No. 24-1522 and all consolidated cases: Nos. 24-1624, 24-1626, 24-1627, 24-1628, 24-1631, 24-1634, 24-1685, and 24-2173

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF IOWA, ET AL.,

Petitioners,

v.

UNITED STATES SECURITIES & EXCHANGE COMMISSION,

Respondent,

DISTRICT OF COLUMBIA, ET AL.,

Intervenors.

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

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BRIEF OF *AMICUS CURIAE* BUSINESS ROUNDTABLE IN SUPPORT OF ALL PETITIONERS' REQUEST FOR VACATUR

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A, *amicus curiae* Business Roundtable is an association of chief executive officers of leading U.S. companies. It has no parent corporation, and no publicly held company owns 10% or more of it.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Business Roundtable is an association of chief executive officers of over 200 leading U.S. companies with over 10 million employees in the U.S. and contributing over $3 trillion to the U.S. GDP. It believes that businesses should play an active role in formulating public policy.

Business Roundtable brings a unique perspective to this challenge. In its view, good corporate governance can include proactive engagement with climate-related risks. But critically, corporate governance also benefits from a corporate board's autonomy to pursue that proactive engagement without being unnecessarily penalized by additional costs, a risk of increased liability, or compelled disclosure of proprietary information. By disproportionately elevating climate risk above all other governance considerations, however, the Rule raises those precise concerns. Business Roundtable therefore submits this brief to shed further light on the ways the Rule actually penalizes proactive mitigation of climate-related risks and the SEC's failure to consider these consequences.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no party's counsel authored this brief in whole or in part and that no party, party's counsel, or other person—other than *amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

As two current Commissioners have observed, the SEC's climate-disclosure rule—The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21671 (Mar. 28, 2024) (the Rule)—reflects an "extraordinary exercise of regulatory authority" requiring "clear congressional authorization."[2] Yet the SEC can point to no such authorization, or even justify its authority to issue the Rule under ordinary principles of statutory interpretation.

The Rule also compels, among its required disclosures, the release of certain information that is not material to a reasonable investor's understanding of a corporation's financial performance and track record. The Rule is quite candid on this score, expressly *disclaiming* the basic materiality threshold for particular compelled disclosures. Instead, it mandates that companies disclose *all* information, material or not, about its board of directors' oversight of climate-related risks. But forcing boards to publicly disclose their confidential governance decisions—and duly increase their attendant risk of liability—may well *penalize* their

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[2] Comm'r Mark T. Uyeda, *A Climate Regulation under the Commission's Seal* (Mar. 6, 2024), https://www.sec.gov/news/statement/uyeda-statement-mandatory-climate-risk-disclosures-030624 (Uyeda Dissent); *see* Comm'r Hester M. Peirce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024), https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624 (Peirce Dissent) ("only a mandate from Congress" would permit disclosure regime).

thoughtful and robust engagement with climate risk, and divert resources from other important risks to managing these costly disclosures.

Moreover, the SEC barely considered these predictable, tangible costs to board oversight and corporate management. Even where the Commission nominally limited its disclosure requirements to material information, it ignored significant compliance costs associated with those mandates. And despite its obligation to conduct a rigorous cost-benefit analysis, the SEC did not make a serious effort to quantify its benefits apart from repeatedly reverting to the general premise that more government-mandated information is necessarily beneficial to investors. But that questionable premise is plainly insufficient to justify this Rule in many of its details—much less satisfy the required cost-benefit analysis. Indeed, the Commission does not meaningfully contend that the longstanding absence of these specific new climate-related disclosures harmed investors, nor does it explain why existing enforcement tools have proven insufficient. And the SEC offers little more than unsupported conjecture about what impact the Rule "could," "can," or "might" have on efficiency, competition, and capital formation—the statutory factors Congress ordered it to analyze. Such inadequate efforts to explain this consequential rulemaking do not qualify as reasoned decisionmaking.

Given these multiple, independent defects, the Rule must be set aside. "[N]o matter how 'important, conspicuous, and controversial' the issue, … an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). And, as justified, this Rule articulates no meaningful limiting principle on the SEC's disclosure authority, going well beyond longstanding principles of materiality and deeply intruding into the practices and workings of corporate boards. Short term, the Rule therefore will penalize proactive engagement with climate risk; long term, its one-size-fits-all approach risks chilling healthy and robust dialogue within corporate boards across the Nation. And if the SEC can compel corporate boards to disclose concededly immaterial information, it is difficult to conceive of *any* limiting principle that would prevent the Commission from mandating disclosure of whatever political issue might come next. The Rule should be vacated.

