrary and capricious because the Commission did not conduct a genuine and thorough economic assessment of the Rescission's costs and benefits. *See* 15 U.S.C. § 78c(f). Instead the Commission distorted the economic analysis from its prior rulemaking by inflating the benefits to PVABs and undervaluing the costs to companies and their shareholders. As one example of the Commission's inconsistency, it said that the Notice and Awareness Conditions were not necessary because PVABs were already self-regulating—while also saying that disposing of the Conditions would save the PVABs the costs of compliance. That inconsistent reasoning exposes the 2022 Rescission for what it was: a preordained result. Whether for procedural or substantive reasons or both, this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this case under 28 U.S.C. § 1331 because appellants' complaint raises claims under the APA, 5 U.S.C. § 553 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291 to

review the district court's final judgment entered on April 24, 2023. Appellants timely filed a notice of appeal on May 3, 2023.

STATEMENT OF THE ISSUES

1. Whether the abbreviated comment period for the 2022 Rescission failed to give "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

2. Whether the 2022 Rescission is arbitrary and capricious because the Commission failed to provide the requisite justification for withdrawing the 2020 Rule's Notice and Awareness Conditions. 5 U.S.C. § 706.

3. Whether the 2022 Rescission is arbitrary and capricious because the Commission failed to engage in the economic analysis required by the Exchange Act. 5 U.S.C. § 706; *see* 15 U.S.C. § 78c(f).

STATEMENT OF THE CASE

A. Factual Background

1. Shareholder Democracy In The United States And The Rise Of Proxy Voting Advice Businesses

Capital markets in the United States are premised on a system of shareholder democracy in which the shareholders of publicly traded companies receive voting rights when they purchase common shares. The

proposals up for vote at shareholder meetings often concern the most critical issues facing public companies, ranging from contested board elections and approvals of mergers and acquisitions, to employee and executive compensation plans, to environmental and social governance (ESG) issues. James R. Copeland, *et al.*, *A Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, Stan. Rock Ctr. for Corp. Governance (May 30, 2018).

Modern shareholder voting typically does not take place in a town hall or corporate boardroom. Instead it almost always occurs "by proxy," that is, remotely through proxy-card ballots cast on behalf of shareholders. R. 35-1 (*Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice Release*, 84 Fed. Reg. 66,518 (Dec. 4, 2019)) (Proposed 2020 Rule) at 248-249. Additionally, more than 75% of corporate shares are held not by individual "retail" investors, but by institutional investors ranging from large mutual funds to small pension funds. *Id.* Those institutional investors often own shares of hundreds of public companies and therefore must vote on thousands of proposals each year, largely during a three-month period in the spring known as "proxy season." R. 35-2 (2020 Rule) at 292.

Recognizing the challenges investors face in attempting to manage their proxy votes, PVABs sell voting recommendations. And as the number of proposals has ballooned in recent years, so too has investors' reliance on PVABs' recommendations. *See* R. 35-3 (*Trends and Updates From the 2022 Proxy Season*, Freshfields (July 7, 2022)) at 366 ("There was a record-breaking number of shareholder proposals for Russell 3000 companies, mostly related to ESG.").[2] For many investors, their dependence on PVABs has become reflexive: through a procedure known as "robo voting," shareholders' proxies are *automatically* voted in line with PVAB recommendations. *See* R. 35-21 (*Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022)) (2022 Rescission) at 741 ("ISS states that it executes more than 12.8 million ballots annually on behalf of its clients representing 5.4 trillion shares."). Other investors use a similar process where PVABs "pre-populate" voting forms. *See* R. 35-5 (Paul Rose & Christopher J. Walker, Comment (Dec. 22, 2021)) at 452 (175 entities representing over $5 trillion in assets voted in line with ISS recommendations 95% of the time).

[2] Investors' reliance on PVABs has been fueled by regulation as well. Most notably, in 2003, the Commission began requiring institutional investors to develop proxy voting policies, while allowing investors to satisfy that obligation by relying on policies developed by PVABs. *See* 17 C.F.R. §§ 239, 249, 270, 274 (2003).

It is difficult to overstate the current influence of PVABs. Because they both guide and even cast a substantial number of shareholder votes, they have come to "play the role of quasi-regulator, whereby boards feel compelled to make decisions in line with proxy advisors' policies due to their impact on voting." R. 35-49 (Timothy Doyle, *The Realities of Robo-Voting* (Nov. 29, 2018)) at 1249. Indeed, it has become "commonplace for powerful CEOs to come on bended knee . . . to persuade the managers of ISS of the merits of their views." R. 35-7 (Leo E. Strine, Jr., *The Delaware Way* (2005)) at 553.

2. The Unregulated PVAB Industry

The PVAB industry traces its roots to 1985, when ISS was founded. Would-be competitors emerged in the early 2000s, but only one, Glass Lewis & Co., has been able to attract a substantial number of clients. By 2022, Glass Lewis's clients collectively managed $40 trillion in assets, while ISS's clients managed far more. R. 35-21 (2022 Rescission) at 741. Together, the two companies, which enjoy over a 90% market share, have come to dominate the PVAB industry, and by extension, shareholder democracy itself. R. 35-2 (2020 Rule) at 336.

The rise of PVABs has come with two notable costs. First, PVABs can have obvious conflicts of interest. Both ISS and Glass Lewis offer voting

advice on public companies while simultaneously offering consulting services to those same companies to improve their corporate governance rankings. R. 35-1 (Proposed 2020 Rule) at 255. In fact, ISS also provides the governance ratings itself. *Id.* As a result, ISS can help a corporate client design a governance proposal to be voted on by shareholders, subsequently recommend to shareholders how to vote on that proposal, and then rate the company's governance policies. As the Commission long ago recognized, companies can feel obligated to purchase PVAB services in order to ensure support for their proposals or to improve their ratings. R. 35-50 (*Concept Release on the U.S. Proxy System; Proposed Rule*, 75 Fed. Reg. 42,982 (July 22, 2010)) at 1284.

Second, "understaffed" or "uninformed" PVABs frequently give error-ridden or incomplete advice. *See, e.g.*, David Gelles, *Lively Debate on the Influence of Proxy Advisory Firms*, N.Y. Times (Dec. 5, 2013), https://archive.nytimes.com/dealbook.nytimes.com/2013/12/05/lively-debate-on-the-influence-of-proxy-advisory-firms/. In recent years, PVABs' voting recommendations have reported wildly incorrect net-income figures, misstated director qualifications, misunderstood company disclosures, or even ignored governing law. R. 35-8 (Am. Council for Cap. Formation, *Proxy Advisors Are Still a*

Problem) at 567. A recent survey by the Society for Corporate Governance found that *nearly half* of companies had been subject to factual or analytical errors by PVABs in the preceding three years. *See* A.R. 58 (Soc'y for Corp. Governance, Comment (Feb. 3, 2020)), Release No. 34-87457, File No. S7-22-19, at 4-7 and Appendix A, http://www.sec.gov/comments/s7-22-19/s72219-6743687-207853.pdf; R. 35-10 (Nat'l Ass'n of Mfrs., *Outlook Survey*) at 644, 649 (over half of surveyed public companies reported diverting resources from their core business functions to respond to PVAB recommendations).[3]

Making matters worse, it is often impossible for companies to address PVAB errors before a shareholder vote occurs. That is because PVABs often issue their recommendations just days before the relevant vote, leaving companies with little to no time to respond. A recent survey identified 42 instances in 2020 and 50 in 2021 when companies managed to file supplemental proxy materials with the Commission to dispute or correct errors contained in PVAB reports. R. 35-8 (Am. Council for Capital Formation, *Proxy Advisors Are Still a Problem*) at 571. But those statistics

[3] Citations to the Administrative Record (A.R.) correspond to the documents indexed at R. 26 (Certified List Describing the Record in Rulemaking Proceedings Before the Securities and Exchange Commission) at 150-153.

capture only the rare situation when a company is able to catch a mistake and file a supplemental report in time. And even then, there is no guarantee the corrected information will reach shareholders before the vote.

3. The Bipartisan Reform Consensus

Section 14(a) of the Securities Exchange Act of 1934 makes it unlawful for any person "to solicit any proxy" with respect to certain securities "in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78n(a)(1). The relevant "rules and regulations" include the requirement that those making proxy solicitations provide specific information—including management information, potential conflicts of interest, and precise details about the topics up for vote—in a "definitive proxy statement" filed publicly with the Commission. 17 C.F.R. §§ 240.14a-3, 240.14a-101.

