No. 24-1624

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LIBERTY ENERGY, INC.; NOMAD PROPPANT SERVICES, LLC,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Petition for Review of an Order of the
Securities & Exchange Commission

OPENING BRIEF OF PETITIONERS LIBERTY ENERGY INC. & NOMAD PROPPANT SERVICES, LLC

Katherine C. Yarger
LEHOTSKY KELLER COHN LLP
700 Colorado Blvd # 407
Denver, CO 80206

R. Trent McCotter
Counsel of Record
Jonathan Berry
Michael Buschbacher
Jared M. Kelson
Caleb Orr
BOYDEN GRAY PLLC
801 17th Street NW, Suite 350
Washington, DC 20006
202-706-5488
tmccotter@boydengray.com

Counsel for Petitioners

SUMMARY AND REQUEST FOR ORAL ARGUMENT

This case is about the Securities and Exchange Commission's ("SEC") new rule entitled, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (the "Climate Rule" or "Rule"). Under the thinly veiled guise of securities regulation, the Rule seeks to regulate large swaths of the economy by requiring publicly traded companies to issue detailed disclosures about "climate-related risks" (including those faced by their suppliers) and their "greenhouse gas" emissions. They also must shoehorn climate-policy "transition risks" and "severe weather events" into traditional financial accounting metrics.

On March 6, 2024, Liberty Energy Inc. and Nomad Proppant Services LLC filed a petition for review of the Rule in the Fifth Circuit, which granted an administrative stay on March 15, 2024. The Fifth Circuit lifted the stay when it transferred the petition to this Court, and the SEC subsequently stayed the effective date of the Rule.

As the only publicly traded company to sue the SEC over the Rule, and as the only party to obtain judicial relief against the Rule, Liberty Energy requests 30 minutes of oral argument time in this important case.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel certifies as follows:

Petitioner Liberty Energy Inc. is a publicly traded entity. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner Nomad Proppant Services LLC is not publicly traded. Liberty Energy Inc. holds more than 10% of Nomad's stock.

June 14, 2024

/s/ *R. Trent McCotter*
R. Trent McCotter

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JURISDICTIONAL STATEMENT

Liberty Energy Inc. and Nomad Proppant Services (together, "Liberty Energy" unless specified otherwise) petition for review of the SEC's Climate Rule pursuant to the Securities Act, 15 U.S.C. § 77i. Rules issued by the SEC pursuant to the Securities Act qualify as "orders" subject to direct judicial review in circuit court. *See, e.g.*, *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 617 n.1 (D.C. Cir. 2019).

STATEMENT OF THE ISSUES

1. Whether Congress granted the SEC authority to regulate the controversial issue of climate change.

    a. Apposite Cases

        i. *West Virginia v. EPA*, 597 U.S. 697 (2022)
        ii. *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758 (2021)
        iii. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)
        iv. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)

2. Whether the Rule is arbitrary and capricious because it fails to account for the SEC's significant change in position regarding its authority to mandate climate disclosures, is drastically different than the proposed rule, is premised on evidence the Rule admits is mixed at best,

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imposes extraordinary costs with no real benefits, and is riddled with material inconsistencies.

a. Apposite cases

i. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)
ii. *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018)
iii. *Niobrara River Ranch, LLC v. Huber*, 373 F.3d 881, 884 (8th Cir. 2004)
iv. *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)

3. Whether the Rule violates the First Amendment by mandating controversial disclosures and discussions about climate change.

a. Apposite Cases

i. *NIFLA v. Becerra,* 585 U.S. 755 (2018)
ii. *NAM v. SEC*, 800 F.3d 518 (D.C. Cir. 2015)
iii. *AMI v. USDA*, 760 F.3d 18 (D.C. Cir. 2014)
iv. *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019)

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INTRODUCTION

"When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *UARG v. EPA*, 573 U.S. 302, 324 (2014).

Liberty Energy asks this Court to vacate the Climate Rule, which seeks to regulate—both directly and indirectly—vast portions of the country's economy under the guise of requiring detailed and wildly speculative disclosures about so-called "climate-related risks" and "greenhouse gas" emissions. Public companies must attempt to collect and calculate not just their own direct emissions and climate risks, but also those of certain third parties, including climate risks faced by their *suppliers*. Public companies must also shoehorn qualitative environmental information like "transition risks" and "severe weather events" into financial accounting that investors rely on for accurate financial information.

The Rule is unique in the history of the SEC. Never before has the agency claimed the power to demand such broad non-financial, "climate"-related disclosures, which will occupy a significant portion of

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public companies' securities filings and subject them to increased enforcement and litigation risks by mandating necessarily vague and indeterminate disclosures. In fact, the SEC stated for nearly 50 years that it lacks the power to do so without a change in statutory authority—a change that has not materialized.

Instead, what changed was the Biden Administration's demand to wield the federal securities laws as part of its "whole-of-government" approach to advancing a "climate agenda." The White House, *Press Briefing by Principal Deputy Press Secretary Karine Jean-Pierre* (Oct. 21, 2021), http://tiny.cc/em4mxz. For its part, the SEC sought to contribute to "breaking down" the "perceived barrier between social value and market value" by making "climate and ESG … front and center" through initiatives like the Climate Rule. SEC Comm'r Allison Herren Lee, *A Climate For Change: Meeting Investor Demand for Climate and ESG Information at the SEC* (Mar. 15, 2021), https://tinyurl.com/mpwn2d2k.

The Climate Rule is thus no ordinary securities disclosure rule. Indeed, the Rule gives unprecedented "special treatment and disproportionate space in Commission disclosures and managers' and directors' brain space" to amorphous climate-related risks and

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greenhouse gas emissions. Statement from SEC Comm'r Hester M. Peirce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024), http://tinyurl.com/2p8xzwj9. The Rule is "in a class of its own without comparison" in any prior SEC disclosure regulation, making it "climate regulation promulgated under the Commission's seal." Statement from SEC Comm'r Mark T. Uyeda, *A Climate Regulation under the Commission's Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024), http://tiny.cc/jhvkxz.

The Rule effects precisely the "transformative expansion in … regulatory authority" and "highly consequential power beyond what Congress could reasonably be understood to have granted," and therefore the Rule triggers the major-questions doctrine. *West Virginia v. EPA*, 597 U.S. 697, 724–25 (2022); *see* Part I.A, *infra*. The SEC must demonstrate clear statutory authority for the Rule, but at best the agency can invoke only amorphous grants to mandate disclosures "in the public interest." Congress has elsewhere provided clear authority for certain disclosures—e.g., for details about conflict minerals and executive

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pay—but never for climate, despite repeated attempts to enact climate-disclosure statutes, which have all failed to pass. *See* Part I.B, *infra*.

Further, in contorting the requirements of federal securities law to justify the Rule, the SEC failed to acknowledge its drastic change in position, presented inadequate evidence, misconstrued the costs, and acted inconsistently throughout the Rule—all of which independently renders the Rule unlawful. *See* Part II, *infra*.

The Rule also violates the First Amendment by mandating disclosures and discissions of controverted and controversial information about climate change, which the Supreme Court and the Administration have both recognized is one of the most controversial political topics. The Rule is not viewpoint neutral and triggers strict scrutiny, which it cannot possibly satisfy. *See* Part III, *infra*.

STATEMENT OF THE CASE

A. The Proposed and Final Rule

In April 2022, the SEC issued a proposed rule entitled, *The Enhancement and Standardization of Climate-Related Disclosures for*

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Investors. App.__ (R. Doc. 1, at 21,334).[1] The proposed rule tried to inject the SEC into the world of climate politics by compelling publicly listed companies to disclose a breathtaking volume of information—much of it highly speculative—about greenhouse gas ("GHG") emissions (including, as the proposed rule's "Scope 3" requirement covered, even by the company's *customers and suppliers*) and "climate-related" risks, on pain of government enforcement proceedings and private penalties if any of those disclosures could plausibly be described as misleading.