BACKGROUND

To protect the unencumbered exercise of robust corporate governance, many features of the American legal system work together to ensure that corporate "matter[s] of internal management" are generally "left to the discretion of the directors." *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917). That principle is the foundation of legal doctrines like the

"business judgment" rule, which directs that "courts will not interfere" with matters "call[ing] for the business judgment or discretion of a corporation's board of directors … so long as that judgment is exercised fairly and honestly." *Wolgin v. Simon*, 722 F.2d 389, 393 (8th Cir. 1983). It underlies multiple federal statutes designed to protect boards of directors from being "chilled" in their open discussion of strategic matters by the prospect of liability, since such liability can "deter[] qualified individuals from serving." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). And it supports the presumption that Congress is "reluct[ant] to interfere with, and potentially chill" boards' ability to engage in "internal self-criticism" and candidly assess challenges as they serve corporate health. *Lippert v. Cmty. Bank, Inc.*, 438 F.3d 1275, 1280 (11th Cir. 2006).

While petitioners have extensively catalogued the breadth of disclosures required by the Rule—and those disclosures' correspondingly high costs—the Rule's burdens on the discretion afforded to boards of directors merit special mention. Notably, the Rule compels "disclosure of board-level governance … of climate-related risks *irrespective* of the materiality of those risks." 89 Fed. Reg. at 21855 (emphasis added). Boards therefore must publicly describe (1) the "processes by which" the board is informed of risks, and by which management "assess[es] and manage[s]" such risks; (2) any committee charged with oversight; (3) "whether and how the board of directors oversees progress" of any "target or

goal or transition plan" the Rule mandates be disclosed; and (4) the "relevant expertise" of management overseeing risks. *Id.* at 21915.

In addition to these board-level disclosures, the Rule also requires extensive public description of proprietary corporate strategy. To start, it mandates disclosure of all "climate-related risks … reasonably likely to have a material impact" on a business, including on its "strategy." *Id.* But companies cannot make such a disclosure without giving away the "strategy" itself.

The Rule then delves deeper into companies' proprietary information, requiring descriptions of key internal analyses including the "parameters, assumptions, and analytical choices used" in climate-related risk scenarios, annual updates on any "transition plan to manage" relevant risks, discussion of how such plans "relate to" a company's overall "business model or strategy," and "whether and how resources are being used to mitigate" risks. *Id.* at 21915-16. And the Rule requires similarly detailed information about any "climate-related target or goal" that "is reasonably likely to materially affect the registrant's business," with annual "update[s]" about all "actions taken during the year to achieve its targets or goals." *Id.* at 21916.

ARGUMENT

I. The Rule Exceeds the SEC's Statutory Authority.

Claiming extraordinary powers based on modest residual clauses, the SEC has imposed an unprecedented, sweeping disclosure regime laser-focused on a single question—climate risk. *See* 15 U.S.C. §§ 77g(a)(1), 78*l*(b)(1), (g)(1). A regime of this magnitude requires a clear grant of authority from Congress. Yet no such foundation exists. While the SEC has been granted authority to compel disclosure of certain *material* information, the Rule far exceeds that traditional statutory constraint.

A. The Rule requires clear statutory authority.

A "plausible textual basis" may be enough to justify the typical technical rule, but "there are 'extraordinary cases' … in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion" require "clear congressional authorization." *West Virginia v. EPA*, 597 U.S. 697, 721-23 (2022) (cleaned up). This Rule—in its particular overreach—is one of them.

First, in promulgating the Rule, the SEC has "claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority.'" *Id.* at 724 (cleaned up). Courts apply "skepticism" to such claims, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)—

especially where, as here, Congress has repeatedly "considered and rejected" proposals to grant an agency the same authority it later asserts it *already* possessed, *Brown & Williamson*, 529 U.S. at 147; *see, e.g.*, Climate Risk Disclosure Act, S. 1217, 117th Cong. (2021); Climate Risk Disclosure Act, H.R. 2570, 117th Cong. (2021).