The Commission has for decades expressed the view in informal guidance that proxy voting advice is a "solicitation" under the proxy rules. Nevertheless, PVABs have avoided the proxy solicitation rules' information and filing requirements under an exemption for proxy voting advice that dates back to 1979, before the rise of the PVAB industry. *See* R. 35-50 (*Concept Release on the U.S. Proxy System* (July 22, 2010)) at 1281. But as evidence of

PVAB conflicts and errors mounted, a growing bipartisan chorus of regulators, public companies, and commentators began calling for regulatory reform. And during the Obama Administration in 2010, the Commission announced its intent to "update" its rules governing the proxy voting process. *Id.* at 1254. As then-Chair Schapiro observed: "Both companies and investors have raised concerns that proxy advisory firms may be subject to undisclosed conflicts of interest, may fail to conduct adequate research, or may base recommendations on erroneous or incomplete facts." R. 35-11 (Chair Mary L. Schapiro, *Opening Statement at the SEC Open Meeting* (July 14, 2010)).

What followed was a masterclass in thoughtful administrative rulemaking. The Commission first embarked on a decade-long process of fact-finding that included multiple requests for public input. *See* R. 35-12 (*Commission Interpretation and Guidance*, 84 Fed. Reg. 47,416 (Sept.10, 2019)) at 655 (detailing requests for public comment in 2010, 2013, and 2018, as well as roundtable discussions held in 2013 and 2018). It then issued a proposed rule in December 2019 suggesting amendments to the federal proxy rules to "enhance the accuracy, transparency of process, and material completeness of the information provided to clients of [PVABs.]" R. 35-1 (Proposed 2020 Rule) at 250. The Commission provided a 60-day comment

period, during which members of the public submitted 650 comments and the Commission staff held 84 meetings with interested parties. R. 35-42 (*Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*), Release No. 34-87457, File No. S7-22-19.

4. The 2020 Rule

In September 2020, the Commission issued the 2020 Rule. The Commission explained at the outset that PVABs were "uniquely situated" to influence investors' voting decisions, making it "vital" that their advice be "based on the most accurate information reasonably available." R. 35-2 (2020 Rule) at 327. According to the Commission, reforms were warranted because of "the risk of [PVABs'] providing inaccurate or incomplete voting advice (including the failure to disclose material conflicts of interest) that could be relied upon to the detriment of investors." *Id.* at 349. And "under existing mechanisms, it [could] be difficult to ensure that those making voting decisions have timely access to materially complete information," including companies' responses to PVAB advice. *Id.* at 317. The Commission found that, whatever the PVABs' error rate, the 2020 Rule was necessary to ensure that "more complete and robust information" would be provided to investors, which would in turn promote "more informed investor decisionmaking." *Id.* at 316.

The 2020 Rule achieved those goals by clarifying that proxy voting advice by PVABs constitutes a solicitation under the securities laws. R. 35-2 (2020 Rule) at 293. But the 2020 Rule also created several conditions that, if met, would continue to exempt PVABs from the proxy rules' information and filing requirements. First, PVABs were required to disclose any potential conflicts of interest. *Id.* at 355. Second, PVABs were required under the Notice and Awareness Conditions (i) to adopt policies designed to reasonably ensure that companies "that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the [PVAB's] clients," and (ii) to "provide[] [their] clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding [their] proxy voting advice by registrants . . . in a timely manner." *Id.* Those common-sense reforms were "overwhelmingly supported" by public companies and retail investors. R. 35-15 (Nasdaq, Comment (Dec. 27, 2021)) at 670 (citing survey that 99% of public companies and 81% of retail investors supported the 2020 Rule).

PVABs and some institutional investors had argued that PVABs' voluntary reforms would "suffice to address" concerns about errors or incomplete information. R. 35-2 (2020 Rule) at 317. The Commission

disagreed, both because those reforms had not been "universally adopted," and because they did not guarantee a comparable means of alerting investors to companies' responses to PVAB recommendations. *Id.* at 303. The Commission did, however, make several "modifications" in response to concerns and suggestions raised by commenters. R. 35-2 (2020 Rule) at 293. Most notably, the Proposed Rule would have required PVABs to provide *draft* recommendations to subject companies, but some commenters objected that an advance-review requirement would affect the "timeliness, cost, and independence" of PVAB advice. *Id.*; *see, e.g.*, AFL-CIO, Comment (Feb. 3, 2020), Release No. 34-87457, File No. S7-22-19 at 4-5, https://www.sec.gov/comments/s7-22-19/s72219-6744333-207884.pdf. The Final Rule required only the simultaneous dissemination of PVAB reports to companies and clients, which avoided "the risk that [PVAB] advice would be delayed or that the independence thereof would be tainted as a result of a [company's] pre-dissemination involvement." R. 35-2 (2020 Rule) at 321.

5. The Predetermined Rescission Of The 2020 Rule

After a change in Administration and the appointment of a new Chair, the Commission's attitude toward the 2020 Rule abruptly shifted. On June 1, 2021, Chair Gensler directed his staff to "consider whether to recommend that

the Commission revisit" the 2020 Rule. R. 35-16 (*Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021)) at 692. That same day, the Commission also took steps that a federal court would later hold amounted to an unlawful rescission of the 2020 Rule. *See Nat'l Ass'n of Mfrs.* v. *SEC*, No. 21-cv-183, Dkt. 47 (W.D. Tex. Sept. 28, 2022). First, the Commission's Division of Corporation Finance declared that it would not recommend any enforcement action based on the 2020 Rule pending "further regulatory action in this area." R. 35-14 (*Statement on Compliance with the Commission's 2019 Interpretation and Guidance* (June 1, 2021)). Second, the Commission publicly attested in a court filing that PVABs would not have to meet the upcoming compliance deadline. *ISS Inc.* v. *SEC*, No. 19-cv-3275, Dkt. 53 at 4 (D.D.C. June 1, 2021). In short, the Commission announced that it would not enforce a rule that was on the books, and thus that the 2020 Rule would not go into effect.

Ten days later, on June 11, Chair Gensler and members of the Commission staff held a closed-door meeting with opponents of the 2020 Rule. The Commission later pointed to "concerns" expressed during that meeting as a reason for revisiting the 2020 Rule. R. 35-17 (Proposed Rescission) at 696. But to this day, the Commission has not produced any documents, minutes, or

notes to shed light on precisely what those concerns were or how the Commission received them. Indeed, one of the appellants here, the U.S. Chamber of Commerce, submitted a FOIA request to understand what happened at that meeting—but that request has now been pending for 17 months without any production from the Commission.

Several months later, in November 2021, the Commission issued a notice of proposed rulemaking, which solicited public comment on whether to withdraw the 2020 Rule's Notice and Awareness Conditions. R. 35-17 (*Proxy Voting Advice*, 86 Fed. Reg. 67,383 (Nov. 26, 2021)) (Proposed Rescission). Under the proposal, which was issued by a 3-2 party-line vote, PVABs would no longer need to send their voting recommendations to companies or make their clients aware of companies' responses. The only justifications for the Proposed Rescission were the potential impact of the 2020 Rule on the "independence, cost, and timeliness" of proxy voting advice and PVABs' supposed adoption of "best practices" that obviated the need for any regulation. *Id.* at 696. And as explained above, the Commission relied on the closed-door meeting as evidence of investors' "concerns." *Id.* Of course, those were the very same objections that the Commission had rejected only 14 months earlier.

It did not escape the notice of the dissenting Commissioners that the majority was responding to concerns by self-interested parties that the Commission had considered and rejected the previous year. As Commissioner Peirce explained, while "[t]he release takes a stab at justifying the rewrite . . . we might as well simply acknowledge that the political winds have shifted." R. 35-18 (Commissioner Peirce, *Dissenting Statement on Proxy Voting Advice Proposal* (Nov. 17, 2021)) at 715; *see id.* ("[N]othing has changed and we have not received any new information to warrant a new rulemaking. I simply cannot pretend that this is a normal course of action for the Commission."); *see also* R. 53 (Br. of Amici Curiae Former SEC Officials and Law Professors) at 1532 (noting the Commission's actions "contradict[] longstanding administrative practice").

6. The 2022 Rescission

The Commission set the comment period at 30 days, despite the absence of any exigency. In practical effect, the period was far more compressed than that, because it ran from November 26 to December 27, 2021, and thus overlapped with multiple holidays and year-end fiscal deadlines for public companies. Regulated parties and Members of Congress repeatedly asked for more time to consider the proposal and comment, but the Commission refused

without any explanation. *See* R. 35-19 (U.S. Chamber of Com., Comment (Nov. 30, 2021)) at 719; R. 35-20 (Am. Sec. Ass'n, Comment (Dec. 3, 2021)) at 723; R. 69-1 (Ltr. from Senator Toomey, *et al.* (Jan. 10, 2022)) at 1968. After receiving 650 comments on the 2020 Rule, the Commission received only 61 on the Proposed Rescission.

