Nos. 24-1522, 24-1624, 24-1626, 24-1627
24-1628, 24-1631, 24-1634, 24-1685, 24-2173

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF IOWA, ET AL.,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent,

DISTRICT OF COLUMBIA, ET AL.,

Intervenors.

On Petitions for Review of an Order and Rule of the
Securities and Exchange Commission

BRIEF OF BETTER MARKETS, INC., AND CONSUMER FEDERATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4), amici make the following disclosures:

Better Markets, Inc., is a non-profit corporation, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Consumer Federation of America is a non-profit corporation, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Nat'l Res. Def. Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) 20
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OTHER AUTHORITIES

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Brad Plumer, *Companies See Climate Change Hitting Their Bottom Lines in the Next 5 Years*, N.Y. TIMES (June 4, 2019) 12

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Daniel T. Deacon & Leah M. Littman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) 21

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Emirhan Ilhan *et al*., *Climate Risk Disclosure and Institutional Investors*, 36 REV. FIN. STUD. 2617 (2022) 9

Emma Cox, Global Climate Leader, PricewaterhouseCoopers, *See Your Climate Blind Spots*, WORLD ECONOMIC FORUM (May 25, 2022) 11

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Former SEC Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) 21
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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Better Markets, Inc. ("Better Markets") is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters on proposed rules, independent research, *amicus curiae* briefs, public advocacy, and Congressional testimony. It advocates for reforms that stabilize our financial system, prevent financial crises, and protect investors through anti-fraud measures and disclosure requirements applicable to companies that depend on the U.S. capital markets to start up, grow, and profit. Better Markets filed an extensive comment letter in support of the set of climate risk disclosure rules at issue here[2] (collectively, "Rule").

Consumer Federation of America ("CFA") is an association of more than 250 nonprofit consumer organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works to ensure that the millions of Americans who rely on investments to fund their retirement or

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[1] Pursuant to Fed. R. App. P. 29(a)(2), amici curiae state that counsel acting on behalf of all parties have consented to the filing of this brief or filed a global consent letter. Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that no counsel for any party authored this brief in whole or in part and that no party, party's counsel, or any other person—other than these amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) ("Release").

other life goals are entitled to a fair financial marketplace that provides strong protections against fraud, manipulation, and abuse; investor disclosures that are accurate and reliable; and effective recourse when they are victims of wrongdoing. CFA filed an extensive comment letter in support of the Rule.

Better Markets and CFA have a strong interest in this case because a decision from the Court vacating the Rule would cause major harm to investors, the securities markets, and above all, the SEC's foundational authority to require disclosures from companies that seek investors' money. In response to overwhelming demand from a broad spectrum of investors, the Rule will require companies to disclose information about the climate-related risks they face. Investors need that information to evaluate public companies and to decide how to invest their capital and cast their proxy votes. The Rule will also enhance efficiency, competition, and capital formation in the securities markets. If the Rule were vacated, all of these investor and market-wide benefits would be lost.

Furthermore, a decision vacating the Rule would inflict serious and long-lasting damage to the SEC's single most important authority: requiring decision-useful information from public companies for the benefit of investors and market integrity. Our capital markets are the envy of the world because our securities laws place a premium on transparency—providing full and fair disclosure, which ultimately rewards investors as well as the companies that seek their capital. Without

such transparency, investors will be exposed to heightened risks they cannot identify or account for, and markets will become less liquid, efficient, and trusted. Such an outcome would harm not only our markets but our entire economy. For all of these reasons, amici seek to defend the Rule against the petitioners' challenges.

SUMMARY OF ARGUMENT

First, the Rule is a necessary and appropriate exercise of the SEC's crystal-clear statutory authority to require company disclosures that protect investors and serve the public interest. The Rule will advance both goals. It will protect investors by providing them with more complete, reliable, accessible, and comparable information about the climate-related risks that companies face and how those businesses are managing such risks. This is information investors want and need to make informed investment and proxy-voting decisions. The Rule will also serve the broader public interest by promoting market efficiency, competition, and capital formation. And contrary to petitioners' claims, the disclosures are clearly material to investors, based on the content of the Rule, the enormous demand for the disclosures from investors, and the widespread judgments of other governments and third parties that such disclosures are important to investors as they allocate their capital and vote their proxies. The disclosures are also *financially* material to investors, because climate-related risks pose ever-increasing threats to the financial condition of virtually every company.

