State of West Virginia
Office of the Attorney General
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Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

<u>Submitted Electronically via SEC Internet Comment Form</u>

Re: Comments in Support of the Proposed Rescission of Climate-Related Disclosure Rules by the Attorneys General of the States of West Virginia, West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming (SEC File No. S7-2026-19)

Dear Secretary Countryman:

The Attorneys General of the States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming submit these comments in support of the Securities and Exchange Commission's proposal to rescind, in their entirety, climate-related disclosure rules adopted in March 2024. *See* Rescission of Climate-Related Disclosure Rules, Securities Act Release No. 11,421, Exchange Act Release No. 105,572, 91 Fed. Reg. 33,296 (proposed May 29, 2026) ("Proposal").

The rules the Commission now proposes to withdraw, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 11,275, Exchange Act Release No. 99,678, 89 Fed. Reg. 21,668 (Mar. 6, 2024) ("Final Rules" or "Adopting Release"), were unlawful the day they were adopted. Twenty-four States warned years ago that the original proposal sought "to recast the Commission's statutory role and remake the federal securities disclosure regime" through "an ill-advised misadventure into environmental regulation." Attorneys General of the States of West Virginia et al., Comment Letter on Proposed Rule Amendments titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (June 15, 2022), at 1, https://tinyurl.com/rf8z8928 ("2022 Comments"). So when the

Commission adopted the Final Rules anyway, the States sued. *See* Consolidated Brief of State Petitioners, *Iowa v. SEC*, No. 24-1522 (8th Cir. June 21, 2024), 2024 WL 3206934 ("States' Br.").

Thankfully, the Proposal now affirms the ideas the States have pressed at every stage. It concludes that the Final Rules "were a dramatic overreach of the Commission's statutory authority and, independently, unsound as a matter of policy." 91 Fed. Reg. at 33,298. It recognizes that the Commission's disclosure authority is "channel[ed]" by the text and context of its governing statutes, which speak to a registrant's business and financial characteristics—not to whatever subject an administration finds urgent. *Id.* at 33,302. It acknowledges that "materiality is a concept inherently rooted in financial considerations," *id.* at 33,303, and that the Final Rules cannot be reconciled with that cornerstone. And it candidly confronts what the States told the Commission in 2022 and again in 2024: that the securities laws do not deputize the Commission as a climate regulator. Quite the opposite: "[a]bsent a clear statutory directive to the contrary, those matters belong to the People's elected representatives, not agency officials, to decide." *Id.* at 33,312. Point by point, the Proposal now says what the States said first.

The States thus urge the Commission to adopt the Proposal. In response to the Commission's specific requests for comment, 91 Fed. Reg. at 33,314, the States' answers are straightforward. Should the Commission rescind the Final Rules in their entirety? Yes. Are there aspects of the Final Rules that remain within the Commission's authority and should be retained? No—the authority defect runs through every provision. Are there alternatives to outright rescission worth pursuing? No—any climate-specific disclosure mandate, however trimmed, would rest on the same absent authority and would duplicate the materiality-based regime that already exists. And would rescission upset reasonable reliance interests? No—the Final Rules were stayed before they ever took effect.

The Commission should therefore end its unfortunate misadventure and return to an appropriate focus on investments, not social policy.

BACKGROUND

A. Congress Built A Disclosure Regime On Financial Materiality, And For Fifty Years The Commission Honored It.

The Securities Act of 1933 and the Securities Exchange Act of 1934 share a single "primary purpose": "to eliminate serious abuses in a largely unregulated securities market." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975). Congress sought to fight "misrepresentations," *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995), and the "manipulation of stock prices," *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 193 (2d Cir. 2021) (cleaned up). It sought to ensure that "dealing in securities [would be] fair and without undue preferences or advantages among investors." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (cleaned up).

To those ends, Congress enumerated the disclosures it wanted. Schedule A of the Securities Act and Section 12(b)(1) of the Exchange Act call for information about a registrant's business, operations, financial condition, management, capital structure, and the terms of the securities being offered—items "central to an understanding of a registrant's business, operation and performance." 91 Fed. Reg. at 33,300. Congress permitted the Commission to adjust those items but only on Congress's terms. Among other things, the Commission may require "such other information" as is "necessary or appropriate in the public interest or for the protection of investors," 15 U.S.C. § 77g(a)(1), may specify the "detail" of the enumerated categories, *id.* § 78l(b)(1), and, when an enumerated category is "inapplicable" to a class of issuers, must require "in lieu thereof . . . other information of comparable character," *id.* § 78l(c). *See* 91 Fed. Reg. at 33,301-02.

The concept that disciplines this entire system is materiality. From the beginning, it was accepted that the new disclosure requirements would "not provide disclosure of all facts necessary to a sound investment judgment." William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 188-89 (1933). Disclosure "cannot go much further" than general and objective parameters allow "without falling hopelessly within the realm of opinion rather than fact." *Id.* Materiality thus "runs through and appears practically everywhere in the Securities Act and the Exchange Act," States' Br. 7 (quoting Philip A. Loomis, Jr., Comm'r, SEC, Materiality and the SEC, Presentation before the Third Annual National Conference of the National Investor Relations Institute (Oct. 2, 1972)), and it has long been recognized as "the cornerstone of federal securities laws' disclosure system," *id.* at 8 (quoting H. COMM. ON INTERSTATE & FOREIGN COM., 95TH CONG., REP. OF THE ADVISORY COMM. ON CORP. DISCLOSURE TO THE SEC (Comm. Print 1977)).

The Supreme Court gave the standard its settled content decades ago. A fact is material, the Court explained, only "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment or voting decision. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976); *accord Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). And the Court was "careful not to set too low a standard of materiality" precisely because a minimal standard would "bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Basic*, 485 U.S. at 231 (cleaned up).

For half a century, the Commission understood these limits and said so—even in the climate space. In 1975, after extensive proceedings, the Commission concluded that it would be inappropriate to require "comprehensive disclosure of the environmental effects of corporate activities." Environmental and Social Disclosure: Notice of Commission Conclusions and Rulemaking Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11,733, 40 Fed. Reg. 51,656, 51,662 (Oct. 14, 1975). It thus disclaimed any power to demand disclosure "solely" to "have some indirect effect on corporate conduct." *Id.* at 51,660. Similarly, in 1977, the Commission told the D.C. Circuit that "[i]f environmental . . . information is material to investors, the Commission's rules already require the disclosure of such information." SEC Opening Br. at 2 n.1, *NRDC v. SEC*, No. 77-1761 (D.C. Cir. Oct. 17, 1977); *see also NRDC v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979) (the securities laws "were designed generally to require disclosure of financial information in the narrow sense only").

More recently, the Commission had reiterated that climate disclosures were sometimes appropriate—but only when they were compelled by the materiality standard. In 2010, the Commission issued interpretive guidance cataloguing how the existing, principles-based regime—Item 101's business description, Item 103's legal proceedings, Item 105's risk factors, Item 303's MD&A—already elicits climate-related information whenever it is material to a particular company. Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61,469, 75 Fed. Reg. 6,290 (Feb. 2, 2010) ("2010 Guidance"). And in 2016, the Commission reaffirmed that "disclosure relating to environmental and other matters of social concern should not be required of all registrants" unless "appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material." Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10,064, Exchange Act Release No. 77,599, 81 Fed. Reg. 23,916, 23,970 (Apr. 13, 2016).

