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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INTRODUCTION

The Commission's brief is most interesting for what it does *not* say. The district court held that the 2022 Rescission was both procedurally and substantively lawful because of the earlier 2020 rulemaking. In the court's view, although the Rescission's comment period was only half as long, the public was already familiar with the issues and so needed less time to comment; and although the Commission did not offer any explanation for changing its view of the facts, it had done so much work for the 2020 Rule that the agency could simply look at the same record and reach the opposite conclusion. The Commission does not defend any of that reasoning, apparently agreeing that the Rescission must be judged on its own.

The Commission does join the district court in one respect. Like the court, the Commission says that the 2022 Rescission was lawful because it was merely a "policy choice" that resulted from a change in its political composition. Br. 5, 18. That defense of the Commission's abrupt rollback of a 10-year rulemaking process misses the point. Agencies can make policy decisions, but the Administrative Procedure Act protects against nakedly political actions—and resulting regulatory whiplash—by requiring agencies to supply meaningful opportunities for public comment and reasoned

explanations for their decisionmaking. The Commission's response brief confirms that neither occurred here.

First, the comment period for the 2022 Rescission was inadequate for no fewer than seven reasons. Opening Br. 33-39. The Commission wrongly tries to downplay some of those circumstances, but it makes no effort to address their cumulative effect. The Commission's main response is that even if the period was inadequate, that error was harmless absent specific commenters or comments that fell by the wayside. Br. 45, 50-51. The district court did not hold that, and it is not the law. *See, e.g.*, *California* v. *Azar*, 911 F.3d 558, 580 (9th Cir. 2018) ("There is no such requirement for harmless error analysis."). Regardless, there is a specific commenter, the U.S. Chamber of Commerce, that would have tried to provide additional quantitative data on the costs of the 2022 Rescission if it had been given more time.

Second, as even the district court recognized, the 2022 Rescission rested on a changed view of the facts and thus gave rise to a heightened obligation under *FCC* v. *Fox Television Stations*, 556 U.S. 502 (2009), to explain "why and how the agency's thinking had changed." R. 74 (Mem. Op.) at 2036. Notably, the Commission does not even try to meet that standard. It argues only that it did not flip on the facts, but that is plainly not true. In 2020, the

Commission thought that PVABs' voluntary practices were insufficient and that the Notice and Awareness Conditions would pose little or no risk to PVABs. In 2022, it thought the opposite on both of those factual questions.

Whatever the standard, the Commission did not provide even a rational justification, let alone a more detailed one, for rescinding the Notice and Awareness Conditions. One searches the Rescission in vain for any explanation for the Commission's new position that the Conditions would impair the timeliness, independence, and cost of PVAB advice. Nor did the Commission explain in 2022 how voluntary PVAB efforts—some of which had actually ceased between the two rulemakings—suddenly became sufficient substitutes for requiring that PVABs send their recommendations to companies and notify clients of any responses. The Commission trots out a few post-hoc justifications, but they are not properly presented and they defy common sense.

Third, the Commission offered an "opportunistic[]" assessment of the rule's "costs and benefits." *Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1148-1149 (D.C. Cir. 2011). On benefits, the Commission said in the Rescission that PVABs' voluntary practices were meeting some of the goals of the Conditions, but then made the inconsistent assumption that withdrawing the Conditions

would save every dollar of compliance costs. On costs, by its own admission, the Commission essentially offered "conjecture" about harms from the Rescission. Br. 40. Even then, the Commission cannot defend the errors that it made in the little analysis it did perform.

Finally, vacatur of the 2022 Rescission is the only appropriate remedy. Procedural violations of the APA almost always require vacatur, and that remedy is especially warranted here because the 2022 Rescission is riddled with substantive defects that the Commission has not demonstrated it can cure on remand. And given that the Notice and Awareness Conditions were necessary predicates to unchallenged portions of the Rescission, the entire 2022 Rescission should be vacated.

ARGUMENT

I. The Commission Fails To Justify The Rescission's Procedural Inadequacy.

The Commission notably does not defend the district court's reasoning that the 31-day comment period was adequate because the 2020 rulemaking had been so thorough. *See* Opening Br. 39-41. The Commission instead argues that "a comment period of at least 30 days is generally sufficient," absent some "fundamental obstacle." Br. 42-43. The Commission also argues that even if the period was inadequate, any error was harmless unless there were

commenters or comments that were not considered. Both of those arguments are wrong.