Second, the major questions doctrine has no application here. The Rule does not invoke a long "unheralded power," stretch the boundaries of the SEC's disclosure authority, or carry massive economic or political significance. Disclosure has been at the heart of the SEC's mission since it was established over 90 years ago, and the SEC has been exercising its disclosure authority for almost a century. Moreover, the SEC has been specifically addressing the need for environmental and climate-related disclosures for over 50 years. While the petitioners claim that the Rule improperly casts the SEC as an "environmental guardian," this argument rests on a superficial and ultimately irrelevant fixation on the *type* of risk at issue, stemming from climate change. In fact, the SEC's authority to require disclosure does not hinge on the specific type of risk that companies face. Moreover, the SEC—in stark contrast with the EPA—is in no way attempting to regulate climate change itself or even the way companies adapt to climate change. As the SEC explains, it is entirely "agnostic about whether or how registrants consider or manage climate-related risks." Release at 21,671. Finally, the Rule is a classic disclosure rule well within the SEC's 90-year-old authority, with nowhere near the economic or political significance found in genuine major questions cases. In any event, the Rule satisfies the essential requirement of the doctrine, since the SEC can point to clear congressional authorization for the SEC to require disclosure of information from companies and to update those requirements as the markets evolve.

Finally, the SEC fully complied with its duty to conduct an economic analysis in support of the Rule. The petitioners seek to impose on the SEC a duty to conduct a quantitative cost-benefit analysis where none exists by arguing that a such an analysis is necessary to satisfy the substantial evidence test. But Congress imposed only a limited duty on the SEC to consider whether a rule will promote efficiency, competition, and capital formation, not to quantify costs and benefits. In this instance, the SEC conducted a thorough economic analysis of the Rule: It considered the impact of the Rule on the three statutory factors, and it furthermore evaluated the benefits and costs, even quantifying them where possible.

ARGUMENT

I. THE RULE IS AN APPROPRIATE EXERCISE OF THE SEC'S AUTHORITY TO REQUIRE DISCLOSURES THAT PROTECT INVESTORS AND SERVE THE BROADER PUBLIC INTEREST.

Any question of statutory interpretation begins "with the plain language of the statute." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011) (cited authorities omitted). Here, the plain language of multiple provisions in the securities laws gives the SEC broad, discretionary authority to require disclosures in registration statements, periodic filings, and other documents, where the SEC determines such disclosures are "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); 15 U.S.C. 78l(b); *see also* 15 U.S.C. 77j(c); 15 U.S.C. § 78m(a); 15 U.S.C. § 78o(d). The

disclosures required by the Rule satisfy both of these statutory criteria. They protect investors by ensuring they have more complete, reliable, accessible, and comparable information about the climate-related risks that companies face and how those businesses are managing those risks. Investors want and need that information to make informed investment and proxy voting decisions. The disclosures also serve the broader public interest. They facilitate not only the securities laws' core objectives of protecting investors but also the goals of promoting market efficiency, fair competition, and capital formation. Release at 21,683.

The petitioners claim that the SEC exceeded its authority because the Rule requires the disclosure of information that is not material, not financial in nature, or not related to preventing fraud and abuse. *See, e.g.*, Liberty Energy Br. at 29-31; States' Br. at 22-27. This narrow interpretation of the SEC's disclosure authority is incorrect. While Congress incorporated a materiality element in some provisions, including those proscribing fraud, *e.g.* 15 U.S.C. § 77k(a), it chose not to do so in the sections authorizing the SEC to require issuer disclosures. Nor did Congress limit the SEC's disclosure authority to financial information. The petitioners' argument also conflicts with the fundamental purpose of the securities laws, which

is not merely to combat fraud and abuse but also to establish a philosophy of full disclosure so investors can evaluate securities.[3]

In this case, the debate over the precise scope of the SEC's disclosure authority is unnecessary, because the record shows that the Rule seeks information that is both material and financially material to investors.

A. <u>The Rule will protect investors by ensuring they have access to material information.</u>

The record contains overwhelming evidence that the Rule requires the disclosure of material information. This follows from the explicit guidance in the Release, the wording of the Rule itself, the widespread investor demand, and the judgments of innumerable governmental and non-profit organizations that have adopted climate-related disclosure requirements and guidelines.