On March 6, 2024, the SEC issued the final Rule. Although transformed from the proposed rule, the Rule still represents a revolutionary change in securities regulation. The Rule requires publicly listed companies to disclose:

- "Scope 1" GHG emissions, meaning the company's own emissions from every activity the company undertakes (e.g., CO_2 emissions from flying to a business meeting); *and* "Scope 2" emissions, meaning all GHG emitted by *third parties* in

[1] "R. Doc." refers to the document number described in the Certified List Describing the Record filed by the SEC, *Iowa v. SEC*, No. 24-1522 (8th Cir. May 7, 2024).

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providing electricity and other energy power sources to the company. App.__ (R. Doc. 4, at 21,915).

- Non-material information about company costs "related to severe weather events and other natural conditions." App.__, __ (R. Doc. 4, at 21,792, 21,913).
- Granular faux-material and entirely non-material "climate-related risks," and the company's oversight of those "risks," including risks faced by their "suppliers." App.__, __–__ (R. Doc. 4, at 21,699, 21,915–16).

The Rule says disclosures of Scope 1 and Scope 2 emissions are required when "material" to the company—and will be subject to attestation requirements that impose heightened liability risks—but the SEC then deems emissions material if the company has faced or reasonably might face a "transition risk," App.__ (R. Doc. 4, at 21,733), which in turn is defined in a nearly unlimited manner that almost certainly sweeps in every company, App.__ (R. Doc. 4, at 21,914).

The chart of excerpts included in the Addendum to this brief tracks how the Rule pervasively seeks to evade "materiality" requirements by omitting them altogether, watering them down, changing the focus away

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from the reasonable investor, or merely deeming certain information material. *See* Add.255–266.

B. Petitioners

Petitioner Liberty Energy Inc. ("Liberty") is a leading North American oilfield services firm that offers cutting-edge completion services and technologies to onshore oil and natural gas exploration and production companies. Christopher Wright Decl. ¶2, https://tinyurl.com/5n627vts.[2] Liberty is subject to the Rule. Michael Stock Decl. ¶7, https://tinyurl.com/bdf4cwtf. From Liberty's perspective, the regulatory regime the Rule imposes is on par cost-wise with the regime required by the Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. No. 107-204, 116 Stat. 745, which likewise imposed significant oversight and disclosure obligations. Stock Decl., *supra*, ¶17. Liberty's direct, out-of-pocket compliance-related compliance costs for SOX exceeded $500,000 for the 2023 fiscal year and estimated total annual costs for SOX

[2] Eighth Circuit rules do not allow the attachment of extra-record materials longer than fifteen pages. *See* 8th Cir. R. 28A(g)(2). The Wright, Stock, and Johnson Declarations would exceed that length, but they were previously filed on the Fifth Circuit docket before this case was transferred, and links are provided herein to those filings. *See Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 8, 2024), ECF Nos. 5-6, 5-7, 5-8.

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compliance exceed $1 million per year. *Id.* ¶18. Thus, even under a very conservative approach, compliance costs for the Rule will be several hundred thousand dollars per year, with higher costs at the outset. *Id.* ¶20.

Petitioner Nomad Proppant Services LLC is a service-based frac sand company. Liberty owns a significant portion of and exercises certain control rights over Nomad, and the Rule will thus compel Liberty to, at the very least, undertake a materiality assessment to determine whether Nomad's "climate-related risks" and GHG emissions must be reported by Liberty. *Id.* ¶¶26–33. Nomad must undertake new expenses to investigate those risks and emissions to report to Liberty. Brad Johnson Decl. ¶¶10–12, https://tinyurl.com/2e73vt4b.

C. Prior Proceedings

On March 6, 2024, the same day the SEC issued the Rule, Liberty Energy filed a petition challenging the Rule in the Fifth Circuit and then promptly filed a motion to stay the Rule pending litigation. After full motions briefing, the Fifth Circuit unanimously issued an administrative stay of the Rule on March 15, 2024. *Liberty Energy, Inc. v. SEC*, No. 24-60109, 2024 WL 1152283, at *1 (5th Cir. Mar. 15, 2024).

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Petitions challenging the Rule were filed in numerous other circuits, triggering the multi-circuit lottery process. *See* 28 U.S.C. § 2112. On March 21, 2024, the Judicial Panel on Multidistrict Litigation randomly selected this Court to receive all challenges to the Rule. *See* Consolidation Order, *In re Securities & Exchange Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors*, MCP No. 180 (J.P.M.L. Mar. 21, 2024).

On March 22, 2024, the Fifth Circuit transferred Liberty Energy's petition to this Court and, over a dissent, lifted the administrative stay. *See* Order, *Liberty Energy, Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 22, 2024), ECF No. 87-1. Liberty Energy's motion for a stay was transferred to this Court and remains pending.

On April 4, 2024, the SEC stayed the Rule "pending the completion of judicial review of the consolidated Eighth Circuit petitions." SEC, Order Issuing Stay, Securities Act Release No. 11,280, Exchange Act Release No. 99,908, File No. S7-10-22 (Apr. 4, 2024). That stay does not directly change the Rule's compliance deadlines, however, which would begin as early as January 2025 for large-accelerated filers like Liberty.

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SUMMARY OF THE ARGUMENT

The Rule is unlawful for several reasons. *First*, it fails the major-questions doctrine. *See* Part I, *infra*. There is no clear authority for the SEC to regulate the controversial issue of climate change, at an acknowledged cost of over $4.1 billion (a figure that is dramatically underinclusive). That conclusion is reinforced by the fact that Congress *has* given the SEC clear authority to demand other kinds of atypical disclosures, such as reporting on "conflict" minerals and executive pay. Congress has also given another agency, the Environmental Protection Agency, clear authority to require detailed emissions disclosures under certain circumstances. Congress and agencies know what clear statutory authority looks like in this realm, and the Rule lacks it.

Second, the Rule is arbitrary and capricious because it (1) fails to account for the SEC's drastic change in position regarding its supposed authority to mandate climate disclosures, (2) varies unpredictably from the proposed rule, (3) is premised on evidence the Rule admits is at-best mixed and which consists largely of new material the agency never previously disclosed, (4) imposes billions in costs while yielding no real

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benefits, and (5) is riddled with material inconsistencies. *See* Part II, *infra*.

Third, the Rule violates the First Amendment by mandating disclosures of controverted and controversial information about climate change. *See* Part III, *infra*.

STANDARD OF REVIEW

Agency action must be set aside if it is "in excess of statutory jurisdiction, authority, or limitations" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C); *see Niobrara River Ranch, LLC v. Huber*, 373 F.3d 881, 884 (8th Cir. 2004). The SEC must also consider the effect of a new rule upon "efficiency, competition, and capital formation." 15 U.S.C. §§ 77b(b), 78c(f). Failing to provide adequate support for findings on those topics renders a rule arbitrary and capricious and not in accordance with law. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

ARGUMENT

I. The Rule Violates the Major-Questions Doctrine.

Under the major-questions doctrine, when "agencies assert[] highly consequential power beyond what Congress could reasonably be

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understood to have granted," or "discover in a long-extant statute an unheralded power representing a transformative expansion of … regulatory authority," "there is every reason to hesitate before concluding that Congress meant to confer" the power claimed. *West Virginia*, 597 U.S. at 724–25 (quotation marks omitted). "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324.

Moreover, "[w]hen an agency has no comparative expertise in making certain policy judgments, … Congress presumably would not task it with doing so." *West Virginia*, 597 U.S. at 729 (cleaned up). "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The Rule checks every box to trigger the major-questions doctrine. *See* Part I.A, *infra*. The Rule purports to "derive[] its authority from an old statute employed in a novel manner, imposes [over $4.1] billion in

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compliance costs,"[3] "involves broad [scientific] considerations that lie outside of [the SEC's] core competencies, and purports to definitively resolve one of today's most hotly debated political issues," i.e., climate policy. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021); *see Biden v. Nebraska*, 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring) ("Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse."); *West Virginia*, 597 U.S. at 729–30.

Yet the Rule lacks clear statutory authorization. Instead, the SEC invokes only vague provisions authorizing mandatory disclosures when "necessary or appropriate in the public interest or for the protection of investors." *E.g.*, 15 U.S.C. § 77g(a)(1). Those provisions fail to provide the SEC with the broad authority it claims. *See* Part I.B, *infra*.