Second, where an agency has not been granted "a like authority" by statute, and other entities are more likely candidates for the job, "[t]here is little reason to think Congress assigned" the task to the agency. *West Virginia*, 597 U.S. at 729-30 (noting the EPA had no "'comparative expertise'" in energy policy); *see King v. Burwell*, 576 U.S. 473, 486 (2015) ("especially unlikely" that decision relating to "health insurance policy" was "delegated … to the *IRS*"); *see also Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (clear statement necessary before health agency could regulate evictions). Here, when Congress *has* expressly assigned power to compel climate-related disclosures without regard to materiality for investors, it has chosen the EPA as the more logical actor. *See, e.g.*, 42 U.S.C. § 7414(a)(1) (authorizing EPA to impose emissions-disclosure requirements).

Third, the Rule undeniably has "deep 'economic and political significance.'" *King*, 576 U.S. at 486. It regulates a "significant portion of the American economy," *West Virginia*, 597 U.S. at 722, and requires corporate "time and

resources" to such a degree that "elevates climate above nearly all other issues facing public companies," Uyeda Dissent. Moreover, the Rule "will increase the typical external costs of being a public company by around 21%," Peirce Dissent, thus "entail[ing] billions of dollars in compliance costs each year," *West Virginia*, 597 U.S. at 716; *accord, e.g.*, *King*, 576 U.S. at 485 ("billions of dollars" in annual costs support the need for a clear statement).

B. Congress did not provide any authority for the Rule, let alone a clear delegation of power.

In disputing the application of the "major-questions" doctrine, the SEC has invoked its "authority to require disclosures that provide investors with information that is important to their investment and voting decisions," and cited residual clauses that generally permit disclosures serving the public interest or protecting investors. 89 Fed. Reg. at 21687. But these provisions do not even provide a plausible textual foundation for the Rule, let alone furnish the necessary "'clear congressional authorization' for the power [the SEC] claims." *West Virginia*, 597 U.S. at 723.

As the SEC has acknowledged for nearly 50 years, "to insure meaningful and useful disclosure documents of benefit to most investors without unreasonable costs to registrants and their shareholders," the Commission may require environmental disclosures "*only* if such information … is important to the reasonable investor"—*i.e.*, "material information." Environmental and Social

Disclosure, 40 Fed. Reg. 51656, 51660 (Nov. 6, 1975) (1975 Release) (emphasis added); *see Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23916, 23971 (Apr. 22, 2016) ("The current statutory framework for adopting disclosure requirements remains generally consistent with the framework that the Commission considered in 1975"). And because "[a]ll reasonable investors value financial returns," if "disclosure of information [is] not clearly related to financial returns" then "*only a mandate from Congress*" may justify it. Peirce Dissent (emphasis added).[3]

The Commission recently reaffirmed these fundamental limitations when addressing disclosure requirements under Regulation S-K, the "central repository for [the SEC's] non-financial statement disclosure requirements." 81 Fed. Reg. at 23916-17. According to the SEC, there are only two scenarios in which it may require "disclosure relating to environmental and other matters of social concern": (1) where "appropriate to further a specific congressional mandate"; and (2) where, "under the particular facts and circumstances, such matters are

[3] Indeed, in one of "several studies" commissioned by the SEC to "advance[] efforts to integrate the Securities Act and Exchange Act disclosure regimes," 81 Fed. Reg. at 23918, an SEC advisory committee previously explained that "*investors are motivated by economic concerns* and are generally interested in information which reflects on the current and future *economic performance* of their investment." Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission 395, Cmte. Print 95-29, House Cmte. on Interstate and Foreign Commerce, 95th Cong., 1st. Sess. (Nov. 3, 1977), https://tinyurl.com/4x98j2hx (Sommer Report) (emphasis added).

material." *Id.* at 23970 (emphasis added). These limits make good sense given that, absent some special mandate, "the securities laws care only about the 'significance of an omitted or misrepresented fact to a reasonable investor.'" *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 187 (2015) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976)); *cf. Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (materiality implicated for the "reasonable investor" where information signals a "certain and clear" "impact" on a company's "fortune").

Considering the Rule "adopts an entirely new subpart of Regulation S-K," Uyeda Dissent, the SEC's bipartite understanding of its own authority in the Regulation S-K context should apply. And because neither condition obtains, it is clear that the Rule exceeds the SEC's conceded limitations on its power.

1. The Rule does not rest on a specific congressional mandate.

The SEC primarily pegs the Rule to broad, general language in two residual clauses that authorize it to compel companies to disclose information the Commission deems "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1) ("[i]nformation required in registration statements"); § 78*l*(b)(1) ("[r]egistration requirements for securities"). The SEC's reliance on these clauses is misplaced for three reasons.

