No. 24-1685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LEGAL AND POLICY CENTER
and
OIL AND GAS WORKERS ASSOCIATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONERS' OPENING BRIEF

Jacob Huebert
M.E. Buck Dougherty III
James McQuaid
LIBERTY JUSTICE CENTER
13341 W. U.S. Highway 290
Building 2
Austin, Texas 78737
512-481-4400
jhuebert@ljc.org
bdougherty@ljc.org
jmcquaid@ljc.org

James Baehr
PELICAN INSTITUTE FOR PUBLIC POLICY
400 Poydras Street, Suite 900
New Orleans, Louisiana 70130
504-475-8704
james@pelicaninstitute.org

Counsel for Petitioners

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Petitioners make the following disclosures:

The National Legal and Policy Center has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Oil and Gas Workers Association has no parent corporation, and no publicly held company owns 10% or more of its stock.

SUMMARY AND ORAL ARGUMENT STATEMENT

This case challenges a rule recently promulgated by the Securities and Exchange Commission titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors." 89 Fed. Reg. 21,668 (Mar. 28, 2024) ("Disclosure Rule"). The Rule generally requires detailed disclosures from publicly listed companies about purported climate-related issues, including direct and indirect greenhouse gas emissions, weather events, and much else. Companies already had to disclose items that were "material" to their finances, so the point of this Rule—including its recasting of "material" to include speculative "transition risks"—is to push an environmental agenda.

Whether that agenda is good or bad policy, the SEC lacks statutory authority to pursue it under the guise of securities regulations. The Rule implicates major questions about climate change and environmental policy, but there exists no statutory authority—clear or otherwise—for SEC to answer those questions. And compelling companies to disclose controversial climate change views violates the First Amendment.

Because of the case's importance and complexity, oral argument is warranted, and Petitioners suggest 20 minutes per party.

Appellate Case: 24-1685 Page: 3 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

TABLE OF CONTENTS

Corporate Disclosure Statement i

Summary and Oral Argument Statement ii

Table of Authorities iv

Jurisdictional Statement 1

Statement of the Issues 2

Introduction 3

Statement of the Case 6

A. Statutory and Regulatory Background 6

B. The Disclosure Rule 14

C. Petitioners 16

Standard of Review 18

Summary of Argument 19

Argument 20

I. The Securities Act and the Exchange Act do not authorize the Disclosure Rule 20

A. The Acts require companies to disclose financial information, not environmental information. 21

B. In context, statutory authorization to act "in the public interest or for the protection of investors" does not transform SEC's purview. 27

C. The major questions doctrine confirms that Congress did not authorize SEC to promulgate a Rule with vast political and economic implications. 30

II. The Rule compels speech in violation of the First Amendment. 49

A. Strict scrutiny applies. 50

B. The Rule fails any heightened scrutiny. 56

Conclusion 60

Appellate Case: 24-1685 Page: 4 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

TABLE OF AUTHORITIES

Cases

303 Creative LLC v. Elenis,
600 U.S. 570 (2023) 53

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.,
594 U.S. 758 (2021) 30, 31, 47, 49

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 7

Brown v. Entm't Merchs. Ass'n,
564 U.S. 786 (2011) 56, 58

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 58

Bus. Roundtable v. SEC,
905 F.2d 406 (D.C. Cir. 1990) 2, 27, 28

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,
447 U.S. 557 (1980) 2, 55, 59

Chadbourne & Parke LLP v. Troice,
571 U.S. 377 (2014) 8

Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund,
590 U.S. 165 (2020) 28

Davis v. Mich. Dep't of Treasury,
489 U.S. 803 (1989) 28

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 7, 8

Espinoza v. Mont. Dep't of Revenue,
591 U.S. 464 (2020) 56

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) ..... passim

Freeman v. Quicken Loans, Inc.,
566 U.S. 624 (2012) 29

Appellate Case: 24-1685 Page: 5 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Fulton v. City of Philadelphia,
593 U.S. 522 (2021) 57

Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy,
764 F.2d 896 (D.C. Cir. 1985) 1

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 56

Gonzales v. Oregon,
546 U.S. 243 (2006) 32, 45

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 51

In re Time Warner Inc. Sec. Litig.,
9 F.3d 259 (2d Cir. 1993) 9

Int'l Bhd. of Teamsters v. Pena,
17 F.3d 1478 (D.C. Cir. 1994) 1

Janus v. AFSCME, Council 31,
585 U.S. 878 (2018) 2, 49, 54

King v. Burwell,
576 U.S. 473 (2015) 31

MCI Telecomms. v. Am. Tel. & Tel. Co.,
512 U.S. 218 (1994) 32

Minnesota Citizens Concerned for Life, Inc. v. Swanson,
692 F.3d 864 (8th Cir. 2012) 50

NAACP v. Fed. Power Comm'n,
425 U.S. 662 (1976) 28, 30

Nat. Res. Def. Council, Inc. v. SEC,
606 F.2d 1031 (D.C. Cir. 1979) 42

Nat'l Inst. of Fam. & Life Advocs. v. Becerra,
585 U.S. 755 (2018) 2, 54, 55, 59

Native Am. Council of Tribes v. Weber,
750 F.3d 742 (8th Cir. 2014) 58

NYSE LLC v. SEC,
962 F.3d 541 (D.C. Cir. 2020) 8, 25, 47

Appellate Case: 24-1685 Page: 6 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Realtors v. Dep't of Health & Hum. Servs.,
594 U.S. 758 (2021) 2

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) 51, 53

Riley v. Nat'l Fed'n of Blind,
487 U.S. 781 (1988) 51

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 56

Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,
547 U.S. 47 (2006) 50

Sherbert v. Verner,
374 U.S. 398 (1963) 57

Thompson v. W. States Med. Ctr.,
535 U.S. 357 (2002) 59

TSC Indus., Inc. v. Northway, Inc.,
426 U.S. 438 (1976) 9, 10

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 50

United States v. Naftalin,
441 U.S. 768 (1979) 7

United States v. Playboy Ent. Grp., Inc.,
529 U.S. 803 (2000) 58

United States v. Williams,
553 U.S. 285 (2008) 28

Utility Air Regulatory Grp. v. EPA,
573 U.S. 302 (2014) 30, 41, 42

West Virginia v. EPA,
597 U.S. 697 (2022) ..... passim

Wooley v. Maynard,
430 U.S. 705 (1977) 49

Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio,
471 U.S. 626 (1985) 55

Appellate Case: 24-1685 Page: 7 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Statutes

15 U.S.C. § 77aa 21
15 U.S.C. § 77b 29
15 U.S.C. § 77g 8, 21, 27
15 U.S.C. § 77i 1
15 U.S.C. § 77j 22, 27
15 U.S.C. § 77s 22
15 U.S.C. § 78 27
15 U.S.C. § 78b 7
15 U.S.C. § 78c 23
15 U.S.C. § 78*l* 23, 24, 27
15 U.S.C. § 78m 24, 27, 48
15 U.S.C. § 78mm 25
15 U.S.C. § 78o 24, 27
15 U.S.C. § 78w 8, 24, 25, 29
15 U.S.C. § 78y 1
5 U.S.C. § 706 18

Other Authorities

Chairman Gary Gensler, *Statement on Final Rules Regarding Mandatory Climate Risk Disclosures*, (Mar. 6, 2024) 37

Chairman Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures*, (Mar. 21, 2022) 35, 37

Commissioner Hester M. Peirce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors*, (Mar. 6, 2024) 38, 44, 47, 55

Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission—At Least Not Yet*, (March 21, 2022) 36

Commissioner Mark T. Uyeda, *A Climate Regulation under the Commission's Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors*,

Appellate Case: 24-1685 Page: 8 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

https://www.sec.gov/news/statement/uyeda-statement-mandatory-climate-risk-disclosures-030624 (Mar. 6, 2024)..... 36, 43, 53, 55

H.R. 1817 (2021)..... 39

H.R. 3623 (2019)..... 39

H.R. Rep No. 73-85 (1933)..... 22

H.R. Rep. 73-1383 (1934) 29

Matthew Goldstein & Peter Eavis, *The S.E.C. moves closer to enacting a sweeping climate disclosure rule*, N.Y. Times, (March 21, 2022) 35