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[3] *See* H.R. Rep. No. 73–1383, at 5–7 (1934) ("No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells."); *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 178 (2015) ("The Securities Act of 1933 . . . protects investors by ensuring that companies issuing securities (known as 'issuers') make a full and fair disclosure of information relevant to a public offering.") (quotation omitted); Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047 (2019) (purpose of requiring disclosure is to provide investors with information so they may develop their own views as to the merits of a security), https://tinyurl.com/2y4exwmr.

The SEC made clear in the Release that the Rule is to be read as embodying the mainstream definitions of materiality, as set forth in the SEC's rules as well as Supreme Court precedent:

> When evaluating whether any climate-related risks have materially impacted or are reasonably likely to have a material impact on the registrant, including on its business strategy, results of operations, or financial condition, registrants should rely on traditional notions of materiality. As defined by the Commission and consistent with Supreme Court precedent, a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote or such a reasonable investor would view omission of the disclosure as having significantly altered the total mix of information made available.

Release at 21,696, *citing, e.g.*, 17 C.F.R. § 230.405 (definition of ''material''); *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1977). These definitions are expansive, encompassing a broad range of information, both financial and non-financial. And they appropriately serve the interests of investors seeking to maximize financial gains as well as investors seeking other types of information on which to base their investment or proxy voting decisions.

The Rule itself is explicitly and consistently framed in terms of materiality, and it seeks information that is inherently material—information that investors would consider important in deciding whether to invest or how to vote their proxies. *See, e.g.*, § 229.1502 (Item 1502) ("Describe any climate-related risks that have *materially* impacted or are reasonably likely to have a *material* impact on the

registrant”); § 229.1501 (Item 1501) (“Describe management’s role in assessing and managing the registrant’s *material* climate-related risks.”) (emphases added).

The materiality of the disclosures required under the Rule is further confirmed by the sustained call for climate risk disclosures that has emanated from a broad swath of investors, including some of the largest investment management firms in the world. The SEC reviewed this investor demand in the Release, observing, for example, that in 2021, 733 institutional investors representing $52 trillion in assets under management similarly issued a statement calling on governments to address climate-related risks, in part, by mandating corporate disclosures. Release at 21,673 n.41.[4] Other sources reinforce the point. Comment letters received in response to the proposed rule, the results of multiple surveys, evidence in academic studies, and even polls all reflect a strong demand from investors for disclosures of the climate-related risks companies face. Release at 21,846-47.[5]

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[4] *See also* Emirhan Ilhan *et al.*, *Climate Risk Disclosure and Institutional Investors*, 36 REV. FIN. STUD. 2617, 2617 (2022) (“Through a survey and analyses of observational data, we provide systematic evidence that institutional investors value and demand climate risk disclosures.”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437178.

[5] *See also* Public Citizen, *Survey Reveals Retail Investors Want SEC to Require Climate Disclosure* (Apr. 29, 2022) (investors want more reliable and standardized information on climate risks facing companies), https://www.citizen.org/news/survey-reveals-retail-investors-want-sec-to-require-climate-disclosure/.

The actions of innumerable other governments as well as non-profit organizations further confirm the enormous importance of the information to be disclosed under the Rule, especially in light of its financial significance. *See* Release at 21,669-70 & n.9; Release at 21,843. The problem of course is that the alternative frameworks are not mandatory; they are not complete, uniform, or comparable; and they are not subject to the same level of accountability or liability that accompanies mandatory disclosures, rendering them of limited use to investors.

In short, the Rule itself, investor demand, and the judgment of other organizations—governments and public interest groups alike—confirm that it is not just a "substantial likelihood" that reasonable investors would consider the disclosures important in making investment and proxy voting decisions, but a certainty.

B. The Rule will also supply investors with financially material information.

The record here furthermore shows that the Rule requires disclosures that are not only material but financially material to investors. In fact, climate risk disclosures are of intense interest to investors precisely because they bear so directly on the financial condition and future prospects of companies.[6] As noted in the

[6] *See* Silvana Secinaro *et al.*, *Impact of climate change mitigation policies on corporate financial performance: Evidence-based on European publicly listed firms*, 27 CORP. SOC. RESP. & ENVIRON. MAN. 2491 (2020) (finding that firm-wide

