No. 23-60255

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; LONGVIEW CHAMBER OF COMMERCE; TEXAS ASSOCIATION OF BUSINESS,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF BETTER MARKETS, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND DENYING THE PETITION FOR REVIEW

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 23-60255, Chamber of Commerce of the United States of America et al. v. United States Securities and Exchange Commission

The undersigned counsel of record certifies that, in addition to the persons and entities listed in the parties' briefs, the following additional persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Amicus curiae Better Markets is a non-profit organization founded to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system. Better Markets has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Better Markets is a non-profit organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy.[1] Better Markets' goals include strong investor protections and disclosure requirements to ensure that our securities markets foster fair, transparent, and efficient capital formation. Better Markets has an interest in this case because petitioners challenge an SEC rule ("Share Repurchase Rule") that requires public companies to provide investors with important disclosures about share repurchases. *Share Repurchase Disclosure Modernization*, Rel. No. 34-97424 (May 3, 2023), 88 Fed. Reg. 36002 (June 1, 2023).[2] Those disclosures are necessary to enable investors to make optimal decisions about how to allocate their investment funds. Petitioners claim that the rule improperly compels speech and that the SEC failed to conduct a proper cost-benefit analysis. As demonstrated below, both claims are wrong under the law; moreover, they threaten not only the Share Repurchase Rule but also much broader harm to the regulatory framework governing the securities markets.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person—other than Better Markets, its members, or its counsel—contributed money to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

[2] This brief uses the pagination of the adopting release included in petitioners' record excerpts, and cites to the adopting release appear as "Release at __."

SUMMARY OF ARGUMENT

Petitioners' First Amendment attack strikes at the heart of federal securities regulation. The basic premise of that regime is disclosure, which for nearly a century Congress has considered the "most effective means" of "curtailing self-dealing and conflicts of interest." Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 HASTINGS L.J. 311, 318-19 (1974). Issuers are free to raise money from the public, but they must provide full and fair disclosure to investors. The Share Repurchase Rule simply requires that issuers provide investors with information about stock repurchases. Vacating this important requirement in the name of "compelled speech" will set a dangerous precedent that will call into question any number of disclosure requirements necessary to ensure that our securities markets remain the most fair, transparent, and robust in the world.

With respect to such disclosure requirements, the Supreme Court has stated repeatedly that laws governing the exchange of information about securities generally do not offend the First Amendment and do not receive heightened scrutiny. Rather, Supreme Court and circuit court precedent establish that the rule should at most be subject to the scrutiny governing commercial speech. Because the Share Repurchase Rule compels the disclosure of only factual and uncontroversial commercial information, it easily satisfies scrutiny under that standard.

The Commission also complied with its statutory obligation to consider the effects of the Share Repurchase Rule on efficiency, competition, and capital formation. Petitioners argue that the Commission was required to quantify the rule's costs and benefits and determine whether those benefits exceed its costs. But the Commission need not conduct a quantitative economic analysis and may instead conduct an economic analysis based on well-informed conjecture, which is what it did. Industry attempts to foist legally groundless and unrealistic economic analysis requirements on the SEC represent a now-familiar strategy aimed at nullifying necessary and appropriate rules that the industry simply dislikes. Unless rejected, petitioners' argument will further undermine the Commission's ability to promulgate and defend a host of rules that are essential for protecting the public.[3]

[3] Petitioners also argue that the rule should be vacated because the Commission provided a 45-day comment period. But courts "have uniformly upheld comment periods of 45 days." *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Petitioners' claim should be rejected. *See* Better Markets, *Letter Re: Senators' Letter on Rulemakings and Comment Periods* (Oct. 25, 2022), https://bettermarkets.org/wp-content/uploads/2022/10/Better_Markets_Letter_SEC_Senators_Rulemaking_CommentPeriods.pdf.

ARGUMENT

I. Securities disclosures are vital to the health of our financial markets, and they are subject to only limited scrutiny under the First Amendment.

A. Disclosure is the lifeblood of securities regulation and suppressing it via the First Amendment will harm investors and the markets.