Michael Littenberg et al., *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, Harvard Law School Forum on Corporate Governance, (April 30, 2022) 35

S. 1217, 117th Cong. (2021) 39

S. 2075, 116th Cong. (2019) 39

Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 Neb. L. Rev. 876 (2023)..... passim

Sharon Yadin, *Regulatory Shaming and the Problem of Corporate Climate Obstruction*, 60 Harv. J. Legis. 337 (2023) 53

Statement of Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk*, (March 21, 2022). 34

Regulations

15 U.S.C.§ 77z 23

75 Fed. Reg. 6,289 (Feb. 2, 2010) 13

81 Fed. Reg. 23,916 (April 22, 2016)..... passim

87 Fed. Reg. 21334 (April 11, 2022)..... 45

89 Fed. Reg. 21,668 ..... passim

Constitutional Provisions

U.S. Const. amend. I 2

Appellate Case: 24-1685 Page: 9 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

JURISDICTIONAL STATEMENT

The Securities and Exchange Commission approved "The Enhancement and Standardization of Climate-Related Disclosures for Investors" rule on March 28, 2024. 89 Fed. Reg. 21,668. SEC invoked "sections 7, 10, 19(a), and 28 of the Securities Act, as amended, and sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act, as amended" as statutory authorities for its action. *Id.* at 21,912. The Court has jurisdiction to review the Disclosure Rule: 15 U.S.C. § 77i provides jurisdiction to review portions of the Rule promulgated under the Securities Act; 15 U.S.C. § 78y(b) provides jurisdiction to review some portions of the Rule promulgated under the Exchange Act; and this Court has jurisdiction to review other portions of the Rule under Exchange Act provisions that do not clearly set out the proper court of review. *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1482 (D.C. Cir. 1994); *see Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985). Petitioners' petition for review was timely filed on March 21, 2024, and consolidated in this Court with other petitions for review of the Disclosure Rule.

STATEMENT OF THE ISSUES

1. Whether the Securities Act and the Exchange Act authorize the Disclosure Rule.

   Apposite Authority: *West Virginia v. EPA*, 597 U.S. 697 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758 (2021); *Bus. Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).

2. Whether the Disclosure Rule violates the First Amendment.

   Apposite Authority: U.S. Const. amend. I; *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

Appellate Case: 24-1685 Page: 11 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

INTRODUCTION

A vigorous national debate about climate change has been ongoing for years. Some have advocated that the United States and American companies adhere to several climate commitments that would purportedly reduce global temperatures at some future date—at great economic cost. They have turned to the legislative process and other advocacy, including through shareholder proposals intended to pressure companies to reduce emissions. Others have questioned the assumptions and benefits of incurring these costs, especially since other countries such as China emit ever more greenhouse gases and render unilateral actions pointless. They too have engaged in the legislative process and responded to shareholder proposals.

This case should not be about that policy debate. But one side in that debate, frustrated by its inability to enact its policy agenda through Congress and impatient with company-by-company engagement, turned to an unlikely source to require sweeping new climate disclosures aimed at forcing companies to reduce emissions: the Securities and Exchange Commission.

Appellate Case: 24-1685 Page: 12 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

The SEC has long mandated disclosures intended to provide investors and the public with financial information about a company's securities, performance, and management. SEC has used a principles-based approach to financial disclosures, generally requiring a company to disclose risks that it views as material to its financial situation. Thus, to the extent that companies identify specific climate issues as material to their finances, or such issues fall into a specific category of statutorily-required disclosures, those issues must already be disclosed.

SEC's new Disclosure Rule would impose a much different regime. Instead of charging individual companies with making determinations about what risks are material to their own business, the Rule adds a new category on to the statutes' financial disclosures for climate-related issues. Again, the goal of these disclosures is not to disclose material risks, for such risks must already be disclosed. Instead, the goal is to pressure companies to act in certain ways on climate-change-related issues, such as greenhouse gas emissions, by forcing them to try to calculate and disclose metrics about qualitative scenarios that often depend on third parties.

Appellate Case: 24-1685 Page: 13 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Whether that goal is good or bad policy, Congress has not authorized SEC to pursue it. SEC is not a scientific policy-setting agency. It regulates securities. And nothing in the agency's authorizing acts—the Securities Act and the Securities Exchange Act—gives it power to enact rules about climate disclosures. When Congress has wanted SEC to promulgate new categories of required disclosures outside existing, principles-based financial ones, it has provided express authorization. It did not do so here. Unable to point to specific statutory authorization, SEC has instead invoked general provisions about the "public interest" and "investor protection," ignoring the context of these terms tied to statutorily listed financial issues. Because nothing in the statutes gives SEC power to promulgate the Disclosure Rule, that Rule is unlawful.

The major questions doctrine confirms this conclusion. SEC is "asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022). The Rule addresses political and economic issues of general, wide-ranging importance and makes new legal rules that Congress has repeatedly refused to enact itself. As justification, SEC is relying on vague terms in statutes passed in response to the Great

Appellate Case: 24-1685 Page: 14 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Depression nearly a century ago. And it is asserting a power that it has repeatedly disclaimed over issues on which it has no special expertise. "Given these circumstances, [Supreme Court] precedent counsels skepticism toward" SEC's claim of authority, and it must "point to clear congressional authorization to regulate." *Id.* at 732 (cleaned up). But all it can point to are the most general of statutory terms about "public interest" and "investor protection." These do not provide clear congressional authorization to require novel climate disclosures unlike the existing material, financial disclosures required by law.

Last, the Rule impermissibly compels speech on a controversial topic of intense public debate: climate change. Its mandates require companies to speak in ways that are inherently supportive of particular viewpoints in that debate. That content-based compelled speech violates the First Amendment.

Thus, the Court should vacate the rule.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Securities Act of 1933 and the Securities Exchange Act of 1934 (collectively, "the Acts") were enacted in response to the 1929 stock

Appellate Case: 24-1685 Page: 15 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

market crash and Great Depression. *See United States v. Naftalin*, 441 U.S. 768, 775 (1979). The Securities Act "was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). As detailed more below, its provisions "deal[] at some length with the required contents of registration statements and prospectuses." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728 (1975).

The Exchange Act "chiefly concern[s]" "the regulation of post-distribution trading on the Nation's stock exchanges and securities trading markets." *Id.* at 752. It "was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges." *Ernst & Ernst*, 425 U.S. at 195; *see* 15 U.S.C. § 78b.

Together, "[t]he basic purpose of the 1934 and 1933 regulatory statutes is to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377,

Appellate Case: 24-1685 Page: 16 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

390 (2014) (cleaned up). The "Acts contain numerous carefully drawn express civil remedies and criminal penalties," and the Exchange Act also created the Securities and Exchange Commission to enforce the Acts. *Ernst & Ernst*, 425 U.S. at 195. But as the Supreme Court has repeatedly admonished SEC, "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law"; "[r]ather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Id.* at 213–14 (cleaned up); *see NYSE LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020). And the Acts themselves direct that SEC "shall not adopt any . . . rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]." 15 U.S.C. § 78w(a)(2).

One significant requirement under the Securities Act is that covered companies provide a registration statement with enumerated financial and securities information. 15 U.S.C. § 77g(a)(1); *see id.* § 77aa. Because the Exchange Act requires similar disclosures, SEC created Regulation S-K "to harmonize disclosure required under both the Securities Act and the Exchange Act by creating a single repository for

Appellate Case: 24-1685 Page: 17 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

disclosure regulation that applies to filings by registrants under both statutes." Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,918 (2016). The focus of the statutory disclosures is "business and financial information," "identif[ying] certain categories of information that are generally viewed as material to investors." *Id.* at 23,921, 23,924.