First, general language from these residual clauses is not a "specific" mandate from Congress, 81 Fed. Reg. at 23970, as opposed to, say, a provision expressly requiring the disclosure of the use of "conflict minerals," 15 U.S.C. § 78m(p). Thus, even under the SEC's own understanding of its authority, these clauses cannot provide a foundation for requiring companies to "disclos[e] [information] relating to environmental … matters." 81 Fed. Reg. at 23970.

Second, and more fundamentally, the clauses' catch-all language "is not without limit." *TSC Indus.*, 426 U.S. at 448; *see NYSE v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) ("[A]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.") (cleaned up). To the contrary, "'public interest' is never an unbounded term," and "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). Here, "[t]he primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975). That counsels toward constraining the scope of disclosures authorized under the pertinent residual clauses to the sort of information that would curb market abuses and protect investors—*i.e.*, *financial* information. *Accord, e.g.*, Sommer Report 395; *cf. Basic Inc.*, 485 U.S. at 232.

Ordinary principles of statutory interpretation lead to the same conclusion. Typically, "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003) (cleaned up). The "specific words" that "preced[e]" the residual clauses' "general words" in this case provide no specific mandate for the Rule. *Id.* In one, the language preceding the residual clause refers to information "specified in Schedule A of section 77aa," 15 U.S.C. § 77g(a)(1), which the SEC itself has admitted is "largely financial in nature," 81 Fed. Reg. at 23921. And in the other, the pertinent catch-all language relates to 12 enumerated disclosure requirements, each of which similarly has a financial focus. *See* 15 U.S.C. § 78*l*(b)(1)(A)-(L) (requiring disclosure of, among other things, "balance sheets," "profit and loss statements," and "any further *financial statements* … deem[ed] necessary or appropriate for the *protection of investors*") (emphases added). None of these requirements is "similar in nature" to determinations about environmental sustainability. *Keffeler*, 537 U.S. at 384.

Simply put, "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). And here, the words accompanying the residual clauses are "financial in nature," 81 Fed. Reg. at 23921, and geared toward "eliminat[ing] serious abuses" in the market, *Forman*, 421 U.S. at 849.

Construing catch-all language to authorize the compelled disclosure of information that is *not* "financial in nature" or aimed at investor protection would therefore "giv[e] … unintended breadth" to the securities laws. *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see, e.g.*, Chamber Br. 46-49; Iowa Br. 19-24; TAEP Br. 29-42.

The validity of this limitation on the SEC's disclosure authority is supported by the fact that, as far as Business Roundtable is aware, the SEC has never brought an enforcement action based on a company's failure to report the extensive nonmaterial information required in the rule. *See also* Chamber Br. 23 ("[T]he Commission apparently has never brought a *single* case against *any* company for failing to disclose material climate-related risks[.]"). Indeed, despite bearing the burden of demonstrating that the current regime is ineffective, the SEC never suggests that any prior enforcement actions uncovered, in relation to a failure to disclose climate risk, the sorts of "serious abuses" that the securities laws were designed to prevent. *Forman*, 421 U.S. at 849. This history underscores the lack of any statutory basis for the Rule. *See West Virginia*, 597 U.S. at 725 ("[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.") (cleaned up).

Third, the SEC's assertion of authority is particularly implausible given that Congress knows how to authorize the Commission to compel non-financial disclosures when it wants to do so. *See* 15 U.S.C. § 78m(p) (requiring companies to disclose use of "conflict minerals"). Here, however, Congress repeatedly "*rejected*" bills that would impose such requirements when it comes to climate risk. *Brown & Williamson*, 529 U.S. at 144, 159 (emphasis added); *see supra* at 8. That is "a sign that an agency is attempting to work around the legislative process to resolve for itself" a question of great importance. *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (cleaned up); *see* Chamber Br. 57-58; Iowa Br. 35.[4]

2. The Rule compels disclosures that are not material.

a. As noted, there is "universal[] agree[ment]" that materiality requires an "objective" inquiry "involving the significance of an omitted or

[4] While the SEC also claims to find authority for the Rule in "sections … 10, 19(a), and 28 of the Securities Act, as amended, and sections 3(b), … 13, 15, 23(a), and 36 of the Exchange Act, as amended," these provisions generally pertain to the disclosure of *financial* information and *investor* safety. 89 Fed. Reg. at 21912; *see, e.g.*, 15 U.S.C. § 77s(a) (SEC may make "rules and regulations governing registration statements and prospectuses" and "to prescribe … the items or details to be shown in the balance sheet and earning statement, and the methods" for preparing accounts), § 78m(a)-(b) (similar). In fact, some of the provisions have little (or nothing) to do with disclosures at all. *See, e.g.*, 15 U.S.C. § 78c-2 (deeming certain instruments "securities" which are otherwise exempted by the Commodity Futures Trading Commission); § 78*l* (requiring registration for "any security … on a national securities exchange"). Read in context, these statutory provisions cannot plausibly authorize the Rule's required environmental disclosures—which is presumably why the SEC does not place much weight on them.