Petitioners' argument that the rule's disclosure requirements violate the First Amendment threatens the foundation of securities regulation in the United States. "The United States' approach to securities regulation focuses on disclosure and is not merits based." Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047 (2019). The purpose of requiring disclosure is to provide investors with information so they may develop their own views as to the merits of a security. *Id.* Corporate insiders know far more about the issuer than investors, and required disclosures reduce these information asymmetries. *Id.* at 1045-46. As a result, the "requirement of full disclosure of all corporate information which might influence investment decisions is the very heart of the federal securities regulations." *Intercontinental Indus., Inc. v. Am. Stock Exchange*, 452 F.2d 935, 940 (5th Cir. 1971).

The Share Repurchase Rule simply requires the disclosure of information in the hands of corporate management that might influence investors' decisions. The requirement to disclose the reason for a repurchase serves multiple purposes, including reducing informational asymmetries, providing valuable details to investors, and assisting investors in distinguishing between repurchases intended to

increase shareholder value (or signal the issuer's view that its stock is undervalued) and those motivated by short-term attempts to boost the share price or increase managers' compensation. Release at 20-21, 23-24. Corporate insiders know the reasons for a repurchase, but investors do not. Reducing this information asymmetry puts investors in a better position to decide how share repurchases—their extent, frequency, and rationale—should influence their investment decisions.

Petitioners claim that the First Amendment forbids requiring this disclosure. Accepting this argument would jeopardize the Commission's ability to require disclosures about all sorts of information investors need to reduce the asymmetries between them and corporate insiders and to enable them to make informed investment decisions. For this reason, the Court must reject petitioners' argument.

B. Regulations that require the exchange of information about securities pass muster under the First Amendment as long as they compel factual and uncontroversial information, as in this case.

Supreme Court precedent indicates that the government may compel disclosures about securities. To the extent the disclosures at issue here require a First Amendment analysis, they should be treated as compelled commercial speech. And even if they are not considered compelled commercial speech, the government's power to regulate the securities markets means they should still be subject to no greater scrutiny than that which would apply under the commercial speech framework. Under that framework, disclosures pass muster as long as they are

reasonably related to a substantial government interest and involve purely factual and uncontroversial information. The disclosures easily satisfy this standard.

1. The Court should, at most, treat the disclosures as compelled commercial speech and evaluate them accordingly.

The Supreme Court has stated repeatedly that disclosures about securities do not receive heightened scrutiny under the First Amendment. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the Court stated that "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities" and "corporate proxy statements." And in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 n.5 (1985), the Court cited as not subject to "rigorous scrutiny" the exchange of information about securities and corporate proxy statements. As a result, securities disclosures are not normally subjected "to searching scrutiny." *Nat'l Elec. Mfrs. Ass' v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001). Indeed, there are "literally thousands" of regulations that require the "routine disclosure of economically significant information designed to forward ordinary regulatory purposes"—such as "SEC reporting as to corporate losses." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005). "The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Id.*

To the extent that disclosures about securities require an analysis under the First Amendment, they should be analyzed as compelled commercial speech. The

Supreme Court has said that required disclosures in the field of securities are not normally subject to heightened scrutiny because "[p]urely commercial speech is more susceptible to compelled disclosure requirements." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 n. 9 (1988). That statement indicates that the framework applicable to commercial speech should apply. That framework makes sense here, because commercial speech is expression "'related solely to the economic interests of the speaker and its audience.'" *Express Oil Change, LLC v. Miss. Bd. of Licensure for Prof'l Eng'rs & Surveyors*, 916 F.3d 483, 487 n.2 (5th Cir. 2019) (citation omitted). The disclosure of information about stock repurchases is speech that is related solely to the economic interests of the speaker (the corporation) and its audience (existing and potential shareholders).

Although the First Amendment protects commercial speech, that protection is more limited than for other speech. *Express Oil Change*, 916 F.3d at 487. And regulations that "compel 'purely factual and uncontroversial' commercial speech" are subject to even "more lenient review than regulations that restrict accurate commercial speech." *Sorrell*, 272 F.3d at 113 (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

This is so because the First Amendment interests implicated by disclosure requirements are "substantially weaker" than when speech is suppressed. *Zauderer*, 471 U.S. at 652 n.14. The disclosure of factual commercial information "furthers,

rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" *Sorrell*, 272 F.3d at 113-14. "Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal." *Id.* at 114; *accord Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 555 (6th Cir. 2012).