A. The Comment Period Was Inadequate.

As the Commission acknowledges, what the APA requires is a "meaningful opportunity for public comment." Br. 42; *see* 5 U.S.C. § 553(c). But the Commission then tries to weight the dice. A comment period "of at least 30 days is generally sufficient," the Commission says, unless there is "some fundamental obstacle that ma[kes] meaningful comment impossible, not just potentially inconvenient." Br. 43. The Commission does not point to any court that has ever articulated or adopted an impossibility standard. Rather, it points to decisions that found comment periods of 30 days or longer either adequate or inadequate, depending on the particular facts. Br. 43-44. Here, similar facts (or "fundamental obstacle[s]") show that the comment period was deficient. *See* SEC Officials Amicus Br. 26 ("[B]ased on the experience of the *amici* who have been intimately involved with the Commission's workings, the Commission's 30-day comment period here was unreasonably short."). If these circumstances do not make a 30-day comment period inadequate, it is hard to imagine what would.

Compressed Time Periods. The Commission tries to dismiss the obvious burden imposed by scheduling the comment period over the year-end holidays and companies' year-end fiscal-reporting deadlines by asserting that "there is no statutory basis for subtracting holidays from comment periods." Br. 46. That misses the point. The argument is not that the Commission allowed fewer than 31 days to comment; it is that those 31 days did not provide a meaningful opportunity because of commenters' competing responsibilities. And the Commission acknowledges (at 46) that courts have considered such competing demands, including holidays, when evaluating a period's adequacy. Opening Br. 33 (citing cases).

The issue was particularly glaring here where the Commission simultaneously had "comment periods open for nine different proposals, many of which affected the same parties who wished to provide substantive input on the Proposed 2022 Rule." SEC Officials Amicus Br. 16-17. When pressed at oral argument before the Fifth Circuit in a parallel challenge, the Commission's counsel was not aware of a single time the Commission had offered such a short comment period that spanned the holiday season, let alone one that also coincided with financial reporting deadlines and overlapping

rulemakings. *See Nat'l Ass'n of Mfrs.* v. *SEC*, No. 22-51069 (5th Cir.), Oral Arg. Tr. 39:30 (*NAM* Arg. Tr.).

The Commission also argues that the comment period "functionally" began when "the proposal was issued on the Commission's website." Br. 46. But the APA specifies that a "[g]eneral notice of proposed rulemaking *shall be published in the Federal Register*," 5 U.S.C. § 553(b) (emphasis added), after which the comment period begins to run, *id.* § 553(c). Regulated parties are not expected to keep abreast of rulemakings by monitoring agency websites.[1] Regardless, the nine days between the Commission's posting on its website and publication in the Federal Register fell over the Thanksgiving holiday. Regulated parties are no more available to draft comment letters over Thanksgiving than Christmas or Hanukkah.

Half The Length Of Prior Comment Period. The Commission acknowledges (at 48) that the 2020 Rule followed a 60-day comment period,

[1] The Commission cites (at 46) *Pangea Legal Services* v. *DHS*, but that court measured the comment period from the date of publication in the Federal Register and held that a 30-day period "spanning the holidays" was insufficient. 501 F. Supp. 3d 792, 820 (N.D. Cal. 2020). The Commission also cites *Omnipoint* v. *FCC*, but that court held that a shortened comment period was justified due to a statutory deadline, meaning that its subsequent discussion of notice was dicta (and the court did not consider the APA's text). 78 F.3d 620, 629 (D.C. Cir. 1996).

but asserts that the APA does not "require[] parity when an agency repeals a rule." Br. 48. Of course it is not a statutory requirement. Parity is instead a factor that courts consider in determining the adequacy of a comment period: if parties needed 60 days to consider *establishing* a rule, it stands to reason that they could need the same time to consider *disestablishing* it. *See, e.g.*, *Becerra* v. *Dep't of the Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019); *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012). The agency should have some coherent explanation for why what was formerly complicated is now more straightforward.