Congress, for its part, repeatedly considered conferring the very authority at issue here—and repeatedly declined to do so. *See, e.g.*, Climate Risk Disclosure Act of 2021, S. 1217, 117th Cong.; Climate Risk Disclosure Act of 2021, H.R. 2570, 117th Cong.; Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (2021); Climate Risk Disclosure Act, S. 3481, 115th Cong. (2018). When Congress has wanted disclosure untethered from the securities laws' traditional concerns, it has said so in plain terms—as with conflict minerals, 15 U.S.C. § 78m(p). And when Congress wanted the federal government to collect emissions data, it knew which agency to task: the Environmental Protection Agency, to which it gave express reporting authority. 42 U.S.C. § 7414; *see Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011).

The statutory landscape, in short, was never ambiguous about who decides climate policy. It was not the Securities and Exchange Commission.

B. The 2022 Proposal Abandoned That Framework, And The States Objected.

In March 2022, the Commission proposed to break from this settled understanding. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 11,042, Exchange Act Release No. 94,478, 87 Fed. Reg. 21,334 (proposed Mar. 21, 2022) ("Proposing Release"). Spanning roughly 500 pages, the proposal would have layered onto Regulations S-K and S-X a vast new apparatus of climate-specific disclosure. It demanded narrative descriptions of board and management oversight of climate risk; discussions of "actual and potential impacts" of climate-related risks on strategy, business model, and outlook; transition plans; scenario analyses; internal carbon prices; targets and goals; greenhouse-gas emissions reporting; and detailed financial-statement metrics for severe weather events. *See* 91 Fed. Reg. at 33,298-99; 87 Fed. Reg. at 21,344-45.

Twenty-four States responded with detailed comments explaining that the proposal failed at every level.

- The Commission's enabling statutes—text, purpose, context, and history—confine mandatory disclosure to matters bearing on the market abuses Congress targeted. The "'public interest' [discussed in the relevant securities law] is never an unbounded term" but "must be limited to the purposes Congress had in mind when it enacted the legislation." 2022 Comments 8 (quoting *Bus. Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990)).

- The proposal was irreconcilable with materiality: it demanded disclosures untethered from the reasonable investor's financial focus, treated the preferences of a subset of powerful institutional investors as a proxy for investor protection, and threatened precisely the "avalanche of trivial information" the Supreme Court warned against. *Id.* at 13-17.

- Canons of construction—the major questions doctrine chief among them—foreclosed the Commission's reading. Beyond that, the proposal would "inappropriately upend the balance between federal and state powers in the corporate sphere," an area traditionally governed by State law. *Id.* at 17-23; *see also id.* at 20.

- Any final rule would flunk arbitrary-and-capricious review: an admittedly incomplete cost-benefit analysis; redundancy with existing requirements the Commission never showed to be inadequate; an unexplained departure from decades of contrary agency position; emissions-calculation requirements companies could not feasibly satisfy; and disregard of Congress's express instructions—in the JOBS Act and the FAST Act—to "modernize and simplify" disclosure, not multiply it. *Id.* at 28-40 (cleaned up).

Two weeks later, the Supreme Court decided *West Virginia v. EPA*, 597 U.S. 697 (2022). The parallels were unmistakable. As the EPA had done in *West Virginia*, the Commission "purport[ed] to 'discover in a long-extant statute an unheralded power'" (quoting *West Virginia*, 597 U.S. at 724); claimed authority based on "vague text"; addressed a subject, climate change, that was "the same issue deemed vitally important in West Virginia"; operated "outside [its] area of expertise"; and imposed standards that "Congress ha[d] considered and rejected … on many prior occasions." Attorneys General of the States of West Virginia et al., Supplemental Comments on Proposed Rule Amendments titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (July 13, 2022), at 2-3, https://tinyurl.com/yw5svuy6 ("Supplemental Comments").

C. The Commission Adopted The Final Rules Anyway.

On March 6, 2024, over vigorous dissents, the Commission nevertheless approved the Final Rules by a 3–2 vote. *See* 91 Fed. Reg. at 33,298. The Final Rules made changes at the margins, most notably dropping the proposal's Scope 3 value-chain emissions mandate. But as the Proposal correctly observes, "the adopted regulations continued to include numerous, highly prescriptive disclosure requirements" housed in an entirely new subpart 1500 of Regulation S-K and a new Article 14 of Regulation S-X. *Id.*

Under the Final Rules, large accelerated filers and accelerated filers must measure and, if material, disclose Scope 1 and Scope 2 greenhouse-gas emissions—including gross volumes in CO2e, constituent gases, methodologies, "significant inputs," "significant assumptions," organizational and operational boundaries, and reporting protocols—and must file third-party attestation reports on those emissions at escalating assurance levels. 91 Fed. Reg. at 33,298-99. All registrants must describe board oversight of climate-related risks "regardless of the materiality of those risks." *Id.* at 33,299. They must disclose climate-related risks that are merely "reasonably likely" to have a material impact. 89 Fed. Reg. at 21,670. They must describe risk-management processes, transition plans, scenario analyses, and internal carbon prices. And they must make new financial-statement disclosures of severe-weather expenditures and losses that are triggered not by materiality but by one-percent line-item thresholds subject to $100,000 and $500,000 de minimis floors. 91 Fed. Reg. at 33,299, 33,310. "[N]early every registrant" would have been required to comply beginning with fiscal year 2027. *Id.* at 33,299.

The Final Rules thus embodied the very defects the States had identified. Though the Adopting Release "purport[ed] to require 'materiality,'" it "redefine[d] the term." It presumed board-elevated climate risks material, sweeping in "reasonably likely" impacts and demanding disclosure at "painfully low monetary thresholds." States' Br. 11, 27. It compelled companies to "examine everything under Scope 1 and 2 to determine what meets SEC's new 'materiality' definition"—that is, to "collect, process, and report vast climate-related information . . . even when such information is immaterial." *Id.* at 12-13.

The Final Rules would have imposed extraordinary costs. By the Commission's own estimate, annual per-registrant compliance costs averaged over the first ten years would run "between '$197,000' at the low end to 'over $739,000' at the 'upper end.'" States' Br. 36 (quoting 89 Fed. Reg. at 21,875). The Commission also conceded that companies believed "the actual costs will be 'considerably higher,'" *id.* (quoting 89 Fed. Reg. at 21,871), and that it could not "'reliably quantify' the Rule's costs '[i]n many cases,'" *id.* (quoting 89 Fed. Reg. at 21,829). One dissenting Commissioner calculated that the Final Rules would "increase the typical external costs of being a public company by around 21%." Hester M. Peirce, Comm'r, SEC, Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 6, 2024).

Altogether, the Final Rules were "climate regulation promulgated under the Commission's seal." Mark T. Uyeda, Comm'r, SEC, A Climate Regulation Under the Commission's Seal (Mar. 6, 2024); *see* 91 Fed. Reg. at 33,312 (quoting both dissents with approval).

D. The States Sued, The Commission Stayed The Rules, And The Commission Abandoned Their Defense.

Petitions for review were quickly filed across the country—including by coalitions of States in the Eleventh Circuit (*West Virginia v. SEC*, No. 24-10679), Eighth Circuit (*Iowa v. SEC*, No. 24-1522), Fifth Circuit (*Louisiana v. SEC*, No. 24-60109), and Sixth Circuit (*Ohio Bureau of Workers' Comp. v. SEC*, No. 24-3220). *See* States' Br. 13; 91 Fed. Reg. at 33,299. After the

Judicial Panel on Multidistrict Litigation consolidated the petitions in the Eighth Circuit, the Commission itself stayed the Final Rules "pending the completion of judicial review of the consolidated Eighth Circuit petitions." States' Br. 14; 91 Fed. Reg. at 33,299 (cleaned up). The Final Rules never took effect and were never even codified in the Code of Federal Regulations. *Id.* at 33,297 n.3.[*]

In their merits brief, the State Petitioners—twenty-five States and the American Free Enterprise Chamber of Commerce—demonstrated that "Congress did not give SEC power to issue the Rule." States' Br. 18 (cleaned up). After all, the Securities Act and Exchange Act "only allow SEC to require information that is financially material." "[E]ven if the Acts could be stretched to plausibly authorize the Rule, Congress needed to state clearly that it intended SEC to tackle a major question like this," which "Congress did not." *Id.* at 14-15. The brief also showed the Final Rules to be arbitrary and capricious at least four times over: the Commission failed to acknowledge or explain its reversal of a fifty-year position; failed to explain why the preexisting regulatory regime was inadequate; rested its judgments on evidence it conceded was unquantifiable and "seemingly contradictory"; and denied the public notice of scientific research on which it relied. *Id.* at 15-17, 42-54.