A. The Major-Questions Doctrine Applies.

The Rule "is an extraordinary exercise of regulatory authority by the Commission that involves an economically and politically significant policy decision." Comm'r Uyeda, *supra*. The Rule uses a statute that

[3] See the Stock Declaration, *supra*, ¶15 & n.1, for details on how this figure was calculated, as the Rule does not expressly sum the estimated cost components.

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authorizes the SEC to regulate financial disclosures to instead require controversial climate-policy disclosures designed to pressure companies to focus on climate issues and reduce greenhouse gas emissions. The SEC's protest that it remains "agnostic" on all-things climate, App.__ (R. Doc. 4, at 21,671), should not fool the Court, *see Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (courts are "not required to exhibit a naiveté from which ordinary citizens are free"). Every indicator for triggering the major-questions doctrine is present here in force.

First, the SEC, rather than Congress, is making a major policy decision. *West Virginia*, 597 U.S. at 724. There can be no dispute that climate change policy is a significant and hotly debated political matter. *See id.* at 731–32. The Biden Administration itself has claimed that climate issues—including disclosures—are among the most politically significant of our time. *See, e.g.*, Exec. Order No. 14,030, *Climate-Related Financial Risk*, 86 Fed. Reg. 27,967 (May 25, 2021). The government cannot have it both ways, denouncing the importance of these issues for litigation purposes only.

The Administration has accordingly pushed climate change policy initiatives in Congress, which has actively considered numerous

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proposed laws that would have required the SEC to mandate disclosure of climate risks and GHG emissions. *See, e.g.*, H.R. 1187, 117th Cong. (2021) (Corporate Governance Improvement and Investor Protection Act) (passed by House of Representatives, Roll Call No. 169, June 16, 2021); H.R. 2570, 117th Cong. (2021) (Climate Risk Disclosure Act of 2021) (reported favorably by committee, H. Rep. No. 117-39 (2021)); H.R. 3623, 116th Cong. (2019) (Climate Risk Disclosure Act of 2019) (reported favorably by committee, H. Rep. No. 116-563 (2020)); S. 1217, 117th Cong. (2021) (Climate Risk Disclosure Act of 2021) (hearings held, *Examining Oversight of the U.S. Securities and Exchange Commission: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 117th Cong. 2, 37 (2021)); S. 2075, 116th Cong. (2019) (Climate Risk Disclosure Act of 2019) (hearings held, *Oversight of the Securities and Exchange Commission: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 116th Cong. 20–21, 87–89 (2020)); S. 3481, 115th Cong. (2018) (Climate Risk Disclosure Act of 2018).

But every single one of those legislative efforts failed. And that failure is what prompted the SEC to step into the breach. Unsatisfied that "Congress [was] not acting," the Administration pledged that it

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would unilaterally act to impose policies that lawmakers rejected. The White House, *Remarks by President Biden on Actions to Tackle the Climate Crisis* (July 20, 2022), https://tinyurl.com/4vr6ky94. This included instructing agencies to push for net-zero emissions by mandating "climate-related" disclosures. 86 Fed. Reg. at 27,967. And the SEC thereafter embarked on a rulemaking that would do precisely what the failed bills sought and the Administration promised: require companies to disclose climate-related information in their ordinary securities filings so they would face pressure to alter their environmental policies and activities.

The Court "cannot ignore that the regulatory writ [the SEC] newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times." *West Virginia*, 597 U.S. at 731. The SEC decided to act on this major policy question only when Congress declined to do so.

Second, the Rule seeks to regulate a "significant portion of the American economy," *id.* at 716, 722, by imposing enormous costs that will be passed along to nearly every participant in the nation's marketplace,

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see Part II.C, *infra*. Even the SEC's unrealistically low estimates—i.e., over $4 billion in compliance costs—put the Rule in the same company as other administrative actions to which courts have readily applied the major questions doctrine. *See King v. Burwell*, 576 U.S. 473, 485 (2015) (applying major questions doctrine to issue that involved "billions of dollars in spending"); *West Virginia*, 597 U.S. at 744 (Gorsuch, J., joined by Alito, J., concurring) ("[A]n agency must point to clear congressional authorization when it seeks to … require 'billions of dollars in spending' by private persons or entities."); *BST*, 17 F.4th at 617 (applying major questions doctrine to administrative action "impos[ing] nearly $3 billion in compliance costs").

The picture is even more stark here because the SEC has drastically expanded how much of the economy will be ultimately exposed to the Rule's costs. Public companies must not only track their own emissions but must also "seek[] input from third parties" to comply with the "requir[ed] disclosure of material impacts from climate-related risks on purchasers, suppliers, or other counterparties," App.__ (R. Doc. 4, at 21,851), and Scope 2 GHG emissions disclosure requirements, App.__ (R. Doc. 4, at 21,915). That imposes "compliance burden[s]" and "increased

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costs" on entities that are not publicly listed companies. App.__ (R. Doc. 4, at 21,851. Nomad is a prime example, because it must "undertake new expenses to investigate [its] climate-related risks" to report to Liberty, Johnson Decl., *supra*, ¶¶11–12, which owns a controlling interest in Nomad that constitutes a "relationship" likely to impact Liberty, App.__ (R. Doc. 4, at 21,851).

The Rule also acknowledges that "market participants, customers, and suppliers" will "face reduced demand for their services or higher prices for their inputs as a result of the [Rule's] required disclosures." App.__ (R. Doc. 4, at 21,830). This easily qualifies as regulating a "significant portion of the American economy." *West Virginia*, 597 U.S. at 716, 722.

Third, the Rule purports to "discover in a long-extant statute an unheralded power." *UARG*, 573 U.S. at 324. The Securities Act was passed in 1933, Pub. L. No. 73-22, 48 Stat. 74, and the Exchange Act in 1934, Pub. L. No. 73-291, 48 Stat. 881. For the last 50 years, the SEC itself agreed that it could not mandate blanket climate disclosures. *See Environmental and Social Disclosure, Notice of Commission Conclusions and Rulemaking Proposals*, 40 Fed. Reg. 51,656, 51,657 (Nov. 6, 1975).

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Echoing its 1975 position, the SEC reiterated as recently as 2016 that "disclosure relating to environmental and other matters of social concern should not be required of all registrants *unless appropriate to further a specific congressional mandate* or unless, under the particular facts and circumstances, such matters are material."[4] The SEC cannot evade that limitation simply by deeming environmental and social disclosures universally "material." *See* Part I.B.2, *infra*.

Fourth, the Rule ventures far "outside of [the SEC's] lane." Comm'r Uyeda, *supra*. The Supreme Court has instructed that "[w]hen an agency has no comparative expertise in making certain policy judgments … Congress presumably would not task it with doing so." *West Virginia*, 597 U.S. at 729 (cleaned up). That is the case here, as the SEC could not be further from its expertise in enacting climate-related disclosures.

The SEC's "lane" is protecting investors and the public interest in capital markets by requiring descriptive and accurate disclosures of *financial* information that is material to investors. That is not what the Rule does, however. Rather, it "require[s] comprehensive and

[4] *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,970 (Apr. 22, 2016) (emphasis added).

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standardized climate-related disclosures," App.__ (R. Doc. 4, at 21,848), that are neither financial in nature nor material to investors.

The SEC has all but admitted that the purpose of the Rule is not protecting investors—the SEC's "lane"—but advancing a substantive climate agenda. In the SEC's view, "mandatory reporting of GHG emissions results in reduced aggregate reported emissions among affected firms." App.__ (R. Doc. 4, at 21,888). That is, the SEC attempts indirectly through a controverted disclosure regime to reduce emissions by public companies and their supply chains. *See* Comm'r Peirce, *supra* (noting the SEC's "feign[ed] agnosticism about how public companies should think about climate risks").