Compelled commercial speech disclosures also do not implicate the "individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state." *Sorrell*, 272 F.3d at 114 (citing *Riley*, 487 U.S. at 796 n.9). The required "disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to" convey a message with which they disagree. *Id.* In other words, compelled speech "raise[s] a serious First Amendment concern" only "where it effects a forced association between the speaker and a particular viewpoint." *Rowe*, 429 F.3d at 316.

2. To the extent the Court does not consider the disclosures to be commercial speech, it should still apply no greater scrutiny than the law requires under that framework.

To the extent the disclosures are not considered commercial speech, they should still receive scrutiny no greater than that which would apply under the commercial speech framework. In *SEC v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365, 372 (D.C. Cir. 1988), the D.C. Circuit did not "see a clear fit" between

commercial speech and the Commission's requirement that a magazine disclose the consideration received for publishing articles featuring firms' securities. Nonetheless, the court held that the Commission could require disclosure in light of "the federal government's broad powers to regulate the securities industry." *Id.* Supreme Court precedent suggested that "the First Amendment protections provided by the commercial speech doctrine do not *detract* from the government's regulatory power over the securities market." *Id*. at 373 (emphasis in original) (referencing *Ohralik* and *Dun & Bradstreet*). The court thus concluded that "the government's power to regulate" speech "relating to the purchase and sale of securities" is "at least as broad as with respect to the general rubric of commercial speech." *Id.*

To be sure, there are limits to the rule that disclosures required under securities regulation are generally immune from heightened scrutiny. But setting those limits depends on the facts, and under the facts here, the required disclosures bear none of the hallmarks that might justify more stringent scrutiny. In *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 372 (D.C. Cir. 2014) ("*NAM*"), *opinion after rehearing*, 800 F.3d 518 (D.C. Cir. 2015), the D.C. Circuit rejected the application of *Wall Street Publishing* on the ground that compelled disclosures should not face relaxed review "just because Congress used the 'securities' label." It equated the requirement for issuers of securities to disclose whether their products contained conflict minerals from the Democratic Republic of the Congo with a requirement that issuers disclose

the labor conditions of their factories abroad or the political ideologies of their board members. *Id.* With respect to such disclosure requirements, the court said heightened scrutiny should apply to prevent the regulation of "otherwise protected speech using the guise of securities laws." *Id.* But the required disclosure of information about an issuer's repurchase of its own stock is nothing like the conflict minerals disclosure or those hypothetical disclosure requirements. It does not require that an issuer say anything about its involvement in a war-torn region, or how it treats its employees, or its political leanings. It requires only that an issuer provide information about its stock—the same stock that members of the public must decide whether to buy, sell, or hold. As a result, the disclosure requirement should at most be subject to the scrutiny at issue in *Wall Street Publishing*, which holds that no more scrutiny should apply than the scrutiny applicable to commercial speech.

An analysis of the D.C. Circuit's opinion on rehearing in *NAM* leads to the same result. In that opinion, the D.C. Circuit declined to decide whether the conflict minerals rule involved commercial speech. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015). The court held that, even if it did, review under *Zauderer* did not apply. *Id.* at 522-24. But, in determining what type of scrutiny should apply, the court recognized that "the conflict minerals disclosure regime is not like other disclosure rules the SEC administers." *Id.* at 521. Here, the required disclosures typify the type of disclosures required by the Commission's many other rules. The

requirement to disclose information about an issuer's repurchases of its own stock is simply a regulation of the exchange of information about securities. So even if not considered to be commercial speech, it should still be subject to no more scrutiny than would be applied under the commercial speech framework.

As to commercial speech, as discussed above, the Supreme Court has applied "more deferential review" to laws that require the disclosure of factual and uncontroversial information. *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). "[T]he government may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial government interest and involves 'purely factual and uncontroversial information.'" *CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 842 (9th Cir. 2019) (quoting *Zauderer*, 471 U.S. at 651 and *NIFLA*, 138 S. Ct. at 2372). At the most, that is the test that should apply here.