The writing was soon on the wall. In March 2025, the Commission voted to end its defense of the Final Rules, notifying the Eighth Circuit "that the Commission withdraws its defense of the rules and that Commission counsel are no longer authorized to advance the arguments in the brief the Commission had filed." 91 Fed. Reg. at 33,299.

In September 2025, the Eighth Circuit held the consolidated petitions in abeyance "until such time as the . . . Commission reconsiders the challenged Final Rules by notice-and-comment rulemaking or renews its defense of the Final Rules." The Court thought it was the Commission's "responsibility to determine whether its Final Rules will be rescinded, repealed, modified, or defended in litigation." 91 Fed. Reg. at 33,299-300 (cleaned up). The Final Rules remain stayed, and no court has ruled on the merits of any petition. *Id.* at 33,300.

E. The Proposal.

The Commission has now taken up the Eighth Circuit's invitation and initiated notice-and-comment rulemaking. The Proposal would rescind the Final Rules in their entirety on two independent grounds.

First, the Final Rules "exceed the scope of the Commission's statutory authority." 91 Fed. Reg. at 33,300. The Proposal's analysis proceeds from first principles. An agency "must act within

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[*] No market participant could reasonably have ordered its affairs around the operation of rules that were stayed pending judicial review of consolidated challenges to their validity, that the promulgating agency then declined to defend, and that a federal court of appeals expressly flagged for reconsideration. If any registrant voluntarily incurred preparation costs during the stay, those were discretionary expenditures made with full knowledge of the Final Rules' precarious status. The Proposal's expectation that rescission "would [not] implicate any reasonable reliance interests," 91 Fed. Reg. at 33,309 n.172, is correct.

its statutory authority," and "illegal agency action 'presumably requires remedial action of some sort'"—here, rescission. *Id.* (quoting *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 22 (2020)). Examining the text and context of Sections 7(a)(1) and 19(a) of the Securities Act and Sections 12, 13, and 23(a)(1) of the Exchange Act, the Proposal concludes that the Commission's authority to add, substitute, or detail disclosures is "channel[ed]" by Congress's enumerated categories, which concern "a registrant's business or financial characteristics." *Id.* at 33,301-02. Further, "public interest" and "protection of investors" are bounded terms that "take meaning from the purposes of the regulatory legislation." *Id.* at 33,302 & n.77 (quoting *FCC v. Consumers' Rsch.*, 606 U.S. 656, 690 (2025)). Congress did not license the agency to act as a "roving commission to inquire into evils and upon discovery correct them." *Id.* at 33,302 (cleaned up). And given their subject matter, granularity, and conduct-shaping design, the Final Rules fell outside every one of these limits. *Id.* at 33,304-06.

The Proposal further recognizes that "[c]ourts also apply the major questions doctrine to determine the lawfulness of agency action." 91 Fed. Reg. at 33,300 & n.46 (citing *Learning Res., Inc. v. Trump*, 607 U.S. 229, 240-44 (2026); *Biden v. Nebraska*, 600 U.S. 477, 502-07 (2023); *West Virginia*, 597 U.S. at 721-24). The Commission concludes that the "indicia" of a major question "are all present here," while "the Commission's authorizing statutes do not provide the needed clarity to justify such a dramatic expansion of regulatory authority." *Id.* at 33,307.

Second, and independently, the Proposal identifies "compelling policy reasons to rescind the rules in their entirety." For one, the Final Rules are unnecessary and inconsistent with the Commission's registrant-specific, materiality-based approach to disclosure; they "stray well beyond the policy concerns of the Federal securities laws." For another, they "impose substantial costs on public companies and their shareholders that are not justified by the informational benefits they may provide to some investors." And were that not enough, they are "at odds with the Commission's policy objectives of facilitating capital formation and promoting public company status." 91 Fed. Reg. at 33,300; *id.* at 33,308-14.

The Proposal estimates that rescission "could generate annualized savings of about $4.9 billion per year over the next 10 years for all affected registrants." 91 Fed. Reg. at 33,307; *id.* at 33,312.

DISCUSSION

I. The Commission Correctly Concludes That It Lacked Statutory Authority To Adopt The Final Rules.

The first question behind any rulemaking goes to the agency's power to act. Because an agency may not confer power upon itself, "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 an agency may not act beyond that grant "even in pursuit of desirable ends," *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021). The Proposal now embraces these essential concepts as the foundation of rescission: an agency "acts unlawfully when it exercises power beyond its authority," and "illegal agency action 'presumably requires remedial action of some sort.'" 91 Fed. Reg. at 33,300 (cleaned up). That framing is right—and it means the analysis that follows is not a discretionary policy reassessment but a legal correction. When an agency concludes that it never had the power it exercised, "[t]he proper remedy . . . is rescission." *Id.*

A. The Text And Context Of The Enabling Statutes Confine Mandatory Disclosure To A Registrant's Business And Financial Characteristics.

The Adopting Release rested principally on the Commission's authority to require "such other information" as is "necessary or appropriate in the public interest or for the protection of investors." 89 Fed. Reg. at 21,683 (quoting 15 U.S.C. § 77g(a)(1)); *see* 15 U.S.C. § 78l(b), (g). As the States have explained, "[t]hough the Commission cite[d] these statutes, it offer[ed] no relevant analysis of them, and [it] thus seem[ed] to have mistakenly assumed that its enabling statutes give it effectively limitless power to compel disclosures." 2022 Comments 8. The Proposal supplies the analysis the Adopting Release skipped—and reaches the conclusion the text compels. And after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), that analysis is the only one that matters because "if it is not the best [interpretation], it is not permissible." *See* 91 Fed. Reg. at 33,304 n.97 (quoting *Loper Bright*, 603 U.S. at 400). No deference cushions the Adopting Release's contrary view. The best reading of the statutes controls, and the Proposal has identified it.

First, broad statutory terms are "known by their companions." *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (open-ended statutory terms are "controlled and defined by reference to the enumerated categories" around them). The "other information" the Commission may require under Section 7(a)(1) keeps company with Schedule A's enumerated items—the registrant's business, its finances, its management, its capital structure, its offering terms. The "detail" the Commission may prescribe under Section 12(b)(1) is detail "in respect of" Congress's twelve enumerated categories. And when the Commission substitutes disclosures under Section 12(c), the substitutes must be "in lieu thereof" Congress's specified fields and "of comparable character." 15 U.S.C. § 78l(c).

Second, "public interest" and "protection of investors" are bounded terms. Courts "have consistently held that the inclusion of the 'words "public interest" in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words "take meaning from the purposes of the regulatory legislation.'" 91 Fed. Reg. at 33,302 (quoting *Consumers' Rsch.*, 606 U.S. at 690); accord *Bus. Roundtable*, 905 F.2d at 413. The States invoked precisely these authorities in 2022, warning that "[t]he 'public interest' and 'protection of investors' are not magic words that the SEC can use to enact any regulations it wants." 2022 Comments 22; *see id.* at 8. The purposes of the securities laws are market purposes—fighting fraud, manipulation, and unfair dealing in securities. *See Forman*, 421 U.S. at 849. Congress underscored the point by requiring the Commission, whenever it makes a public-interest determination, to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. §§ 77b(b), 78c(f); *see* 15 U.S.C. § 78w(a)(2).