"The concept of materiality has been described as the cornerstone of the disclosure system established by the federal securities laws." *Id.* at 23,924. "[I]nformation is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision." *Id.* at 23,925; *see TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

To be sure, materiality is neither necessary nor sufficient for SEC to require disclosure. *See In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts."). Many of the Acts' and SEC's "rules require disclosure when information

Appellate Case: 24-1685 Page: 18 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

is material to investors." 81 Fed. Reg. at 23,925. "These rules rely on a registrant's management to evaluate the significance of information in the context of the registrant's overall business and financial circumstances and determine whether disclosure is necessary"; accordingly, this approach is "often referred to as 'principles-based'" because it "articulate[s] a disclosure objective and look[s] to management to exercise judgment in satisfying that objective." *Id.* Some other rules "employ objective, quantitative thresholds to identify when disclosure is required, or require registrants to disclose information in all cases." *Id.* Such "requirements may result in disclosure that is not necessarily material or important to investors." *Id.* at 23,927.

As SEC has recognized, "[t]here are potential drawbacks associated with disclosure requirements": "Disclosure can be costly for registrants to produce and disseminate, and disclosure of certain sensitive information can result in competitive disadvantages. There is also a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities." *Id.* at 23,919; *see also Northway*, 426 U.S. at 448–49 (emphasizing the dangers of

Appellate Case: 24-1685 Page: 19 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

"bury[ing] the shareholders in an avalanche of trivial information a result that is hardly conducive to informed decisionmaking").

Thus, the Acts and SEC's own rules have long reflected a balance: requiring specific categories of disclosure where mandated by statute and otherwise relying on a principles-based approach to limit disclosures to *material* information that falls within a statutory category of financial or securities information.

"From time to time, Congress has introduced [specific] disclosure requirements through other statutory mandates," including "disclosure that is not necessarily financial in nature." 81 Fed. Reg. at 23,922. For instance, the Iran Threat Reduction and Syria Human Rights Act "requires registrants to disclose certain business activities relating to Iran in their periodic reports." *Id.* But Congress has not introduced any specific climate change-related disclosures.

Accordingly, starting in 1975, SEC has repeatedly refused to require separate, independent disclosure of "environmental and social" matters. 81 Fed. Reg. at 23,971. SEC has "concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure

Appellate Case: 24-1685 Page: 20 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

requirements, although such considerations would be appropriate to further a specific congressional mandate." *Id.* "[D]isclosure to serve the needs of limited segments of the investing public, even if otherwise desirable, may be inappropriate, because the cost to registrants, which must ultimately be borne by their shareholders, would likely outweigh the resulting benefits to most investors." *Id.*

Of course, environmental matters are often subject to required disclosure as part of existing categories of financial or securities information on Schedule S-K. As SEC explained in 2010:

- "With respect to existing federal, state and local provisions which relate to greenhouse gas emissions, Item 101 requires disclosure of any material estimated capital expenditures for environmental control facilities for the remainder of a registrant's current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material."

- "Depending on a registrant's particular circumstances, Item 503(c) may require risk factor disclosure regarding existing or pending legislation or regulation that relates to climate change."

- "Item 303 requires registrants to assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on the registrant's financial condition or results of operation."

Appellate Case: 24-1685 Page: 21 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

- "The potential sources of disclosure obligations related to international accords are the same as those discussed above for U.S. climate change regulation."

- "[B]usiness trends or risks . . . could have a significant enough impact on a registrant's business that disclosure may be required in its business description under Item 101."

- "Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents."

Comm'n Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,289, 6,295–97 (Feb. 2, 2010).

In other words, much information related to climate change must be disclosed under preexisting requirements. *See* Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 Neb. L. Rev. 876, 883-85 (2023). But until now, SEC has declined to establish as new categories of required disclosure for all firms climate change-related information, like greenhouse gas emissions or exposure to natural disasters purportedly linked to climate change.

Appellate Case: 24-1685 Page: 22 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

B. The Disclosure Rule

The Disclosure Rule requires those registered with the SEC to make many disclosures purportedly related to climate change in their registration statement or annual report. *See* 89 Fed. Reg. 21,668. Those disclosures include:

- A company's "climate-related target or goal" and "any progress made toward meeting the target or goal and how any such progress has been achieved";
- For large companies, both direct and indirect (i.e., third-party) greenhouse gas (GHG) emissions "if such emissions are material"—without elaboration of how to measure materiality of that metric—and constituent gases individually, along with explanations for all calculations;
- Attestations of those disclosures by a GHG emissions attestation provider—and disclosure of any disagreements with a former provider; and,
- Expenses "incurred during the fiscal year" if "severe weather events and other natural conditions, such as hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures, and sea level rise" are "a significant contributing factor," along with "contextual information" for the events like "policy decisions made . . . to calculate the specified disclosures."

Id. at 21,914-21. The Rule also requires companies to "[d]escribe the board of directors' oversight of climate-related risks" and "management's

Appellate Case: 24-1685 Page: 23 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

role in assessing and managing" these risks, which are defined broadly to include "transition risks":

> Transition risks are the actual or potential negative impacts on a registrant's business, results of operations, or financial condition attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, including such non-exclusive examples as increased costs attributable to changes in law or policy, reduced market demand for carbon-intensive products leading to decreased 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, and reputational impacts (including those stemming from a registrant's customers or business counterparties) that might trigger changes to market behavior, consumer preferences or behavior, and registrant behavior

Id. at 21,914-15. Companies must "[d]escribe any processes . . . for identifying, assessing, and managing material climate-related risks." *Id.* at 21,916.

The Disclosure Rule cites "[S]ections 7, 10, 19(a), and 28 of the Securities Act" and "[S]ections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act" as the SEC's authority to promulgate the Disclosure Rule. *Id.* at 21,912.

Appellate Case: 24-1685 Page: 24 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

C. Petitioners

The National Legal and Policy Center (NLPC) is a nonprofit organization, founded in 1991, that promotes ethics in public life through research, investigation, education, and legal action. *See* Declaration of Peter Flaherty, Ex. 1 to Motion to Stay ¶ 3 (Apr. 3, 2024). NLPC promotes integrity in corporate governance, including honesty and fair play in relationships with shareholders, employees, business partners and customers. *Id*. NLPC emphasizes a company's responsibility to advance the interests of the people who own the company (shareholders) against attempts to impose political objectives that erode the financial value of its shares. *Id*.

To protect this principle, NLPC owns shares in companies that are subject to the Disclosure Rule. *Id*. ¶ 4. NLPC frequently attends shareholder meetings of companies of which it owns shares to advocate for the interests of shareholders and oppose efforts to advance resolutions related to climate change. *Id*.

In addition, NLPC proposes its own resolutions to protect its shares' financial value, including at least twenty-five in 2022. *Id*. NLPC representatives make public remarks and vote their shares in favor of

Appellate Case: 24-1685 Page: 25 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

their resolutions at shareholder meetings to advance their mission as an organization. *Id.* The Disclosure Rule will injure NLPC's interest in protecting the principle of companies serving the financial interests of their shareholders because the Rule encourages companies to take actions regarding climate change that erode the value of their shares. *Id.* ¶¶ 9-10. NLPC submitted a comment opposing the proposed version of the Disclosure Rule during its notice and comment period. *Id.* ¶ 11.

Petitioner Oil & Gas Workers Association ("OGWA") is a grassroots, independent, nonpartisan 501(c)(6) nonprofit trade association founded in 2015 by a worker in the oil and gas industry. Declaration of Matthew Coday, Ex. 1 to Motion to Stay, ¶ 3 (Apr. 3, 2024). OGWA is dedicated to securing, growing, and sustaining American oil and gas jobs, representing the interests of all individuals working in the U.S. oil and gas industry, as well as those whose jobs that industry supports. *Id.* OGWA advocates for that workforce nationwide, collaborating with lobbyists, attorneys, consultants, and educators to advance the industry's image and represent workers on legislative and regulatory issues impacting their livelihoods. *Id.* ¶ 4.

Appellate Case: 24-1685 Page: 26 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

The Disclosure Rule will harm OGWA's members, who work for companies subject to the new rule or in an industry directly affected by the Rule. The SEC's Rule compels companies that employ OGWA's members to undertake costly, burdensome, and intrusive measures to comply. *Id.* ¶ 5. These measures will not only impose significant financial burdens, but also will divert resources from core operational activities, threatening the sustainability and growth of the oil and gas jobs OGWA seeks to protect. *Id.*

The injuries OGWA and its members will suffer will be substantial and ongoing. *Id.* ¶ 6. They include, but are not limited to, increased operational costs, potential competitive disadvantages, compelled speech based on politically motivated disclosure standards, and dilution of shareholder focus on essential financial performance and risk factors—all of which threaten OGWA's members' livelihoods. *Id.*

STANDARD OF REVIEW

The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "otherwise not in accordance with law." 5 U.S.C. § 706(2).