And it is certainly met in this case. The government's interest in reducing information asymmetries is undoubtedly substantial as it is the basis for our disclosure-based regime of securities regulation. And the rule is reasonably related to that interest as it is designed to reduce asymmetries between issuers and investors by providing investors with information to help them evaluate the reasons behind issuers' repurchases and the ramifications of those repurchases. So the disclosures need only involve factual and uncontroversial information to survive scrutiny.

a. The requirement that issuers provide the reason for a repurchase involves a factual disclosure.

The Supreme Court has long recognized that statements of reasons, opinions, or beliefs of a company's directors are statements of fact for purposes of the securities laws. In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092 (1991), the Court held that the directors' statements of reasons or belief "are factual . . . as statements that the directors do act for the reasons given or hold the belief stated." "Reasons for directors' recommendations or statements of belief are . . . characteristically matters of corporate record subject to documentation." *Id.*

Here, the rule requires that issuers disclose the reason for their repurchase, and even if the reason was an opinion as to the value of their shares all that they must disclose is that they held that opinion or belief. They are not required to explicate their opinions but only to disclose that they in fact repurchased their shares on the basis of an opinion that they held. The required disclosure is a factual statement that the issuer acted for the reasons given or held the beliefs stated.

Petitioners claim that an issuer's reason for repurchasing its stock is not a fact but rather its subjective opinion about the business benefits of its actions and the market's estimation of its stock price. Br. at 24. But the reason for repurchasing stock *is* a fact. If the issuer repurchased its stock to reduce the number of outstanding shares to a specific number, that would be a fact. The reason need not be about the issuer's subjective beliefs at all. And if the issuer repurchased its stock because it

thought the stock was undervalued, that too would be a fact. The issuer is not being asked to opine on whether the stock is undervalued. It is being asked to report the fact that the reason it repurchased the stock was its belief that the stock was undervalued. That the issuer had that belief and acted on that belief is a fact. A holding that such a disclosure is not factual would imperil numerous securities disclosure requirements. *See, e.g.*, 17 C.F.R. § 229.407(h) (requiring that registrants disclose "why the registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the registrant").

b. The requirement that issuers provide the reason for a repurchase involves an uncontroversial disclosure.

The requirement that an issuer disclose the reason for a repurchase also calls for the disclosure of uncontroversial information because it does not require that issuers "communicate[] a message." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc). The cases petitioners cite again prove the point. They cite *NIFLA*, 138 S. Ct. at 2369, 2372, for the proposition that a disclosure is controversial "if it implicates a significant policy or factual disagreement." Br. at 25. But the Court held the disclosure requirement at issue was controversial because it required clinics to disclose information about abortions, which was "anything but an 'uncontroversial' topic." 138 S. Ct. at 2372. Similarly, in *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530, the court held that requiring an issuer to disclose "whether a product is 'conflict free' or 'not conflict free'" was "hardly 'factual and non-ideological'"

because it required an issuer "to confess blood on its hands." The requirement to disclose the reason for a repurchase is nothing like these disclosures as it does not convey any belief or viewpoint about any controversial subject. Indeed, if such disclosures were deemed controversial, then much of the SEC's disclosure regime would be thrust into the realm of politically or ideologically charged topics—a result as untenable as it its undesirable from the standpoint of investor protection.

Despite petitioners' contention, the rule does not require "that companies opine on a 'controversial' topic." Br. at 24. It requires that they provide the reason for their repurchases. They need not take any position on whether repurchases, or the reasons for them, are good or bad. That issuers might not want to disclose the reason for a repurchase or that investors might react to a particular reason does not render the disclosure controversial. *See N.Y.S. Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (rejecting contention that required disclosure of calorie content on restaurant menus was not subject to *Zauderer* because restaurants "do not want to communicate to their customers" caloric content); *see also Disc. Tobacco*, 674 F.3d at 569 (stating that facts can "provoke an emotional response" and "spark controversy" yet that does not make them controversial under *Zauderer*).