Third, the Proposal rightly rejects the Adopting Release's fallback that "importance to" investors, "investor demand," or the pursuit of "consistency" and "comparability" could supply freestanding authorization. Here again, the States made exactly this point four years ago: benefits like "standardization" and "verification" "would be true for *any* mandatory disclosure regime," 2022 Comments 9. "[I]t is plainly not enough for the Government to say simply that it has a substantial interest in giving [investors] information," because "that would be true of any and all disclosure requirements," *id.* at 24 (quoting *Am. Meat Inst. v. USDA*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment)). A theory of authority with no limiting principle is not a theory of authority at all. It is a theory of power. The Proposal is right to abandon it.

Fourth, measured against the properly construed statutes, the Final Rules fail on their face. The Final Rules "are fundamentally different from the types of enumerated disclosures found in the Commission's governing statutes." Rather than setting broader standards, they "mandate highly specific and granular information on the sole topic of climate-related matters, such as operational and governance practices and internal metrics (including GHG emissions) that many registrants may not track or use for business purposes." 91 Fed. Reg. at 33,304. Many of the mandated disclosures are "only secondarily or remotely about the past or immediate effects of climate-related matters on the operations, revenue, expenses, capital structure, liquidity, management or controlling shareholders of the registrant"—reaching climate-related impacts on third parties such as suppliers and counterparties, and "transition risks" defined expansively to sweep in speculation about "changes in law or policy, reduced market demand for carbon intensive products, . . . competitive pressures associated with the adoption of new technologies, and reputational impacts." *Id.*

The States described this same defect in litigation: "transition risk," for instance, "inherently requires speculation about a boundless number of primarily political outcomes," and the Final Rules "d[id] not require consideration of risks that such transition may not occur or may be reversed." States' Br. 12. Nothing in Schedule A or Section 12(b)(1) remotely resembles a command to forecast the political future of energy policy. The Proposal's conclusion follows: "Nothing in these provisions expressly empowers the agency to burden public companies and their shareholders with such detailed (and costly) disclosures about one particular topic." 91 Fed. Reg. at 33,304.

B. The Final Rules Cannot Be Reconciled With The Materiality Cornerstone.

Materiality does double work in this analysis, and the Proposal handles both functions correctly. Materiality is not itself a source of rulemaking authority. 91 Fed. Reg. at 33,303. But it still "bears directly on the Commission's consideration of investor protection, efficiency, and capital formation," because "[i]mmaterial disclosures do not further the 'public interest' or 'protection of investors'—indeed, they are likely to frustrate such objectives." *Id.* The materiality standard therefore "filters out information that a reasonable investor would not consider important, protects investors from being buried in an avalanche of trivial information, and prevents the registrant from having to collect and disclose every minor detail about its operations." *Id.* (citing *Basic*, 485 U.S. at 231-32). And because "[t]he common interest of reasonable investors is in information regarding the financial performance of a company, the pricing of securities, and the prospect for economic and financial return," materiality "is a concept inherently rooted in financial considerations." *Id.*; *see also* 2022 Comments 12-17; *see also* States' Br. 25-26 ("materiality speaks to a security's value and reaches only facts that affect a company's 'fortune' in 'certain and clear' ways" (quoting *Basic*, 485 U.S. at 232)).

The Final Rules flunked this standard in both directions at once. "SEC insist[ed] that it [wa]s applying the traditional materiality standards" in the Final Rules, "but a close read shows otherwise." States' Br. 27. The Final Rules presumed that all climate-related risks elevated to the board level are material, 89 Fed. Reg. at 21,713; required disclosure of risks merely "reasonably likely" to have a material impact, *id.* at 21,670; required board-oversight narratives "regardless of the materiality of those risks," 91 Fed. Reg. at 33,299; and triggered financial-statement disclosure at one-percent thresholds with $100,000 and $500,000 de minimis floors—thresholds that, as the Proposal observes, "make clear that the Final Rules cannot be justified as eliciting disclosure of material information," *id.* at 33,310. Altogether, the Final Rules "replaced ordinary materiality with an overriding command that climate issues are uniquely important and thus material as a matter of law—even when financially immaterial." States' Br. 27.

The Commission's prior framing also created a dilemma. If the Final Rules truly elicited only information satisfying the traditional standard, they were pointless: "businesses already must disclose such risks," States' Br. 27 (citing *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 117-18 (2021)), so "[w]hy . . . would SEC bother adopting a rule that's redundant?" *id.* And if the Final Rules elicited more than the traditional standard reaches, they compelled immaterial disclosure that the statutes do not authorize and that affirmatively harms the investors the Commission exists to protect. The Proposal grasps both horns, recognizing that the Final Rules are either redundant or detrimental to the businesses subjected to them and investors meant to use them. 91 Fed. Reg. at 33,305.

The Proposal also correctly rejects the notion that the Final Rules' scattered materiality qualifiers could "salvage the Final Rules from their legal defects." 91 Fed. Reg. at 33,304. As the States said in court, the Final Rules "go[] beyond directing companies to report what's material and require[] them to examine *everything* in Scopes 1 and 2 to affirmatively determine what is not material—or else risk answering to SEC." States' Br. 26. A "materiality" screen that operates only after a company has built an emissions-accounting apparatus it would never otherwise maintain is not a limit on the mandate. It is the mandate. And in the context of "the complex and overlapping nature of the Final Rules' disclosure obligations, such materiality qualifiers do not meaningfully limit the information that a registrant feels compelled to disclose, burying investors in disclosures of limited value"; they "merely mask how the rules reached well beyond what a reasonable investor would consider important in buying or selling securities." 91 Fed. Reg. at 33,313.

One more materiality point warrants the Commission's attention, because it disposes of an argument opponents of rescission will press: that climate information is material because some investors—particularly large institutional investors—say they want it. The States answered this in 2022, and the answer has not changed. The Supreme Court "rejected a definition of materiality that would 'include[] all facts which a reasonable stockholder might consider important.'" 2022 Comments 16 (quoting *Northway*, 426 U.S. at 445). The demands of "a subsection of powerful, institutional investors" whose portfolio-wide strategies require "comparable data across registrants" are "not a stand-in for those of the reasonable investor." *Id.* (cleaned up).

At bottom, "investing based on non-financial climate change disclosures is a matter of investor preference, not one of investor protection." 2022 Comments 16 (quoting Bernard S. Sharfman, *Non-Material Mandatory Climate Change Disclosures*, 2021 OHIO ST. BUS. L.J. ONLINE 1, 11 (2021)). The Proposal adopts the same principle: "it is not the Commission's role to require disclosure of particular information because it is useful for any one investment strategy or desired by some political interests for the purpose of influencing business practices." 91 Fed. Reg. at 33,298. And "[i]n designing a disclosure regime, the Commission should not seek to cater to the specific informational needs of every subset of investors about each emergent topic," *id.* at 33,310-11. Investors "are not monolithic," *id.* at 33,310. The reasonable-investor standard exists so that the disclosure regime serves the market as a whole rather than the loudest faction within it.

C. Fifty Years Of Agency Practice And Congressional Choice Confirm The Absence Of Authority.

Statutory meaning does not float free of history. "[J]ust as established practice may shed light on the extent of power [Congress] conveyed," so too "the want of assertion of power by those who presumably would be alert to exercise it, is equally significant." *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941); *see* States' Br. 33.