Release, at 21,671, "the importance of climate-related disclosures for investors has grown as investors, companies, and the markets have recognized that climate-related risks can affect a company's business and its current and longer-term financial performance in numerous ways." The reality is that "[a]ll companies are potentially exposed to climate impacts—even companies with low or no carbon emissions."[7] Thus, it has long been recognized within the business community that plans to account for climate-related risks are essential to maximize profits: "[b]usinesses that continue to sit on the sidelines will be badly handicapped relative to those that are now devising strategies to reduce risk and find competitive advantage in a warming,

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adoption of environmental practices positively impacts company financial performance), https://onlinelibrary.wiley.com/doi/abs/10.1002/csr.1971; Hsiao-Min Chen *et al.*, *Impacts on the ESG and financial performances of companies in the manufacturing industry based on the climate change related risks*, 380 J. CLEAN. PROD. 134951 (2022) ("[D]isclosure of climate change-related risks and opportunities has a significant positive effect on financial performance among [private] firms."), https://www.sciencedirect.com/science/article/abs/pii/S0959652622045243; N.S.A. Megeid, *The impact of climate risk disclosure on financial performance, financial reporting and risk management: evidence from Egypt*, 10 FUTUR. BUS. J. 21 (2024) (statistical analysis reveals "significant positive association between the financial performance, financial reporting, and risk management of industrial organizations and the disclosure of climate change."), https://doi.org/10.1186/s43093-024-00309-5.

[7] Emma Cox, Global Climate Leader, PricewaterhouseCoopers, *See Your Climate Blind Spots*, WORLD ECONOMIC FORUM (May 25, 2022), https://www.weforum.org/agenda/2022/05/see-your-climate-blind-spots/.

carbon-constrained world."[8] As the Release also explains, the physical and transition risks posed by climate change, and issuers' responses thereto, will impact financial performance and investors' return on investment. Release at 21, 672.[9]

The Release canvasses other sources showing the close connection between the risks of climate change and the financial condition and performance of companies. It explains that "academic literature shows a well-established link between climate-related risks and firm fundamentals," including, for example, the impact of various climate trends on corporate revenues, operating income, and profit growth. Release at 21,848. It also cites findings that climate-related risks are found to be priced into corporate bonds, options, credit default swaps, and futures contracts. Release at 21,849.

By all accounts, climate-related risks are having, and will continue to have, a profoundly important *financial* impact on every type of company in every industry sector. The disclosures required by the Rule are financial in nature.

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[8] Editor's Note in *Climate Business/Business Climate*, HARV. BUS. REV. (Oct. 2007), https://hbr.org/2007/10/climate-business-_-business-climate.

[9] *See also* Brad Plumer, *Companies See Climate Change Hitting Their Bottom Lines in the Next 5 Years*, N.Y. TIMES (June 4, 2019) (analysis shows business leaders expect climate change, and the policy responses to it, to ripple through every corner of the global economy), https://www.nytimes.com/2019/06/04/climate/companies-climate-change-financial-impact.html.

II. <u>THE MAJOR QUESTIONS DOCTRINE IS INAPPLICABLE TO THE RULE AND IN ANY EVENT SATISFIED.</u>

The petitioners challenge the SEC's authority to promulgate the Rule in part by arguing that it triggers, yet fails to satisfy, the Supreme Court's major questions doctrine. *See, e.g.*, National Legal Br. at 30-49; States' Br. at 28-41. This principle of administrative law is intended solely for extraordinary cases, and it only applies where an agency has asserted a regulatory authority that is unheralded, so extraordinarily broad as to be transformative, and of enormous economic and political significance. Under these circumstances, the Supreme Court has said, the agency must be able to point to clear congressional authorization for the authority it claims. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

Here, the major questions doctrine has no application, since the Rule has none of the attributes that, if present together, would require a court to search for an exceptionally clear congressional authorization for the SEC's regulatory approach. The Rule does not rely on a long "unheralded power," it does not stretch the boundaries of the SEC's disclosure authority or cast the agency in an unfamiliar role, and it does not carry massive economic or political significance. As a result, applying the major questions doctrine here would represent a significant and unwarranted expansion of its scope. In any event, the SEC has clear congressional authorization for the Rule.