misrepresented fact to a reasonable investor." *TSC Indus.*, 426 U.S. at 445; *see Omnicare*, 575 U.S. at 186-87 (explaining the "materiality" inquiry turns on an "objective" assessment "of a reasonable investor"). And because the hallmark of reasonable investors is "the expectation that they w[ill] earn a profit[,]" the materiality standard turns on investors' *financial* considerations. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946); *accord, e.g.*, *Basic Inc.*, 485 U.S. at 232.

The "particularized interests" surrounding the Rule's non-financial, climate-based disclosure regime therefore mark a stark departure from matters of "objective[]" significance to the "reasonable investor." Peirce Dissent; *see, e.g.*, *Omnicare*, 575 U.S. at 187. While some of the Rule nominally anchors itself to the adjective "material," 89 Fed. Reg. at 21683-86, much of its "materiality" analysis reduces to the broad premise that any climate-related information is material because some investors would like to know it, *see id.* at 21684 (claiming the Rule "reflect[s] investors' increased demand[s]"). Congress, however, "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." Peirce Dissent; *see, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (discussing "contextual inquiry" necessary for determining whether undisclosed information would have "*significantly* altered the 'total mix' of information made

available" for "a *reasonable* investor") (citations omitted, emphases in original); *see also* Chamber Br. 46-54; TAEP Br. 32-42.

Both the SEC's reasoning and the Rule's actual requirements therefore stretch the concept of materiality beyond traditional limits in spite of the lack of any congressional authority to do so. That further calls into question the Rule's legitimacy.[5]

b. While petitioners have highlighted numerous examples in the Rule that go beyond materiality limits (*e.g.*, Chamber Br. 33-37; Iowa Br. 10-13, 26-28), the degree to which the Rule's board-disclosure and strategic-disclosure requirements strain materiality merit further attention.

First, the Rule requires disclosure of all "climate-related risks," "target[s,] or goal[s]" "reasonably likely to have a material impact" on a business—

[5] As the Chamber notes (Br. 59-67), the SEC's deviation from the traditional materiality standard also raises serious First Amendment compelled-speech concerns. The First Amendment "prohibits the government from telling people what they must say," *Rumsfeld v. FAIR*, 547 U.S. 47, 61 (2006), including when it comes to SEC disclosure requirements, *see, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 555 (D.C. Cir. 2015). By compelling speech, the Rule is a facially content-based regulation that is therefore subject to strict scrutiny and "presumptively unconstitutional." *NIFLA v. Becerra*, 585 U.S. 755, 766 (2018). But the SEC's asserted justification for the Rule largely turns on providing consumers with more information (as opposed to, *e.g.*, fraud protection), and thus would likely fail even the most lenient form of First Amendment scrutiny governing disclosures. *See, e.g.*, *Am. Meat Inst. v. USDA*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) ("[I]t is plainly not enough" just to say a compelled disclosure "giv[es] consumers information.").

including on its "strategy." 89 Fed. Reg. 21915-16; *see supra* at 6-7. From that attenuated understanding of "material" the Rule requires extensive detail about the tools that track or lead to the identification of these risks, irrespective whether that detail is itself material information. *See, e.g.*, 89 Fed. Reg. at 21916 (requiring disclosure of "parameters, assumptions, and analytical choices used" in any "scenario analysis" that identifies climate risk reasonably likely to be material; lacking exception for proprietary information).

Second, the Rule mandates that companies describe "a board of directors' oversight of climate-related risks," and expressly declines to "adopt[] a materiality qualifier for this portion of the final rule." *Id.* at 21712-13. As such, every board must disclose—material or not—the "processes by which" the board is informed, and "whether and how the board of directors oversees progress" of any "target or goal or transition plan." *Id.* at 21915. While the SEC attempts to justify this portion of the Rule on the theory that "any risks elevated to the board level will be material to the company and limited in number," *id.* at 21713, it does not actually embrace this argument. If the SEC truly believed any risk "elevated to the board level," *id.*, was necessarily "material" to the "reasonable investor," *TSC Indus.*, 426 U.S. at 445, it would mandate disclosure of *every* risk a board considers. But the SEC does not do that. Indeed, by declining to "adopt[]

a materiality qualifier," 89 Fed. Reg. at 21713, the SEC all but concedes this provision requires disclosure of immaterial information.