Here the history is one-directional. From 1971 through 2016, across administrations of both parties, the Commission consistently disclaimed the very authority the Final Rules asserted. It told the public in 1975 that "comprehensive disclosure of the environmental effects of corporate activities" was inappropriate and that it lacked power to compel disclosure aimed at "some indirect effect on corporate conduct." It told the D.C. Circuit in 1977 that material environmental information was already covered by existing rules. It told registrants in 2010 that the existing, principles-based regime reaches climate matters when material—and nothing more. And it told the world in 2016 that environmental and social disclosure "should not be required of all registrants" absent "a specific congressional mandate" or case-specific materiality. *See* States' Br. 9-10, 31-33; *supra* Background Part A. The Proposal squarely reaffirms the 1975 position: "more than fifty years ago, the Commission stated that it does not have discretion under the Securities Act or the Exchange Act to require disclosure for the sole purpose of promoting social goals unrelated to those underlying these Acts. We agree with the sentiments in the Commission's 1975 statement." 91 Fed. Reg. at 33,312.

The Adopting Release tried to rewrite this history, "recalling fifty years of 'requir[ing] disclosure about various environmental matters.'" States' Br. 32 (quoting 89 Fed. Reg. at 21,685). But as the States showed, the Adopting Release's examples were "disclosures directly affecting a company's profits that just so happen to involve environmental matters"—material environmental legal proceedings, or the "material effects" of complying with environmental regulations on "capital expenditures, earnings, and competitive position." *Id.* at 32-33. Requiring an oil-and-gas registrant to disclose material reserve data is disclosure about the registrant's business. Requiring every public company in America to build a greenhouse-gas accounting system is something else entirely. The Commission "has never before adopted a broad [environmental] regulation of this kind," States' Br. 32 (quoting *NFIB v. OSHA*, 595 U.S. 109, 119 (2022))—and a half-century of institutional restraint was not an oversight awaiting correction. It was the agency reading its statutes correctly.

Congress's conduct points the same way, as it "has repeatedly 'considered and rejected'" climate-disclosure legislation. *See* States' Br. 35 (quoting *Brown & Williamson*, 529 U.S. at 144). The Climate Risk Disclosure Acts of 2018 and 2021 and the Corporate Governance Improvement and Investor Protection Act are recent examples, but hardly stand alone. And "'[u]nsuccessful attempt[s]' to get 'an express grant of' statutory authority confirm the agency lacks it." *Id.* (quoting *Bunte Bros.*, 312 U.S. at 352). The Proposal at least recognizes that "Congress is clearly aware of the potential and claimed risks posed by climate change, yet it has not legislated directly nor instructed the Commission to adopt regulations in response. Instead, Congress has declined to enact climate-related disclosure legislation." 91 Fed. Reg. at 33,307-08 & n.158 (citing the same bills the States cited).

Meanwhile, where Congress has wanted the securities-disclosure apparatus used for purposes beyond the statutes' core, it has spoken "explicitly," as with conflict minerals, 15 U.S.C. § 78m(p), *see* States' Br. 41. And where Congress has wanted emissions reporting, it has assigned the task to the agency with actual expertise, *see* 42 U.S.C. § 7414; 91 Fed. Reg. at 33,308 ("Congress has created an agency—the Environmental Protection Agency—and tasked that agency with collecting reports from major emissions sources and making them available to the public."). Text, structure, practice, and congressional choice all converge on the Proposal's bottom line: "The Commission's asserted basis for the Final Rules does not satisfy" the statutes Congress actually wrote. *Id.* at 33,308.

II. The Major Questions Doctrine Independently Confirms That Rescission Is The Only Lawful Course.

Even if the enabling statutes could be "stretched to plausibly authorize" the Final Rules, the analysis would not change because "Congress needed to state clearly that it intended SEC to tackle a major question like this. But Congress did not." States' Br. 14-15. The Proposal now correctly agrees.

A. The Final Rules Addressed A Major Question.

"[I]n certain extraordinary cases," a court's "skepticism" is warranted when an agency claims "highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia*, 597 U.S. at 721, 724. In those cases, "something more than a merely plausible textual basis" is required: the agency "must point to 'clear congressional authorization.'" *Id.* at 723 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). The Supreme Court has applied this principle repeatedly and recently—to the CDC's eviction moratorium, *Ala. Ass'n of Realtors*, 594 U.S. at 764; to OSHA's vaccine mandate, *NFIB*, 595 U.S. at 117-20; to the EPA's generation-shifting plan, *West Virginia*, 597 U.S. at 724-35; and to the Secretary of Education's loan-cancellation program, *Nebraska*, 600 U.S. at 501-07.

Whatever the precise doctrinal formulation any given Justice employs, the operative factors are the same. Courts look for an unheralded power discovered in a long-extant statute; a transformative expansion of the agency's role; a subject of vast economic and political significance; regulation outside the agency's comparative expertise; and congressional consideration and rejection of the very policy the agency adopted. Every factor condemned the Final Rules. The States catalogued six in their brief, States' Br. 29-39, and each maps onto findings the Proposal now rightly makes.

First, the Final Rules worked a "radical" and "fundamental revision" of the disclosure scheme, "'changing it from [one sort of] scheme' into a totally different one." States' Br. 30 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)). The centerpiece was the materiality overhaul described above: a rule that "adds nothing if it hews to materiality's century-old meaning," and therefore plainly did not, instead "elevat[ing] climate above nearly all other issues facing public companies." *Id.* at 30. The Proposal confirms the revision, finding that the Final Rules created "an entirely new" climate-only disclosure architecture "fundamentally different from the types of enumerated disclosures found in the Commission's governing statutes." 91 Fed. Reg. at 33,304. Put another way, "[t]he assertion of regulatory power under the Final Rules represents a 'transformative expansion in [the Commission's] regulatory authority,'" *id.* at 33,307 (quoting *UARG*, 573 U.S. at 324).

Second, the Final Rules deployed old law in a never-before-seen way. "It is evidence of improper arrogation of authority when an agency 'claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion of its regulatory authority.'" States' Br. 31 (quoting *West Virginia*, 597 U.S. at 724). Sections 7(a)(1), 12, and 13 date to the 1930s. For fifty years the Commission read them to foreclose exactly what the Final Rules did—and said so in 1975, 1977, 2010, and 2016. *Supra* Part I.C. An agency's own sustained disclaimers are among the most probative evidence that the power was never there. *See Bunte Bros.*, 312 U.S. at 352. The Proposal accepts this history and "agree[s] with the sentiments in the Commission's 1975 statement." 91 Fed. Reg. at 33,312.

Third, the Final Rules took the Commission far outside its comparative expertise. "SEC is not a climate regulator." States' Br. 33. Its statutory competence lies in combating misrepresentation and manipulation and ensuring fair dealing in securities—not in evaluating emissions methodologies, scenario analyses, or the physical science of severe weather. "When an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." *West Virginia*, 597 U.S. at 729 (cleaned up). Yet "[t]he Commission clearly has no expertise, scientific or otherwise, related to climate-related risks or the criteria or analytical frameworks to be used in evaluating such risks." 91 Fed. Reg. at 33,308. So in adopting the Final Rules, "the Commission acted well 'outside its wheelhouse.'" *Id.* (quoting *Nebraska*, 600 U.S. at 518 (Barrett, J., concurring)). Congress, meanwhile, created and equipped a different agency, EPA, for emissions reporting. *Id.*; 42 U.S.C. § 7414.