A. **<u>The Rule does not trigger the major questions doctrine.</u>**

1. The Rule is not an unheralded exercise of the SEC's authority.

The SEC is not asserting an unheralded authority, one that is little known or exercised unexpectedly. To dispose of this argument, it is enough to observe that the SEC has had broad authority to require disclosures from companies since its creation and that it has exercised that authority repeatedly over decades. Moreover, that disclosure authority is the very antithesis of "unheralded." It lies at the heart of the SEC's core competence and core practice of protecting investors through required disclosures. As observed in the Release, the SEC has a "long history" of requiring disclosures about risks companies face. Release at 21,672 n.27.

Here the case is even stronger, since the SEC has been specifically addressing the need for environmental and climate-related disclosures for over 50 years. In 1971, the SEC issued guidance regarding the duty to make disclosures about environmental compliance and legal proceedings.[10] A future General Counsel and Chairman of the Commission wrote then that the SEC "should impose affirmative environmental disclosure requirements upon all corporate entities subject to its

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[10] Disclosures Pertaining to Matters Involving the Environment and Civil Rights, 36 Fed. Reg. 13,989 (July 29, 1971), https://tinyurl.com/25299hvr.

jurisdiction"; "[t]hat the Commission's authority is not so limited as to preclude such an approach," he explained, "is apparent from a reading of its statutory authority."[11]

In 1973, the Commission adopted rules requiring disclosure of the material effects of compliance with environmental laws and various proceedings involving environmental laws.[12] In 1976, the SEC mandated disclosure of the effects that environmental compliance may have on issuers' capital expenditures, earnings, and competitive position.[13] The SEC also made clear that its "broad discretion to require disclosure provides necessary latitude to expand or contract disclosure rules in light of changes in the relevant context in which securities issuers conduct their business."[14]

In 2010, the SEC issued Commission-level guidance regarding how the Commission's existing disclosure rules "apply to climate change matters." Noting

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[11] Theodore Sonde & Harvey Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"*, 16 HOWARD L.J. 831, 850 (1971).

[12] Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, 38 Fed. Reg. 12,100 (May 9, 1973), https://tinyurl.com/2d2th5v3.

[13] Notice of Commission Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure, 41 Fed. Reg. 21,632 (May 6, 1976), https://tinyurl.com/29382m2m.

[14] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act, 40 Fed. Reg. 51,656, 51,659 (Oct. 14, 1975), https://tinyurl.com/2b6zhe2x; *see also* Disclosure of Environmental and Other Socially Significant Matters, 40 Fed. Reg. 7,013 (Feb. 11, 1975), https://tinyurl.com/243r3b7d.

that legislation, regulation, international accords, business trends, and physical impacts of climate change could all affect a registrant's operations or results, the release "remind[ed] companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare documents to be filed with us and provided to investors."[15] This 50-year history shows that the Rule is hardly an unheralded or dramatic assertion of some novel authority by the SEC.

Yet the petitioners persist with this line of attack by insisting that the Rule exceeds the SEC's authority because it casts the SEC as an "environmental guardian" intruding on the EPA's domain. States' Br. at 29, 33, 46; *see also* Chamber Br. at 53. That argument fails because it reflects an irrelevant fixation on the *type* of risk at issue, stemming from climate change. In reality, the SEC's authority to require disclosure does not hinge on the specific type of risk that companies face. Risks to public companies come in many forms, ranging from poor management, excessive debt, legal jeopardy, and cyber threats to natural disasters and a myriad of other risk factors. Investors need to understand all of those threats regardless of their source, and climate change risk is undeniably among them.

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[15] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290; 6,297 (Feb. 8, 2010), https://tinyurl.com/24qznbb7.

The dispositive point is that the SEC—in stark contrast with the EPA—is in no way attempting to regulate climate change or even the way companies adapt to climate change. The Rule is nothing more than a disclosure requirement, as the Release makes clear:

> We are adopting the final rules to advance these investor protection, market efficiency and capital formation objectives, consistent with our statutory authority, and not to address climate-related issues more generally. . . . The Commission has been and remains agnostic about whether or how registrants consider or manage climate-related risks.

Release at 21,671.

The Rule is a classic disclosure rule well within the SEC's 90-year-old authority, a necessary and appropriate response to indisputably serious risks increasingly facing public companies, which provides critical information investors want and need.

2. The Rule does not have major economic or political significance.

No more persuasive is the argument that the Rule has enormous economic or political significance. Climate change itself certainly has enormous economic and financial implications for society and virtually all businesses—which is of course why the Rule is so important to investors. But the disclosure requirements in the Rule certainly do not carry such extraordinary weight.