In July 2022, the Commission approved the 2022 Rescission by another 3-2 party-line vote. Unlike the 2020 Rule, which was modified to take into account the views of stakeholders through a robust comment period and numerous meetings, nothing of substance had changed from the proposed rule to the final version. The 2022 Rescission repealed the Notice and Awareness Conditions, again citing "continued" concerns about "adverse effects on the cost, timeliness, and independence of proxy voting advice" and the existence of voluntary PVAB self-regulation. R. 35-21 (2022 Rescission) at 727. The Commission did nothing to explain why those concerns were valid. It did not explain why the 2020 Rule would have adversely affected "the cost, timeliness, and independence" of PVAB advice. Nor did the Commission explain why it now viewed PVAB self-regulation as an adequate substitute for regulatory reform. Without saying it, the Commission effectively deferred to PVABs—whose very errors and abuses the 2020 Rule had been adopted to curb.

B. Procedural Background

Appellants brought this APA suit, challenging the Rescission on both procedural and substantive grounds. The parties filed cross-motions for summary judgment, and in April 2023 the district court denied appellants' motion and granted the Commission's motion. *See* R. 74 (Mem. Op.) at 2008-2046.

The district court first addressed appellants' procedural challenge. The court acknowledged that the 30-day comment period was "somewhat troubling," particularly because the agency had "depart[ed]" from its "usual practice" of providing 60 days to comment on a proposed rule and in doing so had overridden "the objections of interested parties." R. 74 (Mem. Op.) at 2028. The court further acknowledged that periods "around 30 days—and even, on occasion, longer than 30 days—have been held to be insufficient" depending on the circumstances. *Id.* at 2027. But the court ultimately held that the 30-day period here was sufficient because of the previous 2020 rulemaking. It believed that interested parties were "well-prepared to comment quickly" because the comment period for the 2020 Rule had been a "robust process." *Id.* at 2028-2029.

The district court next addressed whether the 2022 Rescission was arbitrary and capricious because the Commission had failed to provide an adequate explanation for reversing course from the 2020 Rule. The court agreed that "changes in the SEC's understanding of the underlying situation" gave rise to a heightened obligation to "explain why and how the agency's thinking had changed" under *Fox*, 556 U.S. at 515. R. 74 (Mem. Op.) at 2036. But the court then held that *Fox*'s "more detailed" justification standard required very little of the Commission, and in practice actually allowed the Commission to do less in rescinding the rule than in promulgating it. *See id.* ("It is important . . . not to overstate the additional burden that the APA imposes on the SEC based on the fact that it was reversing course from earlier conclusions."). The court concluded that the Commission's conclusory explanations for changing course were sufficient. *Id.* at 2038-2041.

Finally, the district court disagreed that the 2022 Rescission was arbitrary and capricious because the Commission had failed to conduct a proper economic analysis as required by the Exchange Act, 15 U.S.C. § 78c(f). The court reasoned that the Commission's 2022 analysis did not need to be as thorough or detailed as the 2020 analysis (which was four times as long) because it "did not involve the SEC's first foray into significant regulation of

PVABs." R. 74 (Mem. Op.) at 2031. The court then discounted arguments that the Commission had inflated the Rescission's benefits and ignored or failed to quantify various costs—on the ground that the Commission's analysis was "primarily *qualitative* in nature." *Id.* at 2032 (emphasis added).

STANDARD OF REVIEW

"When a district court upholds on summary judgment an administrative agency's final decision under the APA," this Court reviews "the district court's summary judgment decision *de novo*." *Ky. Waterways All.* v. *Johnson*, 540 F.3d 466, 473 (6th Cir. 2008). "The APA directs that when reviewing the decision of an administrative agency, a court shall 'hold unlawful and set aside the agency action' if the action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* (quoting 5 U.S.C. § 706(2) (A)).

"As part of this review process, courts are charged with ensuring that agencies comply with the procedural requirements of the APA." *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 764 (4th Cir. 2012) (requiring "strict" review of agency procedural compliance). If agency action is found to have been taken "without observance of procedure required by law," it must also be set aside. 5 U.S.C. § 706(2)(D).

In addition, "[t]he APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). In making that assessment, courts may not consider *post hoc* rationalizations: "an agency must defend its actions based on the reasons it gave when it acted." *Regents of the Univ. of California*, 140 S. Ct. at 1909. And in recent years, the Supreme Court has made clear that far from being "toothless," the arbitrary-and-capricious standard has "serious bite." *Wages & White Lion Invs., L.L.C.* v. *FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) (citing *Regents*, 140 S. Ct. at 1907-1915).

SUMMARY OF ARGUMENT

The 2022 Rescission violates the APA in three independent ways. This Court should therefore reverse the district court's decision granting summary judgment to the Commission and set aside the Rule.

I. The 2022 Rescission's 30-day comment period violated the Commission's obligation to "give interested persons an opportunity to participate" in the rulemaking. 5 U.S.C. § 553.

A. Courts have made clear that the APA requires a *meaningful* opportunity to comment on and therefore influence the rulemaking process.

While 30 days is the bare minimum that an agency must provide to allow for meaningful public comment, 30 days will not be sufficient in all circumstances. For several reasons, 30 days was patently inadequate here. The 30-day comment period spanned several major holidays and year-end fiscal reporting deadlines, violated the Commission's own policy of providing at least 60 days for comment, and generated only *one-tenth* as many comments as the 2020 Rule. In conducting the Rescission, the agency gave no explanation for the compressed time frame, yet complained that commenters had not provided it with all the information it had requested, after ignoring commenter requests for more time. Because all these circumstances individually and collectively demonstrate that the Commission foreclosed meaningful participation in the rulemaking process, the 2022 Rescission should be set aside.

B. In arriving at a contrary conclusion, the district court improperly allowed the Commission to rely on an earlier fulsome comment period to compensate for a later inadequate one. Thus, even while finding aspects of the 2022 Rescission's comment period "somewhat troubling," the court concluded that the comment period was nonetheless sufficient because of the "robust process" that the Commission had conducted in the 2020 rulemaking. But the procedural requirements of the APA are not relaxed when an agency seeks to

rescind a prior rule. Regardless of whether an agency is rescinding a rule or creating a new one, the APA requires that the public be provided with a meaningful opportunity to participate. No such meaningful opportunity was provided here.

II. The 2022 Rescission also failed to satisfy the APA's basic requirement that the Commission offer a reasoned explanation for its reversal of the 2020 Rule's Notice and Awareness Conditions.

A. An agency is required to provide "more substantial justification" when it announces a new rule based on "factual findings that contradict those which underlay its prior policy." *Hicks* v. *Comm'r of Soc. Sec.*, 909 F.3d 786, 808 (6th Cir. 2018) (quoting *Fox*, 556 U.S. at 515). As the district court correctly found, the Commission needed to provide a more substantial justification here, because the 2022 Rescission reversed course on the two factual findings that underpinned the 2020 Rule: (i) whether the Notice and Awareness Conditions would adversely affect the independence, timeliness, and cost of PVAB advice, and (ii) whether PVAB voluntary practices would sufficiently substitute for the Conditions.

The Commission has never provided a reasoned explanation, let alone a more detailed justification, for those factual flips. Indeed, the Commission did

not even *attempt* to satisfy *Fox's* heightened-justification standard in the 2022 Rescission itself or before the district court here. The Commission has only offered conclusory statements that the Notice and Awareness Conditions could pose "risks" to the timeliness, independence, and cost of PVABs' advice and that PVABs' voluntary efforts could substitute for the Conditions. It has never explained *why* it reached those opposite conclusions on factual issues that had been considered and addressed in the 2020 rulemaking.

B. Despite finding that *Fox*'s standard applied, the district court effectively rendered that standard meaningless. It concluded that the Commission's unsubstantiated explanations in 2022 were sufficient in light of the "robust" analysis contained in the prior 2020 rulemaking—the rulemaking that the Commission was *rescinding*. As with the APA's procedural requirements, an agency cannot shirk its substantive obligations under the APA by pointing to an adequate analysis in a prior rulemaking, particularly when the agency is reaching a contrary conclusion. That result would vitiate *Fox*.

III. Finally, the 2022 Rescission violated the Commission's obligation under the Exchange Act to provide a thorough economic analysis. In particular, the Exchange Act requires the Commission to adequately estimate

the costs and benefits of a proposed rule before issuing it. 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c). The Commission did no such thing in promulgating the 2022 Rescission.

A. The Commission's analysis of the Rescission's benefits was internally contradictory: it said that the Notice and Awareness Conditions were unnecessary because PVABs were already self-regulating, while also saying that eliminating those Conditions would save the PVABs the full costs of complying with the 2020 Rule. And the Commission compounded its error by relabeling the 2020 Rule's *exact* quantification of those costs as benefits despite having rejected the reasoning underlying the 2020 Rule's calculation of costs. Simply put, the Commission cannot have it both ways.