Lack Of Justification. The Commission offers no credible explanation for why it rushed through this rulemaking. Its only rationale is that the Rescission was more "targeted" than its predecessor. Br. 42. That is hard to take seriously. The 2022 Rescission withdrew the Notice and Awareness Conditions, which were centerpieces of the 2020 Rule. *See NAM* Arg. Tr. 41:10 (asking Commission counsel whether the Rescission is really "[t]argeted" because "[it] is basically undoing the 2020 Rule"). Those Conditions generated hundreds of comments during the 2020 rulemaking, and continue to draw intense interest from members of Congress, States, and the public. *See, e.g.*, R. 69-2 (Ltr. from Sen. Tester, et al.); States Amicus Br. 17-22; *Cracking the*

Proxy Advisory Duopoly, Wall Street Journal (Jul. 12, 2023), https://www.wsj.com/articles/proxy-advisory-firms-glass-lewis-institutional-shareholder-services-esg-investing-761e044f. The Commission literally has nothing to say about why it did not allow more time for an important rulemaking concerning "extremely powerful actors." States Amicus Br. 4.

Departure From Practice. The Commission tries to downplay its departure from both Executive Branch guidance and the Chair's public statements by arguing that they are not "binding." Br. 46-47. But whether a policy or statement is binding says nothing about whether the Commission's failure to follow it matters to procedural adequacy. Chair Gensler represented to Congress that the Commission has "said it would always" provide at least 60 days for comment from the date of the Commission's vote. R. 35-31 (Hearing on FY 2023 Budget Requests (May 18, 2022)) at 806. The Commission says nothing in its brief—not one word—about *why* it did not "endeavor[]" to provide 60 days here. Br. 47 (quoting Chair Gensler's testimony). Its silence speaks volumes: if the Commission had a reason, it is not one the agency wants to offer in court. Regardless, the Commission's unexplained deviation is yet another indicator of arbitrariness.

Requests for More Time. The Commission dismisses the fact that many parties requested more time because "all but one submitted extensive, substantive comments." Br. 47. First, given the Commission's emphasis on whether even "a single party" was deprived of the opportunity to comment, Br. 45; *see* Br. 49, the fact that one potential commenter did not submit its views should matter. Second, even if most parties who requested more time ultimately submitted comments, it is virtually impossible to know how the 31-day period affected the quality of those comments—or which potential commenters did not speak up.

The Commission asserts that it has an "established practice of considering comments received after the close of a comment period." Br. 47. It cites 17 C.F.R. § 202.6(b), which merely says that "[t]he Commission, in its discretion, may accept and include" late comments in a rulemaking record. But assuming such a discretionary practice is actually followed and publicly known, it is irrelevant. An agency complies with the APA only by offering an adequate comment period—not by offering an inadequate period and then considering any after-filed comments as a matter of executive grace.

Far Fewer Comments. The Commission concedes that courts have compared the number of comments received "at adoption" and "repeal" in

determining a comment period's adequacy. Br. 48. But the Commission says that the 2020 rulemaking received 10 times as many comments because it did other things, and rescinding the Notice and Awareness Conditions simply did not inspire the same level of interest. *Id.* That speculation is hard to square with the facts that the Rescission has been the subject of two lawsuits by three leading trade associations; 26 States have participated as amici; and Members of Congress have repeatedly expressed interest in the issue.

B. The Inadequacy Of The Comment Period Was Not Clearly Harmless.

The Commission argues (at 50-51) that even if the comment period was inadequate, the error was harmless. That is a difficult showing for the Commission to make. This Court has held that when an agency violates the APA's notice-and-comment procedures, the "harmless error [analysis] hinges not on whether the same rule would have been issued absent the error, but whether the affected parties had sufficient opportunity to weigh in on the proposed rule." *United States* v. *Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012). That will rarely be the case, because an inadequate comment period virtually always means that parties did *not* have a "sufficient opportunity to weigh in on the proposed rule." *Id.*; *United States* v. *Johnson*, 632 F.3d 912, 932 (5th Cir. 2011) ("[A] finding of harmless error for inadequate notice-and-comment

procedures" will be "rare" with respect to "the vast majority of agency rulemaking.").

The Commission tries to reinvent the legal standard. It says that appellants must "identify any substantive challenges they would have made had they been given additional time" or "a single party" who was unable to comment. Br. 45, 50. "There is no such requirement for harmless error analysis." *Azar*, 911 F.3d at 580. Courts have rejected the notion that parties must show "additional considerations they would have raised in a comment procedure" to prevail on any challenge to a comment period because that would "eviscerate[]" and "virtually repeal [S]ection 553's requirements." *Sugar Cane Growers Co-op. of Fla.* v. *Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002).