Appellate Case: 24-1685 Page: 27 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

SUMMARY OF ARGUMENT

The Disclosure Rule should be vacated. First, the Securities Act and the Exchange Act do not authorize, clearly or otherwise, the SEC to adopt required disclosures focused on environmental goals. Climate change is a hotly contested public policy issue, and these novel disclosures—through which the SEC has sprinkled the word "material" while departing entirely from its principles-based approach to materiality—fall outside the statutory authority given to the agency by Congress. Reading the Acts otherwise would confer near-unlimited authority on the SEC. The major questions doctrine confirms the absence of statutory authority, for the Disclosure Rule implicates major public policy questions—and imposes massive costs—and SEC cannot point to any *clear* authorization for its Rule. Statutory generalities about the public interest do not suffice for an agency to make a new legal rule of this magnitude.

Second, the Rule violates the First Amendment. The government cannot compel speech except in limited circumstances, none of which applies here. At SEC's command, the Rule would force public companies to weigh in on an ongoing policy debate with controversial, subjective disclosures. Such compelled speech is neither factual nor

Appellate Case: 24-1685 Page: 28 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

uncontroversial, so the same test that applies to speech restrictions broadly applies: strict scrutiny. And the Rule cannot pass strict scrutiny, particularly since any risks that are actually "material" already must be disclosed. For that reason, the Rule would flunk even lesser, exacting scrutiny.

ARGUMENT

I. The Securities Act and the Exchange Act do not authorize the Disclosure Rule.

By their plain meaning, the Securities Act and the Securities Exchange Act do not authorize the Disclosure Rule focused on environmental concerns. This conclusion is confirmed by the major questions doctrine, which requires that Congress *clearly* authorize an agency to enact a rule that implicates significant economic and political decisions. Because Congress has not authorized SEC to adopt this Disclosure Rule implicating hotly disputed questions of scientific and energy policy, the Rule exceeds the SEC's statutory authority.

Together, the Securities Act and the Securities Exchange Act (the "Acts") generally authorize the SEC to promulgate rules to compel entities to disclose information about securities, financial statements, and director and management decisions. In the few circumstances

Appellate Case: 24-1685 Page: 29 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Congress has directed SEC to go outside those types of financial disclosures, it has expressly authorized specific disclosures. But Congress has not authorized SEC to promulgate rules on the environmental and climate issues implicated by the Disclosure Rule. Thus, SEC lacked statutory authority to promulgate the rule.

A. The Acts require companies to disclose financial information, not environmental information.

In the Disclosure Rule, the SEC invokes various sections of the Acts as providing statutory authority. But those sections specifically authorize the SEC to compel disclosure of traditional financial data, not environmental data.

On the Securities Act, SEC invokes Sections 7, 10, 19(a), and 28. 89 Fed. Reg. at 21,912. Starting with Section 7, the statute requires those issuing securities to file a registration statement. 15 U.S.C. § 77g. Registration statements, according to the statute's text, require disclosures of traditional financial data only. For example, statements must include the "name under which the issuer is doing or intends to do business," a "balance sheet" showing liabilities, and a "profit and loss statement." 15 U.S.C. § 77aa(1), (25), (26). The original House report summarized these requirements as the "essential facts concerning the

Appellate Case: 24-1685 Page: 30 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

property in which [the investor] is invited to acquire an interest," the "essential facts concerning the identity and the interests of the persons with whom he is dealing," and the "essential facts in regard to the price and cost of the security." H.R. Rep No. 73-85, at 18–19 (1933); *see id.* at 3 ("The items required to be disclosed, set forth in detailed form, are items indispensable to any accurate judgment upon the value of the security.").

Next, Section 10 requires that advertisements, such as a "prospectus," include the information in the registration statement along with certain "other information" required by the Commission (a provision addressed below). 15 U.S.C. § 77j.

Section 19(a) allows the SEC to promulgate rules to carry out the Securities Act's provisions, including those related to registration statements and prospectuses. 15 U.S.C. § 77s(a). This authorization includes "defining accounting, technical, and trade terms." *Id.* It can also "prescribe the form or forms in which required information shall be set forth." *Id.* This includes the "the items or details to be shown in the balance sheet and earning statement." *Id.* Congress says in subsection (b) that in "issuing such rules the SEC can use generally accepted accounting practices." *Id.*

Appellate Case: 24-1685 Page: 31 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Last, Section 28 gives the SEC the power to "conditionally and unconditionally exempt" a "person, security, or transaction" from many of the requirements above, including regulations that the SEC promulgates. 15 U.S.C.§ 77z–3.

Turning to the Exchange Act, the SEC cites Sections 3(b), 12, 13, 15, 23(a), and 36 as grounds for its authority to promulgate the Disclosure Rule. 89 Fed. Reg. at 21,912. But like the Securities Act, these sections of the Exchange Act generally pertain to financial disclosures, not environmental information.

Section 3(b) has nothing to do with the power to require disclosures. It says only that certain agreements exempted by the Commodity Futures Trading Commission are deemed "securities" for purposes of "securities laws." 15 U.S.C. § 78c–2.

Section 12 makes it illegal to trade a security on an exchange unless it is registered. 15 U.S.C. § 78*l*. Registration requires a company to file an application containing certain information prescribed by SEC, such as organizational structure, rights of shareholders, terms on the securities, company officials with 10% more of stock, executive compensation, and bonuses. *See id.*

Appellate Case: 24-1685 Page: 32 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Section 12 authorizes the SEC to create broad exemptions to these required disclosures and only then to "require in lieu thereof the submission of such other information of comparable character as it may deem applicable to such class of issuers." 15 U.S.C. § 78*l*(c). "Comparable character" restricts these submissions to traditional financial data.

Section 13 requires companies to file with the SEC supporting documents for their registration statements and annual reports "as the [SEC] may prescribe." 15 U.S.C. § 78m. It allows the SEC to prescribe the "form" that these reports are to take, including the "items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in . . . the differentiation of investment and operating income." *Id.* § 78m(b)(1). Section 15 also requires that brokers and dealers file the registration statements mentioned in Section 13. 15 U.S.C. § 78o.

Section 23(a) authorizes the SEC to issue rules "as may be necessary or appropriate to implement the provisions of [the Exchange Act]." 15 U.S.C. § 78w(a)(1). To the extent that other provisions do not authorize compelling disclosure about environmental issues, this provision would not apply. That is because a rule compelling extraneous

Appellate Case: 24-1685 Page: 33 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

disclosures would be neither necessary nor appropriate to implement the Exchange Act's other provisions. *See NYSE*, 962 F.3d at 556 ("[A] 'necessary or appropriate' provision in an agency's authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized.").

Section 23(a) also requires the SEC to consider "competition" when making rules and forbids the SEC from adopting a rule that imposes "a burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act. 15 U.S.C. § 78w(a)(2). Far from authorizing climate disclosures, this provision makes them even more inappropriate. Compelling climate change disclosures would burden companies from competing against other companies at home and abroad. It would hamper domestic competition by imposing costs that larger firms can more readily absorb than smaller firms, and it would hamper international competition by forcing U.S. firms to comply with rules that do not apply to foreign competitors.

Last, Section 36 authorizes the SEC to exempt people and companies from the Exchange Act's requirements and regulations. 15 U.S.C. § 78mm. The power to create exemptions to rules compelling

Appellate Case: 24-1685 Page: 34 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

disclosure of financial data does not, of course, create a power to compel disclosures of other types of data.

In sum, the Acts' specific authorizations are permeated with a focus on financial and core management disclosures, not extraneous social or environmental concerns. Indeed, SEC itself has previously "concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements" absent "a specific congressional mandate." Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,971 (Apr. 22, 2016).