Unless the Judiciary puts a stop to it, the SEC's corporate-governance overreach is almost certain to continue. The disclosure rule in this case comes amidst a flurry of new SEC disclosure requirements into internal-management matters for public and private entities alike, some of which have been held invalid. *See, e.g.*, *Nat'l Ass'n of Priv. Fund Managers v. SEC*, No. 23-60471, 2024 WL 2836655, at *11-12 (5th Cir. June 5, 2024) (vacating SEC rule requiring disclosures from private fund advisors as "exceed[ing] its statutory authority," and concluding "the Commission has not articulated a 'rational connection' between fraud and any part of the Final Rule"); *Chamber of Com. of U.S. v. SEC*, 85 F.4th 760, 766, 780 (5th Cir. 2023) (concluding that "[t]he SEC acted arbitrarily and capriciously … when it failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis" of a rule requiring disclosure of company's rationale for stock buybacks).

Absent continued judicial scrutiny, the SEC likely will feel emboldened to continue drifting further from material, financial concerns and toward unmistakably political matters, jeopardizing investors and boards alike. After all, if the SEC can compel board-related disclosures shorn of any "materiality qualifier" without express statutory authority, it is hard to see what would stop the

Commission from mandating disclosures related to *any* sensitive issue "elevated to the board level." 89 Fed. Reg. at 21713; *see also, e.g.*, TAEP Br. 49-50 (explaining SEC's approach "would deny any limiting principle").

II. The Rule Is Not Reasonably Explained.

Even if the Rule had a statutory foundation, the SEC's decisionmaking process would still violate the Administrative Procedure Act (APA). A rule may be vacated under the APA when the agency has "failed to consider an important aspect of the problem" or neglected to "look at the costs as well as the benefits" of a regulation. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 54 (1983). And when it comes to the SEC specifically, Congress required the Commission to also "assess the economic effects of a new rule" and "consider the effect of a new rule upon 'efficiency, competition, and capital formation'"—assessments that should "quantify" a rule's costs and benefits whenever possible. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (citing 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c)); *see, e.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010) (SEC failed to "consider the economic implications" of its rule fully, where "it failed to consider" the baseline *status quo*). Here, the SEC's explanation for the Rule fails to fully assess its costs (including its chilling effect on boards addressing climate risks at

all); explain how the Rule's supposed benefits counterbalance its conceded costs; or meaningfully analyze the factors it was statutorily mandated to consider.

A. The SEC failed to adequately address numerous key costs.

As petitioners explain, the SEC failed to consider many important costs of its Rule and dramatically underestimated others. *See, e.g.*, Chamber Br. 37-43. Notably, the SEC failed to reasonably assess two costs bearing on the ability of corporate boards and management to exercise effective corporate governance.

First, the Rule's board and management level disclosure requirements will punish companies' proactive efforts to address climate-related risk, and run the risk of chilling robust board discussions. Once a board exercises any "oversight of climate-related risks"—which must be disclosed "irrespective of the materiality of those risks"—or assesses "progress" toward a "transition plan," the board must immediately engage in "disclosure of [that] board-level governance." 89 Fed. Reg. at 21855, 21915. Thus, even at the most tentative stage of structuring climate risk oversight, corporate boards across the country will have to consider the disclosure impact of their decisions.

Perversely, the burdens of the Rule increase in direct relation to a company's proactive engagement with climate risk. If, for example, management commissions a risk scenario for any climate-related issue "reasonably likely to have a material impact on its business, results of operations, or financial

condition," the Rule requires the company to describe "the parameters, assumptions, and analytical choices used, as well as the expected material impacts, including financial impacts, on the registrant under each such scenario." *Id.* at 21916. Similarly, should a business take the initiative to set a climate-related "target or goal" that is "reasonably likely to materially affect the registrant's business," it must provide extensive public disclosure on the details, including its scope of activities, its plan to meet the target, and an update "each fiscal year" on its progress toward the target. *Id.* And, of course, all these compelled disclosures carry with them the threat of "legal liability"—including an "inevitable flood of class actions"—should public or private litigants perceive any of the company's additional disclosures as inaccurate or insufficient. Peirce Dissent. Such a regime penalizes thoughtful engagement with climate risk by mandating the diversion of key risk-management resources to address these intrusive disclosure mandates in a manner that minimizes potential liability.[6]