Petitioners also argue that the required disclosures are controversial because the value of repurchases is "fiercely debated." Br. at 26. But subjecting required disclosures to heightened First Amendment scrutiny because the topic is "fiercely

debated" would imperil numerous provisions of the securities laws. For example, Exchange Act Section 16(a) requires that company insiders report trades in the stock of their corporations "to apprise 'investors of security transactions by insiders,' so that 'abuses resulting from the use of inside information may be averted.'" *mPhase Technologies, Inc.*, Rel. No. 34-74187, 2015 WL 412910, at *5 (Feb. 2, 2015) (citations omitted). Yet insider trading "is one of the most controversial aspects of securities regulation" because whether it should be prohibited "has never been fully settled." 3 Bromberg & Lowenfels on Securities Fraud 6:112 (2d ed.); *see also, e.g.*, 17 C.F.R. § 229.402(u) (requiring that registrants disclose the ratio between the median pay of their employees and their CEOs); Peter Yeung, *Why CEOs Make So Much Money*, BBC (Jan. 27, 2021) ("Whether CEO pay is justified remains subject to fierce debate), https://www.bbc.com/worklife/article/20210125-why-ceos-make-so-much-money. A debate about the subject of a disclosure requirement cannot be sufficient to render the disclosed information controversial. *See CTIA*, 928 F.3d at 848 (finding required disclosure about possible harm from cell phone usage uncontroversial, despite debate in the scientific community, because it did not force the speaker "to take sides in a heated political controversy").

C. No basis exists for subjecting the disclosures to strict scrutiny.

Petitioners argue that strict scrutiny applies here because the Commission has not proven that the required disclosures fall outside the category of fully protected

speech. Br. at 23. But the cases they cite do not support their argument. They cite *NIFLA*, 138 S. Ct. at 2371, for the proposition that laws compelling speech are "'presumptively unconstitutional' and almost always trigger strict scrutiny." Br. at 22. What *NIFLA* held to be "presumptively unconstitutional" were laws that target speech based on its communicative content and compel individuals "to speak a particular message." 138 S. Ct. at 2371. The case involved a requirement that clinics serving pregnant women inform women "how they can obtain state-subsidized abortions." *Id.* The disclosure requirements at issue here, involving information about an issuer's stock repurchases, are not at all similar and do not fall within the category of speech deemed "presumptively unconstitutional."

Petitioners also cite *303 Creative LLC v. Ellis*, 143 S. Ct. 2298, 2312 (2023), for the proposition that the disclosures "infringe[] on their right 'to remain silent,' triggering strict scrutiny." Br. at 22. *303 Creative* held that strict scrutiny applies when "the government seeks to compel a person to speak its message." 143 S. Ct. at 2312. The Court determined that a wedding website business could not be compelled to create websites celebrating same-sex marriages. *Id.* at 2313. The Court held that the government may not force someone "to 'utter what is not in [her] mind' about a question of political and religious significance." *Id*. at 2318 (citation omitted) (alteration in original). The Share Repurchase Rule does no such thing.

Indeed, this case is nothing like the "'leading First Amendment precedents'" that "'established the principle that freedom of speech prohibits the government from telling people what they must say.'" *Id.* at 2317 (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61-62 (2006)) ("*FAIR*"). Those precedents deemed unconstitutional laws requiring schoolchildren to recite the Pledge of Allegiance and salute the flag and requiring motorists to display "Live Free or Die" on their license plates. *FAIR*, 547 U.S. at 61 (citing *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). The requirement that issuers provide the reason for a stock repurchase "is a far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62.

II. <u>The Commission conducted a proper economic analysis.</u>

A. The Commission need only "consider" the impact of its rule on efficiency, competition, and capital formation and need not conduct a quantitative cost-benefit analysis.

Petitioners misstate the Commission's obligation to conduct an economic analysis under the securities laws. They say the Commission must "'quantify'" a rule's costs and benefits or "'explain why [they] could not be quantified.'" Br. at 39 (alteration in brief) (quoting *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011)). Petitioners assert further that the Commission must "determine 'as best it can' whether the benefits of a regulation exceed its costs." *Id.* at 38 (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)).

