No. 22-51069

In the

United States Court of Appeals

for the

Fifth Circuit

NATIONAL ASSOCIATION OF MANUFACTURERS
and NATURAL GAS SERVICES GROUP, INC.,

Plaintiffs-Appellants,

– v. –

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
and GARY GENSLER, in his official capacity as Chair of the SEC,

Defendants-Appellees.

On appeal from the United States District Court
for the Western District of Texas
Case No. 7:22-cv-163-DC
Hon. David Counts

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible recusal.

Plaintiffs-Appellants: The National Association of Manufacturers ("NAM"), which is a 501(c)(6) non-profit organization, has no parent corporation, and of which no publicly held corporation owns 10% or more of its stock; and Natural Gas Services Group, Inc. ("NGS"), which is a publicly traded corporation that has no parent corporation, and of which no publicly held corporation owns 10% or more of its stock.

Defendants-Appellees: The United States Securities and Exchange Commission and Gary Gensler, in his official capacity as Chair of the Securities and Exchange commission.

Counsel for Plaintiffs-Appellants: For all Plaintiffs-Appellants: Paul W. Hughes; Debbie E. Green; Andrew A. Lyons-Berg; McDermott Will & Emery LLP. For the National Association of Manufacturers: Erica T. Klenicki; Michael A. Tilghman II.

Counsel for Defendants-Appellees: B. David Fraser; Daniel Matro; Keefe Bernstein; Tracey A. Hardin.

Dated: January 6, 2022 /s/ *Paul W. Hughes*

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument may aid in the court's decisional process in this case, particularly given the somewhat complex regulatory history and corresponding administrative-law arguments involved.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Cases—continued

Statutes, rules and regulations

Other Authorities

INTRODUCTION

This case is a study in capricious agency action. Beginning in 2010, the Securities and Exchange Commission ("SEC") embarked on a decade-long bipartisan policymaking process, culminating in a compromise rule addressing long-recognized issues surrounding the role of proxy advisory firms (also known as proxy firms, proxy voting advice businesses, and PVABs) in the corporate governance process. *See generally* ROA.177-250 (*Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020)) ("2020 Rule").

Shortly thereafter, however, a new SEC Chair took office—and under Chair Gary Gensler's leadership, the SEC immediately began to undermine and reverse this bipartisan compromise. The SEC unlawfully suspended the 2020 Rule via a series of coordinated actions in June 2021, and Chair Gensler then conducted closed-door meetings with opponents of the 2020 Rule before formally rescinding it through an unduly abbreviated notice-and-comment process. *See generally* ROA.125-154 (*Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022)) ("2022 Rescission"). Critically, at no point during this truncated rulemaking did the SEC provide any legitimate justification for why the same record that supported the 2020 Rule two years prior suddenly required its rescission—or, indeed, why its action was rational at all.

The Administrative Procedure Act ("APA") exists precisely to check such arbitrary and capricious governmental conduct. An agency cannot reverse course by simply disregarding earlier factual findings that contradict its new intended action—but that is just what the SEC has done here. Nor can it rely on reasoning that is irrational—yet, here, the SEC premised its action on baseless and unexplained concerns, and failed to respond to comments highlighting that those concerns were unfounded. And finally, an agency cannot adopt or rescind a legislative rule without providing the public a meaningful opportunity for comment—and courts thus routinely vacate agency actions taken through truncated and predetermined comment processes like the one the SEC employed here.

The district court below largely declined to engage with the substance of these claims based on idiosyncratic legal holdings that, in the court's view, rendered such analysis unnecessary—but each of these holdings is either wrong, beside the point, or both. And while the district court was surely correct that an agency may change its mind about a policy issue, settled doctrine provides that an agency wishing to do so must grapple with the underpinnings of its prior decision, must rationally explain the new decision and engage with critical comments, and must follow appropriate rulemaking procedures. The SEC has not done so here. The district court's judgment must be reversed, and the 2022 Rescission set aside.

JURISDICTION

The district court had federal-question jurisdiction over this Administrative Procedure Act case pursuant to 28 U.S.C. § 1331. The district court signed a final judgment disposing of all the parties' claims on December 5, 2022; that judgment was entered on the docket on December 6, 2022. ROA.6, 1037. Appellants filed their notice of appeal from that judgment on December 6, 2022. ROA.1038. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the SEC act arbitrarily and capriciously in rescinding the 2020 Rule's issuer-engagement provisions, including by (a) failing to provide a "more detailed justification" for disregarding its earlier, contrary factfinding (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)), or (b) failing to "reasonably consider[] the relevant issues and reasonably explain[] the decision" (*Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 855 (5th Cir. 2022) (quotation marks omitted))?