The petitioners focus on the compliance costs associated with the Rule, but that by itself cannot reasonably be said to satisfy the "economic significance"

requirement in the major questions doctrine. The primary focus of the doctrine is on whether a rule would have a major impact on other members of society or other industry sectors, beyond the inevitable costs of compliance facing a regulated industry. As Justice Roberts explained in *West Virginia*, the doctrine addresses concerns over assertions of "extravagant statutory power over the *national economy*." *West Virginia v. EPA*, 597 U.S. at 724 (emphasis added).

Illustrating the point, in *West Virginia* and other major questions cases, the Court was confronting economic and political significance on a far grander scale than here. For example, in *West Virginia,* the Court observed that the rule at issue would, in addition to billions of dollars in compliance costs, lead to higher energy prices, the closure of dozens of coal-fired plants, the loss of tens of thousands of jobs across various sectors, significantly higher retail electricity prices, and a reduction in GDP of at least a trillion dollars by 2040. *See id.* at 714–15; *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (involving sweeping student debt relief with "staggering" economic and political significance, costing taxpayers "nearly one-third of the Government's $1.7 trillion in annual discretionary spending"); *Alabama Assoc. of Realtors v. Dept. of Health and Human Services*, 594 U.S. 758, 764–65 (2021) (involving eviction moratorium putting between 6 and 17 million tenants at risk of eviction, placing a huge financial burden on landlords, and promising an economic impact of $50 billion).

Moreover, the underlying rationale for the doctrine is to address rules that create such enormous upheaval that Congress did not likely intend them to fall within the agency's existing authority. *See West Viginia*, 597 U.S. at 721–25. But Congress knows full well that companies seeking the benefits of access to the capital markets must face the compliance costs that come with disclosure under the securities laws. And because our society, our economy, and our financial markets are constantly growing in size and complexity, it stands to reason that compliance costs can be significant. Yet if that were sufficient to satisfy the economic significance test, then the doctrine would become commonplace. Such an expansive and ultimately routine application would conflict with the Supreme Court's admonition that it be reserved for "extraordinary cases."

In any event, requiring companies to disclose the climate-related information required under the Rule comes nowhere near the kind of seismic economic disruption that the Supreme Court sought to address in the major questions doctrine. Disclosure has been the bread and butter of securities regulation for 90 years, both in initial offerings of securities and on a routine basis thereafter. Companies are accustomed to such requirements and have the ability to comply without undue burden. That's not only true as a general matter but also as to climate risk specifically. The record shows that many companies already disclose climate risk

information. *See, e.g.*, Release at 21,669 & n.4; Release at 21,843-45.[16] Finally, as to political implications, the reality of climate change and the risks it poses are no longer matters of credible debate. While *solutions* to the problem may continue to generate controversy, the Rule steers well clear of those issues. Release at 21,687 (SEC remains agnostic as to the management of climate risk).

B. Even if the Rule were deemed subject to the major questions doctrine, it would survive review because it rests on clear statutory authority.

Even if the Rule were held to trigger the major questions doctrine, it would satisfy the Supreme Court's essential requirement, since Congress—and the courts—have made abundantly clear that the SEC has authority to require companies to disclose information to investors. That authority has long been interpreted to encompass new disclosure requirements as circumstances and markets evolve. In addition to requiring some specific disclosures, Congress afforded the SEC the discretion to issue new disclosure rules in response to changing circumstances in the market. *See Nat'l Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045, 1050 (D.C. Cir. 1979) (observing that the SEC was given "very broad discretion" to promulgate rules governing corporate disclosure and that "[r]ather than casting disclosure rules

[16] *See also* Center for Capital Markets, *2021 Survey Report: Climate Change & ESG Reporting from the Public Company Perspective* (2021), https://tinyurl.com/25hjxyyp.

in stone, Congress opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable."); *see also* Former SEC Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) ("We have broad authority to prescribe disclosure requirements as necessary or appropriate in the public interest or for the protection of investors.").

The major questions doctrine should not be interpreted to mean that agencies may not adopt rules to address modern, emerging problems within the traditional scope of their jurisdiction. *See* Daniel T. Deacon & Leah M. Littman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1081 (2023) (arguing against applying the major questions doctrine simply when evolving circumstances warrant a new regulatory approach). Requiring companies to disclose the increasingly intense risks they face from climate change is well within that traditional SEC jurisdiction.