B. The Commission also failed to account for—let alone quantify—numerous costs of rescinding the Notice and Awareness Conditions. In passing the 2020 Rule, the Commission had explicitly cited the costs to public companies and shareholders of PVAB advice premised on incomplete or incorrect information. In rescinding those same Conditions, the Commission largely ignored the costs of error-ridden or misleading PVAB advice while brushing aside compelling evidence on that subject brought to its attention by numerous commenters. The Commission could attempt to find that rescinding

the Conditions was worth the costs of doing so, but it could not pretend those costs were nonexistent.

C. Despite those flagrant errors, the district court—yet again—permitted the Commission to escape its statutory obligations in light of the Commission's thorough analysis in the 2020 Rule. Indeed, by characterizing the Rescission as a policy shift that had not altered "economic realities," the court effectively excused the Commission from its statutory burden altogether. The court also treated appellants' challenge to the Rescission's economic analysis as if it were based only on the analysis's physical length, when that was but one indication of the analysis's substantive inadequacy.

ARGUMENT

This Court should reverse the judgment below and set aside the 2022 Rescission for three independent reasons. First, the Commission's unexplained refusal to extend the 30-day comment period deprived regulated parties of a meaningful opportunity to comment on the Rescission under the unique circumstances presented here. Second, the Commission acted arbitrarily and capriciously when it failed to justify its complete reversal on the core conclusions underlying the 2020 Rule. Third, the Commission acted arbitrarily and capriciously when it conducted an economic analysis that is

riddled with internal inconsistencies, and that inflates the Rescission's benefits and ignores or fails to quantify many of its costs.

I. The District Court Erred In Holding That The Commission's 30-Day Comment Period Was Adequate Under The Circumstances.

To ensure informed decisionmaking, the APA mandates that agencies "give interested persons an opportunity to participate in [a] rulemaking," 5 U.S.C. § 553(c), which requires a "meaningful opportunity" for public comment, *Rural Cellular Ass'n* v. *FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). A sufficient comment period is not an end in itself but serves to ensure that "agency regulations are tested via exposure to diverse public comment," and that "affected parties" are treated fairly. *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (quoting *Int'l Union, United Mine Workers of Am.* v. *Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). It also safeguards the administrative process by encouraging an agency to retain a "flexible and open-minded attitude towards its own rules." *Fed. Express Corp.* v. *Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (quoting *Nat'l Tour Brokers' Ass'n* v. *United States*, 591 F.2d 896, 902 (D.C. Cir. 1978)).

A 30-day comment period is "generally the shortest time period" that the APA allows. *Nat'l Lifeline Ass'n* v. *FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019); *see Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1809 (2019)

(referencing the "APA minimum of 30 days"). But agencies and courts must always consider all of the circumstances surrounding a rulemaking, *see N.C. Growers' Ass'n*, 702 F.3d at 770; *Prometheus Radio Project*, 652 F.3d at 450-453, and 30 days will not always be enough. Courts have found that a 28-day comment period was insufficient because it was an abrupt departure from the "usual 90 days," *id.* at 453; that 30 days was insufficient because it violated an Executive Branch policy of providing "60 days," *Cath. Legal Immigr. Network* v. *Exec. Off. for Immigr. Rev.*, 2021 WL 3609986, at *2 (D.D.C. Apr. 4, 2021); and that 60 days was insufficient because a number of interested commenters could not reasonably comment within that period, *Estate of Smith* v. *Bowen*, 656 F. Supp. 1093, 1097-1099 (D. Colo. 1987).

Because a comment period must be evaluated holistically, merely meeting the 30-day minimum is not an agency safe harbor. That would effectively be the result if the decision below were permitted to stand, because here there were several circumstances—from violations of agency policy to commenter outcry—demonstrating that the comment period was insufficient. Moreover, the Commission never even offered any explanation for its hurry. Whether the Commission was rushing toward a predetermined outcome or truncated the comment period for some other unexplained reason, the fact

remains that the full public did not have a meaningful opportunity to review and comment on the 2022 Rescission. The district court concluded otherwise by relying on the far more thorough process that attended the *2020 Rule*, but having done it the right way there only highlights that the Commission did it the wrong way here.

A. The 30-Day Period Here Was Inadequate.

For no fewer than seven reasons, the 2022 Rescission's 30-day comment period was plainly inadequate. First, the comment period ran from November 26 (the Friday after Thanksgiving) to December 27, 2021 (the Monday after Christmas), overlapping with several significant year-end holidays and the busy fiscal year-end period for public companies. As a result, the comment period was functionally even *shorter* than the 30-day period that is generally considered the bare minimum for meaningful comment. *See Pangea Legal Servs.* v. *Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 819 (N.D. Cal. 2020) (finding inadequate a 30-day comment period that "spanned the year-end holidays" since it "undercut the purpose of the notice process to invite broad public comment"); *see also Centro Legal de la Raza* v. *Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 954-955 & n.26 (N.D. Cal. 2021) (30-day comment

period that overlapped with Labor Day and comment periods for related rulemakings was too short to allow for meaningful comment).

Second, the 30-day period was only half the length of the 60-day period that accompanied the 2020 Rule. "[I]n cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process," because typically the comment periods for promulgation and repeal should be comparable. *Becerra* v. *Dep't of the Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019); *see N.C. Growers' Ass'n*, 702 F.3d at 770 (significant reduction in comment-period length for rulemaking on same subject provided evidence of inadequacy). The Commission has never explained why the public needed two months to review and comment on regulating PVABs in 2020, but only a month to consider withdrawing core components of that regulation in 2022. If anything, the Commission has it backward. The 2020 Rule was the product of a decade-long study and a total of *84 meetings* between the Commission and various interested parties. R. 35-42 (*Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*), Release No. 34-87457, File No. S7-22-19. By contrast, the 2022 Rescission was an abrupt

reversal with far less notice and public engagement. The public should have had *more* time, not less.

Third, the 30-day period violated the Commission's and the Executive Branch's own declared policies. *Cath. Legal Immigr. Network*, 2021 WL 3609986, at *3 (finding that "defendants[']fail[ure] to abide by [Executive Branch] guidelines or explain their departure from them" was "troubling"). Needless to say, ignoring one's own policies is the very definition of arbitrariness. *See Gatlin* v. *Nat'l Healthcare Corp.*, 16 Fed. Appx. 283, 288 (6th Cir. 2001) ("The fact that NHC violated its own policy" indicated it had acted arbitrarily and capriciously); *Anne Arundel Cnty.* v. *EPA*, 963 F.2d 412, 416-417 (D.C. Cir. 1992) (agency acted arbitrarily and capriciously where it "offered no explanation or justification" for its deviation from agency policy). Chair Gensler has testified to Congress that the Commission "always" provides "at least two months" to comment on rule proposals. R. 35-31 (*Hearing on FTC, SEC FY 2023 Budget Requests Before the H. Appropriations Subcomm. on Fin. Servs. & Gen. Gov't* (May 18, 2022)) at 799. More generally, the White House and the U.S. Administrative Conference have both recognized that "a meaningful opportunity to comment . . . should include a comment period of not less than 60 days." R. 35-26 (Exec. Order No.

12866 (Sept. 30, 1993)) at 771; R. 35- 27 (Exec. Order 13258 (Feb. 26, 2002)); R. 35-28 (Exec. Order No. 13563 (Jan. 18, 2011)); R. 35-29 (86 Fed. Reg. 7223 (Jan. 20, 2021)); R. 35-30 (Admin. Conf. of the U.S., *Recommendation No. 2011-2*: *Rulemaking Comments* (June 16, 2011)) at 791 (recommending no fewer than 60 days for public comment).

Fourth, the Commission did not simply provide less time than it had in 2020 and than Chair Gensler pledged to Congress—it has never offered any persuasive explanation for its needlessly accelerated timing. At the very least, if the agency were going to depart from its usual practice and have a one-month comment period over the holidays, it should have identified some good reason for the haste. *See, e.g.*, *Centro Legal*, 524 F. Supp. 3d at 955 (striking down rule issued after 30-day period in part because the agency "did not identify any exigent circumstances requiring a compressed comment period"); *Cath. Legal Immigr. Network*, 2021 WL 3609986, at *3 (failure to give any "reason" for exigency further rendered comment period inadequate). In the 2022 Rescission, the Commission stated that it believed the comment period was "adequate" due to the "targeted nature of [its] amendments." R. 35-21 (2022 Rescission) at 731. Given that the 2022 Rescission sought to

rescind the Notice and Awareness Conditions, which were the *centerpieces* of the 2020 Rule, it is nonsense to say that the amendments were "targeted."