Fourth, the Final Rules seized an issue of vast political significance that Congress reserved to itself. "Climate change has staked a place at the very center of this Nation's public discourse," States' Br. 34 (cleaned up), and that the subject "'ha[s] been the subject of an earnest and profound debate across the country . . . makes the oblique form of the claimed delegation all the more suspect,'" *id.* at 34-35 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006)). Worse for the Final Rules, Congress did not just fail to authorize them—it "considered and rejected" the same policy repeatedly. *Id.* (cleaned up). "Leaning on old powers in surprising ways to 'conveniently enable[]' the agency 'to enact a program that Congress has chosen not to enact itself' is a hallmark of major-questions cases." *Id.* (quoting *Nebraska*, 600 U.S. at 503). The Proposal agrees on every particular: "questions about the country's response to climate change generally and about climate-related disclosures by public companies specifically continue to be important and contentious," and "[i]n light of the controversy, costs, and intrusions into the operations of public companies that would be generated by mandatory climate-related disclosure rules, this is a choice for Congress, not the Commission, to make." 91 Fed. Reg. at 33,307-08.

Fifth, the Final Rules asserted "extravagant statutory power over the national economy." *UARG*, 573 U.S. at 324; States' Br. 36. By the Commission's own numbers, per-registrant compliance would cost between roughly $197,000 and over $739,000 annually averaged over the first ten years, 89 Fed. Reg. at 21,875—figures the Commission conceded were likely understated, *id.* at 21,871—amounting to what one Commissioner calculated as an approximately 21% increase in the external cost of being a public company. States' Br. 36-37. The Proposal now quantifies the stakes from the other direction: "[u]pdating these figures for inflation and aggregating them across all affected registrants, we estimate that rescinding the Final Rules could generate annualized savings of about $4.9 billion per year over the next 10 years." 91 Fed. Reg. at 33,307-08. Costs of that magnitude are "'staggering by any measure,'" States' Br. 37 (quoting *Nebraska*, 600 U.S. at 502), and because the Final Rules applied to "virtually all public companies, regardless of size, industry, or specific circumstances," 91 Fed. Reg. at 33,298, they touched "virtually every sector" of the economy, States' Br. 37.

Sixth, the Final Rules intruded into the traditional state-law domain of corporate governance—a factor that both marks a major question and independently triggers the clear-statement federalism canon. "[C]orporation law" is traditionally "governed by state-law standards," *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991), the Supreme Court has been "reluctant to federalize" it, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977), and "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations," *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). *See* States' Br. 37-39; 2022 Comments 20-22. The Final Rules expected reporting to drive "changes in behavior," "prompt[ing] managers to alter their approach to climate-related risks" and potentially requiring "some registrants . . . to reorganize their business." States' Br. 39 (quoting 89 Fed. Reg. at 21,888); *accord* 91 Fed. Reg. at 33,300 & n.50, 33,307, 33,308.

So for these many reasons, the Final Rules were plainly tackling a major question.

B. No Clear Congressional Authorization Exists, And The Commission Has Never Claimed Otherwise.

The Commission cannot "point to 'clear congressional authorization' for the power it claims." *West Virginia*, 597 U.S. at 723 (cleaned up). "To its credit, SEC never claim[ed] it built the Rule on 'clear' authority. It point[ed] simply to its authority to regulate as 'necessary or appropriate in the public interest or for the protection of investors.'" States' Br. 39-40 (quoting 89 Fed. Reg. at 21,683). But "[l]anguage that provides no basis to act obviously doesn't provide a clear basis, either." *Id.* at 40. "Terms like 'necessary or appropriate' and 'public interest' are broad, but they are not clear—at least divorced from their statutory context of financially material information," *id.* at 41, and "Congress does not delegate power to answer major questions 'in so cryptic a fashion,'" *id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

The contrast with genuine grants is instructive. For example, when Congress wanted the Commission to venture beyond the statutes' typical zone, it said so expressly, directing disclosure of whether "conflict minerals . . . originate[d] in the Democratic Republic of the Congo or an adjoining country." States' Br. 41 (quoting 15 U.S.C. § 78m(p)). No comparable command exists for climate.

Two further observations will assist the Commission in finalizing this analysis. First, the doctrine's recent development only strengthens the Proposal's conclusion. In *Learning Resources*, *see* 91 Fed. Reg. at 33,300 n.46, a plurality of the Supreme Court confronted a claim of open-ended authority resting on broad statutory language ("regulate . . . importation") and rejected it, emphasizing the absence of any historical exercise of the claimed power and the presence of express delegations elsewhere in the statutory landscape, 607 U.S. at 240-244 (opinion of Roberts, C.J.).

The same facts are present here. The Commission went five decades without asserting the power the Final Rules claimed. Indeed, it expressly disclaimed that power, and Congress placed express emissions-reporting authority in a different statute administered by a different agency. Whatever differences individual Justices may hold about the doctrine's precise formulation, the considerations that helped decide *Learning Resources*—historical non-use, statutory context, express delegations elsewhere, and the political and economic magnitude of the assertion—each independently condemns the Final Rules. No matter how the doctrine is framed, the Final Rules fail it.

Second, the doctrine cuts in only one direction here, and the Commission should say so in the final release. The major questions doctrine constrains assertions of regulatory power; it imposes no clear-statement burden on an agency's decision to relinquish power it never had.

Rescinding never-effective rules and returning to the pre-2024 status quo—the materiality-based regime that governed for ninety years and that no one disputes the Commission may administer—claims no new authority at all. Opponents of rescission cannot conscript the doctrine to attack the Proposal, because the Proposal does not "discover" anything "in a long-extant statute." Rather, it restores the statute's long-settled meaning. The asymmetry matters for the durability of the Commission's final action. The doctrine that doomed the Final Rules poses no obstacle whatsoever to their rescission.

C. Because The Authority Defect Runs Through Every Provision, Nothing Can Be Severed, Retained, Or Repackaged.

The major questions analysis also answers the Commission's second and third requests for comment—whether "aspects of the Final Rules . . . remain within the Commission's statutory authority and should be retained," and whether the Commission should instead "propose to replace the Final Rules with less prescriptive and less costly disclosures about climate-related matters." 91 Fed. Reg. at 33,314. The answer to both is no, for reasons the Proposal itself supplies.

Every operative provision of the Final Rules—every S-K item in subpart 1500, every S-X requirement in Article 14—rests on the same statutory foundation the Proposal correctly rejects. No subset of climate-specific mandates draws on some different, sounder source of authority. A trimmed rule requiring, say, only emissions data, or only risk-factor narratives, or applying only to the largest registrants, would still be a rule mandating climate-specific disclosure untethered from case-by-case materiality, adopted by an agency without climate expertise, on a subject Congress has repeatedly declined to assign to it. The clear-authorization requirement does not soften as the mandate shrinks. A smaller unauthorized rule is still an unauthorized rule. So the Commission's severability analysis in the Proposal is correct: the Final Rules were engineered as a single, mutually referential scheme with pieces that "cannot operate sensibly without the others." 91 Fed. Reg. at 33,308. A fragment of an integrated, unlawful scheme would be both incoherent and no less unlawful. What's more, recent reporting-practice developments don't affect the rationale, because nothing in voluntary frameworks or foreign regimes can supply the statutory authority the Final Rules always lacked.

Nor should the Commission entertain a "replacement" regime of lighter-touch climate-specific mandates. The defect in the Final Rules was never merely their weight; it was their premise that the Commission may erect a standing, subject-specific disclosure around a politically contested topic. Reducing the prescriptiveness would not cure the defect, because the problem with the Final Rules is not their stringency but the absence of authority to adopt any climate-specific mandate in the first place. And as a policy matter, any replacement would replicate the redundancy the Proposal identifies: existing requirements "already elicit information about the material effects of climate-related matters," *id.* at 33,309 (cleaned up), so a replacement regime could add only what materiality excludes.