As Commissioner Pierce recognized, the Rule does not treat climate disclosures as ordinary financial disclosures because they are *not* ordinary financial disclosures. They are rules designed to ensure "special treatment and disproportionate space in Commission disclosures and managers' and directors' brain space." *Id.*

The Rule's sheer novelty and exceptionalism for climate policy issues compared to existing disclosure rules built up over a century

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demonstrate that the SEC has traveled far beyond the limits of its authority. For example:

- "For no other risk does the Commission require prescriptive, forward-looking disclosure of the risk's impacts on the company's strategy, business model, outlook, financial planning, and capital allocation." Comm'r Uyeda, *supra*.

- The "requirement to disclose GHG emissions and obtain an attestation report on such disclosure is in a class of its own without comparison in the Commission's disclosure regime." *Id.*

- The Rule "requires disclosure of climate-related targets and goals, even though the Commission has no similar requirements for a company's targets and goals related to other, more important matters affecting the company, such as financial performance." *Id.*

- The Rule acknowledges that "existing rules already require disclosure about material risks," but the SEC nonetheless "continue[s] to believe that a specific disclosure item focused on managing material climate-related risks is warranted." App.__ (R. Doc. 4, at 21,719).

- "In no other context is a company required to provide an explanation of expenses that exceed one percent of income before taxes

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and analyze the significant contributing factor to the expense," Comm'r Uyeda, *supra*, but the Rule specially compels that explanation for expenses related to "severe weather events and other natural conditions," App.__ (R. Doc. 4, at 21,913).

- Far from remaining "agnostic," the Rule's definitions of transition risk and climate-related risk always assume "*reduced* market demand for carbon-intensive products." App.__ (R. Doc. 4, at 21,914) (emphasis added).

- The Rule requires that registrants disclose "expenditures," "losses," and "costs" incurred because of severe weather events, App.__ (R. Doc. 4, at 21,913), but does not require disclosure of analogous financial upsides—such as, for example, during a winter storm, a natural gas company could see demand for energy spike. *See* App.__ –__ (R. Doc. 3455, at 5–8) (Letter from Christopher Wright, Chairman & CEO, Liberty Energy, to Gary Gensler, Chairman, SEC 5–8 (June 16, 2022) ("[I]t is simply incorrect to suggest that increasing extreme weather is posing a risk to businesses. If anything, the opposite is the case.")).

- Companies must describe "the process of how a company's board oversees and is informed of climate risk, how a company's

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management assesses and manages material climate risk, which management positions manage climate risk and the associated expertise, the geographic location of physical climate risk, and how climate risks affect items like a company's '[p]roducts or services,' 'suppliers,' climate mitigation activities, and 'expenditures for research and development.'" Comm'r Peirce, *supra*.

Further, the end-product of the Rule will be disclosures that are not financial in nature but instead involve "technical and policy expertise not traditionally needed in [SEC] regulatory development." *West Virginia*, 597 U.S. at 729. The Rule largely adopts "third-party framework[s]" implemented by outsiders for reporting companies' governance of climate-related "risks," *e.g.*, App.__, __ (R. Doc. 4, at 21,719, 21,725), and GHG emissions, *e.g.*, App.__ (R. Doc. 4, at 21,735), precisely because such matters are outside the SEC's bailiwick.

Further confirming that the SEC is acting far outside its statutory lane is the fact that Congress has already dictated that the EPA—not the SEC—is the agency with expertise over climate- and emissions-related issues, including the mandatory disclosures of some climate information. The Clean Air Act tasks the EPA with collecting reports from major

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emission sources and making them available to the public. *See* 42 U.S.C. § 7414; *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011). It authorizes the EPA to mandate disclosure of emissions data on a "one-time, periodic or continuous basis" from "any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the [EPA] Administrator believes may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this chapter." 42 U.S.C. § 7414(a)(1). And Congress provided that "[a]ny records, reports or information obtained under subsection (a) shall be available to the public." *Id.* § 7414(c).

Pursuant to that statutory power, the EPA already requires the disclosure of GHG emissions from many facilities, representing 85 to 90 percent of all U.S. GHG emissions, *see* EPA, *Greenhouse Gas Reporting Program and the U.S. Inventory of Greenhouse Gas Emissions and Sinks*, https://tinyurl.com/4754c7sx (last visited June 14, 2024). The SEC never explains why Congress would give the SEC broader climate-disclosure power (and through vague statutory provisions, no less) than it *expressly* gave to the EPA.

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* * *

"Given these circumstances"—i.e., the controversial political nature of climate change, the extraordinary costs of the Rule, the novel use of old statutes, the unprecedented and one-sided nature of these climate-related disclosures, and the lack of SEC expertise—"there is every reason to hesitate before concluding that Congress meant to confer on [the SEC] the authority it claims." *West Virginia*, 597 U.S. at 725 (quotation marks omitted). Because the major-questions doctrine applies, the SEC must identify *clear* authority for the Rule. It cannot do so, as explained next.

B. The SEC Lacks Clear Authority for the Rule.

1. Congress Knows How to Give Clear Authority—and Did Not Do So Here.

Congress knows how to give the SEC clear authority to mandate non-traditional disclosures. Congress has already done so for disclosures related to conflict minerals, extraction of oil and natural gas, and executive pay—but has *not* done so for climate disclosures. *See* 15 U.S.C. §§ 78m(p)(1)(A) (conflict minerals), 78m(q)(2)(A) (resource extraction), 78n(i) (executive compensation). Further, as discussed above, Congress has provided detailed GHG-emission disclosure powers to the EPA, not to the SEC. *See Part* I.A, *supra*.

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In contrast to those specific and clear statutory authorization regimes, the Climate Rule invokes only vague statutory language authorizing disclosures when "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); *see* §§ 77j(c), 78*l*(b)(1), 78m(a), 78o(d); *see* App.__–__ (R. Doc. 4, at 21,683–86)

The SEC's view of its own disclosure powers under those provisions is unpersuasive. *First*, read in context, none of the SEC's vague statutory provisions authorizes the Rule, let alone clearly. Section 77g(a)(1)'s reference to "the public interest" and "protection of investors" must be construed with the rest of that paragraph, which requires registration statements to include the specific information in "Schedule A." *See Dubin v. United States*, 599 U.S. 110, 124–25 (2023) (discussing *noscitur a sociis*); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018) (discussing *ejusdem generis*).

The SEC admits that Schedule A deals with anodyne "balance sheet and profit and loss statement[s]," App.__ (R. Doc. 4, at 21,685), and has elsewhere conceded the list is "largely financial in nature," 81 Fed. Reg. at 23,921. Thus, under 15 U.S.C. § 77g, the SEC cannot require disclosures of just *anything* it thinks will be in the public interest. The

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information must be of the same nature as disclosures Congress dictated under Schedule A. *See Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 763–64 (2021); App.__–__ (R. Doc. 443, at 7–11) (Andrew N. Vollmer, *The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules* (Apr. 12, 2022)).

Likewise, the grant of disclosure power in § 78*l* is cabined by the eleven expressly listed types of information that must be disclosed, which focus on management and balance-sheet information. 15 U.S.C. § 78*l*(b)(1)(A)–(K). And the SEC's power in § 78m incorporates that same limitation by allowing for disclosure of updated information required by "section 78*l* of this title." *Id.* § 78m(a)(1). It is also limited by a restriction to financial disclosures typically "shown in the balance sheet and the earnings statement." *Id.* § 78m(b)(1).

These provisions provide clear authority only for standardized disclosure of management and accepted "balance-book" financial figures. But climate data and risks are of a completely different type. They are not measurements of any traditional financial performance or indicator, and, in many cases, they are entirely outward looking, rather than

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revealing anything about a company's own financial performance. *See* App.__–__ (R. Doc. 443, at 15–17) (Vollmer, *supra*).

Second, the Court also "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133. As noted above, Congress already provided detailed climate-disclosure powers to the EPA, which is the logical location for such authority. *See* Part I.A, *supra*; *West Virginia*, 597 U.S. at 729. The point is not that the EPA regime overlaps entirely with the Climate Rule, but rather that it defies "common sense" that Congress would have given the SEC the authority to demand broader environmental disclosures (via vaguer statutes) than it already gave to the EPA.