Sometimes, Congress has provided such mandates. The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 both "introduced additional disclosure requirements" "focused on corporate responsibility [and] corporate governance." *Id.* at 23,922. Other statutes have "mandated disclosure that is not necessarily financial in nature." *Id.* For instance, in 2010, Congress amended Section 13 of the Exchange Act to require that certain companies disclose their use of "conflict minerals" that "directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country." 15 U.S.C.

Appellate Case: 24-1685 Page: 35 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

§ 78(p)(1)(A)(ii), 78(p)(1)(D), 78(p)(2)(B). Other statutory authorizations have pertained to environmental compliance and litigation disclosure, mine safety, and business activities in Iran. *See* 81 Fed. Reg. at 23,922. If Congress believed that the Acts already authorized SEC to require disclosures of these types of peripheral issues, it need not have provided express statutory authorization to do so. That Congress acted provides more evidence that, in the main, SEC's statutory authorization is limited to core financial information relevant to the sale and exchange of securities, not extraneous environmental information.

B. In context, statutory authorization to act "in the public interest or for the protection of investors" does not transform SEC's purview.

SEC has pointed to several provisions in the Acts that generally give the SEC authorization to promulgate rules requiring disclosure of information that the SEC believes is "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); *id.* § 78*l*; *see id.* §§ 77j, 78m, 78*o*. But "'public interest' is never an unbounded term": "broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation.'" *Bus. Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990) (quoting

Appellate Case: 24-1685 Page: 36 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

NAACP v. Fed. Power Comm'n, 425 U.S. 662, 670 (1976)). And the context of both Acts shows that SEC's authority to make rules for the "public interest" and the "protection of investors" is defined and circumscribed by association with its authority to make rules about disclosures of financial information.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Under "the commonsense canon of *noscitur a sociis*," "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008); *see Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 172 (2020) ("context often imposes limitations").

Thus, "[t]his open-ended standard[s]" of "investor protection" and "public interest" must be understood in light of the statutes' "larger list of more specific standards concerning" securities. *Bus. Roundtable*, 905 F.2d at 413. As explained above, Congress has generally limited the universe of required disclosures to financial information, management and director decisions, and securities details. And the interests that SEC

Appellate Case: 24-1685 Page: 37 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

"shall also consider, in addition to the protection of investors" are tied too to financial issues: "whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b); *see id.* § 78w(a)(2). Given the statutory context, the "public interest" and "investor protection" standards do not authorize SEC to promulgate expansive rules about extraneous, non-financial disclosures.

To hold otherwise would "transform[]" the Acts, again in contradiction of basic interpretive principles. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). If, as SEC's Disclosure Rule suggests, the Acts authorize any disclosures with any relation to SEC's conception of the public interest, SEC's power would be practically unlimited. The agency could routinely promulgate rules with tenuous connections to any financial or securities issues, as long as it thought that the rules had some relation to a social good. That interpretation would contradict the statutory focus on specific financial and securities issues—and render meaningless the statutory parameters and explanations of the appropriate areas for securities disclosures. *Contra* H.R. Rep. 73-1383, at 23 (1934) (noting that the Exchange Act was not designed to give SEC "unconfined authority to elicit any information whatsoever").

Appellate Case: 24-1685 Page: 38 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

In sum, as the Supreme Court has explained, "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." *Fed. Power Comm'n*, 425 U.S. at 669. Regardless of whether compelling environmental disclosures or limiting emissions might be good policy, the Acts do not authorize SEC to set policy beyond its defined financial and securities purview. Accordingly, the Disclosure Rule is contrary to the plain meaning of the Securities Act and Exchange Act provisions on which the SEC relied in adopting it.

C. The major questions doctrine confirms that Congress did not authorize SEC to promulgate a Rule with vast political and economic implications.

Even if the statutes' plain meaning did not foreclose the Disclosure Rule, the Rule would still exceed the SEC's authority under the major questions doctrine, by which courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). At minimum, the Acts contain no *clear* statement authorizing SEC to adopt its wide-ranging climate change Disclosure Rule, so that Rule is unlawful.

Appellate Case: 24-1685 Page: 39 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 597 U.S. at 723 (cleaned up). This "major questions" doctrine applies when "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). And when an agency has adopted a rule on a major question, a "colorable textual basis" for its assertion of authority is not enough; "[t]he agency must instead point to 'clear congressional authorization' for the power it claims." *Id.* at 722-23.

Under this doctrine, the Supreme Court has repeatedly invalidated agency rules on major questions on which Congress had not clearly delegated authority to the agency. *See, e.g., id.* at 735 (invalidating EPA rule that would have forced existing coal-fired power plants to reduce production of electricity, increase production of electricity by alternative means, or purchase emission allowances); *Ala. Ass'n of Realtors*, 594 U.S. at 766 (invalidating CDC rule imposing a nationwide eviction moratorium); *King v. Burwell*, 576 U.S. 473, 476 (2015) (invalidating IRS

Appellate Case: 24-1685 Page: 40 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

rule to determine applicability of Affordable Care Act tax credits that involved affected billions of dollars in spending and affected millions of people); *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (holding that "oblique" statute could not authorize Attorney General to criminalize assisted suicide); *Brown & Williamson*, 529 U.S. at 160 (invalidating FDA rule regulating cigarettes because delegation on a matter of "such economic and political significance" would not be enacted "in so cryptic a fashion"); *MCI Telecomms. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (holding that FCC lacked authority to excuse certain long-distance carriers from rate filing requirements because it was not clear that Congress left "determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion").

The major questions doctrine applies here. The Disclosure Rule implicates economic and political questions of monumental importance pertaining to climate change and the environment. And Congress cannot be said to have *clearly* given SEC authorization to address those questions. Thus, the Rule exceeds SEC's statutory authority.

Appellate Case: 24-1685 Page: 41 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

1. The Disclosure Rule implicates the major questions doctrine.

The Disclosure Rule addresses major questions unrelated to the SEC's statutory role of regulating the securities market and therefore implicates the major questions doctrine. Courts have considered several factors in determining whether the major questions doctrine applies. All factors here show that it does. The Disclosure Rule is premised on SEC's taking sides in a controversial policy debate about the scientific basis of, consequences of, and appropriate responses to climate change. These are major questions with significant political and economic implications, and congressional attempts to enact proposals like the Rule have been rejected. To get around this problem, SEC invokes vague terms in old statutes, and asserts a new power to regulate that it has repeatedly disclaimed and on which it has no expertise. All this shows that the Rule implicates the major questions doctrine, under which SEC must—but cannot—show clear congressional authorization to adopt the Rule.

a. SEC is asserting a highly consequential power on issues where Congress has declined to act.

In assessing the major questions doctrine's applicability, courts first consider whether the agency is "asserting highly consequential

Appellate Case: 24-1685 Page: 42 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

power" over significant policy questions. *West Virginia*, 597 U.S. at 724. SEC Commissioners themselves described the proposed rule as "a watershed moment" because it "addresses disclosure of climate change risk," purportedly "one of the most momentous risks to face capital markets since the inception of [the SEC]." Statement of Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk*, https://www.sec.gov/news/statement/lee-climate-disclosure-20220321 (March 21, 2022). They proclaimed that "[t]he science is clear and alarming," and that "we have ample, well-documented warning of potentially vast and complex impacts to financial markets." *Id.* They emphasized "the centrality of GHG emissions in analyzing a company's climate risk," without evident concern about any proof between a particular company's "climate risk" and its financial concerns. *Id.* Going even further afield, they "note[d] that climate risks likely disproportionately impact groups that have traditionally faced higher barriers to participating in the economy than the general population, including low-income communities, communities of color, and Tribal populations." *Id.* (cleaned up). In devising the Rule, the Commissioners looked to an "international framework that many

Appellate Case: 24-1685 Page: 43 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

companies and countries already have started to adopt, including Brazil, the European Union, Hong Kong, Japan, New Zealand, Singapore, Switzerland, and the United Kingdom." Chairman Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures*, https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321 (Mar. 21, 2022).