2. Did the 2022 Rescission comply with the APA's procedural requirement of a meaningful opportunity for public comment?

3. Should the Court order vacatur of the entire 2022 Rescission?

STATEMENT

A. Factual background

1. The growing role of proxy firms.

Public companies make many of their most important corporate governance decisions via votes at shareholder meetings—yet few shareholders vote their own shares directly. To the contrary, "today's financial markets . . . are characterized by significant intermediation and institutional investor participation," and "proxies have become the predominant means by which shareholders of publicly traded companies exercise their right to vote on corporate matters." ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083).

With the increasing importance of proxy voting, particularly by institutional investors and intermediaries, proxy advisory firms "have come to play an important role in the proxy voting process." ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083). Such firms "typically provide investment advisers, institutional investors, and other clients with a variety of services that relate to the substance of voting decisions," including "research and analysis regarding the matters subject to a vote," promulgating "benchmark voting policies" or "specialty voting policies . . . such as a socially responsible policy," and "making specific voting recommendations to their clients on matters subject to a shareholder vote." ROA.178 (*Id.*).

The SEC has recognized that the structure of the proxy advice market raises significant concerns. Specifically, "the market is essentially a duopoly," with the two largest firms, Institutional Shareholder Services (ISS) and Glass Lewis, collectively "controlling roughly 97% of the market share for such services." ROA.222 (2020 Rule, 85 Fed. Reg. at 55,127 n.517) (quoting sources).

The largest of those two firms, ISS, also has an obvious conflict of interest, as it sells corporate-governance consulting services to some of the very same companies about which it issues voting recommendations to shareholders, and on the very same topics that are the subject of its recommendations. *See* ROA.223 (2020 Rule, 85 Fed. Reg. at 55,128) (describing ISS's practices); ROA.259 (*Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518, 66,525 & n.74 (Dec. 4, 2019)) ("2019 Proposed Rule") (explaining that such an arrangement "could affect the objectivity or reliability" of proxy advice, and that even other proxy firms "strongly believe[]" that offering both consulting services to companies and voting recommendations to shareholders "creates a problematic conflict of interest").[1] Unsurprisingly, "[t]he issuer in this situation may purchase consulting services from the proxy advisory firm in an effort to garner the firm's support for

[1] Indeed, Appellant NGS described in related litigation receiving incessant marketing communications from ISS's consulting arm, even while ISS was issuing negative, uninformed, and misleading voting recommendations to NGS's shareholders. Decl. of Stephen C. Taylor ¶ 16, *Nat'l Ass'n of Mfrs. v. SEC*, No. 21-cv-183 (W.D. Tex. Sept. 14, 2022), Dkt. 45-22.

the issuer when the voting recommendations are made." *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982, 43,012 (July 22, 2010).

Moreover, in addition to voting recommendations on what might be considered traditional corporate governance matters—board nominees, executive compensation, and the like—proxy firms also have policies and provide recommendations on a wide range of environmental, social, and governance ("ESG") topics like issuers' greenhouse gas emissions, diversity statistics, and positions on hot-button political topics. Recent analysis has shown that proxy firms are overwhelmingly supportive of shareholder proposals in this area: For example, ISS, the largest proxy firm, recommended in favor of ESG-related shareholder proposals 79% of the time in 2019. Lily Tomson, *Another Link in the Chain: Uncovering the Role of Proxy Advisors in Investor ESG Voting*, Harvard Law School Forum on Corporate Governance (Mar. 5, 2020), perma.cc/PE6T-WVPN. And the NAM's latest survey found that 77.6% of publicly traded manufacturers are concerned "that the recent increase in outside pressure on [ESG] topics" by third parties including "proxy advisory firms . . . would increase costs for public companies, divert management and board time and resources and endanger long-term value creation." *NAM Manufacturers' Outlook Survey, Fourth Quarter 2022* 3 (Jan. 4, 2023), perma.cc/T484-ZCPL.

As the SEC has stated, proxy firms' advice on ESG and other topics "is often an important factor in the clients' proxy voting decisions." ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083). Indeed, in addition to offering voting policies and recommendations, in some instances the firms "are given authority to execute votes on behalf of their clients" directly—often without any review of those voting decisions by the firms' clients—in a practice known as robo-voting. ROA.178.

Despite the industry's duopolistic structure and troubling practices, the ubiquity of proxy voting and the sheer number of votes that must be taken by institutional investors and large intermediaries have led proxy advisory firms to "become uniquely situated in today's market to influence, and in many cases directly execute, these investors' voting decisions." ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083). To put it more concretely, institutional investors controlling over *$5 trillion* in assets under management "voted in lockstep alignment with either ISS or Glass Lewis in 2020," with the result that these proxy firms' recommendations directed those institutions' votes on over 100,000 individual corporate resolutions that year. *See* Paul Rose, *Proxy Advisors & Market Power: A Review of Institutional Investor Robovoting* 10-11 (Apr. 2021), perma.cc/U2HV-DMRN. As the SEC has recognized, ensuring "the transparency, accuracy, and completeness of the information provided to clients of proxy voting advice businesses in connection with their voting decisions" is therefore critical. ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083).