Third, the SEC's view would risk rendering several other statutory provisions redundant, as there would be no reason for Congress to expressly provide authorization for mandating disclosures about things like executive pay and conflict minerals if the SEC already could clearly require such disclosures under vague "public interest" provisions. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645

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(2012) ("[I]f possible, effect shall be given to every clause and part of a statute.").

* * *

We know what "clear congressional authorization" looks like in this context, *West Virginia*, 597 U.S. at 723, and there is none here—a point long conceded by the SEC itself, as explained above. The SEC is accordingly left with at-best "plausible" interpretations of generic statutes, which is precisely what the Supreme Court rejected in other major-questions cases. *Id.*; *Ala. Ass'n of Realtors*, 594 U.S. at 763–64. This Court should do the same here.

2. The SEC Cannot Ignore Materiality or Deem Certain Non-Financial Information to Be Material.

The Rule lacks authority for another reason: it compels disclosures of *immaterial* information. References to "the public interest" and "protection of investors" in the Securities Act and Exchange Act, 15 U.S.C. §§ 77g(a)(1), 77j(c), 78*l*(b)(1), 78m(a), 78o(d), provide authority only to compel the disclosure of information that is material to a reasonable investor, who buys stocks "expect[ing] profits," *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946).

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The Supreme Court has indicated that the "public interest" is not furthered by requiring companies "simply to bury the shareholders in an avalanche of trivial information," which would "hardly [be] conducive to informed decisionmaking" and would "accomplish more harm than good." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 249 (1988); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970). The long-understood materiality requirement is thus part-and-parcel of the "public interest" text in those statutes. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011).

Not "all facts which a reasonable shareholder might consider important" meet the high threshold for materiality. *TSC Indus.*, 426 U.S. at 445. Given that companies must *already* disclose specific issues that are material pursuant to other SEC regulations,[5] why did the SEC issue the Rule at all? The answer is obvious: the SEC wants to mandate disclosure of GHG emissions and climate risks even when they are not truly material to a reasonable investor focusing only on profits, and thus

[5] *See, e.g.*, 17 C.F.R. §§ 229.101(c), 229.103(c)(3), 229.303(a), 230.408, 240.12b-20.

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need not be disclosed under current law. *W.J. Howey Co.*, 328 U.S. at 298–99.

The problem isn't that companies are omitting truly material climate information. The SEC conspicuously avoids justifying the Rule on the basis that any particular company has failed to do so. *E.g.*, App.__ (R. Doc. 4, at 21,691). Rather, as the SEC and institutional investors see it, public companies simply aren't focusing enough attention on the SEC's political cause *du jour*. *See* App.__ n.102 (R. Doc. 4, at 21,677 n.102) (e.g., BlackRock, CalPERS, Harvard Mgmt.).

To force companies to talk about climate change, the SEC had to get creative in its approach to materiality, as summarized by the chart of Rule excerpts included in the Addendum. Add.255–66. But that creativity puts the Rule beyond the SEC's statutory authority to mandate only material disclosures.

The Rule's unlawful approach to materiality falls into several categories. *First*, for several requirements, the Rule does not even pretend to require materiality. App.__ (R. Doc. 4, at 21,915) (board's oversight of climate-related risks), App.__ (R. Doc. 4, at 21,913) (expenditures for "severe weather events and other natural conditions"

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greater than $100,000); App.__ (R. Doc. 4, at 21,915) (management's "positions" and "committees" for managing climate risk), App.__ (R. Doc. 4, at 21,915) ("geographic location" of physical risks). For others, the Rule invents new, vaguely lower standards than actual materiality. App.__ (R. Doc. 4, at 21,915) ("potential material impacts").

Second, throughout the Rule, the SEC directs companies to disclose information that has material impacts "*on*" or is material "*to*" specific company activities, even when not material to reasonable investors or to the company as a whole. App.__ (R. Doc. 4, at 21,915) ("material impacts … on the registrant's strategy, business model, and outlook"); App.__ (R. Doc. 4, at 21,915) ("material impacts on … suppliers, purchasers, or counterparties"), App.__ (R. Doc. 4, at 21,916) ("material to how [the registrant] evaluates and manages a climate-related risk").

By centering the materiality inquiry on discrete sub-issues and away from what the reasonable investor requires, the Rule inflates the significance of otherwise immaterial information. That contravenes the Supreme Court's longstanding approach to materiality, which is focused solely on what is material to the reasonable investor seeking profits. *See TSC Indus.*, 426 U.S. at 448–49; *W.J. Howey Co.*, 328 U.S. at 298–99.

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Third, even when the Rule purports to require "materiality," it does so "in name only." Comm'r Peirce, *supra*. Most notably, the Rule says a company must disclose Scope 1 and 2 emissions only if they are material, App.__ (R. Doc. 4, at 21,916), but then deems materiality triggered when a company faces climate-change "transition risk," App.__ (R. Doc. 4, at 21,733), which in turn is defined so broadly that it sweeps in virtually every covered company, including those that otherwise have no obligation to report such information pursuant to pre-existing SEC rules.

For example, the SEC says there is transition risk when "emissions are currently or are reasonably likely to be subject to additional regulatory burdens," App.__ (R. Doc. 4, at 21,733), like when "governments including the United States and others throughout the world have made public commitments to transition to a lower carbon economy," such as the non-binding Paris Agreement, App.__ & n.34 (R. Doc. 4, at 21,672 & n.34). Nearly every public company operates in a country that is at least "reasonably likely" to adopt *non-binding* climate agreements.

In fact, the Rule's requirements will *themselves* presumably create transition risk, allowing the SEC to use the Rule to bootstrap its *own*

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reporting requirements. As noted, the Rule tautologically explains that a transition risk exists when a company's emissions are "reasonably likely to be subject to additional regulatory burdens." App.__ (R. Doc. 4, at 21,733).

That is just the start, though. The Rule's definition of "transition risk" is all-encompassing. It "include[s], but [is] not limited to": "increased costs attributable to climate-related changes in law or policy, reduced market demand for carbon-intensive products leading to decreased sales, prices, or profits for such products, the devaluation or abandonment of assets, risk of legal liability and litigation defense costs, competitive pressures associated with the adoption of new technologies, reputational impacts (including those stemming from a registrant's customers or business counterparties) that might trigger changes to market behavior, changes in consumer preferences or behavior, or changes in a registrant's behavior." App.__ (R. Doc. 4, at 21,914). Under that definition, for example, if a company's "customers [and] business counterparties" are deemed unpopular by environmental groups, that's a transition risk, and (for reasons entirely unexplained) the company likely

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must therefore disclose its Scope 1 and 2 emissions. App.__ (R. Doc. 4, at 21,914).

The Rule then goes out of its way to emphasize that companies "may be exposed to a material transition risk" if they operate "in a jurisdiction that has made a GHG emissions reduction commitment," App.__, __ (R. Doc. 4, at 21,694, 21,915), which will cover nearly every public company. The Rule makes that example the leading circumstance when Scope 1 and 2 emissions are likely to be material. App.__ (R. Doc. 4, at 21,733).[6] At one point, the Rule even slips and says the SEC is imposing "mandatory disclosure of Scope 1 and Scope 2 emissions data." App.__ (R. Doc. 4, at 21,858). As Commissioner Peirce put it, the SEC thus "decorated the final rule with materiality ribbons" that scarcely veil its true nature. Comm'r Peirce, *supra*.

There is another serious flaw with the Rule's approach to materiality, especially for climate risks. Information can be material only

[6] The one example the Rule musters of when Scope 1 and 2 disclosures allegedly *won't* be material is when a new law "restricts the sale of [a company's] products based on the technology it uses." App.__ (R. Doc. 4, at 21,733). But that isn't really a climate-related transition risk at all, proving Petitioners' point that the SEC is just backdooring mandatory disclosure of Scope 1 and 2 data.

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if it is "sufficiently specific." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 185 (2d Cir. 2014). As Commissioner Peirce explained, however, the Rule mandates "authoritative-looking results" that are ultimately "high-priced guesses" that will "spam investors" with useless information, Comm'r Peirce, *supra*.