The *New York Times* described the proposed rule as "a sweeping proposal long demanded by environmental advocates" "that would bolster the Biden administration's stalled environmental agenda." Matthew Goldstein & Peter Eavis, *The S.E.C. moves closer to enacting a sweeping climate disclosure rule*, N.Y. Times, https://www.nytimes.com/2022/03/21/business/sec-climate-disclosure-rule.html (March 21, 2022). "The limited progress [the administration] has made with emissions-focused legislation has left financial regulation as one of the main tools it has to change the behavior of companies as climate change worsens." *Id.*; *see also* Michael Littenberg et al., *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, Harvard Law School Forum on Corporate Governance, https://corpgov.law.harvard.edu/2022/04/30/ten-thoughts-on-the-secs-proposed-climate-disclosure-rules/ (April 30, 2022) ("The

Appellate Case: 24-1685 Page: 44 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

rules are arguably the most significant new public company disclosure and compliance requirements in a generation.").

As these explanations suggest, the Rule's goal is environmental, not related to finances or securities. It coerces companies into combatting climate change by "direct[ing] board and managerial attention to climate issues." Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission—At Least Not Yet*, https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 (March 21, 2022). Though the SEC had toned down its climate change rhetoric by the time it finalized the proposed rule—and trimmed the proposal's sails on the margins—it still "adopt[ed] an entirely new subpart of Regulation S-K and an entirely new article of Regulation S-X for one topic—climate change—applicable to all public companies," thereby "elevat[ing] climate above nearly all other issues facing public companies." Commissioner 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).

The Rule would upend current American practice. Even a Commissioner supporting the rule said that "SEC staff, in reviewing

Appellate Case: 24-1685 Page: 45 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

nearly 7,000 annual reports submitted in 2019 and 2020, found that [only] a third included some disclosure related to climate change." Gensler, *supra*; *see* 89 Fed. Reg. at 21,835. Though the same Commissioner now tries to backtrack by claiming that "90 percent of the Russell 1000 issuers are publicly providing climate-related information," even he emphasizes the difference between this information and what the Disclosure Rule requires—indeed, he says that difference explains the Rule's necessity. *See* Chairman Gary Gensler, *Statement on Final Rules Regarding Mandatory Climate Risk Disclosures*, https://www.sec.gov/news/statement/gensler-statement-mandatory-climate-risk-disclosures-030624 (Mar. 6, 2024) ("There are standard controls and procedures for filings unlike for sustainability reports.").

No surprise, then, that the Disclosure Rule will be crushingly expensive for companies—and therefore for consumers and employees too. The SEC itself, in what is almost certainly an underestimate, suggests costs of $1.8 billion. 89 Fed. Reg. at 21,906 (Table 6). The Rule "will increase the typical external costs of being a public company by around 21%." Commissioner Hester M. Peirce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related*

Appellate Case: 24-1685 Page: 46 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Disclosures for Investors, https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624 (Mar. 6, 2024). And even SEC "acknowledge[d] that third parties could bear some of the increased costs of compliance." 89 Fed. Reg. at 21,851.

Compliance would be expensive in other ways too. If companies are coerced into switching to more expensive energy sources or curtailing their activities and outputs, the result will be some combination of lower wages, lower profits, lower returns to shareholders, and higher prices. In the aggregate, this too will amount to "'billions of dollars in spending' by private persons or entities." *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring).

Tellingly, Congress has refused to enact similar policy decisions into law. The Court "cannot ignore that the regulatory writ [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 (cleaned up); *accord Brown & Williamson*, 529 U.S. at 147. Bills that would have amended the Exchange Act to include provisions substantially similar to the Disclosure Rule never made it past the

Appellate Case: 24-1685 Page: 47 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

committee stage. S. 2075, 116th Cong. (2019); H.R. 3623 (2019); S. 1217, 117th Cong. (2021); H.R. 1817 (2021). "The importance of the issue, along with the fact that the same basic scheme [SEC] adopted "has been the subject of an earnest and profound debate across the country, makes the" SEC's claim of statutory authority "suspect." *West Virginia*, 597 U.S. at 732; *see Brown & Williamson*, 529 U.S. at 133 ("[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.").

b. SEC is relying on vague terms in very old statutes.

Next, "[e]xtraordinary grants of regulatory authority are rarely accomplished through" "vague terms or subtle devices," and Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *West Virginia*, 597 U.S. at 723 (cleaned up). As discussed, SEC's assertion of authority boils down to complete reliance on a couple vague or oblique terms like public interest and investor protection. That assertion tortures the statutory language even more than the EPA's arguments did in *West Virginia*. There, the EPA did not cite a specific provision authorizing its

Appellate Case: 24-1685 Page: 48 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

rule, just as the SEC has failed to do here. *Id.* at 732. Instead, it cited a provision allowing it to "establish emissions caps at a level reflecting 'the application of the best system of emission reduction . . . adequately demonstrated.'" *Id.* The Supreme Court held that although it was technically possible to describe shifting away from coal to renewables as a "'system,'" that interpretation robbed the provision of its "context." *Id.* Under that interpretation, "almost anything could constitute such a 'system.'" *Id.* The Court concluded that "[s]uch a vague statutory grant is not close to the sort of clear authorization required." *Id.*

The Court also observed that "Congress went out of its way to amend" a statute to include a cap-and-trade system for "acid rain." *Id.* at 734. But "not a peep was heard from Congress about the possibility that a trading regime" could be used for the statute the EPA relied on to promulgate the rule. *Id.* (cleaned up).

In a similar way, interpreting the general terms "public interest" and "investor protection" to enable compelled climate change disclosures that are specifically *not* included in the Acts would drastically expand the SEC's power to require disclosure over non-financial matters it has never addressed before, environmental and otherwise.

Appellate Case: 24-1685 Page: 49 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Relatedly, courts consider whether the agency "claimed to discover in a long-extant statute an unheralded power." *West Virginia*, 597 U.S. at 724; *see Utility Air*, 573 U.S. at 324. The statutes that SEC relies on are older than the statute the EPA relied on in *West Virginia*. There, the EPA relied on the Clean Air Act (enacted in 1970 to combat air pollution) to start regulating carbon dioxide in 2015. 597 U.S. at 707, 711. The Supreme Court held that claiming to "'discover[] in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority'" showed the absence of clear authorization for the new rule. *Id.* at 724.

Likewise, the SEC's reliance on statutes passed in response to the 1929 stock market crash and the Great Depression shows that the Disclosure Rule is unauthorized. Congress certainly did not pass those statutes with the environment—let alone climate change—in mind. Yet the SEC claims those statutes empower it to restructure the financial market so that companies focus on fighting climate change instead of profit. SEC's reliance on vague terms in 1930s statutes underscores that its assertion of statutory authority should be met with "skepticism." *Id.* at 732.

Appellate Case: 24-1685 Page: 50 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

c. SEC is asserting a power that it has repeatedly disclaimed and on which it has no expertise.

Courts considering whether the major questions doctrine applies also look to the agency's "established practice," particularly "the want of assertion of power by those who presumably would be alert to exercise it." *West Virginia*, 597 U.S. at 725 (cleaned up); *see id.* at 747 (Gorsuch, J., concurring) ("[C]ourts may examine the agency's past interpretations of the relevant statute."); *Brown & Williamson*, 529 U.S. at 146; *Utility Air*, 573 U.S. at 317. The SEC's "inaugural" interpretation (*West Virginia*, 597 U.S. at 726) in the 1970s of its ability to compel disclosures of environmental information was that "its authority was limited to contexts related to the objectives of the federal securities laws." *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979). "[T]hese laws, in the Commission's view, were designed generally to require disclosure of financial information in the narrow sense only." *Id.* Accordingly, SEC rejected a petition for rulemaking that would have compelled disclosures of whether a company "has changed company products, projects, production methods, policies, investments or advertising to advance environmental values." *Id.* at 1036.

Appellate Case: 24-1685 Page: 51 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

The SEC "consistently applied" this interpretation until the Disclosure Rule. *West Virginia*, 597 U.S. at 727. It stated in 2016 that it generally could not compel "disclosure[s] relating to environmental and other matters of social concern." 81 Fed. Reg. at 23,970. Indeed, "[f]or 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." Uyeda, *supra*. Accordingly, the SEC's departure from its long-standing interpretations counsels skepticism.