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[6] The SEC's claim that "some of the required disclosures …. will be subject to [Private Securities Litigation Reform Act] safe harbors, which may reduce litigation costs" is no response to this concern. 89 Fed. Reg. at 21855. Many of the statements that require "assertions of *present* fact"—*e.g.*, how the company *currently* addresses risk—will not be covered. *Boykin v. K12, Inc.*, 54 F.4th 175, 184 (4th Cir. 2022). And these safe harbors are no absolute bar to litigation based on forward-looking statements if, for example, a plaintiff alleges a statement was knowingly false and lacked "'meaningful cautionary language.'" *IBEW Loc. 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 778 n.2 (8th Cir. 2016).

Second, the SEC concededly failed to adequately account for an important category of costs: the "standalone cost" of "materiality determinations" under the Rule's various quasi-materiality standards. 89 Fed. Reg. at 21875 (declining to "estimate" such costs and suggesting, without elaboration, that they may be built into other cost estimates); *see* Peirce Dissent ("The Commission does not take full account of the costs to make such a non-materiality determination."). That cost is amplified under the Rule's broad approach to materiality—encompassing not just climate risks materially endangering a company's financial health, but risks "reasonably likely to have a material impact" on various aspects of a company (including its "strategy"). 89 Fed. Reg. at 21915-16. And because "any non-disclosure, including assessments of materiality, will be judged in hindsight," companies will be pressured toward overinclusive disclosure—and in turn, more expense—to "avoid potential liability." Uyeda Dissent.[7]

It is therefore far from clear "what disclosures the rule *actually* mandate[s]"—a problem in and of itself. *Chamber*, 85 F.4th at 779. Indeed, a study undertaken by an SEC advisory committee anticipated that the SEC's lack of

[7] Complicating matters, "nested" materiality pervades the rule, where Information A is treated as material if it is material to Information B, which is material to the business. *See, e.g.*, 89 Fed. Reg. at 21916 (requiring disclosure of certain "material component[s] of a registrant's plan to achieve climate-related targets or goals" when those targets or goals may be likely to materially impact a business); *see also, e.g.*, Chamber Br. 35.

environmental expertise would leave it with "no standard on which to base its decisions as to what specific additional disclosure should be required" if it adopted a relevance threshold more capacious than just "reflect[ing] significantly on the economic and financial performance of" a company. Sommer Report 395-96. It is therefore no answer for the SEC to treat vagueness as a virtue, saying that the Rule preserves "flexibility" in corporate descriptions of strategy that "may enable [companies] to avoid disclosure of competitively sensitive information." 89 Fed. Reg. at 21851. That response fails to consider how partial or oblique statements could themselves give rise to liability—and further underscores that the SEC did not engage with the full costs of its disclosure regime.

B. The SEC failed to quantify the Rule's purported benefits and to consider downstream costs imposed on investors.

Failure to rigorously address a rule's costs and benefits is a classic APA violation. *See, e.g.*, *Bus. Roundtable*, 647 F.3d at 1150-51. But even where the SEC attempted to calculate the costs of its rule, it failed to meaningfully assess whether the "anticipated benefits" of its Rule to investors were sufficient to "*outweigh* the [Rule's] costs." Peirce Dissent (emphasis added). Indeed, despite the Rule's invocation of various possible benefits like "reducing information asymmetry" it repeatedly concedes it is "unable to quantify these benefits." 89 Fed. Reg. at 21866 (weather events); *see, e.g.*, *id.* at 21829-30 ("In many cases, however, we are unable to reliably quantify the potential benefits and costs of the

final rules because we lack information necessary to provide a reasonable estimate.").

While firm quantification of a rule's benefits may sometimes be challenging, the SEC's dismissive shrug here reveals a lack of reasoned decisionmaking given that (1) the SEC's own estimates concede severe costs; and (2) both dissenting Commissioners along with a bevy of commentators explain that the SEC dramatically underestimates the Rule's price tag.[8] To determine whether those costs were worth it, the SEC needed to come up with some estimate of the supposed benefits of the Rule. It failed to do so.