Climate risks are mere guesswork because they rely on subjective modeling about events with horizons occurring over decades, premised on a panoply of subjective assumptions, 87 Fed. Reg. at 21,445, 21,427; Comm'r Peirce, *supra*. There is great uncertainty about the risks that will (or will not) flow from temperature changes. *See* App.__–__ ¶¶37–40 (R. Doc. 3902, at 105–06 ¶¶37–40) (Letter from Amb. C. Boyden Gray, to Gary Gensler, Chairman, SEC) (Dr. Roy Spencer Decl.). Climate models are consistently wrong and "have also historically overpredicted temperature rise." App.__ ¶47 (R. Doc. 3902, at 108, ¶47). Even if future temperatures themselves could be predicted with certainty, that is not "what businesses are being asked to assess. Instead, they are asked to apply extrapolations from these models to predict the effect of long-term weather changes on business operations." App.__ ¶49 (R. Doc. 3902, at 108, ¶49).

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Other courts have held that this defeats materiality. For example, when New York sued Exxon, alleging it had failed to disclose material information about contributions to climate change, the court found that none of the information was material because "[n]o reasonable investor during the period from 2013 to 2016 would make investment decisions based on speculative assumptions of costs that may be incurred 20+ or 30+ years in the future with respect to unidentified future projects." *People ex rel. James v. Exxon Mobil Corp.*, 119 N.Y.S.3d 829, *20 (Sup. Ct. 2019).

* * *

The proposed rule justified mandatory, one-sided climate disclosures on the theory that *every company* faces transition risk because climate change is supposedly an imminent world-ending catastrophe. *See* 87 Fed. Reg. at 21,336. Having realized it cannot simply demand blanket climate disclosures, the SEC tries to backdoor the same thing by omitting or incanting materiality. Either way, the Rule is unlawful because it lacks clear statutory authority and contradicts Supreme Court precedent on materiality.

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II. The Rule Is Arbitrary and Capricious for Several Reasons.

The Rule is also arbitrary and capricious for several independent reasons, any one of which is sufficient to vacate the Rule. *See, e.g.*, *Bus. Roundtable*, 647 F.3d at 1148.

A. The SEC Failed to Acknowledge Its Change in Position.

The Rule does not explain the switch in the SEC's position, held for decades, that it lacks authority to impose broad climate disclosures. *See* Part I.A, *supra*. An agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

For 50 years, the SEC stated that it could not mandate blanket climate disclosures. The SEC declared in 1975 that "[n]owhere" in the relevant statutes "is there any suggestion of an intention to create such a wide ranging environmental control over the private sector" and that "[s]uch a major purpose would hardly have gone wholly unmentioned" by Congress. 40 Fed. Reg. at 51,662.[7] The SEC said the same thing in 2016:

[7] *See also* A.A. Sommer, Jr., *The U.S. Securities and Exchange Commission Disclosure Study*, 1 J. Comp. Corp. L. & Sec. Reg. 145, 149 (1978) (former SEC Commissioner explaining the advisory committee's

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"[D]isclosure relating to environmental and other matters of social concern should not be required of all registrants *unless appropriate to further a specific congressional mandate* or unless, under the particular facts and circumstances, such matters are material." 81 Fed. Reg. at 23,970 (emphasis added).

But in the Rule, the SEC claims it hasn't changed its position at all, again insisting the Rule is just another ordinary disclosure regime. App.__–__ (R. Doc. 4, at 21,686–87). That is wrong. *See* Part I.A, *supra*. In any event, the SEC cannot dispute that it has never before required such voluminous climate disclosures from nearly every public company, least of all by simply deeming emissions and climate risk to be material across the board, in contradiction of the 2016 statement that materiality must be determined company-by-company.

Accordingly, even if the SEC does have statutory authority to impose the Rule, the Rule is still arbitrary and capricious because the SEC denies that it has performed an about-face in agency policy. *See*

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conclusion that the SEC "should not try to use its powers to compel disclosure concerning, for instance, social or environmental matters, hiring practices, and the like, unless it could be shown that such matters were material to investors").

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Shazi v. Wilkinson, 988 F.3d 441, 449 (8th Cir. 2021) ("An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.") (cleaned up).

B. The Rule Relies on "At Best Mixed" and New Evidence.

When there is "at best mixed" evidence supporting the SEC's claim that the Rule "will result in improved board and company performance and shareholder value," the SEC fails "its statutory responsibility to determine the likely economic consequences of [the Rule] and to connect those consequences to efficiency, competition, and capital formation," as required by the Securities Act and the Exchange Act. *Bus. Roundtable*, 647 F.3d at 1148, 1151 (cleaned up); *see* 15 U.S.C. §§ 77b(b), 78c(f).

The Rule flunks this test. The SEC claims climate risks "significantly affect the company's financial performance," App.__ (R. Doc. 4, at 21,669), but then admits that *no study* has shown an overall positive effect on profitability or stock price as a result of mandating climate disclosures, while numerous studies found overall *negative* effects or no effect, App.__–__ (R. Doc. 4, at 21,851–52). That is not even "mixed" evidence—it is one-sided evidence *against* the Rule's

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fundamental premise. Forcing disclosures of climate information hurts stock performance and profitability. If there were ever a lack of adequate evidence supporting a multi-billion-dollar rule, this is it.

The SEC also concedes the evidence of a link between a company's GHG emissions and its stock performance is "seemingly contradictory," App.__ n.2745 (R. Doc. 4, at 21,849 n.2745), which is effectively a concession that there is "at best mixed" evidence of yet another core premise for the Rule.

The Rule also justifies itself on the theory that higher temperatures, droughts, and "exposure to physical climate risk" all reduce firm revenues, and that there is supposedly a relationship between climate information and asset pricing. App.__–__ nn.2737–46 (R. Doc. 4, at 21,848–49 nn.2737–46). But the SEC lacks proper record evidence for this point, too. Of the 34 articles cited for the Rule's core "benefits," 27 were *never* mentioned in the proposed rule. App.__–__ nn.2737–50 (R. Doc. 4, at 21,848–49 nn.2737–50). That alone renders the Rule unlawful. "[S]tudies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."

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Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008); *see, e.g.*, *Texas v. EPA*, No. 23-60069, 2023 WL 7204840 at *8–9 (5th Cir. May 1, 2023). The failure to do so is a "serious procedural error" because it prevents the public from commenting on the rigor of those studies. *Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007). And that is no idle concern here, given that public comment revealed the weaknesses in so many other alleged justifications for the Rule, as described above.

The SEC also claims the Rule is justified by individual investor demand, but the SEC points overwhelmingly to institutional and organizational comment letters. App.__–__ nn.99–108 (R. Doc. 4, at 21,677–78 nn.99–108). In any event, mere demand is insufficient because not "all facts which a reasonable shareholder might consider important" are actually *material*, especially where they lack a demonstrated connection to the financial performance that a "reasonable investor" seeks. *TSC Indus.*, 426 U.S. at 445. Just because some organizations, or even company officers themselves, think information is important does not make that information material *to a reasonable investor*—i.e., an investor seeking profits.

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In the end, each of the core justifications for the Rule is unsupported by proper and adequate evidence. The Rule should be vacated.

C. The Rule Imposes Extraordinary Costs, with No Real Benefits.

Not only is the Rule unsupported by any proper evidence, but it imposes billions in costs with no real benefits. The Rule does not provide material information to the reasonable investor focused on profits, even as it forces public companies, their suppliers, their customers, and their investors to spend billions to comply with its onerous disclosure requirements, which Commissioner Peirce described as yielding nothing more than "high-priced guesses." Comm'r Peirce, *supra*.

The Rule claims investors are clamoring for this information, yet the Rule fails to cite even one specific example of a company omitting material climate information from its disclosures. The SEC has thus "failed to substantiate [its] conclusion that a problem ever existed." *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985).