That is especially true because SEC has no expertise in making the types of scientific and policy judgments that it explained as underlying the Rule. "When 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). Here, the "mismatch between an agency's challenged action and its congressionally assigned mission and expertise" is stark. *Id.* at 748 (Gorsuch, J., concurring). The SEC lacks expertise in science and environmental economics. Its only expertise is in accounting— ensuring that companies accurately report financial information. If Congress wanted to compel

Appellate Case: 24-1685 Page: 52 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

corporations to make disclosures about their efforts with respect to climate change, it would have given that authority to an agency with relevant expertise, not the SEC.

The SEC will claim that compelling disclosure of environmental information will impact corporations' finances—and that some investors might be interested in that environmental information. This logic has no stopping point, and similar arguments have been rejected in analogous cases. *Every* action of a corporation (and each of its employees) could have some eventual effect on its finances, but that is not enough to warrant SEC-mandated disclosure of all those actions. The Rule imagines a "series of possibilities"—"that governments, regulators, or consumers might take action against GHG emissions that might cause a negative financial effect at the company that might be significant to a reasonable investor." Peirce, *Green Regs and Spam*, *supra*. On top of this speculative chain, the "uncertain and imprecise methods for calculating GHG emissions" that the Rule requires may not provide any reliable information about the hypothetical "series of possibilities" to begin with. *Id.* The Supreme Court has squarely rejected such attenuated chain of causation justifications:

Appellate Case: 24-1685 Page: 53 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

> Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.

West Virginia, 597 U.S. at 730.

SEC asserts that its Rule "advance[s] the Commission's mission to protect investors" rather than "address climate-related issues more generally." 89 Fed. Reg. at 21,671. "This generality, however, does not suffice." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). The Rule implicitly "place[s] extensive reliance on [scientific] judgments and the views of [some in the climate change] community in concluding that" climate issues must always be disclosed. *Id.* For instance, the Rule asserts that "[c]limate-related risks can affect a company's business and its financial performance and position in a number of ways" because "[s]evere and frequent natural disasters can damage assets, disrupt operations, and increase costs." 89 Fed. Reg. at 21,685; 87 Fed. Reg. 21334, 21,336 (April 11, 2022) (second quote). SEC seems to assume that such disasters are a result of "climate change" and that climate change-related events will impact every company.

Appellate Case: 24-1685 Page: 54 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Worse, the thrust of the Rule—to require disclosure of individual company emissions—has no necessary relation to an individual company's financial risks. Certainly whether a particular company's emissions "cause" climate change effects that would affect that company's financial situation is outside SEC's bailiwick (and highly questionable). And the assumption that *every* company will face regulatory pressures to reduce emissions appears to be both unsupported and outside SEC's expertise on finances and accounting. If an individual company faces such regulatory pressures that would make emissions material, such disclosures are already required. *Supra* pp. 12-13. Thus, the Rule's emissions disclosures have an outward-facing goal—so that outsiders can pressure companies to act in certain ways on climate change issues. The Rule is not about an individual company's financial situation, but focused on extraneous goals with disputed scientific assumptions. These assumptions may or may not be reasonable, but they are not in SEC's purview.

SEC also claimed that "the required disclosures will elicit information that investors have indicated is important to their investment and voting decisions." 89 Fed. Reg. at 21,685. But the fact

Appellate Case: 24-1685 Page: 55 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

that some investors desire "idiosyncratic information to assess a company's performance on" special interest issues has never been a sound basis under the Acts for required SEC disclosures. Peirce, *Green Regs and Spam*, *supra*. "Congress did not create [the SEC] to satisfy the wants of every investor, but to serve the interests of the objectively reasonable investor seeking a return on her capital." *Id.*

Adopting SEC's logic on these points "would give [it] a breathtaking amount of authority," and "[i]t is hard to see what measures this interpretation would place outside the [SEC's] reach." *Alabama Ass'n of Realtors*, 594 U.S. at 764-65; *cf. NYSE*, 962 F.3d at 554 ("[W]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony."). SEC's reasoning here would "trigger a hodgepodge of requirements tailored to meet the demands of a vast and ever-expanding panoply of special interests": "Employees, customers, suppliers, social activists, local communities, and other interested non-investors [would] now line up to get the information they want to know included in disclosures for which shareholders have to pay." Peirce, *Green Regs and Spam*, *supra*.

* * *

Appellate Case: 24-1685 Page: 56 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

"Given these circumstances," Supreme Court "precedent counsels skepticism toward" SEC's claim of statutory authority to promulgate the Rule. *West Virginia*, 597 U.S. at 732. "To overcome that skepticism, the Government must—under the major questions doctrine—point to clear congressional authorization to regulate in that manner." *Id.* (cleaned up). As reiterated next, it cannot do so.

2. Congress has not provided a clear statement authorizing the Disclosure Rule.

As explained, the best statutory reading is that Congress has withheld authority from SEC to promulgate the Disclosure Rule. But at a minimum, Congress has not given SEC *clear* authority to do so, for many of the reasons already explained. SEC's invocation of the statutory "public interest" and "investor protection" standards disregards the context of those standards, in statutes focused on regulation of specific financial and securities matters. As noted, when Congress wanted to broaden the statutory focus beyond core financial issues, it did so expressly by amending the Exchange Act to require disclosures about, for instance, conflict minerals. 15 U.S.C. § 78m(p). It did not do so here.

The Acts' specific statutory authorizations "inform[] the grant of authority by illustrating the kinds of measures that could be necessary"

Appellate Case: 24-1685 Page: 57 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

for the public interest. *Alabama Ass'n of Realtors*, 594 U.S. at 763. The statutes' references to public interest and investor protection cannot be read "in isolation." *Id.* at 764. Reading "public interest" and "investor protection" "shorn of all context" would make the statutes "empty vessel[s]." *West Virginia*, 597 U.S. at 732. As the Supreme Court has explained in analogous circumstances, "[s]uch a vague statutory grant is not close to the sort of clear authorization required." *Id.*

That SEC had to rely on very old statutes and depart from its own prior interpretations of the statutes provides more evidence that *clear* statutory authorizations do not exist. *See id.* at 747 (Gorsuch, J., concurring). And SEC's involvement in a scientific area beyond its traditional expertise provides still more evidence. *See id.* at 748.

Because Congress did not authorize, clearly or otherwise, the Disclosure Rule, the Rule exceeds SEC's statutory authority.

II. The Rule compels speech in violation of the First Amendment.

"[F]reedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). And speech, of course, "does not lose its First Amendment

Appellate Case: 24-1685 Page: 58 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

protection because it comes from a corporation." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 871 (8th Cir. 2012) (cleaned up). When the government compels speech, the entity "must personally speak the government's message," which often means "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

These principles govern here. SEC's Rule would force public companies to take controversial stands on a hotly contested public policy issue. The Rule's speech compulsion demands heightened scrutiny, and the Rule cannot pass any form of such scrutiny—not least because public companies must already disclose material risks.

A. Strict scrutiny applies.

"[L]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny [as other content-based laws]." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642 (1994). Such content-based regulations of speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests," *Reed v.*

Appellate Case: 24-1685 Page: 59 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

Town of Gilbert, 135 S. Ct. 2218, 2226 (2015), *i.e.*, strict scrutiny. *See also id*. at 2233 (Alito, J., concurring).

The SEC's rule exemplifies the type of content-based regulation that requires strict scrutiny. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. That describes the Rule, which regulates (and compels) speech related to one topic: climate change. *See* 89 Fed. Reg. at 21,670.

Further, compelled speech by its nature runs afoul of the First Amendment: the very act of "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). This change in content is the problem, even if the mandated content is purportedly factual. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("[The] general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact."); *Riley*, 487 U.S. at 797 (explaining that both "compelled statements of opinion" and "compelled statements of fact" "burden[] protected speech").