There have been growing concerns, however, that proxy firms have *not* been providing "transparen[t], accura[te], and complete[]" information to their clients. ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083). A recent survey by the NAM found that nearly 78% of public company respondents were concerned about the actions of proxy advisory firms, and 56% of them found that they were having to divert resources from their core business functions in order to respond to the actions of proxy advisory firms. See *NAM Manufacturers' Outlook Survey, Fourth Quarter 2018* 8, 13 (Dec. 20, 2018), perma.cc/9CNE-HSYU. Similarly, data from 2016, 2017, and 2018 show that proxy advisory firms' reports on nearly one hundred companies included numerous factual and analytical errors. Frank M. Placenti, *Analysis of Proxy Advisor Factual and Analytical Errors in 2016, 2017, and 2018* (2018), perma.cc/RGR3-YR6X. And a more recent analysis identified 50 instances in 2021 alone in which public companies filed supplemental proxy materials to correct a proxy firm's analysis, a 21% increase over the year before. American Council for Capital Formation, *Proxy Advisors Are Still a Problem* 9 (Dec. 2021), perma.cc/C55R-39ZX.

In response to increasing concerns about the influence of proxy advisory firms and their conflicts of interest, lack of accuracy and transparency, and unwillingness to engage with issuers, the SEC in 2010 initiated a decade-long policymaking process involving SEC Chairs of both political parties, ultimately culminating in the adoption of the 2020 Rule. *See, e.g.*, *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. at 42,982 (noting concerns that "voting recommendations by proxy advisory firms may be made based on materially inaccurate or incomplete data"; that "the analysis provided to an institutional client may be materially inaccurate or incomplete" and that proxy firms "may be unwilling, as a matter of policy, to accept any attempted communication from the issuer or to reconsider recommendations in light of such communications," and discussing proposed solutions); Press Release, *SEC Announces Agenda, Panelists for Roundtable on Proxy Advisory Services* (Nov. 27, 2013), perma.cc/UE9F-KZRZ (announcing policy discussion of "the transparency and accuracy of recommendations by proxy advisory firms"); Chair Jay Clayton, *Statement Announcing SEC Staff Roundtable on the Proxy Process* (July 30, 2018), perma.cc/2D93-VGR4 (panelist discussion of "[w]hether issuers are being given an appropriate opportunity to raise concerns if they disagree with a proxy advisory firm's recommendations, including, in particular, if the recommendation is based on erroneous, materially incomplete, or outdated information," along with "[t]he appropriate regulatory regime for proxy advisory firms.").[2]

[2] The NAM was a vocal participant throughout this process. *See, e.g.*,

2. *The SEC adopts modest conditions for proxy firms wishing to be exempt from proxy solicitation requirements.*

The 2020 Rule was the culmination of this decade-long bipartisan process. With the 2020 Rule, the SEC acted to address proxy firms' conflicts of interest, lack of accuracy and transparency, and unwillingness to engage with issuers, adopting modest protections "so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions." ROA.177 (2020 Rule, 85 Fed. Reg. at 55,082).

Rather than attempt to regulate "all aspects of proxy voting advice businesses' role in the proxy process," the 2020 Rule was narrowly focused on "certain specific concerns about proxy voting advice businesses" and was tailored to "help to ensure that the recipients of their voting advice make voting determinations on the basis of materially complete and accurate information." ROA.255 (2019 Proposed Rule, 84 Fed. Reg. at 66,521). Moreover, the Rule's requirements are not requirements at all, but rather conditions to exemptions from a more onerous reporting regime—the federal proxy rules' information and filing requirements—with which proxy firms would other-

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ROA.436 (explaining, as part of the 2018 roundtable, that while "the NAM believes that proxy firms can be constructive and provide a useful service" under the correct conditions, "the flaws embedded into the business model of proxy advisory firms are at this point well-documented, and manufacturers have time and time again faced significant costs due to their influence").

wise have to comply. *See, e.g.*, ROA.179 (2020 Rule, 85 Fed. Reg. at 55,084).

Specifically, the 2020 Rule "codif[ied]" the SEC's pre-existing "interpretation that proxy voting advice generally constitutes a solicitation within the meaning of [Securities Exchange Act of 1934] Section 14(a) and therefore is subject to the Federal proxy rules." ROA.178 (2020 Rule, 85 Fed. Reg. at 55,083); *see* 17 C.F.R. § 240.14a-1(*l*)(1)(iii)(A). And it "condition[ed] the availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules commonly used by proxy voting advice businesses upon compliance with additional disclosure and procedural requirements." ROA.178-179 (2020 Rule, 85 Fed. Reg. at 55,083-55,084). In particular, the 2020 Rule required proxy advisory firms seeking exemption from the proxy rules' information and filing requirements to both disclose specified conflicts of interest and to comply with a set of procedures for engaging with issuers—that is, publicly traded companies—that are the subject of the firms' proxy advice.