The Commission points (at 50-51) to cases involving technical foot faults that did not impose any real barrier to commenting under the circumstances. For example, in *U.S. Telecom Ass'n* v. *FCC*, the agency had mislabeled the title of the request for comment. 400 F.3d 29, 41 (D.C. Cir. 2005); *see City of Arlington* v. *FCC*, 668 F.3d 229, 244-245 (5th Cir. 2012) (wrong title in Federal Register notice); *Stevenson*, 676 F.3d at 563-565 (agency "received and addressed numerous comments from the public" but mistakenly cited the

wrong legal authority); *see also Omnipoint*, 78 F.3d at 630 (comment period adequate given exigent circumstances and agency's responsiveness to comments). By contrast here, no fewer than seven different circumstances show that the public did not have a "sufficient opportunity to weigh in on the proposed Rule." *Stevenson*, 676 F.3d at 565.

Even assuming that the public must provide this sort of evidence of prejudice, appellants have identified *both* "[a] party that wanted to comment but was unable to" *and* "additional argument[s] that commenters would have made." Br. 45. As to the former, the Commission admits that one of the parties who requested an extension of the comment period was unable to submit substantive comments on the proposal. Br. 47; R. 35-20 (Am. Securities Association, Comment). That alone disposes of the Commission's harmless-error argument.

As to the latter, when the Chamber asked to extend the comment period, it noted that "[s]uch a truncated timeline does not allow for the collection and development of the kind of empirical data and analysis the SEC requests in the Proposal." R. 35-19 (U.S. Chamber, Comment) at 719. And when the Commission adopted the Rescission, it observed that it had "not received information or data that would permit a quantitative analysis." R. 35-21 (2022

Rescission) at 744. The Commission faults the Chamber for not explaining the exact data on "the costs of inaccurate proxy advice" it would have submitted, Br. 45, 51, but that is too demanding a standard. When an agency cuts short a comment period, it is enough for commenters to identify what they would have done—they need not complete the work out of time just to prove that they were harmed.

II. The Commission Fails To Provide A Heightened Justification For Its Abrupt Reversal.

A. The Commission Was Required To Provide A Heightened Justification For Rescinding The Notice And Awareness Conditions.

The district court correctly held that the 2022 Rescission was "at least partly based on a reevaluation of the facts," which gave "rise to an obligation to explain why and how the agency's thinking had changed" under *Fox*. R. 74 (Mem. Op.) at 2035-2036. In applying that standard, however, the court did not actually require the agency to offer a "more detailed justification" for changing its view of the key facts. *Fox*, 556 U.S. at 515; *see* Opening Br. 52-54. The Commission does not disagree. It asserts in a footnote that the district court erred in finding that the Commission had reversed itself on the facts, but then says that the court "nonetheless applied the proper standard,"

Br. 35 n.8—which is a tacit recognition that the court did *not* apply *Fox*'s heightened-justification requirement.

The Commission tellingly does not argue that it can satisfy *Fox*. Instead the Commission rests entirely on the notion that the 2022 Rescission was a "policy shift," Br. 35; the agency did not change its view of the facts, Br. 34-38; and "thus no more detailed justification was required," Br. 33 (citation omitted). That is simply wrong, as even the district court recognized. The agency once understood that the Notice and Awareness Conditions would not significantly impair the timeliness or independence of PVAB advice, and it now has determined they will. The agency also once thought that PVABs' voluntary practices were not sufficient, and it now believes they are. The Commission's priorities may have shifted, but *what the agency said is that the facts have changed*.

1. The Proposed 2020 Rule would have required PVABs to provide *draft* recommendations to companies prior to dissemination to clients. In the final 2020 Rule, to address concerns raised by commenters, the Commission required that PVABs simultaneously provide their *final* recommendations to companies and notify clients if the companies had any response. When the Commission rescinded those Notice and Awareness Conditions in 2022, it did

so on the basis that the Conditions posed a risk to the timeliness, independence, and cost of PVAB advice. R. 35-21 (2022 Rescission) at 733. The Commission had concluded the exact opposite two years earlier: the 2020 Rule "*does not create the risk that such advice would be delayed or that independence thereof would be tainted* as a result of a registrant's pre-dissemination involvement." R. 35-2 (2020 Rule) at 321 (emphasis added).