III. THE SEC FULLY COMPLIED WITH ITS DUTY TO CONDUCT ECONOMIC ANALYSIS.

The petitioners argue that because the SEC failed to conduct a quantitative cost-benefit analysis, the Rule is not supported by "substantial evidence." States' Br. at 48. This critique represents an attempt to impose on the SEC a duty to conduct a quantitative cost-benefit analysis where none exists. In the securities laws, Congress carefully delineated the type of economic analysis that the SEC must

conduct in support of its rules, and it imposed only a limited duty to consider whether a rule will promote efficiency, competition, and capital formation. Congress chose not to require the SEC to conduct a quantitative cost-benefit analysis for its rules, and for good reason, as it is generally impossible in the realm of financial regulation.[17] In this instance, the SEC conducted a thorough economic analysis of the Rule, in full accordance with what the law actually requires.

A. The SEC is not required to conduct a quantitative cost-benefit analysis for its rules.

The SEC's obligation to conduct economic analysis for its rules is specific and limited. For example, Section 3(f) of the Exchange Act simply requires the SEC to "*consider*, in addition to the protection of investors, whether [its rule] will promote efficiency, competition, and capital formation." *See, e.g.*, 15 U.S.C. § 78c(f) (emphasis added); *see also* 15 U.S.C. § 78w (a)(2) (setting forth duty under Exchange Act to avoid burdens on competition that are not necessary or appropriate).[18]

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[17] *See* John C. Coates, IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882 (2015), http://nrs.harvard.edu/urn-3:HUL.InstRepos:30000102.

[18] *See generally* BETTER MARKETS, COST-BENEFIT ANALYSIS IN CONSUMER AND INVESTOR PROTECTION REGULATION: AN OVERVIEW AND UPDATE (Dec. 8, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Investor_Protection_Dec-2020.pdf.

It is now well-established that in fulfilling these requirements, the SEC need not attempt "to measure the immeasurable," nor must it "conduct a rigorous, quantitative economic analysis" unless its organic statute "explicitly directs it to do so"—something Congress refrained from doing in the securities laws. *See Inv. Co. Inst. v. CFTC,* 720 F.3d 370, 379 (D.C. Cir. 2013). Recent decisions confirm the point. The Fifth Circuit, for example, has explained that the SEC "is not required to undertake a quantitative analysis to determine a proposed rule's economic implications. The relevant statutory provisions do not stipulate such a requirement—they merely command the SEC to 'consider . . . whether the action will promote efficiency, competition, and capital formation.'" *Chamber of Commerce of United States v. SEC*, 85 F.4th 760, 773 (5th Cir. 2023); *see also Nasdaq Stock Mkt. LLC v. SEC*, 34 F.4th 1105, 1111 (D.C. Cir. 2022).

Congress's decision simply to require the SEC to "consider" these discrete economic factors, without more, gives the SEC wide discretion in how to conduct its analysis. The Supreme Court has long recognized that statutorily mandated *considerations* "imply wide areas of judgment and therefore of discretion" as an agency fulfills its statutory duty. *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 611 (1950). The Fifth Circuit has recently affirmed this principle as well, observing that the SEC "is only told to 'consider,' and that term—shorn of modifiers or limiters—does not restrict the universe of otherwise permissible methods by

which the SEC can analyze the economic implications of a proposed rule." *Chamber of Commerce*, 85 F.4th at 773. A flexible and qualitative assessment of economic impact in the realm of financial regulation is the only workable approach, as the predicted costs and especially the benefits of new rules are impossible to quantify accurately. Petitioners' claim would upend these well-recognized limits on the SEC's duty to conduct economic analysis, in effect rewriting the securities laws.

B. The SEC conducted a robust economic analysis of the Rule, in full compliance with its duty.

1. The SEC considered the effect of the Rule on efficiency, competition, and capital formation.

As the SEC explains, the Rule is likely to enhance efficiency in multiple ways, for the benefit of investors, companies, and the markets as a whole. Release at 21,888–89. It will promote efficiency in the most fundamental and important way by ensuring that investors have more complete, reliable, accessible, and comparable information about climate risks facing issuers and how companies are responding to those risks. As a result, investors will be able to more accurately evaluate companies and make more informed investment and voting decisions, leading to more accurate pricing of shares, which is the central feature of a more efficient market. The resulting increase in efficiency will also enhance the overall level of public trust in the markets, which in turn will increase investor participation and market liquidity. Release at 21,830. The Release also explains that the Rule will promote efficiency

for the benefit of investors through standardized reporting in machine-readable form, making it easier and less costly to acquire and analyze climate related disclosures. Release at 21,888–89.