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Against this dearth of benefits there is a mountain of costs. The SEC's cost estimates added up to $4.1 billion in direct costs.[8] And that is still deceptively low. For example, the Rule lowers its estimate for "average" annual costs by including years in which certain key requirements do not apply. To calculate the Rule's "average[]" "annual compliance cost[]," the Rule estimated annual costs "averaged over the first ten years of compliance." App.__ (R. Doc. 4, at 21,875). The catch? For years one and two, the Rule recorded "$0" in compliance costs for the Rule's GHG emissions disclosure requirement for large-accelerated filers and non-exempt accelerated filers, respectively, likely because (though the Rule did not explain so) those filers' compliance obligations phase in during those years. App.__ & nn.1–2, __ & nn.1–2 (R. Doc. 4, at 21,899 & nn.1–2, 21,900 & nn.1–2) (PRA Tbls. 4A & 4B). That resulted in a misleadingly low cost estimate.

The Rule's cost-free accounting for GHG emissions—one of its costliest elements—in years one and two flies in the face of the SEC's earlier assumption that those filers would "incur the[] costs" of compliance during the phase-in period. App.__ (R. Doc. 4, at 21,747).

[8] *See* note 3 and accompanying text, *supra*.

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Indeed, the initial costs incurred during that phase-in period of developing the necessary infrastructure, hiring and training employees, and retaining external consultants to track and report GHG emissions and determine whether they are material may even be greater than the cost of actual compliance. Stock Decl., *supra*, ¶¶21, 23–24.

Accordingly, at best, the Rule imposes billions in costs, with minimal benefits. That renders it arbitrary and capricious. *See Bus. Roundtable*, 647 F.3d at 1150–51 (holding that imposing billions in costs for no meaningful resulting benefits is paradigmatic arbitrary and capricious action).

D. The Final Rule Changed Dramatically from the Proposed Rule.

Under blackletter administrative law, "the final rule the agency adopts must be a logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quotation marks omitted). "The object, in short, is one of fair notice." *Id.* This means "the Proposed and Final Rule must be alike in kind so that commentators could have reasonably anticipated the Final Rule." *Mock v. Garland*, 75 F.4th 563, 584 (5th Cir. 2023); *see Citizens Telecomms. Co. of Minn., LLC*

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v. FCC, 901 F.3d 991, 1005 n.11 (8th Cir. 2018) (applying this "fair notice inquiry").

The Rule, however, "differs quite dramatically from the propos[ed rule]." Comm'r Peirce, *supra*. For example, the Rule repeatedly relied on novel (and unlawful) approaches to materiality that had not previously been proposed—and thus were not subject to public comment. *See* Part I.B.2, *supra*. And this novel approach to materiality in the final rule is anything but a minor change—it effectively makes all Scope 1 and 2 disclosures mandatory, even when those disclosures are not *actually* material.

The Rule also introduced for the first time a new requirement that registrants collect data about "climate-related risks on [registrants'] purchasers, suppliers, or other counterparties." App.__ (R. Doc. 4, at 21,851). This new requirement appears to be an attempt to backdoor the extensive requirements for collecting third-party data that disclosing Scope 3 GHG emissions would have required, as included in the proposed rule. App.__–__ (R. Doc. 4, at 21,732–33). But the public had no opportunity to comment on this new requirement, which substantially changes the regulatory regime.

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The overhaul of the proposed rule denied the public "fair notice," *Citizens Telecomms.*, 901 F.3d at 1005 n.11, and the "opportunity to address anything that closely resembles [the] final rule," Comm'r Peirce, *supra*. In fact, the SEC has essentially admitted as much. The Rule points out that "[m]any commenters provided aggregate costs estimates that did not include certain elements required by the final rules." App.__ (R. Doc. 4, at 21,871). That was because many of those elements first appeared in the final Rule itself.

The SEC's prior briefing at the Fifth Circuit also effectively conceded that the final Rule was not a "logical outgrowth of the rule proposed." *Long Island*, 551 U.S. at 174 (quotation marks omitted). The SEC argued that Petitioners' earlier request that the SEC stay the *proposed rule* did not qualify as a request to stay the *final Rule* because the Rule had changed so dramatically in the meantime. The SEC claimed it did not have a sufficient "opportunity to address specific arguments for a stay of the [Rule] *as adopted*." SEC Opp. to Pets.' Mot. for Admin. Stay at 6, *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 13, 2024) (emphasis added), ECF No. 42. In other words, the substance of the Rule

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changed so much that even the SEC itself could not have "reasonably anticipated the Final Rule" based on the proposal. *Mock*, 75 F.4th at 584.

If the SEC itself couldn't predict the Rule based on the proposed version, there is no way the public could. That renders the Rule arbitrary and capricious, requiring it to be vacated.

E. The Rule Is Riddled with Inconsistencies.

Perhaps due to the drastic changes made from the proposed version, the Rule is riddled with material inconsistencies that require vacatur. *See, e.g.*, *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (an agency's "reasoning cannot be internally inconsistent").

For example, the Rule purports to exclude the proposed requirement that companies disclose the data of unaffiliated third parties, commonly referred to as Scope 3 emissions, because of "serious concerns" that "data … in the control of third parties" would be "difficult[to] collect[]," and impose costs on "private companies" not themselves subject to SEC disclosure obligations. App.__–__ (R. Doc. 4, at 21,728–29). But then the Rule inexplicably requires that companies nonetheless disclose "material impacts *on* … suppliers, purchasers, or counterparties." App.__ (R. Doc. 4, at 21,915) (emphasis added). That

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dictates data reporting from the very same third parties for which the Rule elsewhere purported to disclaim coverage due to collection difficulties.

The Rule's internal inconsistencies continue with its assessment of the ease of obtaining the requisite assurance from third-party auditors regarding the accuracy of registrants' GHG emissions reporting. The assurance requirement is a significant aspect because, for the first time, registrants will be required to provide auditor attestation for non-financial statement reporting. App.__ n.1128 (R. Doc. 4, at 21,740 n.1128). When it helped the SEC to downplay concerns about registrants' ability to obtain the requisite assurance over GHG emissions, the Rule stated that the assurance field for GHG emissions is "far from nascent." App.__ (R. Doc. 4, at 21,746). But then in the cost-benefit analysis, the Rule emphasized just the opposite, stating that the field "is fairly new" and "still maturing," App.__ (R. Doc. 4, at 21,862), and thus "new assurance providers will enter the market" and lead to "reductions in the costs" of obtaining assurance, App.__ (R. Doc. 4, at 21,747). Within the same Rule, the SEC starkly changed its position based solely on whether it helped the agency.

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Finally, as discussed in Part II.C, *supra*, the SEC's assumption that the cost of complying with the Rule's GHG emissions requirement during its phase-in period would be "$0" was flatly inconsistent with its earlier assumption that companies would "incur the[] costs" of compliance during the phase-in period. App.__ (R. Doc. 4, at 21,747).

These inconsistencies are yet another reason why the Rule is arbitrary and capricious.

III. The Rule Violates the First Amendment.

The First Amendment also prohibits the SEC from forcing corporate disclosures and discussions on controversial political issues. "[F]reedom of speech includes both the right to speak freely and the right to refrain from speaking at all," and "the latter is perhaps the more sacred of the two rights." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). Because the Rule infringes upon this "sacred" right, it is subject to—and fails—the highest level of scrutiny under the First Amendment. But even if the Rule were subject only to some lower level of scrutiny, it would fail that test, as well.

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A. The Rule Is Subject to Strict Scrutiny As a Content-Based Regulation Compelling Speech.

Laws that compel speech that the speaker "would not otherwise make" are "content-based regulation[s] of speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *NIFLA v. Becerra*, 585 U.S. 755, 766–67 (2018) (holding unconstitutional a law requiring pregnancy crisis centers to inform patrons of state abortion services). As such, they are "presumptively unconstitutional" and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also Telescope Media*, 936 F.3d at 754 ("Laws that compel speech or regulate it based on its content are subject to strict scrutiny."). Strict scrutiny applies even where the content compelled speech consists of "statements of fact the speaker would rather avoid," *B.W.C. v. Williams*, 990 F.3d 614, 619 (8th Cir. 2021) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)).

The Rule undoubtedly compels companies to engage in speech they would not otherwise make. It requires them, for example, to "describe the actual and potential material impacts of any climate-related risk." App.__ (R. Doc. 4, at 21,698). It also requires them to "describe a transition plan," App.__ (R. Doc. 4, at 21,703), and "disclose any climate-related target or

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goal," App.__ (R. Doc. 4, at 21,723). With these provisions, companies lose their ability to tailor their own speech and are instead forced to engage in climate-related "risk" discourse, even where that discourse is not material to investors. *See* Part I.B.2, *supra*.