The Commission now says (at 34) that in 2020 it was only addressing the risks from "a registrant's pre-dissemination involvement"—*i.e.*, the risks to PVABs from sending *draft* recommendations to companies before sending them to clients. According to the Commission, it did "not consider, let alone reject, the distinct risks" posed to PVABs from sending *final* recommendations to companies and alerting clients to any responses. *Id.* As a bipartisan group of former SEC officials and scholars explains, the Commission's spin on the 2020 release is "mystifying." SEC Officials Amicus Br. 23. On its face, the Commission was saying that "because [the Notice and Awareness Conditions] do[] not require [PVABs] to . . . provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, the rule does not create the risk that such advice would be delayed or that the independence thereof

would be tainted." R. 35-2 (2020 Rule) at 321. In other words, the Commission had *eliminated* the risk of delayed or tainted recommendations by jettisoning pre-dissemination review.

The 2020 Rule did not indicate that there were any "residual risk[s]" to costs, timeliness, and independence posed by the Notice and Awareness Conditions. Br. 31. First, the 2020 Rule says not one word about any residual risks. Second, the Commission explicitly stated: "*we believe we have addressed the concerns raised by commenters*" about "timing and the risk of affecting the independence of the advice," and "we believe the final amendments will *substantially address, if not eliminate altogether*, the concerns raised by commenters related to objectivity and timing pressure." R. 35-2 (2020 Rule) at 321, 347-348 (emphasis added). The Commission does not address those statements, but it is clear that the agency thought it had solved any problem in 2020.

At the very least, it is indisputable that the Commission believed in 2020 that the Notice and Awareness Conditions posed a minimal risk to PVABs. Two years later, the Commission concluded that the Conditions threatened the timeliness, independence, and cost of PVAB advice to such an extent that it warranted rescinding them altogether. That is not a change in policy but a

change in the agency's view of the *facts—i.e.*, the Commission said that the Notice and Awareness Conditions would have different effects in the real world in 2022 than 2020. That changed view of the facts required a "more detailed justification." *Fox*, 556 U.S. at 515; *see Texas* v. *Biden*, 20 F.4th 928, 991 (5th Cir. 2021) (agency finding that policy was "effective" versus prior finding that it had "mixed effectiveness" triggered "more detailed justification" requirement).

2. The Commission also argues that it "did not reject any prior factual findings regarding PVABs' voluntary practices." Br. 36. Again, the record tells a different story. In the 2020 Rule, the Commission "[did] not believe the existing voluntary forms of outreach to registrants and other market participants" by PVABs "are alone sufficient" to achieve the goals of the Notice and Awareness Conditions. R. 35-2 (2020 Rule) at 317. In the 2022 Rescission, by contrast, the Commission averred that "certain voluntary practices of PVABs . . . are likely, at least to some extent, to advance the goals underlying the [Notice and Awareness Conditions]." R. 35-21 (2022 Rescission) at 728. Simply put, the Commission changed its view on the extent to which PVABs' voluntary practices would foster transparency and greater information.

To be sure, the Commission did not say in the Rescission that PVABs' voluntary practices were a complete answer. Indeed, the Commission acknowledged that PVABs' policies "do not replicate" the Notice and Awareness Conditions, and that ISS had "discontinued" its most relevant practice since the 2020 Rule. Br. 36 & n.9 (quoting R. 31-21 (2022 Rescission) at 734-735 n.142, 747). All of that begs the question of why the Commission wanted to put the foxes back in charge of the hen house. *See infra* at 23-24. But the point here is that, even though the Commission did not treat PVABs' voluntary practices as a cure-all in the Rescission, it still treated them as more effective than it had previously. That shift in the agency's factual views required a heightened justification under *Fox*.

B. The Commission Did Not Provide Even A Rational Justification, Let Alone A Heightened One, For Rescinding The Conditions.

1. The Rescission's primary rationale for withdrawing the Notice and Awareness Conditions was their supposed risk to the timeliness, independence, and cost of PVAB advice. Br. 23 (quoting R. 35-21 (2022 Rescission) at 727-728). Yet the Commission cannot identify anywhere in the Rescission that it explained how and why the Conditions presented such risks.

That is insufficient under *any* standard of review, and should be the end of the analysis. *See SEC* v. *Chenery Corporation*, 318 U.S. 80, 87 (1943).