Any renewed climate-specific compelled-disclosure mandate would also revive the serious First Amendment questions the States raised in their 2022 comments, *see* 2022 Comments 23-28, and that petitioners pressed in the Eighth Circuit. Climate-specific mandates compel companies to speak and speculate on one of the most contested policy questions in American life, and the D.C. Circuit has already invalidated an SEC-administered disclosure requirement on compelled-speech grounds. *See Nat'l Ass'n of Mfrs. v. SE*C, 800 F.3d 518, 524 (D.C. Cir. 2015); 2022 Comments 23-28. Complete rescission avoids those questions altogether, which is one more reason why the clean course is the right one.

III. The Commission's Policy Judgments Are Sound, And The Record Supporting Them Was Built Long Ago.

The Proposal is careful to rest rescission "[i]n addition to (and independent of) the legal authority defects" on "strong policy arguments for rescinding the Final Rules in their entirety." 91 Fed. Reg. at 33,308. The States agree with those arguments, too.

A. Existing Disclosure Requirements Already Elicit Material Climate Information.

The Proposal's first policy ground—that "the Commission's existing disclosure requirements and anti-fraud provisions already elicit information about the effects of climate-related matters in a way that is tailored to reflect registrants' particular circumstances [and] is focused on material information for investors," 91 Fed. Reg. at 33,309—is correct. And the Commission's fifth request for comment ("Do existing disclosure requirements serve to elicit adequate disclosure about climate-related matters, when material to a specific registrant?," *id.* at 33,314) should be answered with an unqualified yes.

The States made this showing in 2022. The 2010 Guidance "highlighted Regulation S-K items related to description of business, legal proceedings, risk factors, and management's discussion and analysis," and "registrants must consider any financial statement implications in accordance with applicable accounting standards"—coverage that the Commission itself, in adopting the Final Rules, acknowledged already obligated registrants "to consider material impacts on the financial statements regardless of whether a material impact was driven by climate-related matters." 91 Fed. Reg. at 33,309; *accord* 2022 Comments 34 (cataloguing "the many existing requirements that require companies to disclose *material* environmental risks and information" and noting that the Commission "issued an interpretive release in 2010 describing how companies were already required to disclose certain *material* matters pertaining to climate change"). Item 303's MD&A requirement alone obligates a company to "disclose and discuss any known trend or uncertainty that has had a material positive or negative consequence for the company's results of operations"—climate-driven or otherwise. 91 Fed. Reg. at 33,305.

Nor is this regime toothless. As the States documented, the existing "principles-based standards . . . have real teeth": the Division of Corporation Finance "has [] been sending comment letters to various public companies questioning the adequacy of their climate-related disclosures under the existing rules"—dozens of them. 2022 Comments 34. And behind the line-item requirements stand the liability provisions: Sections 11 and 12 of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5, and the catch-all obligations of Rule 408 to add whatever further material information is necessary to make required statements not misleading. *See* 91 Fed. Reg. at 33,309. A registrant that conceals a material climate-related risk today violates the law today. The Final Rules added nothing to that protection; they added only the obligation to disclose what materiality excludes.

The Adopting Release's answer that principles-based disclosure lacks "consistency, comparability, and reliability" 89 Fed. Reg. at 21,679, fails for the reasons the States gave and the Proposal now rightly adopts. The Commission "has not shown any specific evidence that companies are producing unreliable or otherwise inaccurate climate disclosures under the current regime; it merely assumes that companies might cut corners." 2022 Comments 35. And the promised comparability was illusory in any event, as the Proposal explains: "any assertions about the benefits of the consistency and comparability of the disclosures elicited by the Final Rules should be discounted because those benefits are substantially compromised by the inconsistent, variable, and often speculative assumptions necessary to make many of those disclosures," which "would vary across even similarly-situated registrants" depending on their practices, methodologies, and judgments. 91 Fed. Reg. at 33,309. The States told the Commission the same thing in 2022: the emissions and forward-looking disclosures would produce "guesswork figures that provide no information to investors and create significant litigation risk for the companies." 2022 Comments 40. Standardizing the format of a guess does not standardize its accuracy.

Finally, on the second half of Request for Comment 5—whether the Commission should "revise the 2010 Guidance to provide updated guidance," 91 Fed. Reg. at 33,314—the States submit that no revision is necessary. The 2010 Guidance does not create disclosure obligations; it describes how the existing framework operates, and that framework has not changed. The Guidance's continued vitality is, in fact, part of the answer to those who claim rescission leaves a "gap." There is no gap, and there never was one. The Commission should finalize the rescission on the strength of the existing regime as it stands.

B. Rescission Restores The Commission's Consistent Position.

The Proposal's second policy ground is that the Final Rules "deviate[d] from the Commission's 'long-standing commitment to a principles-based, registrant-specific approach to disclosure' that is 'rooted in materiality,'" and that a regime "that prioritizes a single potential factor above any other that may affect the registrant" is "inferior to the Commission's existing approach." 91 Fed. Reg. at 33,308, 33,310 (cleaned up). The States agree. And in finalizing this ground, the Commission should emphasize that it is returning to the approach it maintained for half a century.

Opponents of rescission will no doubt invoke *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), to argue that the Commission has failed to justify a policy reversal, but such an argument would get the history wrong. As the States demonstrated in the Eighth Circuit, the Commission adopted the Final Rules without "even acknowledg[ing] that it [wa]s changing its longstanding position," instead "claim[ing] the Rule [wa]s an extension of powers it had all along"—a claim "contrary to decades of explanations SEC provided." States' Br. 15-16, 42-44. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change," *Encino Motorcars*, 579 U.S. at 221, but an agency must at minimum "display awareness that it is changing position" and "show that there are good reasons for the new policy," *Fox*, 556 U.S. at 515.

While the Adopting Release did not employ the required *Fox* analysis, the Proposal does. It quotes *Encino Motorcars* at the head of its policy discussion, 91 Fed. Reg. at 33,308; it "display[s] awareness" of the change on every page; it identifies the "good reasons" at length; and it candidly explains that "the Adopting Release gave inappropriate weight to several of the main justifications for adopting the Final Rules," such that the Commission "now reach[es] a different policy judgment," *id.* The administrative record before the Commission—including the States' 2022 Comments, the Supplemental Comments, the States' Eighth Circuit brief, and the extensive comment file on the Proposing Release—independently documents those good reasons. When the Commission finalizes the rescission, it will do so with a more complete explanation than that which accompanied the rule it's rescinding.

The substance of the restored position is equally sound. A disclosure system exists "to elicit information about the most significant factors affecting a registrant's operations and financial condition," and "[t]he Commission's disclosure regime generally does not require this level of detailed disclosure for other factors affecting a registrant's business." 91 Fed. Reg. at 33,310. Registrants face interest-rate risk, supply-chain risk, cyber risk, litigation risk, geopolitical risk, and a hundred others; for none of them does the Commission demand a standing architecture of board-oversight narratives, management-expertise disclosures, third-party attestation, and sub-materiality financial-statement line items. Singling out one factor "may lead to registrants devoting an inappropriate amount of attention to managing and reporting on such matters, which may not be among the most significant factors affecting the registrant's business," and "[t]he sheer volume of disclosures responsive to the Final Rules may hurt investors' abilities to ascertain relevant information about the other factors affecting a registrant because the climate-related disclosures could overshadow material disclosures about those other factors." *Id.* That information overload is the "avalanche" problem the Supreme Court identified in *Basic* and the States raised in 2022. *See* 2022 Comments 15; *Basic*, 485 U.S. at 231. Disclosure "of such dubious significance that insistence on its disclosure may accomplish more harm than good" is not investor protection. *Northway*, 426 U.S. at 448-49.