Fifth, it is even worse for the Commission than it seems, because several parties requested that the Commission extend the comment period. *See* R. 35-19 (U.S. Chamber of Com., Comment (Nov. 30, 2021)) at 719; R. 35-20 (Am. Sec. Ass'n, Comment (Dec. 3, 2021)) at 723. The Commission did not respond. The situation even drew attention from Members of Congress, who characterized the comment period as "unreasonably short" and "urge[d the Commission] to immediately extend" the comment period. R. 69-1 (Ltr. from Senator Toomey, *et al.* (Jan. 10, 2022)) at 1967-1968. Still the Commission said nothing. Simply put, the comment period's inadequacy is not an after-the-fact objection; the Commission had ample notice of the problem at the time. *See*, *e.g.*, *Estate of Smith*, 656 F. Supp. at 1099 (finding 60-day comment period inadequate in part due to agency's "failure to extend th[e] period pursuant to the numerous requests to do so"); *Centro Legal*, 524 F. Supp. 3d at 955 (finding 30-day comment period inadequate where "numerous commenters" "noted" that "a 30 day comment period is extremely limited").

Sixth, the Commission itself has indirectly cast doubt on the adequacy of the comment period. In the 2022 Rescission, the Commission stated that it

could not fully assess the costs and benefits of the repeal because it had not received the "information or data that would permit a quantitative analysis" that it had requested from commenters. *See* R. 35-21 (2022 Rescission) at 744. It is not possible to know precisely how much more information an additional month or more would have produced. But one of the appellants here, the U.S. Chamber of Commerce, has submitted detailed comments in other rulemakings, and has informed counsel that it would have marshaled more data here with more time. And in any event, the key point is that even the Commission does not believe the comment period resulted in a thorough vetting of the Rescission. It explicitly relied on the lack of data from commenters as a reason why it could not conduct a quantitative analysis of the Rescission.

Seventh and finally, in a sense the results speak for themselves. The 2020 Rule generated *650 comments*, whereas the 2022 Rescission generated a mere *61 comments*. The Commission has correctly never argued that during the intervening two years, the question at issue—whether PVABs should have to provide their voting recommendations to the subject companies and then notify shareholders of the companies' responses—somehow became less important to the public. The fact that the 30-day period here produced far

fewer comments than the 60-day period for the 2020 Rule is itself powerful evidence that the period was inadequate. *See N.C. Growers' Ass'n*, 702 F. 3d at 770 (no "adequate opportunity for comment" where an earlier rulemaking generated thousands of comments over a 60-day comment period while the 10-day comment period for the rule's rescission garnered only 800 comments); *Pangea Legal Servs.*, 501 F. Supp. 3d at 820-821 (similar). Although some entities like the U.S. Chamber of Commerce and Business Roundtable were able to submit comments, many other entities were not.

B. The District Court Erred In Relying On The Thorough Process That Attended The Previous 2020 Rule.

The district court acknowledged many of these deficiencies. It observed that the 30-day comment period "departe[d] from much of the [Commission's] usual practice" and was therefore "somewhat troubling." R. 74 (Mem. Op.) at 2027-2028. And the considerable discrepancy between the comments received during the 2020 and 2022 periods "added to the court's concern." *Id.* at 2028. But the court ultimately took comfort in the fact that there had been a "robust process" leading to the 2020 Rule. *Id.* at 2029. It concluded that the 2022 Rescission's comment period was "sufficient" because "parties on all sides of the issues were well-prepared to comment quickly and effectively" as they

"had little need to formulate arguments from scratch" given the rulemaking two years earlier. *Id.* at 2028-2029.

That is simply not correct. When the Commission proposed amending the federal proxy rules in December 2019, the proposal would have required PVABs to provide draft recommendations to subject companies for their advance review. R. 35-1 (Proposed 2020 Rule) at 228. Some commenters objected, however, that an advance-review requirement would affect the "timeliness, cost, and independence" of PVAB advice. *See, e.g.*, AFL-CIO, Comment (Feb. 3, 2020), Release No. 34-87457, File No. S7-22-19 at 4-5, https://www.sec.gov/comments/s7-22-19/s72219-6744333-207884.pdf. In the final 2020 Rule, the Commission required only that PVABs provide their recommendations to companies at the same time as clients. R. 35-2 (2020 Rule) at 363. Of course, that version of the Rule had not been the subject of public comment. So when the Commission proposed rescinding the Notice and Awareness Conditions in 2021, commenters could not simply regurgitate old data or arguments that they had previously submitted. They had to consider and explain anew why providing *simultaneous* notice to companies and clients would not impair the timeliness, cost, or independence of PVAB advice.

The district court's reasoning also flies in the face of the factual record. The dissenting Commissioners decried the comment period as "needlessly compressed" and "unnecessarily short." R. 35-32 (Commissioner Uyeda, *Statement on Final Rule Amendments on Proxy Voting Advice* (July 13, 2022)) at 816; R. 35-33 (Commissioner Peirce, *U-Turn, Comments on Proxy Voting Advice* (July 13, 2022)) at 821. Interested parties—ranging from the U.S. Chamber of Commerce to several Members of Congress—asked for additional time. If everyone was "well-prepared to comment quickly and effectively," R. 74 (Mem. Op.) at 2027, it is odd that so many serious voices called for more time rather than simply submitting their views. And even if all 650 commenters on the 2020 Rule did not submit new comments, one would expect more than just *a tenth* to have done so—and of course the existing comments almost certainly would have contained better data. In the end, the unique circumstances here—including the holiday timing, the Commission's unexplained departure from its past and usual practice, and the relative paucity of the comments—all point in one direction: the public was needlessly deprived of the opportunity for meaningful comment.

II. The District Court Erred In Holding That The Commission Had Provided A Heightened Justification For Its Abrupt Reversal.

Even if the Commission had offered an adequate comment period, the resulting rule is substantively inadequate under the APA. Because the 2022 Rescission contradicted factual findings underlying the 2020 Rule, the Commission had to provide a "more detailed justification" than if it had been writing on a "blank slate." *Fox*, 556 U.S. at 515. Far from providing a heightened justification, the Commission gave only two conclusory rationales for the 2022 Rescission, neither of which passes even minimal scrutiny.

A. The Commission Was Required To And Did Not Provide A Heightened Justification For Rescinding The Notice And Awareness Conditions.

"Agencies are free to change their existing policies as long as they provide a *reasoned* explanation for the change." *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016) (emphasis added). That, in turn, "requires an agency to provide more substantial justification" when it announces a new rule based on "factual findings that contradict those which underlay its prior policy." *Hicks*, 909 F.3d at 808 (quoting *Fox*, 556 U.S. at 515). The district court correctly determined that the 2022 Rescission contradicts the factual findings underpinning the 2020 Rule. R. 74 (Mem. Op.) at 2035-2036. Indeed, the Commission's "own reasoning unambiguously characterized the 2022

decision as arising, at least in part, out of changes in the agency's understanding of the relevant factual circumstances." *Id.* at 2035 (emphasis added). The Commission thus was required to provide a "more detailed justification" than would typically suffice, *Fox*, 556 U.S. at 515, and it failed to do that.

1. The Commission Changed Its View Of The Key Facts.

a. In the 2022 Rescission, the Commission explained that it was withdrawing the Notice and Awareness Conditions because opponents of the 2020 Rule had raised concerns that the conditions posed a risk of "adverse effects on the cost, timeliness, and independence of proxy voting advice." R. 35-21 (2022 Rescission) at 728. But as the Commission itself acknowledged, those same concerns had been raised during the 2020 rulemaking. *See id.* at 729; R. 35-33 (Commissioner Peirce, *U-Turn, Comments on Proxy Voting Advice* (July 13, 2022)) at 821 (noting that the 2022 Rescission "reiterated concerns that commenters had raised during the prior rulemaking process").

The Commission analyzed those concerns in 2020 and determined that they could be addressed by revising the Notice and Awareness Conditions. In response to commenters' fears that an advance-review requirement could adversely affect the timeliness, independence, and cost of PVAB advice, the

Commission opted instead to require PVABs only to provide their final advice to companies at the same time as they provided it to their clients. By eliminating the pre-publication review requirement, the Commission concluded that "*the rule does not create the risk* that [PVAB] advice would be delayed or that the independence thereof would be tainted as a result of a registrant's pre-dissemination involvement." R. 35-2 (2020 Rule) at 321. The Commission flipped on that factual question in the Rescission: it concluded that the Notice and Awareness Conditions *would* risk harm to the timeliness, independence, and cost of PVAB advice. *See* R. 74 (Mem. Op.) at 2015-2016.

b. The Commission also took the position that the 2022 Rescission was "supported by certain voluntary practices of PVABs," which "are likely, at least to some extent, to advance the goals underlying the [Notice and Awareness] Conditions." R. 35-21 (2022 Rescission) at 728. The Commission had equally considered that factual question in issuing the 2020 Rule. And it had concluded that industry self-regulation was not alone sufficient to ensure the provision of timely and complete information to shareholders. *See* R. 35-2 (2020 Rule) at 317 ("[W]e do not believe the existing voluntary forms of outreach to registrants and other market participants . . . are alone sufficient."); *id.* ("We do not believe that those mechanisms, as currently

implemented, suffice to achieve our goal of ensuring that clients of proxy voting advice businesses have timely access to a more complete mix of relevant information and exchange of views.").