Petitioners cite no statute that requires the Commission to conduct a cost-benefit analysis. Rather, Exchange Act Section 3(f) requires only that it "consider" whether the action "will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f). Similarly, Section 23(a)(2) requires only that it consider the impact a rule "would have on competition" and not adopt a rule that would impose an unnecessary burden on competition. 15 U.S.C. § 78w(a)(2). The D.C. Circuit has clarified, in cases decided after the cases petitioners cite, that a duty "to consider economic impacts does not necessarily require a precise cost-benefit analysis" and that the Commission need not "'base its every action upon empirical data' and may reasonably conduct 'a general analysis based on informed conjecture.'" *Nasdaq Stock Market LLC v. SEC*, 34 F.4th 1105, 1111 (D.C. Cir. 2022) (internal citations omitted). In other words, the Commission "need not conduct a 'rigorous, quantitative economic analysis' unless the statute explicitly directs it to do so." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369 (citation omitted). It does not do so here.

The fundamental rationale for Congress's determination not to require the Commission to conduct a cost-benefit analysis is clear: it would conflict with, and thereby frustrate, the Commission's ability to implement one of Congress's "central purposes" in enacting the Exchange Act—"to protect investors through the requirement of full disclosure by issuers of securities." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). This is so because attempting to calculate the costs and

benefits of regulation is imprecise and speculative at best. Many rules "have benefits or costs that cannot be quantified or monetized in light of existing information." OMB, 2011 REPORT TO CONG. ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, at 4 (2011). Agencies "must often act in the face of substantial uncertainty about the likely consequences" of a regulation and recognize that, in some cases, "quantification of various effects is highly speculative." *Id.*

These uncertainties apply with special force in financial market regulation, where the costs and benefits are often contingent, unpredictable, and difficult to quantify. For example, the costs of compliance will vary greatly depending on how a market participant adapts to a new regulation. Assessing the rule's benefits is often even more difficult. The benefits of financial regulation are typically crucial yet amorphous, such as market integrity, investor protection, and reducing informational asymmetries. Thus, under a cost-benefit analysis, many advantages of financial regulation, no matter how important to investors and properly functioning markets, may be sorely undervalued or entirely disregarded. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 987 (D.C. Cir. 1985) (rejecting petitioners' focus "on costs to the exclusion of the Rule's benefits" where the "non-pecuniary nature of many of the benefits [made] them difficult to measure and weigh in cost-benefit terms").

As a result, the utility of applying a cost-benefit analysis to financial regulations is likely to be low. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 888 (2015). Too many variables are in play, and too many contestable assumptions are required, "to have any confidence in any specific estimate of costs or benefits, even if expressed in ranges or bounds." *Id.* at 998. So "[b]asing policy on specific quantitative outputs would simply be a poor exercise of judgment." *Id.*

At the same time, the hazards of requiring that agencies justify their rules through a quantitative cost-benefit analysis are likely to be high. The "resources consumed, regulatory delay, [and] diffusion of regulatory focus" detract from the usefulness of a cost-benefit analysis. *Id.* at 888. For these reasons, critics of cost-benefit analysis have long warned that it is too often used as a "device not for producing the right kind and amount of regulation, but for diminishing the role of regulation even when it was beneficial." Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHIC. L. REV. 1, 5-6 (1995).

All of this is not to say that the consideration of a rule's potential costs and benefits has no role to play in financial market regulations. Those costs and benefits "can be a legitimate part of decision making, as one input into a judgmental choice." Coates, 124 YALE L.J. at 999. Indeed, the Commission must "take seriously its statutory duty to consider" the effects of its rules on efficiency, competition, and

capital formation. *FMC Corp. v. Train*, 539 F.2d 973, 979 (4th Cir. 1976). But "courts of review should be mindful of the many problems inherent in an undertaking of this nature and uphold a reasonable effort made by the Agency." *Id.* Private litigants must not be allowed to use an agency's good-faith efforts to estimate the costs and benefits of its rules to "undermin[e] the validity of the very rules that the analysis informed." Bruce Kraus and Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 341 (2013).