Moreover, by "elevat[ing] climate above nearly all other issues," the SEC's regime inevitably diverts resources from proactively addressing other key risks. Uyeda Dissent; *see Michigan v. EPA*, 576 U.S. 743, 753 (2015) ("too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems") (citation omitted). Particularly when a corporation's immediate threats come from areas other than climate risk—*e.g.*, cybersecurity risks or global instability—a climate-risk requirement that requires significant operational

[8] *See generally* Peirce Dissent; Comment from Retail Industry Leaders Association (RILA Comment) at 5 ("[T]he true initial set up and ongoing compliance costs for a typical retailer will be *more than 35 times the amount that the SEC has estimated*.") (emphasis added).

resources undermines the business's ability to address more immediate perils. And that in turn will jeopardize investors' interests.

Nevertheless, the SEC only passingly acknowledged these costs, never attempting to reconcile them with the Rule's supposed benefits. *See* 89 Fed. Reg. at 21856 ("To the extent that the final rules lead companies to alter their governance structures in ways that are less efficient (*e.g.*, by diverting board or management attention from other pressing corporate matters or devoting internal resources and expertise to climate-related risks at the expense of other concerns), investors could incur costs in the form of diminished shareholder value."). That is not enough. *See, e.g.*, *Michigan*, 576 U.S. at 753.

C. The SEC's analysis of statutorily mandated factors is inadequate.

Finally, the SEC failed to adequately analyze "statutorily mandated factors." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1222 (D.C. Cir. 2004). Per Congress's mandate, the SEC is required: (1) to consider whether a proposed rule "will promote efficiency, competition, and capital formation," 15 U.S.C. § 77b(b); *see id.* § 78c(f) (similar); and (2) in considering an "impact … on competition," to "not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate" to further its statutory purposes, *id.* § 78w(a)(2). The Commission also must consider whether specific disclosures in registration statements are "necessary or appropriate in the public

interest or for the protection of investors." *Id.* § 77g(a)(1); *see* 89 Fed. Reg. at 21683. Namechecking these factors is insufficient; the SEC must "disclose a reasoned basis" for its conclusions on each. *Am. Equity*, 613 F.3d at 177. Here, the SEC fell short in at least two ways.

First, while the SEC invoked empirical research to support its view that it "expect[s] the final rules to increase efficiency," 89 Fed. Reg. at 21888-89, its analysis of the Rule's effect on "competition" and "capital formation" is inexplicably conclusory, *id.* at 21890-91. For instance, rather than determining how the Rule will impact competition, the SEC simply stated it "*expect[s]* that by standardizing reporting practices, the final rules would level the playing field among firms, making it easier for investors to assess the climate-related risks of a registrant against those of its competitors," and that "[t]he effects of peer benchmarking *can* contribute to increased competition." *Id.* at 21890 (emphasis added). Absent greater substantiation, this reasoning only "supports at most the conclusion that any SEC action in this area *could* promote competition, but does not establish [the Rule's] *effect* on competition." *Am. Equity*, 613 F.3d at 178 (emphasis added). Indeed, courts have rejected similar economic analysis from the SEC before. *See, e.g., Chamber*, 412 F.3d at 143-44 ("[T]he Commission violated its obligation under 15 U.S.C. § 80a-2(c), and therefore the APA" by failing to

"do what it [could] to apprise itself … of the economic consequences of a proposed regulation").

Second, the SEC must assess its rules against "the existing regime," *Am. Equity*, 613 F.3d at 179, and evaluate costs and benefits "at the margin" of that regime, *Bus. Roundtable*, 647 F.3d at 1151. The SEC acknowledges that "current requirements for climate-related disclosures and current market practice" forms the "baseline against which … the effects on efficiency, competition, and capital formation … are measured." 89 Fed. Reg. at 21830. But despite describing that "baseline" at some length, the SEC provides a perfunctory discussion of benefits to competition and capital formation (such as allowing "investors to assess the climate-related risks of a registrant against those of its competitors," *id.* at 21890), that does not discuss the degree to which the baseline is already serving those goals. Because the Rule does not "accurately assess any potential increase or decrease in competition," it must be set aside. *Am. Equity*, 613 F.3d at 178.

CONCLUSION

For the reasons discussed above, the Court should vacate the Rule.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), I certify that the foregoing brief contains 6,472 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as counted using the word-count function on Microsoft Word 365 software.

This brief further complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because this brief has been prepared in a proportionately spaced typeface, 14-point Calisto MT.

Dated: June 24, 2024

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EIGHTH CIRCUIT RULE 28A(h)(2) CERTIFICATION

I hereby certify that this brief has been scanned for viruses and is virus-free.

Dated: June 24, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit via the CM/ECF system. I further certify that service on all parties' counsel will be accomplished by the CM/ECF system.

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