In particular, the Commission concluded in 2020 that those voluntary programs were not "sufficient" because they were not comprehensive or universally followed, and PVABs could choose to abandon those efforts at any time. R. 35-2 (2020 Rule) at 317. Indeed, as commenters on the Rescission pointed out, there was arguably less voluntary regulation in 2022 than in 2020, because in the period between the two rulemakings ISS had discontinued the engagement process it had previously undertaken. *See* A.R. 58 (Soc'y of Corp. Governance, Comment (Dec. 30, 2021)) at 9, https://www.sec.gov/comments/s7-17-21/s71721-20111068-264733.pdf. In any event, the point is that, just as the Commission flipped on the question of whether the Notice and Awareness Conditions posed harm to PVABs, it likewise flipped on whether the Conditions were needed in light of PVABs' voluntary practices. Those flips meant that the Commission had to offer a more detailed justification under *Fox*. *See Whitman-Walker Clinic, Inc.* v. *HHS*, 485 F. Supp. 3d 1, 50 (D.D.C. 2020) (assessing agency's reversal on costs and burdens of a regulation under *Fox*'s standard).

2. The Commission Did Not Offer Any Persuasive Reason For Its Changed View Of The Facts.

Before the district court, the Commission did not even attempt to defend the 2022 Rescission under *Fox*'s heightened-justification standard. Nor could it have. As explained below, the Commission offered only conclusory rationales for rescinding the Notice and Awareness Conditions. *See Air Alliance Houston* v. *EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (failure to adequately explain "departure from [agency's] previous conclusions" rendered rule arbitrary and capricious); *see also Wages & White Lion Invs.*, 16 F.4th at 1139 (setting aside agency action for a *Fox* violation); *Organized Vill. of Kake* v. *USDA*, 795 F.3d 956, 967-969 (9th Cir. 2015) (failure to explain change in position within a two-year period rendered rule arbitrary and capricious).

a. The Commission failed to explain its new factual determination that the Conditions posed too great a risk to the timeliness, cost, and independence of PVAB advice. To be sure, the Commission referred again and again to that supposed risk in the Rescission, but it never explained *why* or *how* the Conditions created such a risk. Rather, the Commission merely offered the vague statement that it was "weigh[ing] these competing concerns differently today." R. 35-21 (2022 Rescission) at 733. That "summary discussion" falls "short of the agency's duty to explain why it deemed it

necessary to overrule its previous position." *Encino Motorcars*, 579 U.S. at 222. The Commission said in the 2020 Rule that the Conditions would *not* threaten the timeliness or independence of proxy advice. *See* R. 35-2 (2020 Rule) at 339; *id.* at 321. The Commission may change its mind, but it has to adequately justify its reversal with more than *ipse dixit*.

The Rescission does note that certain commenters "continue[d] to express significant concerns" that the Notice and Awareness Conditions posed risks to the timeliness, independence, and cost of PVAB advice. R. 35-21 (2022 Rescission) at 729. But the Commission did not acknowledge that those "continu[ing]" concerns had first been raised in challenging the proposed *advance*-review requirement. *See, e.g.*, Cal. Pub. Emps.' Ret. Sys., Comment (Feb. 3, 2020), Release No. 34-87457, File No. S7-22-19, at 5, https://www.sec.gov/comments/s7-22-19/s72219-6744092-207880.pdf (pre-review requirement "diminishes independence for proxy voting advisors" because it requires advisors to "clear" advice with management). Critically, the Commission did not explain in the Rescission why it believed that *simultaneous* review would still threaten the cost, independence, or timeliness of PVAB advice.

The answer is hardly obvious. The theory of commenters on the 2020 Rule was that a pre-publication review requirement might increase costs, introduce delay, or allow for the possibility that subject companies could try to influence PVABs' advice. *See, e.g*, Tchrs. Ins. & Annuity Ass'n of Am., Comment (Feb. 3, 2020), Release No. 34-87457, File No. S7-22-19, at 4, https://www.sec.gov/comments/s7-22-19/s72219-6742759-207808.pdf ("If proxy advisory firms are required to additionally review their voting recommendations with registrants in advance, consider registrant feedback, and potentially make changes to their recommendations before disseminating them to clients, the costs of providing these recommendations will likely increase substantially."). The Commission has not offered any apparent reason why providing recommendations to companies and clients *at the same time* should cost more, introduce delay, or threaten PVABs' independence.

At bottom, the Commission did not offer even a "rational justification" for the supposed harm to PVABs, let alone the heightened justification required under *Fox*. *Susquehanna Int'l Grp., LLP* v. *SEC*, 866 F.3d 442, 447 (D.C. Cir. 2017). The Commission simply pointed to the fact that some commenters were concerned, but the agency had an independent duty to determine whether those concerns were in fact well founded. *Id.* (acceptance

of interested parties' comments without making "an independent review" was arbitrary and capricious); *Sorenson Commc'ns Inc.* v. *FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (invalidating action that "heavily relied on" "unsubstantiated conclusion[s]" and "conjecture" provided in comment letters); *Nat'l Ass'n of Regul. Util. Comm'rs* v. *FCC*, 737 F.2d 1095, 1125 (D.C. Cir. 1984) (agency may not rely on comments "uncritically" and must apply its "expert evaluation").

The Commission has argued in this litigation that while eliminating pre-publication review addressed some concerns about the 2020 Rule, the Notice and Awareness Conditions "*may* compromise the timeliness and independence of proxy advice *in other ways*." R. 58 (SEC Mot. Summ. J.) at 1584 (first emphasis added). It is not clear what that speculation means, but the Commission pointed below to commenters who believed the Conditions might "tilt the playing field toward management" because PVABs would want to "avoid critical comments from companies." *Id.* at 1578. That suggestion is truly remarkable—*i.e.*, if PVABs had to provide notice to companies, they might be so fearful of criticism that they would change their recommendations. One would think that a reason for *more* regulation of fickle PVABs, not less. In any event, the Commission did not embrace such reasoning in the

Rescission itself, and its post-hoc rationalization cannot salvage the rule now. *See*, *e.g.*, *Hicks*, 909 F.3d at 808 ("[A]n agency's actions must be upheld, if at all, on the basis articulated by the agency itself.").

b. The Commission similarly failed to justify its changed view on the effectiveness of PVAB voluntary practices. In particular, it did not explain why self-regulation would "to some extent" mitigate the "negative effects of rescinding" the Notice and Awareness Conditions. R. 35-21 (2022 Rescission) at 734. Just two years earlier, the Commission had found that a similar set of PVAB voluntary practices were "alone insufficient" to give registrants an opportunity to "provide a response" to PVAB recommendations and thereby help to ensure that "those making voting decisions have timely access to materially complete information prior to voting." R. 35-2 (2020 Rule) at 317.

Nor is it obvious why the Commission concluded that PVAB self-regulation could compensate for the Notice and Awareness Conditions. As commenters pointed out, the voluntary regulations relied on by the Commission were a set of "non-binding principles" that "proxy advisors could change without any notice," and did not require simultaneous dissemination of voting advice to subject companies and shareholders prior to the shareholder vote. A.R. 58 (Soc'y of Corp. Governance, Comment (Dec. 30, 2021)) at 8-9,

https://www.sec.gov/comments/s7-17-21/s71721-20111068-264733.pdf. And while the Commission posited that PVABs "have market-based incentives to maintain [these voluntary practices]," R. 35-21 (2022 Rescission) at 746, it ignored that it had previously recognized that the PVAB market is a duopoly, meaning it is insulated from precisely this type of market pressure. *Id.* at 366 n.517; R. 35-33 (Commissioner Peirce, *U-Turn, Comments on Proxy Voting Advice* (July 13, 2022)) at 821 ("[G]iven the concentration in the proxy voting advice market, proxy advisors have limited incentives to engage with public companies . . . and correct errors."). Accordingly, the "agency has not offered a rationale to explain the disparate findings" regarding PVABs' voluntary practices. *Humane Soc'y* v. *Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).[4]

In the absence of a clear explanation in the 2022 Rescission, the Commission has attempted in this litigation to minimize the importance of PVABs' voluntary practices to its decision. It contends that the Commission

[4] The Commission has never offered any reason for its unusual faith in PVABs' ability to self-regulate. The agency has seemingly provided PVABs with preferential treatment while rejecting voluntary regulation in a variety of other contexts. *See, e.g.,* R. 35-40 (*Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33, 318 (July 12, 2019)) (rejecting voluntary regulation in Regulation Best Interest rule governing brokers); R. 35-41 (Gensler, Prepared Remarks (July 28, 2021)) (discussing, in context of issuer climate disclosures, that self-imposed standards "can lead to a wide range of inconsistent disclosures").

only considered voluntary practices in a "limited respect" to "reinforce" its decision to rescind the Notice and Awareness Conditions. *See* R. 58 (SEC Mot. Summ. J.) at 1585. That is not a correct reading of the Rescission. PVAB self-regulation was one of the two rationales that the Commission offered in the 2022 Rescission for repealing the Review and Notice Conditions. *See* R. 35-21 (2022 Rescission) at 727-728. But even if self-regulation was less important to the Commission than the supposed risks to PVABs, the Commission still relied on it; the agency therefore had to adequately justify its flip-flop on the effectiveness of self-regulation; and its failure to do so remains arbitrary and capricious.