B. The Commission sufficiently considered the impact of the rule on efficiency, competition, and capital formation.

Under the proper framework for evaluating the Commission's assessment of the economic impact of the rule, it satisfied its statutory duties. As discussed above, the Exchange Act required the Commission to "consider" whether the rule would promote efficiency, competition, and capital formation. The Supreme Court has made clear that the duty to "consider" various economic factors in the rulemaking process entails wide agency discretion. As the Court has explained, when statutorily mandated "consideration[s]" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion." *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950). Indeed, the requirement to "consider" a criterion "does not mean to 'adhere to,' 'be bound by,' or 'follow'" it. *United States v. Bruce*, 285 F.3d 69, 73 (D.C. Cir. 2002). Rather, to "'consider' means to 'reflect on,' 'think about,' 'deliberate,' 'ponder,' or 'study.'"

Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 483 (1993)). The Commission did this with respect to the relevant factors.

The Commission stated that it expected the rule to "have positive overall effects on efficiency, competition, and capital formation." Release at 143. It expected the resulting decrease in information asymmetry to "lead to more informationally efficient prices," "more efficient capital allocation in investor portfolios," fewer "adverse selection costs," and greater "stock liquidity. *Id.* It also expected the disclosures to "incrementally facilitate capital formation and reduce the cost of capital." *Id.* at 144. The Commission also recognized that, depending on how certain issuers responded, the rule *could* lead to some adverse effects on competition or decreased price efficiency and decreased liquidity. *Id.* at 145-46. These conclusions show that the Commission reflected on, thought about, and studied the rule's effects on efficiency, competition, and capital formation.

Nonetheless, petitioners claim that the Commission's economic analysis suffered from numerous defects. Petitioners are wrong.

1. The Commission considered the rule's costs and benefits.

Despite the D.C. Circuit's recent caselaw, petitioners claim that the Commission's failure to make "quantitative estimates" of the rule's costs and benefits requires vacatur. Br. at 42. But even the case petitioners cite for this proposition does not support it. In *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*,

60 F.4th 956, 973 (5th Cir. 2023), this Court did not say anything about quantifying the costs and benefits of a rule. Rather, it held that an agency must "consider[ ] the costs and benefits associated with the regulation." *Id.* The Commission undoubtedly did so here. That commenters suggested ways for the Commission to compile data does not mean the Commission could quantify the *effects* of the rule. Indeed, the Commission explained that many of the effects of the rule could not be quantified, and it explained why this was so. Release at 97-98, 104 n.390. The fact that it did so in a footnote is irrelevant. The Commission discussed the economic effects of the rule, including its costs and benefits, for over 50 pages; under any reasonable definition, it "considered" those costs and benefits.

2. The Commission found substantial benefits to the rule.

Petitioners claim that the Commission did not adequately justify the rule's benefits because it "never substantiated the threshold proposition that improperly motivated buybacks are actually a problem" but rather "merely noted disagreements" about the motivations for buybacks "without making any effort to resolve" the disagreements. Br. at 43. But the Commission cited research indicating that companies engage in repurchases to boost earnings per share (EPS) targets and therefore executive compensation. Release at 15-16. It then noted the views of commenters who "questioned the premise that stock repurchases are deliberately used to enhance executive compensation or otherwise benefit insiders looking to sell

their shares." *Id.* at 16. In response, the Commission "disagreed with their assessment of the underlying evidence." *Id.* at 17. The Commission stated that it "share[d] the assessment of other commenters who argued that . . . personal benefit may be a factor in determining whether to undertake a share repurchase." *Id.*