Appellate Case: 24-1685 Page: 60 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

The Rule requires and alters companies' speech. The mandatory disclosures force each company to take a position on contested public policy questions. A company must "[d]escribe the board of directors' oversight of climate-related risks," along with "management's role in assessing and managing" them—chilling board and management speech. 89 Fed. Reg. at 21,915. If a company "has adopted a transition plan to manage a material transition risk," it must "describe the plan" (*id.*)—opening to criticism any company that does *not* describe such a plan. It must also specifically describe any "scenarios" it used "to assess the impact of climate-related risks on its business, results of operations, or financial condition." *Id.* at 21,916. It must "[d]escribe any processes [it] has for identifying, assessing, and managing material climate-related risks"—again pressuring companies to create intricate processes or be subject to criticism by certain sides of the public debate. *Id.* It must "disclose any climate-related target or goal if such target or goal has materially affected or is reasonably likely to materially affect the registrant's business, results of operations, or financial condition" (*id.*)—the materiality limitation here being no real limitation at all: having a target or goal necessarily suggests a "material effect" on the business, so

Appellate Case: 24-1685 Page: 61 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

failing to disclose a target will typically reveal the *absence* of a target. The list goes on and on—greenhouse gas emissions, assumptions involved in those calculations, interactions with businesses that provided those calculations, and much more. *Id.* at 21,916-18. The point of all this compelled speech is clear: to subject companies to public shaming for their environmental stances. *See* Uyeda, *supra*; *see also, e.g.*, Sharon Yadin, *Regulatory Shaming and the Problem of Corporate Climate Obstruction*, 60 Harv. J. Legis. 337, 348 (2023) (identifying (and seemingly praising) the Rule as an example of "climate shaming").

The SEC's motives, of course, are irrelevant: "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 576 U.S. at 165; *see id.* at 166 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."). The Rule intrudes on the core First Amendment right "to remain silent" so must satisfy strict scrutiny. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023).

Appellate Case: 24-1685 Page: 62 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

The SEC is likely to argue that strict scrutiny should not apply because "[t]he required disclosures are factual information about certain risks companies face to their businesses, finances, and operations." 89 Fed. Reg. at 21,687. The SEC is wrong in both premises and conclusion. First, Supreme Court "precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018). But as explained above, these climate-focused disclosures are not "noncontroversial." As the Supreme Court has recognized, "controversial subjects such as climate change . . . are sensitive political topics." *Janus*, 585 U.S. at 913-14. And the Rule "create[s] controversy in at least three ways": it "engage[s] in viewpoint discrimination" by "expect[ing] companies to view climate change as a serious risk," seeks "to advance an interest group agenda," and "redefine[s] concepts at the core of the SEC's regulatory agenda—investor protection and materiality." Griffith, *supra*, at 928-41. Nor are these disclosures "factual" within the meaning of the Supreme Court's commercial speech precedents—they depend heavily on a company's subjective views about unknowable future events,

Appellate Case: 24-1685 Page: 63 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

without formulas or guidance in the Rule. *See* Uyeda, *supra*. Essentially, these disclosures would be a forced public statement on the company's opinion about climate change. Because that is "anything but an 'uncontroversial' topic," lessened scrutiny "has no application here." *NIFLA*, 585 U.S. at 769.

Further, the Rule could not trigger more permissive forms of scrutiny because it does not involve "commercial speech" within the meaning of the Supreme Court's precedents to begin with. ""[C]ommercial speech" "propos[es] a commercial transaction" and "relate[s] solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980); *see Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 (1985). By contrast, "[a] company has the full panoply of protections available to its direct comments on public issues." *Id.* at 637 n.7 (cleaned up). Here, by virtue of their existence, public companies are compelled to speak directly on climate change via the Rule's "climate prescriptions." Peirce, *Green Regs and Spam*, *supra*. The disclosures do not propose any financial transactions or relate "solely" to such transactions.

Appellate Case: 24-1685 Page: 64 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

For all these reasons, strict scrutiny should apply to the Rule, which compels speech at the core of the First Amendment's protections.

B. The Rule fails any heightened scrutiny.

The SEC cannot satisfy any form of heightened scrutiny. To satisfy strict scrutiny, the SEC must first show that the Rule "plainly serves compelling state interests of the highest order" and is "unrelated to the suppression of expression." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). This "stringent standard is not watered down but really means what it says." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 484 (2020) (cleaned up). Then, the SEC must demonstrate *specifically* that "application of the [legal] burden to the person represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006). The SEC must also "specifically identify an actual problem" and show that restricting "speech [is] actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (cleaned up). The SEC cannot meet any of these burdens here, much less all of them.

The SEC has a heavy burden to show a compelling interest: "only the gravest abuses, endangering paramount interest, give occasion for

Appellate Case: 24-1685 Page: 65 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

permissible limitation" on a "First Amendment right." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (cleaned up). And the SEC must show a compelling interest in enforcing the law against each company specifically, rather than merely a general interest. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021).

The SEC, however, has provided no compelling government interest. To justify the rule, the SEC claims a "crucial interest[]" in "respond[ing] to the growing investor need for more reliable information regarding climate-related risks by providing investors with information that is important to their investment and voting decisions." 89 Fed. Reg. at 21,687. That interest is not tied to "the gravest" of private "abuses." *Sherbert*, 374 U.S. at 406. It is, at best, a purely financial interest, and at worst, a purely ideological one—in other words, no more than a dictation of expression for its own sake. And it is an interest that can be fully addressed without government intervention: the nature of public companies means that investors who want more disclosures can vote with their shares to achieve that goal. In any event, SEC rules already required the disclosure of similar climate information with an actually material effect on company finances. Griffith, *supra*, at 883-85. And the

Appellate Case: 24-1685 Page: 66 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

SEC "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 564 U.S. at 803 n.9. Finally, at best, "the rules only help some investors" "at the expense of [others]," so "it is difficult to see how the investor protection justification can count as compelling or even important" here. Griffith, *supra*, at 942.

The SEC will independently fail to meet the "exceptionally demanding" least-restrictive-means test. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). "In order to satisfy this burden, the [SEC] must come forward with specific evidence of no less restrictive means available." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751 (8th Cir. 2014). In other words, "the government cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged" law. *Id.* at 751-52 (cleaned up). If a less restrictive alternative would serve the government's purpose, the government "*must* use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added).

The SEC has no evidence that it considered or tried less restrictive means, that such means do not exist, or that such means are insufficient.

Appellate Case: 24-1685 Page: 67 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

"Precision must be the touchstone when it comes to regulations of speech." *NIFLA*, 585 U.S. at 775 (cleaned up). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

Here, "[c]ompelling the production of immaterial information is not necessary to protect investors," for "[i]mmaterial disclosures provide at best, only ineffective or remote support for investor protection." Griffith, *supra*, at 942. And even insofar as the Rule "require[s] the disclosure of material information," those requirements too "are more extensive than necessary because companies are already required to release material information concerning climate under existing disclosure rules." *Id.*

For the same reasons, the Rule would fail to pass muster even under lesser intermediate or exacting scrutiny. Even under that lesser scrutiny, "the restriction must directly advance the state interest involved"—meaning it must provide more than "ineffective or remote support"—and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction[] cannot survive." *Central Hudson*, 447 U.S. at 564. For all the reasons discussed earlier, the Rule is far too broad, forcing companies to disclose

Appellate Case: 24-1685 Page: 68 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

large swathes of information even if is not financially impactful. Thus, no matter the level of scrutiny, the Rule violates the First Amendment.

CONCLUSION

For these reasons, the Court should vacate the Disclosure Rule.

Respectfully submitted,

s/
Jacob Huebert
Jeffrey M. Schwab
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, IL 60654
312-637-2280
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

James Baehr
Pelican Institute for Public Policy
400 Poydras Street, Suite 900
New Orleans, LA 70130
504-475-8704
james@pelicaninstitute.org

Counsel for Petitioners

June 14, 2024

Appellate Case: 24-1685 Page: 69 Date Filed: 06/14/2024 Entry ID: 5404016 RESTRICTED

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2024, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

s/ Jacob Huebert
Jacob Huebert
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f), it contains 11,224 words.

I certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

I further certify that this motion has been scanned for viruses and is virus-free.

s/ Jacob Huebert
Jacob Huebert
Counsel for Petitioners

June 14, 2024