B. The District Court Again Erred In Relying On The Thorough Process That Attended The Previous 2020 Rule.

In finding that the Commission had adequately explained the Rescission, the district court said that it was applying *Fox*'s more detailed justification standard. It observed that the Commission had to "clearly and thoroughly" "explain[]" its decision to come "down on a different side," "acknowledge[] the arguments for and against its proposed course of action, and explain *why*, on balance, it preferred one option to the other." R. 74 (Mem. Op.) at 2041-2042 (emphasis added). But the court proceeded to misapply that standard. In practice, far from reviewing the Commission's about-face more

stringently, the court actually reviewed it *less* stringently than even a typical agency rulemaking.

The district court again relied on the extensive process surrounding the *2020 Rule*. The court believed that "the depth and thoroughness of the 2020 record" compensated for the lesser analysis in the Rescission. R. 74 (Mem. Op.) at 2037. In the court's view, because the Commission had reviewed the issues so thoroughly leading up to the 2020 Rule, it was a straightforward matter for the agency to examine the same record and "com[e] down on a different side of a difficult set of questions." *Id.* at 2040. For the court, this case was about "a change in the SEC's policy preference, plain and simple." *Id.* at 2042.

Of course an agency can change its policy preference, and of course it need not "prov[e] its earlier analysis obsolete." R. 74 (Mem. Op.) at 2038. But "changes in course . . . cannot be *solely* based on political winds and currents." *N.C. Growers' Ass'n*, 702 F.3d at 882 (Wilkinson, J. concurring) (emphasis added). The APA "requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *Id.* Critically, under the APA, when an agency shifts not only its

policy priority but its view of critical facts, it has to offer a "more detailed justification" in *that* rulemaking. *Fox*, 556 U.S. at 515.

By making the case all about a policy shift, the district court missed that the Commission's explanations for its changed factual views ranged from *ipse dixit* to nonexistent. At bottom, this Court can search the Rescission in vain for any real or persuasive explanation by the Commission as to *why* the 2020 Rule posed risks to the timeliness or independence of PVABs' voting advice, or *why* PVABs' self-regulation would be an adequate substitute for giving notice to companies and alerting shareholders to companies' responses. If what the Commission did here passes muster, then *Fox*'s requirement lacks any practical force, and agencies may reverse course simply by saying that they now view things differently than once they did.

III. The District Court Erred In Holding That The Commission Performed An Appropriate Economic Analysis.

The 2022 Rulemaking should be set aside for a third independent reason: it violates the Commission's statutory obligation "to determine as best it can the economic implications of the rule." *Chamber of Com.* v. *SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005). Specifically, the Commission has a "unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.' " *Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011)

(quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c)). And the Commission's "failure to 'apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with the law." *Id.* (quoting *Chamber of Com.*, 412 F.3d at 144). Here, the Commission "opportunistically framed" the Rescission's "benefits," and failed to "quantify certain costs or to explain why those costs couldn't be quantified." *Id.* at 1148-1149.

A. The Commission Was Inconsistent In Its Treatment Of The Rescission's Benefits.

The Commission asserted that the "main benefit" of the 2022 Rescission would be cost savings to PVABs due to the reduced employee hours needed to comply with the Notice and Awareness Conditions. R. 35-21 (2022 Rescission) at 744. But of course the Commission justified the Rescission in part because PVABs had already adopted "voluntary practices" that "are likely, at least to some extent, to advance the goals underlying the [Notice and Awareness] Conditions." R. 35-21 (2022 Rescission) at 728. The Commission "cannot have it both ways." *Air Alliance Houston*, 906 F.3d at 1068. It cannot say that the 2020 Rule was unnecessary because the PVABs were *already complying* to some extent (whatever that means), and then say that the Rescission will be beneficial because it will save PVABs *the costs of compliance*. That type of

internally inconsistent reasoning is classically arbitrary and capricious conduct. *Id.*; *Bus. Roundtable*, 647 F.3d at 1148-1149.

The inconsistency was particularly glaring because the Commission asserted that each PVAB would save over 11,000 burden hours per year from the changes imposed by the 2022 Rescission. *See* R. 35-21 (2022 Rescission) at 750 n.322. It did so not by looking at any of the PVABs' financial information—which it conceded it did not have access to—but instead by reciting the exact costs estimated by the Commission in promulgating the 2020 Rule. *Id.* at 749-750. In other words, the Commission assumed that PVABs would save every dollar imposed on them by the 2020 Rule by not doing *any of the things* required by that Rule. The Commission has never explained how the PVABs could save those full costs, while still implementing "voluntary practices" that, "at least to some extent, . . . advance the goals underlying the [Notice and Awareness C]onditions." *Id.* at 728.

B. The Commission Failed To Adequately Quantify And Assess Costs.

After a decade-long process, the Commission settled on the 2020 Rule's Notice and Awareness Conditions because of the need for "complete information" concerning PVAB advice—advice that it found sometimes rested on factual inaccuracies. R. 35-2 (2020 Rule) at 311, 316. To withdraw those

Conditions, the Commission needed to quantify and weigh the costs of PVABs' mistakes and misleading advice. Instead, the agency again took a different view of the facts. It dismissed all of the evidence it had previously surveyed of PVABs' errors, and rested instead on an unreasonable reading of a single study. *See* R. 35-21 (2022 Rescission) at 733-734. That study found that dozens of companies filed supplemental proxies with the Commission in 2020 and 2021 to correct inaccurate or incomplete information in PVABs' advice. *Id.* at 733 n. 127, 734. The Commission drew the perverse conclusion that the system was working fine because "registrants were able to identify those issues and respond using pre-existing mechanisms." *Id.* at 734.

That analysis is obviously flawed for at least four reasons. First, it assumes that all errors are caught and corrected by subject companies. The Commission failed to cite any supporting evidence, and it ignored evidence to the contrary. *See*, *e.g.*, A.R. 58 (Soc'y of Corp. Governance, Comment (Dec. 30, 2021)), at 9, https://www.sec.gov/comments/s7-17-21/s71721-20111068-264733.pdf; R. 35-39 (Nat'l Gas Servs. Grp., Inc., Comment (Dec. 27, 2021)) at 980-981; A.R. 17 (Axcelis, Techs., Inc., Comment (Dec. 20, 2021)) at 3, https://www.sec.gov/comments/s7-17-21/s71721-20110059-264371.pdf. It is common sense that in a world of thousands of voting recommendations and

limited resources, companies are not able to catch every mistake and file a supplemental proxy.

Second, the Commission ignored whether supplemental filings reach shareholders prior to a vote. As numerous commenters and the Commission itself had acknowledged in 2020, PVABs often make their recommendations shortly before votes, meaning that there is not time for companies to file corrective materials. *See*, *e.g.*, R. 35-2 (2020 Rule) at 312; R. 35-35 (Exxon Mobil Corp, Comment (Feb. 3, 2020)) at 901 ("Our experience is that supplemental proxy materials filed with the SEC after the release of the proxy advisors' reports . . . are ineffective.").

Third, the Commission did not address the costs to companies of attempting to correct PVABs' errors. *See*, *e.g.*, R. 35-38 (Nat'l Gas Servs. Grp., Inc., Comment (Dec. 27, 2021)) at 980-981 (detailing how "factually incorrect or otherwise misleading proxy advice" required the company "to spend both money and the time and effort of its leadership team to refute the misinformation"); *see also* R. 35-10 (Nat'l Ass'n of Mfrs., *Outlook Survey*) at 644, 649 (56% of surveyed public companies reported being forced to divert resources from their core business functions to respond to PVAB recommendations).

Fourth, the Commission entirely ignored the influence of "robo voting"—the process by which shareholders' proxies are automatically voted in line with PVAB recommendations. *See* R. 35-21 (2022 Rescission) at 741 (describing how ISS *executes* more than 12.8 million ballots annually representing 5.4 trillion shares). Supplemental proxy materials have virtually no chance of influencing these votes.