Worse, this compelled speech is fundamentally political in nature. The Biden Administration itself has insisted that climate change is one of the biggest political issues facing the nation. *See* Part I.A, *supra*. A company's views about climate conditions and future climate policy necessarily inform every assessment of its climate-related risk. So even if this speech were not compelled, the Rule would still trigger strict scrutiny because it would *burden* companies' speech on a political issue. *See Miller v. Thurston*, 967 F.3d 727, 739 (8th Cir. 2020) ("Generally, laws that burden political speech are subject to strict scrutiny.").

Compelled speech escapes strict scrutiny only in rare circumstances where there is "persuasive evidence of a long … tradition" of that speech receiving less protection. *NIFLA*, 585 U.S. at 767 (cleaned up). There is no such tradition here. To the contrary, the D.C. Circuit has held that the SEC cannot "regulate otherwise protected speech using the guise of securities laws." *NAM v. SEC*, 748 F.3d 359, 372 (D.C. Cir. 2014) ("*NAM*

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I"). That court cautioned that "requir[ing] issuers to disclose the labor conditions of their factories abroad or the political ideologies of their board members, as part of their annual reports," for example, would be "*obviously repugnant to the First Amendment* [and] should not face relaxed review just because Congress used the 'securities' label." *NAM v. SEC*, 800 F.3d 518, 555 (D.C. Cir. 2015) ("*NAM II*") (emphasis added). Moreover, that the SEC is plainly regulating outside the "heartland" of securities laws only confirms the need to apply the highest level of scrutiny. *Cf. Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 145, 159 (2023) (explaining that trademark use "within the heartland of trademark law … does not receive special First Amendment protection").

To be sure, *NIFLA* recognized that laws that require disclosure of "purely factual and uncontroversial information" in "commercial speech"—i.e., commercial advertising—"about the terms under which … services will be available" have sometimes been subject to lesser scrutiny. 585 U.S. at 768 (citing *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)). But the Rule is wholly unlike those laws.

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The Rule requires disclosure of information that is "hardly factual and non-ideological." *NAM II*, 800 F.3d at 530 (quotation marks omitted). Not only is climate change in general a politically charged matter, *see* Part I.A, *supra*, but the frameworks the Rule relies on, such as that of the Task Force on Climate-Related Financial Disclosures, App.__, __–__, __, __ (R. Doc. 4, at 21,680, 21,691–92, 21,719, 21,725), are also partisan and controversial, *see* App.__–__ (R. Doc. 3902, at 33–35). Whether emissions and climate change are material to corporate performance is a strongly debated political matter, and the disclosures are incredibly subjective and manipulable. *See* Part I.B.2, *supra*.

In addition to being controversial, the Rule is anything but "evenhanded." *AMI v. USDA*, 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment). It does not address directly analogous matters that are contrary to the SEC's favored view on climate and environmental matters—e.g., the SEC doesn't contemplate the risk that the government might *stop* providing subsidies to "green" companies, or that severe weather events often *increase* company profits, *see* Part I.A, *supra*. That kind of blinkered approach is a tell-tale sign of a controversial regime masquerading as a disclosure rule. And given that

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the SEC is pushing its favored view, it will be rational for companies to "conclude that the safe course [is] to avoid controversy," *Telescope Media*, 936 F.3d at 754, by simply giving in and discussing climate risk through the framework and lens mandated by the Rule so that it can avoid agency scrutiny.

Even if the compelled disclosures were uncontroversial, they would still not be subject to a lesser level of scrutiny because they are not regulating "commercial speech." Commercial speech merely "propos[es] a commercial transaction" and is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–62 (1980). As this Court has explained, "three factors [] govern whether speech is commercial rather than expressive: '(i) whether the communication is an advertisement, (ii) whether it refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech.'" *Dryer v. NFL*, 814 F.3d 938, 943 (8th Cir. 2016) (quoting *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999)).

None of these factors are present here. Climate disclosures are not advertisements, nor do they refer to specific products and services to

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promote future commercial transactions for those products and services. Moreover, the compelled disclosures are the opposite of economically motivated—they are motivated by the social interests of policymakers and activist investors who seek to drive social policy change.

B. The Rule Fails Strict Scrutiny and Would Fail Even Lesser Forms of Review If They Applied.

The Rule cannot survive strict scrutiny, which requires the government "at a minimum, to prove" that the regulation "is narrowly tailored to serve a compelling state interest." *Telescope Media*, 936 F.3d at 754 (cleaned up).

There is no sufficient compelling government interest in using the securities "disclosure regime as a means for driving social change," Comm'r Uyeda, *supra*. Even if there were, the SEC has not demonstrated that requiring such exhaustive disclosures yields a compelling, or even an important, effect. In fact, the evidence is to the contrary. *See* Part II.C, *supra*. At most, the disclosures "tilt public debate in a preferred direction," but that is precisely what the First Amendment protects against. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011).

Moreover, "it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information.

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After all, that would be true of any and all disclosure requirements." *AMI*, 760 F.3d at 31 (Kavanaugh, J., concurring in the judgment). Nor is the Rule's invocation of putative consumer interest sufficient, *see, e.g.*, App.__–__ (R. Doc. 4, at 21,679–80), because "'consumer curiosity alone is not a strong enough state interest' to sustain a compelled commercial disclosure," even when it is of accurate, factual information, *AMI*, 760 F.3d at 32 (Kavanaugh, J., concurring in the judgment); *see also Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) ("We are aware of no case in which consumer interest alone was sufficient[.]").

Even under lessened scrutiny, "the SEC ha[s] the burden of demonstrating that the measure it adopted would 'in fact alleviate' the harms it recited 'to a *material degree*.'" *NAM II*, 800 F.3d at 527 (emphasis added). But the Rule mandates broad disclosures that are untethered from "material[ity]," and there is scant evidence (at best) that the disclosures would "in fact alleviate" any purported harms. *Id.*; *see* Part II.B–C, *supra*.

For its part, the Rule addresses narrow tailoring only with *ipse dixit* that its requirements are "appropriately tailored." App.__ (R. Doc. 4, at 21,687). But as explained above, the Rule "is anything but a delicate

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exercise" of the SEC's disclosure power. *BST*, 17 F.4th at 612 (cleaned up). It mandates extraordinarily broad, non-financial disclosures unlinked from materiality.

Finally, at the very least, concerns about the constitutionality of the Rule caution strongly against the SEC's broad interpretations of its statutory authority to mandate disclosure. *See* Part I.B, *supra*. The Court should avoid an interpretation of the relevant Securities and Exchange Acts' provisions that would likely render them unconstitutional. *See, e.g.*, *Sisney v. Kaemingk*, 15 F.4th 1181, 1199 (8th Cir. 2021) ("When a federal court is dealing with a federal statute challenged under the First Amendment as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.") (cleaned up).

Constitutional avoidance thus reaffirms that the Court should hold that the Rule lacks clear statutory authority.

CONCLUSION

The Court should vacate the Rule.

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June 14, 2024

Respectfully submitted,

/s/ R. Trent McCotter

Katherine C. Yarger
LEHOTSKY KELLER COHN LLP
700 Colorado Blvd # 407
Denver, CO 80206

R. Trent McCotter
Counsel of Record
Jonathan Berry
Michael Buschbacher
Jared M. Kelson
Caleb Orr
BOYDEN GRAY PLLC
801 17th Street NW, Suite 350
Washington, DC 20006
202-706-5488
tmccotter@boydengray.com

Counsel for Petitioners

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CERTIFICATE OF COMPLIANCE

Pursuant to 8th Cir. R. 28A(h)(2), the electronic version of this addendum has been scanned for viruses and is virus-free.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11,364 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

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Dated: June 14, 2024

/s/ R. Trent McCotter
R. Trent McCotter

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

June 14, 2024

/s/ R. Trent McCotter
R. Trent McCotter

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