The Commission *now* says that it could "reasonably credit[] commenters' concern" that the Conditions would threaten timeliness by "disrupt[ing] the preparation and delivery of proxy voting advice," threaten independence by "increas[ing] the costs of the proxy advice that opposes management," and "increase compliance costs." Br. 29, 31. Those "*post hoc* rationalizations" are "not properly before" this Court, *Dep't of Homeland Sec.* v. *Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020), and in any event they are wrong.

Most obviously, the 2022 Rescission did not actually "credit" those three commenter concerns. Rather, the Rescission described them in a footnote in the "Comments Received" section of the rule. *See* R. 35-21 (2022 Rescission) at 733 n.118. Needless to say, describing comments is not the same as analyzing and adopting the views expressed in those comments. Moreover, agencies cannot accept comments "uncritically," but must instead apply their own "expert evaluation" to them. *Nat'l Ass'n of Regul. Util. Comm'rs* v. *FCC*, 737 F.2d 1095, 1125 (D.C. Cir. 1984). That is especially true in rulemakings like this one, where "crediting" some commenters would require rejecting the

analysis offered by others. *See* NAM Amicus Br. 17-18 (detailing comments that explained why "concerns" raised about risks posed by Conditions were not "credible"); *AARP* v. *U.S. Equal Empl. Opportunity Comm'n*, 267 F. Supp. 3d 14, 32 (D.D.C. 2017) (agency "must explain *why*" it credited some commenters over others).[2]

To this day, the Commission has never identified where in the 2022 Rescission it explained how or why the Notice and Awareness Conditions would impair the timeliness, independence, or cost of PVAB advice. On timeliness, providing recommendations to companies *at the same time* as clients cannot delay those recommendations. On independence, it should be a cause for embarrassment—and *greater* regulation—if having to provide recommendations to the subject companies would cause PVABs to alter their advice. On cost, there is no apparent reason why providing recommendations and alerts, presumably through an automated system, would meaningfully

[2] The Commission relies (at 29) on cases in which agencies offered comments as additional support for their own analyses grounded in their "supervisory experience." *Nasdaq Stock Mkt.* v. *SEC*, 38 F.4th 1126, 1142 (D.C. Cir. 2022) (approving detailed agency analysis supported by supervisory experience and comments); *see Stilwell* v. *Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("[agency] thoroughly explained its concern," citing "long [supervisory] experience" along with support in comments). Those cases underscore that the Commission did not conduct its own independent analysis in the Rescission.

increase PVABs' costs. *See NAM* Arg. Tr. 22:28 (asking why PVABs would be harmed when "all they had to do is push a button").

The Commission trots out a few post-hoc suggestions to plug the holes in the Rescission. First, it says that PVABs would have to send "at least one and possibly two separate notices to clients about each registrant's response, including a hyperlink to the response." Br. 28. What the Commission means is that it would have to send its recommendation email to an additional recipient (the registrant), and then it might have to send a second email (with a hyperlink) if the company elects to respond. It is hard to believe those costs are significant, let alone that they would risk "disrupting the delivery of [proxy] advice." Br. 30. At a minimum, if the Commission wants to rest on this kind of implausible rationale, it needed to articulate and explain it in the Rescission.

Second, the Commission speculates that "advice that opposes management is more likely to prompt a registrant response," Br. 33, which means that PVABs would tilt their recommendations in favor of management to spare themselves the trouble of defending their views. So much for sunlight as "the best of disinfectants." *Buckley* v. *Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, Other People's Money 62 (National Home Library Foundation

ed. 1933)). Regardless, the Commission offers nothing—not in the Rescission, and not even before this Court—to substantiate the view that PVABs will change their recommendations in order to avoid company responses.

2. When it comes to PVABs' voluntary practices, the Commission conceded in the Rescission that those practices do not confer all of the benefits of the Notice and Awareness Conditions and that PVABs might not continue them. Br. 37; *see* States Amicus Br. 25 (describing commenter evidence on the inadequacy of PVABs' "voluntary practices"). The Commission said in the Rescission that PVABs have "financial" and other "market-based" incentives to maintain voluntary practices, Br. 37, but that ran "counter to the evidence before the agency," *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 658 (2007). This industry is a duopoly dominated by ISS and Glass-Lewis, and ISS had discontinued its most relevant practice by the time of the Rescission. When one of two market players no longer goes along, it blinks reality to talk about how voluntary compliance will advance the goals of the Notice and Awareness Conditions.