The best the Commission could do was "acknowledge[]" in the abstract that rescinding the Notice and Awareness Conditions " 'could increase costs to investors and registrants' by 'reducing the overall mix of information available to [PVABs'] clients' and 'limit[ing] a registrant's ability to timely identify errors and mischaracterizations in proxy voting advice.' " R. 58 (SEC Mot. Summ. J.) at 1587-1588 (quoting R. 35-21 (2022 Rescission) at 745). But acknowledging costs is not the same as actually addressing and quantifying them. *Gresham* v. *Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns . . . only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). In effect, the Commission just said that there was some unspecified and countervailing weight on the other side of the balance.

Whatever the error rate of PVABs, at a minimum the Commission had evidence before it that there would be *some* error rate that would impose *some* costs. As the Bipartisan Policy Center explained, "when tens of thousands of proposals are voted on every year, even a small percentage of errors could have profound effect on the information that is used to cast those votes." R. 35-39 (Bipartisan Pol'y Ctr., Comment (Dec. 27, 2021)) at 989-990. And whether the costs of those errors can be quantified, they can at least be estimated. *See Chamber of Com.*, 412 F.3d at 143 (holding that even when the Commission has difficulty in determining the costs of a rule and can only determine a "range," it "does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the proposed rule"). The Commission did not attempt to do that here.

C. The District Court Again Erred In Relying On The Thorough Analysis That Attended The Previous 2020 Rule.

The district court did not meaningfully engage with the Commission's inconsistent approach to benefits or its failure to quantify and assess costs. The court instead upheld the Commission's cost-benefit analysis on two grounds, neither of which is correct.

1. The district court suggested that appellants' chief complaint was about the length (*i.e.*, the number of pages) of the 2022 Rescission's economic

analysis. R. 74 (Mem. Op.) at 2030. It is true that the analysis was one-fourth the length of that for the 2020 Rule, but appellants' point was that length, "while not dispositive, is a useful metric in a case with no quantitative data." R. 64 (Pls.' Reply) at 1929. Appellants explained that the brevity of the economic analysis, "in combination with the other fundamental errors already described," rendered the Rescission arbitrary and capricious. *Id.* What else, after all, could appellants say? The Commission did not quantify costs—a failure that it blamed on commenters for not providing the necessary data (although the Commission refused to extend the comment period). R. 35-21 (2022 Rescission) at 743-744. Facing an analysis that was "primarily qualitative in nature," R. 74 (Mem. Op.) at 2032, appellants could only note that the analysis was cursory, treated benefits inconsistently, and did not attempt to assess costs.

2. Ultimately, the district court approved the Commission's economic analysis on the ground that it was largely irrelevant. "As the SEC explained, its decision to repeal the notice-and-awareness condition was not, fundamentally, based on a belief that economic realities had shifted in some way that would require regulators to start over from square one." R. 74 (Mem. Op.) at 2031. The court continued, "[r]ather, the SEC, based at least in part

on investor feedback, revised the conclusion it had reached about how best to balance the incommensurable policy tradeoffs at issue." *Id.* Again, by framing the case as solely about a policy shift, the court effectively slid past the agency's statutory burden. Under the Exchange Act, the Commission had to do an adequate economic analysis that estimated benefits and costs. It had "to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct, even if the . . . estimate will be imprecise." *Pub. Citizen* v. *Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004). The Commission did not discharge that statutory burden here.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and set aside the 2022 Rescission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a) because it contains 12,858 words.

This brief also complies with the requirements of Federal Rules of Appellate Procedure 32(a) because it was prepared in 14-point font using a proportionally spaced typeface.

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June 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of June, 2023, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

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June 20, 2023

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(g)(1), appellants hereby designate the following filings in the district court's record as relevant to the disposition of this appeal:

Record Entry #	Description	Date	Page ID No.
1	Complaint	7/28/2022	1-59
26	Certified List Describing the Record in Rulemaking Proceedings Before the Securities and Exchange Commission	9/09/2022	149-155
35-1	*Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice Release*, 84 Fed. Reg. 66,518 (Dec. 4, 2019) (Proposed 2020 Rule)	9/23/2022	247-289
35-2	*Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) (2020 Rule).	9/23/2022	290-364
35-3	Freshfields, *Trends and Updates From the 2022 Proxy Season* (July 2022)	9/23/2022	365-367
35-5	Comment Letter of Paul Rose and Christopher J. Walker, Professors of Law, the Ohio State University, File No. S7-17-21 (Dec. 22, 2021)	9/23/2022	393-489
35-7	Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. of Corp. Law 673 (2005).	9/23/2022	537-561

Record Entry #	Description	Date	Page ID No.
35-8	American Council for Capital Formation, Proxy Advisors Are Still a Problem	9/23/2022	562-581
35-10	National Association of Manufacturers' 2018 Fourth Quarter Outlook Survey	9/23/2022	636-649
35-11	Chair Mary L. Schapiro, *Opening Statement at the SEC Open Meeting* (July 14, 2010)	9/23/2022	650-653
35-12	*Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47,416 (Sept. 10, 2019)	9/23/2022	654-669
35-14	*Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rule 14a-1(1), 14a-2(b), 14a-9* (June 1, 2021)	9/23/2022	665-667
35-15	Comment Letter of John A. Zecca, Executive Vice President, Chief Legal and Regulatory Officer, Nasdaq, Inc., File No. S7-17-21 (Dec. 27, 2021)	9/23/2022	668-690
35-16	Gary Gensler, Chairman, U.S. Securities and Exchange Commission, *Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021)	9/23/2022	691-693
35-17	*Proxy Voting Advice*, 86 Fed. Reg. 67,383 (Nov. 26, 2021) (Proposed Rescission)	9/23/2022	693-713

Record Entry #	Description	Date	Page ID No.
35-18	Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission, *Dissenting Statement on Proxy Voting Advice Proposal* (Nov. 17, 2021)	9/23/2022	714-716
35-19	Comment Letter of Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, File No. S7-17-21 (Nov. 30, 2021)	9/23/2022	717-721
35-20	Comment Letter of Christopher Iacovella, CEO, American Securities Association, File No. S7-17-21 (Dec. 3, 2021)	9/23/2022	722-724
35-21	*Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022) ((2022 Rescission)	9/23/2022	726-755
35-26	Clinton Administration's Executive Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993)	9/23/2022	766-775
35-27	Bush Administration's Executive Order No. 13258, *Amending Executive Order 12866 on Regulatory Planning and Review*, 67 Fed. Reg. 9,385 (Feb. 28, 2002)	9/23/2022	776-780
35-28	Obama Administration's Executive Order No. 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3,821 (Jan. 18, 2011)	9/23/2022	781-784

Record Entry #	Description	Date	Page ID No.
35-29	Biden Administration's Memorandum for the Heads of Executive Departments and Agencies, *Modernizing Regulatory Review*, 86 Fed. Reg. 7223 (Jan. 20, 2021)	9/23/2022	785-787
35-30	Administrative Conference of the United States, *Recommendation No. 2011-2, Rulemaking Comments* (June 16, 2011)	9/23/2022	788-793
35-31	House Appropriations Subcommittee on Financial Services, *Hearing on the Fiscal Year 2023 SEC and Federal Trade Commission Budget Requests* (May 18, 2022)	9/23/2022	794-813
35-32	Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission, *Statement on Final Rule Amendments on Proxy Voting Advice* (July 13, 2022)	9/23/2022	814-818
35-33	Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission, *U-Turn: Comments on Proxy Voting Advice* (July 13, 2022)	9/23/2022	819-824
35-35	Comment Letter of Neil A. Hanson, Vice President, Investor Relations and Secretary, Exxon Corporation, File No. S7-17-22 (Feb. 3, 2020)	9/23/2022	968-970
35-38	Comment Letter of Stephen C. Taylor, Chairman, President, and CEO, and John W. Chisholm, Lead Independent Director,	9/23/2022	977-983

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35-39	Comment Letter of Michele Nellenbach, Vice President of Strategic Initiatives, Bipartisan Policy Center, File No. S7-17-21 (Dec. 27, 2021)	9/23/2022	984-990
35-40	*Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33,318 (July 12, 2019)	9/23/2022	991-1166
35-41	Gary Gensler, Chairman, U.S. Securities and Exchange Commission, *Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar* (July 28, 2021)	9/23/2022	1167-1172
35-42	Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-87457, File No. S7-22-19	9/23/2022	1173-1196
35-49	Timothy M. Doyle, *The Realities of Robo-Voting*, Harv. L. Sch. F. on Corp. Governance, (Nov. 29, 2018)	9/23/2022	1244-1261
35-50	*Concept Release on the U.S. Proxy System; Proposed Rule*, 75 Fed. Reg. 42,982 (July 22, 2010)	9/23/2022	1262-1292
53	Brief of Amicus Curiae Former SEC Officials and Law Professors In Support of Plaintiffs' Motion for Summary Judgment	10/17/2022	1512-1535

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