The Release also examines the potential ways in which the Rule might negatively impact efficiency. For example, it echoes commenters who cautioned that the Rule might dissuade companies from developing "business strategies, transition plans, or goals, because the amendments would require disclosure of these strategies, plans, or goals." Release at 21,889. But the Release observes that because companies are likely to benefit from addressing climate risk by developing these strategies, the upside of having them in place is likely to outweigh the costs of making the required disclosures. *Id.*

As to competition, the Release explains that the Rule can be expected to broadly increase competition among companies by making it easier for investors to compare the climate-related risks their companies face. The result will be more competition among companies in search of capital, both across and within industries. Release at 21,890. The Release also makes clear that the Rule poses no adverse impacts on competition, at least none that are not mitigated by virtue of the design of the Rule. For example, the requirements of the Rule are generally scaled to the size of the company, as smaller companies will have no duty to provide GHG emissions and smaller companies will have longer lead times for compliance.

With respect to capital formation, the Release explains that more consistent, comparable, and reliable disclosures regarding climate-related risks will reduce information asymmetries *between* company managers and investors. This will allow investors to better estimate future cash flows, which can reduce investors' uncertainty, thus lowering the costs of capital for issuers and promoting capital formation. Release at 21,890. Similarly, the Rule will reduce information asymmetries *among* investors, closing the knowledge gap between large investors with the means to gather climate-related information under the current, fragmented frameworks and those investors who cannot afford that effort. This in turn will attract more investors, increase liquidity for shares, and further reduce the cost of capital.

The Release also assesses ways in which the Rule might hamper capital formation, citing principally the risk that if compliance costs are too high, that might induce some companies at the margins to exit public markets or refrain from going public in the first place. Release at 21,888–91. But the Release makes clear that this impact is unlikely, as any company pursuing this "avoidance" strategy would lose the major benefits of participating in the public equity markets, including a more liquid market for the company's securities and the associated reduction in the cost of capital. Indeed, it is unlikely that many companies, especially the larger firms,

would choose to avoid becoming or continuing as a public registered company as a result of the Rule.

2. The SEC also considered the benefits and costs of the Rule.

The SEC also provided a comprehensive analysis of the benefits and costs associated with the Rule. Release at 21,848–87. It explained its methodology, assumptions, and adjustment factors. *See, e.g.*, Release at 21,876-78. It also explained that it attempted to quantify the benefits and costs of the Rule where possible—and it expended considerable effort in the process—but that in many cases, it was unable to do so due to a lack of necessary information. Release at 21,829. Although the SEC sought extensive input and data from commenters, commenters provided varied and flawed assessments of limited use. Release at 21,871. Where quantification of the economic effects of the final rules was not practical or possible, the SEC provided a qualitative assessment of the effects. Release at 21,829.

The SEC's analysis sets forth the core benefits of the Rule:

> The final rules will provide investors with more consistent, comparable, and reliable disclosures with respect to registrants' climate-related risks that have materially impacted, or are reasonably likely to have a material impact on, the registrant's business strategy, results of operations, or financial condition, the governance and management of such risks, and the financial statement effects of severe weather events and other natural conditions, which will enable investors to make more informed investment and voting decisions.

Release at 21,830. The Release also explains that these required disclosures, in a standard and searchable format, will address a series of problems arising from the current assortment of primarily voluntary climate-related disclosures. They will increase the amount of information disclosed about climate risks, while enhancing their timeliness and reliability. Release at 21,830.

The SEC also appropriately considered the costs arising from the Rule. As a general matter, it adopted a conservative approach to the assessment of costs, "erring on the side of overstating costs rather than understating them." Release at 21,874. The primary costs will be compliance costs. However, those costs will be mitigated in various ways: A significant number of companies already make climate-related disclosures; smaller companies are not required to report GHG emissions; and companies that do not in fact have material climate-related risks will have little to report. In short, the SEC compiled the best possible economic analysis of the Rule.

CONCLUSION

For all the foregoing reasons, the Court should deny the petitions for review.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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