Petitioners cannot reasonably dispute that evidence supports this assessment. Financial economists have "long understood" that repurchases improve EPS by reducing the number of shares outstanding. Nitzan Shilon, *Stock Buyback Ability to Enhance CEO Compensation: Theory, Evidence, and Policy Implications*, 25 LEWIS & CLARK L. REV. 303, 308 (2021). And "higher EPS not only increases executives' bonuses but also enhances their long-term incentive awards." *Id.* One study found that the potential for repurchases to improve long-term incentive awards "is currently 10 times higher" than the established ability of buybacks to affect annual bonuses. *Id.* So there can be no dispute that "executives are motivated to conduct buybacks excessively." *Id.* Another study concluded that investors should know the purpose of a repurchase so they may "better evaluate whether board members have a philosophy relating to share repurchases that represents investors' interests." IIRC INSTITUTE AND TAPESTRY NETWORKS, BUYBACKS AND THE BOARD: DIRECTOR PERSPECTIVES ON THE SHARE REPURCHASE REVOLUTION 30 (Aug. 2016), https://www.tapestrynetworks.com/publications/irrc-institute-buybacks-and-the-board. Against this backdrop, petitioners cannot question the benefits of a rule

designed to "provide investors with enhanced information to assess the purposes and effects of repurchases, including whether those repurchases may have been undertaken for reasons that may not increase an issuer's value." Release at 19.

Petitioners cite a study of repurchase activity by 350 U.K. firms that found none of them used repurchases to hit an EPS target. Br. at 43 n.2. But of the $1.3 trillion in global repurchases in 2022, approximately $1 trillion was in the U.S. Brooke Masters, *If companies are going to buy back shares, they should pay a fair price*, Financial Times (July 22, 2023), https://www.ft.com/content/5303e9a3-603d-4621-88e3-24f07c87fc69. And a U.S. study found that 29% of companies that announced buybacks did so at a time when they would have been at risk of missing EPS expectations without them. *Id.* Regardless, the point is not that one study is better than another study. The point is that evidence supported the Commission's articulated assessment that the well-established possibility of various motivations for repurchases justified the need for more disclosure.

3. The Commission considered the excise tax.

Petitioners argue that the Commission failed to account for the effect of a newly-enacted 1% excise tax on stock repurchases. Br. at 54. According to them, by "not making any definitive judgment on whether some portion of the Rule's benefits remained constant," the Commission "arbitrarily failed to substantiate [its] conclusion that the excise tax did not alter the Rule's cost-benefit ratio." *Id.* at 56.

This argument fails, as the Commission reopened the record for additional comment on this precise issue, thoroughly considered the matter, and in fact made a judgement that the excise tax would not likely affect the benefits of the rule. The Commission stated that although the tax *could* lead to fewer repurchases, they would still be substantial, and it believed "that the underlying rationale for the rule—informing investors in a more comprehensive fashion about the repurchase decisions of issuers that do continue to conduct repurchases—remains applicable." Release at 106. As a result, it concluded that it "expect[ed] that the tax will not meaningfully affect the rationales for the" rule. *Id.* at 54. This "definitive judgment" satisfied the Commission's obligation to consider the tax's effect.

4. The Commission considered the rule's overall effects.

Petitioners contend that, "even if the Commission had properly quantified and considered the Rule's costs and benefits *separately*, it did not reasonably assess their *combined* effect." Br. at 58 (emphasis in original). While the Commission was not required to quantify the rule's costs and benefits, it plainly considered those costs and benefits in its 50-page analysis of the economic effects of the rule, and it also concluded that overall, the rule provided worthwhile benefits to investors despite the acknowledged costs to issuers. The Commission determined that the rule's disclosure requirements would "provide investors with enhanced information to assess the purposes and effects of repurchases," it recognized that "any enhanced

disclosure requirements will come at a cost for issuers," and it concluded that the final rule was designed to "limit the compliance burden on issuers while still providing investors with the information they need to better assess the efficiency of, and motives behind, issuer repurchases." Release at 19.

A holding that the Commission needed to do more to justify providing investors with material information would imperil federal securities regulation. Industry's insistence that agencies achieve absolute precision and certainty as they consider the costs and benefits of a rule is in reality a strategy for weaponizing economic analysis and thwarting reasonable regulation, not a methodology aimed at producing sound regulatory policy. The Court should reject this line of attack not only to ensure investors receive the disclosures at issue here but also to more broadly safeguard the regulatory framework governing securities that has produced the most robust, trustworthy, and economically powerful capital markets in the world.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on August 16, 2023, I served a copy of the foregoing brief on all counsel of record through this Court's electronic filing system.

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