The Proposal's observation about recent international developments, 91 Fed. Reg. at 33,310-11, only underscores the wisdom of the flexible approach. A disclosure system "built around shifting investor preferences and reporting trends" in "an evolving area," *id.* at 33,309, invites perpetual, costly recalibration, while a materiality-anchored system adapts automatically, *id.* at 33, 310-11. It elicits climate information when, where, and to the extent it actually matters to a particular registrant's investors. *Id.*

C. The Final Rules' Costs Were Never Justified By Their Purported Benefits.

The Proposal's third policy ground—that "[t]he significant costs of the Final Rules provide a separate, compelling reason to rescind," 91 Fed. Reg. at 33,312—rests on a record that was overwhelming before the ink on the Adopting Release dried. The States urge the Commission to finalize this ground because every component of the cost-benefit imbalance was conceded by the Commission itself in 2024 or documented by commenters, including the States, in 2022.

Start with what the Commission admitted was problematic even back then. The Adopting Release conceded that it could not "reliably quantify" the Final Rules' costs "[i]n many cases." 89 Fed. Reg. at 21,829. It conceded that commenters believed the actual costs would be "considerably higher" than its estimates, *id.* at 21,871. And it conceded that the empirical evidence for the Rules' benefits was, in the Commission's own words, "seemingly contradictory." States' Br. 16, 47-52.

Even the concededly understated official estimates were staggering: per-registrant annual compliance costs "rang[ing] from less than $197,000 to over $739,000" averaged over the first ten years. 91 Fed. Reg. at 33,307 (citing 89 Fed. Reg. at 21,875). Those estimates also failed to grapple with the "standalone cost estimate of making . . . materiality determinations." 89 Fed. Reg. at 21,875. That omission carries serious financial consequence, as the Final Rules' structure forced registrants to build measurement systems, adopt protocols, set organizational and operational boundaries, and implement controls and procedures before any materiality judgment could even be made. 91 Fed. Reg. at 33,304, 33,311-12.

The States identified this dynamic in 2022, warning that the Commission's approach "positioning registrants . . . for failure" by demanding figures companies "have no realistic way of" producing reliably, 2022 Comments 40, and the point carried into litigation: companies "must now examine everything under Scope 1 and 2 to determine what meets SEC's new 'materiality' definition," States' Br. 12. Summed across the market, the burden was immense. Aggregating and updating its estimates, the Commission now calculates that rescission "could generate annualized savings of about $4.9 billion per year over the next 10 years for all affected registrants," 91 Fed. Reg. at 33,307, 33,312—with disproportionate relief flowing to smaller companies, for whom fixed compliance costs loom largest, *id.* at 33,313, 33,345. Against those costs, the Adopting Release offered benefits that were "largely amorphous"—"consistency," "comparability," "reliability," "transparency"—benefits that "could be claimed for just about any mandated disclosure." 2022 Comments 29. The Proposal rightly reweighs the asserted benefits and finds them wanting.

This conclusion also has a legal dimension the Commission should preserve in the final release. Congress obligated the Commission to consider efficiency, competition, and capital formation. 15 U.S.C. §§ 77b(b), 78c(f). It separately barred it from imposing any "burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act. 15 U.S.C. § 78w(a)(2). Courts have not hesitated to vacate Commission rules for "inconsistently and opportunistically fram[ing] the costs and benefits," for "fail[ing] adequately to quantify the certain costs or to explain why those costs could not be quantified," and for "neglect[ing] to support [] predictive judgments." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011*); see Am.*

Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Com. v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); 2022 Comments 29. The Adopting Release repeated every one of those errors. The Proposal corrects them. Rescinding a rule whose costs the agency admittedly could not quantify, in reliance on benefits its own evidence called contradictory, is good cost-benefit hygiene that the statutes command.

Relatedly, the States endorse the Economic Analysis's approach and conclusions. Treating the Final Rules as the baseline notwithstanding the stay, 91 Fed. Reg. at 33,315, is the conservative and methodologically correct choice. After all, the Final Rules are legally operative rules whose stay is expressly contingent on the outcome of judicial review. Absent rescission, they take effect if the petitions fail—so the counterfactual against which savings are measured is a world in which registrants comply beginning in fiscal year 2027, exactly as the Adopting Release assumed. And the analysis, if anything, understates rescission's benefits. The estimated aggregate annualized savings of approximately $4.9 billion, *id.* at 33,307, 33,312, and the per-registrant savings for smaller entities—approximately $1,101,780 in one-time costs and $732,687 annually in later years for SRCs, EGCs, and non-accelerated filers, *id.* at 33,345—are consistent with the costs commenters developed in 2022 and the Commission's own concessions in 2024. The States likewise support the Initial Regulatory Flexibility Act analysis: because fixed compliance costs fall proportionally hardest on the estimated 712 small entities affected, "rescinding the Final Rules could result in cost savings for smaller firms that are proportionately greater than such savings for larger firms." *Id.* No alternative short of complete rescission would further minimize small-entity burdens.

D. Rescission Advances The Commission's Capital-Formation Mission And Congress's Simplification Directives.

The Proposal's final policy ground—that the Final Rules' "high costs . . . are at odds with the Commission's policy objectives of facilitating capital formation and promoting public company status," 91 Fed. Reg. at 33,314 (cleaned up)—answers the Commission's seventh request for comment and warrants strong endorsement.

The numbers tell the story. "The number of public companies has diminished significantly since 2000"—from 9,656 reporting issuers in 2004 to 7,902 in 2024, an 18.2% decline—"with some observers pointing to the cost of public company disclosure as one deterrent." 91 Fed. Reg. at 33,313-14 & nn.224-25. Onto that shrinking base, the Final Rules would have loaded a compliance apparatus increasing "the typical external costs of being a public company by around 21%." States' Br. 36-37 (cleaned up). The Proposal rightly catalogues several predictable and harmful effects, like deterring participation in capital markets and impairing competition. 91 Fed. Reg. at 33,313-14. The Commission's own Adopting Release admitted the competitive dimension, conceding the Final Rules "may limit the ability of smaller registrants to compete with larger registrants." 89 Fed. Reg. at 21,890; *see also* States' Br. 37.

Congress anticipated this problem and legislated against it—twice. In the JOBS Act and again in the FAST Act, Congress directed the Commission to "modernize and simplify" its disclosure requirements. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 108, 126 Stat. 306, 313 (2012); Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015); *see* 2022 Comments 40. The States asked the obvious question in 2022: how could a rule "saddl[ing] public companies with an unprecedented new form of disclosure running potentially hundreds of pages long at a cost of millions . . . each year" be squared with "Congress's intent to make disclosure easier, not harder"? 2022 Comments 40. The Adopting Release never attempted an answer. The Proposal supplies the only one available: it cannot be. Rescission aligns with the Commission's current capital-formation agenda, 91 Fed. Reg. at 33,313, and it aligns with instructions Congress gave the Commission a decade ago and the Final Rules defied.

* * *

Four years ago, the States urged the Commission to abandon a rulemaking that "recast[] the Commission's statutory role" and pushed "naked policy preferences far afield of the Commission's market-focused domain." 2022 Comments 1. The Commission pressed forward, and the States were compelled to seek relief in court.

The Proposal now before the Commission ends that detour. It reads the securities laws as Congress wrote them; it restores materiality to its place as the cornerstone of the disclosure system; it respects the line between securities regulation and environmental policy, and between federal disclosure law and state corporate governance; and it relieves public companies and their shareholders of billions of dollars in annual costs that were never lawful.

So the States respectfully urge the Commission to adopt the Proposal and rescind the Final Rules in their entirety. The Commission should return to its rightful role as a securities regulator focused on preventing fraud through requiring the material disclosures that reasonable investors both want and need, just as the States urged four years ago. *See* 2022 Comments 40. The Proposal charts that course. The States support it without reservation.

Sincerely,

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