More generally, there is a flat contradiction between the Commission's two rationales for the Rescission. It makes no sense to say that the Notice and Awareness Conditions were not necessary because PVABs have incentives to

voluntarily comply with them—but that the Conditions are harmful to PVABs because they impair the timeliness, independence, and cost of PVAB advice. The Commission noted that very inconsistency in 2020. *See* R.35-2 (2020 Rule) at 312 n.259 ("It is difficult to understand how, if ISS' voluntary review and comment processes do not currently compromise the independence of their advice[,] the Proposed Rule's review and comment period for all public companies would do so."). The Commission then turned around and embraced exactly that inconsistency without explanation in 2022.

III. The Commission Fails To Defend Its Flawed Economic Analysis.

Under the Exchange Act, the Commission had to determine the Rescission's economic implications. Instead it offered an "opportunistic[]" assessment of the rule's "costs and benefits" devoid of any genuine analysis, rendering the Rescission arbitrary and capricious. *Bus. Roundtable*, 647 F.3d at 1148-1149.

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

There is a basic inconsistency at the heart of the Commission's analysis of the Rescission's benefits. In 2020, the Commission concluded that PVABs' voluntary practices did not replicate the Notice and Awareness Conditions, and it calculated the costs of complying with those Conditions. Then in 2022,

the Commission concluded that PVABs' voluntary practices *do* replicate the Conditions, at least to some extent. That should have meant the costs of complying with the Conditions were smaller than the Commission previously thought, and thus that the cost savings of rescinding the Conditions would also be smaller. But instead the Commission assumed that PVABs would be spared the *entire costs it had calculated in 2020*. Opening Br. 55-56.

The Commission responds by pointing (at 38) to the Rescission's caveat that the magnitude of cost savings will "vary depending on each PVAB's current practices." That truism is irrelevant. ISS presumably would have greater cost savings than Glass-Lewis because ISS had abandoned a relevant voluntary practice. But none of that explains why ISS and Glass-Lewis would save *every dollar of cost* the Commission had calculated in 2020. Once the Commission said in 2022 that the gap between PVABs' practices and the Conditions was smaller than it had previously believed, it should have followed that the costs of complying with the Conditions—and the savings from withdrawing the Conditions—were smaller too. The Commission has no answer to that basic point.

B. The Commission Did Not Adequately Quantify And Assess Costs.

The Commission defends its costs analysis by attacking an argument no one is making: that the Commission needed to "commission [its] own empirical or statistical studies" on this subject. Br. 40. Of course the Commission was not required to conduct a new empirical study, but it was required to "determine *as best it [could]* the economic implications of the rule it ha[d] proposed." *Chamber of Com.* v. *SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005) (emphasis added). Throwing up its hands and asserting that the costs of the Rescission were unknowable did not satisfy that obligation. *See Bus. Roundtable*, 647 F.3d at 1149 (agency had to "quantify" costs or "explain why those costs could not be quantified").

When it comes to its actual analysis of costs associated with the Rescission, the Commission has little to say. It does not defend the way it wrongly discounted the evidence of PVAB errors presented by commenters. *See* Opening Br. 57-59; NAM Amicus Br. 6-8 (recounting evidence of errors in the record); BIO Amicus Br. 13-14 (offering anecdotal evidence, including when Glass-Lewis overstated proposed executive compensation by a factor of 15). Nor does it defend reducing the overall mix of information available to shareholders. *See* R. 35-2 (2020 Rule) at 316. As the amici highlight, PVABs

often make "one-size-fits-all recommendations" that are not suited to smaller companies in certain industries, BIO Amicus Br. 16-20, or that are based on social policy goals "counter to [a] company's economic interests" and in "conflict with the investors' own preferences or investment goals," States Amicus Br. 19. The Commission cannot pretend that allowing errors to go uncorrected (regardless of the error rate) or limiting the exchange of information comes at costs too indeterminate to be analyzed.

Surprisingly, the Commission concedes that its economic analysis was more conjecture than analysis. It brags that the Rescission "acknowledged that rescinding the [Notice and Awareness] conditions *could*" "limit a registrant's ability to timely identify errors and mischaracterizations in proxy voting advice" and "reduce the overall mix of information available to PVABs' clients." Br. 40 (quoting R.35-21 (2022 Rescission) at 745 (emphasis added)). But the Commission had to do more: it had to actually analyze and account for the costly implications of corporate-governance decisions based on inaccurate, incomplete, or biased information. *Gresham* v. *Azar*, 950 F.3d 93, 103 (D.C. Cir. 2019) ("Nodding to concerns . . . only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). "By ducking serious

evaluation of [the Rescission's] costs," the Commission acted arbitrarily. *Bus. Roundtable*, 647 F.3d at 1152.

IV. Vacatur Of The Entire 2022 Rescission Is The Appropriate Remedy.

The Commission is wrong to argue that the Court should merely remand without vacating the 2022 Rescission, or in the alternative sever and vacate only some portions of the rulemaking. Br. 51-55.

A. The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" found to violate one of its standards. 5 U.S.C. § 706(2). Given the statute's plain language, the Commission is forced to concede that "vacatur is the 'normal' remedy" for unlawful agency action. Br. 52 (quoting *Allina Health Servs.* v. *Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)). Remand without vacatur is allowed only "[i]n rare cases," *United Steel* v. *Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019), and is so unusual that this Court has never granted such relief as far as appellants are aware.

The Commission comes nowhere close to overcoming the "presumption of vacatur." *All. for the Wild Rockies* v. *U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018). Courts have found vacatur unwarranted only when the "seriousness of the order's deficiencies" is minimal, and the likely "disruptive

consequences" of vacatur are large. *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). The Commission does not argue that it satisfies the second factor, meaning that it must make a "strong showing" on the first. *Am. Bankers Ass'n* v. *Nat'l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019). The Commission's conclusory assertion that there is a "serious possibility" that the Commission could "further explain[] its policy choice" on remand, Br. 52, is hardly a "strong showing" that the Rule's deficiencies are not "serious."

To the contrary, the 2022 Rescission is riddled with serious deficiencies that "go to the heart of the [agency's] decision." *Humane Soc'y of U.S.* v. *Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017). It is not at all clear that the Commission can adequately explain the 2022 Rescission, given that the agency's justifications contradict one another and "lacked support in the record." *Nat'l Women's L. Ctr.* v. *Off. of Mgt. and Budget*, 358 F. Supp. 3d 66, 93 (D.D.C. 2019). Separately, the Commission's failure to provide a meaningful opportunity for comment is a fundamental flaw that almost always requires vacatur. *See Heartland Reg'l Med. Ctr.* v. *Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009). For that reason, vacatur has been the consistent remedy in decisions holding a comment period inadequate.

Remand without vacatur would be particularly inappropriate here. Before promulgating the 2022 Rescission, the Commission unlawfully rescinded the 2020 Rule by suspending its enforcement without notice and comment. *See Nat'l Ass'n of Mfrs.* v. *SEC*, 631 F. Supp. 3d 423, 431 (W.D. Tex. 2022). The APA supplies the remedy of vacatur precisely so that agencies cannot make a hasty and unreasoned decision, in the hope of eventually placing it on firmer footing. Agencies are not typically allowed to make rules through adverse possession. *See Standing Rock Sioux Tribe* v. *United States Army Corps of Engineers*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) (declining to give "substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later").

B. The Court also should not take the highly unusual step of vacating only certain aspects of the 2022 Rescission. The primary question guiding the severability inquiry is whether the agency "would not have enacted" unchallenged provisions "absent the" challenged portions of the rule. *Cmty. for Creative Non-Violence* v. *Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990). As to Note (e), the Commission points to a boilerplate severability clause, Br. 54, but provides no reason to believe that the agency would have rescinded Note (e) on its own. *See United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). The

opposite is true, given the 2022 Rescission's statement that the Note's deletion was prompted by the same "concerns regarding the 2020 Final Rules that prompted the Commission to issue the 2021 Proposed Amendments." R. 35-21 (2022 Rescission) at 737.

The Supplemental Guidance is also clearly "intertwined" with the 2022 Rescission. *Carlson* v. *Postal Regul. Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019) (citation omitted). The Commission again said as much in rescinding the Supplemental Guidance, explaining that the repeal of the Notice and Awareness Conditions rendered the Guidance unnecessary. R. 35-21 (2022 Rescission) at 736 & n.161. It is nonsensical to suggest that the Commission would have rescinded the Guidance while leaving in place the Conditions that prompted the Guidance in the first place.

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 6,488 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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August 22, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of August, 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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