As promulgated, the 2020 Rule's issuer-engagement provisions (the rescission of which are the focus of this appeal) required proxy firms to adopt "policies and procedures reasonably designed to ensure that:"

> (A) Registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business's clients; and

> (B) The proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants who are the subject of such advice, in a timely manner before the security holder meeting.

ROA.249 (2020 Rule, 85 Fed. Reg. at 55,154), *see* 17 C.F.R. § 240.14a-2(b)(9)(ii) (2020). In other words, the 2020 Rule simply required proxy firms to (a) disclose their proxy voting advice to the public companies that are the subject of the advice; and (b) provide their investor clients a mechanism through which they can become aware when a company responds to the firm's analysis.

Notably, the issuer-engagement provisions adopted by the 2020 Rule were a materially watered-down version of the policy originally proposed by the agency. The proposed rule, issued in 2019, would have required proxy firms to "provide registrants . . . a limited amount of time to review and provide feedback on the advice *before* it is disseminated to the business's clients." ROA.265 (2019 Proposed Rule, 84 Fed. Reg. at 66,531) (emphasis added). At the time, the SEC explained that it "believe[d] that establishing a process that allows registrants . . . a meaningful opportunity to review proxy voting advice in advance of its publication and provide their corrections or responses would reduce the likelihood of errors, provide more complete information for assessing proxy voting advice businesses' recommendations, and ultimately improve the reliability of the voting advice utilized by investment advisers and others who make voting determinations, to the ultimate benefit of investors." ROA.264 (*Id.* at 66,530).[3]

But in response to "concerns raised by commenters regarding the potential unintended consequences" of the 2019 framework, "including those related to timing and the risk of affecting the independence of the [proxy voting] advice" (ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112)), the SEC materially softened its approach, weakening the proposed safeguards and instead adopting the 2020 Rule's simultaneous-disclosure approach to issuer engagement. *See* ROA.127 (2022 Rescission, 87 Fed. Reg. at 43,170 n.26) (noting that "[t]he Commission adopted the [2020 issuer-engagement] conditions, in part, in response to the concerns expressed by commenters about the 'advance review and feedback' conditions that were included in the Commission's 2019 proposed rules"). This decision was made in the face of comments, including from the NAM, explaining that it was "extraordinarily unlikely" that the proposed 2019 framework would impede proxy firms' ability to deliver timely voting

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[3] The NAM strongly supported this 2019 version of the issuer-engagement provisions, and in fact advocated for an even more active approach. ROA.424-425, 428-429 (NAM comment letter, explaining that the 2019 proposed procedures "would reduce the likelihood of errors, provide investors with more complete information, and improve the reliability of proxy voting advice," without "imped[ing] the proxy firms' ability to meet the deadlines of proxy season" or "threaten[ing]" "the proxy advisory firms' independence"); ROA.426 (advocating for requirement that proxy firms to include the full text of an issuer's dissenting opinion alongside the firm's analysis).

advice and that there was "no risk of the proxy advisory firms' independence being threatened by the proposed reforms." ROA.425, 428-429.

3. *The SEC unlawfully suspends and then rescinds the 2020 Rule.*

Not long after the 2020 Rule was adopted, and before the Rule had taken effect, the SEC under its new Chair, Defendant Gary Gensler, began an abrupt about-face. Undoing the result of a decade of bipartisan policymaking, Chair Gensler "direct[ed] [SEC] staff to . . . consider whether to recommend that the Commission revisit" the 2020 Rule, and agency staff the same day stated that they would not enforce the 2020 Rule "during the period in which the Commission is considering further regulatory action in this area." Gary Gensler, SEC Chair, *Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021), perma.cc/AZK5-6LND; SEC Division of Corporation Finance, *Statement on Compliance* (June 1, 2021), perma.cc/GH2B-YSJ4. SEC attorneys confirmed in litigation that these actions "provide[d] . . . proxy voting advice businesses[] relief" from having to comply with the 2020 Rule. Mtn. for Abeyance, *Institutional Shareholder Services Inc. v. SEC*, No. 19-cv-3275 (D.D.C. June 1, 2021), Dkt. 53, at 4. In other words, the SEC unlawfully suspended the compliance requirement for the 2020 Rule without notice and comment, before it had even come into effect.[4]

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[4] In a separate but related case involving the same parties, the district court held that this unilateral suspension violated the APA. *See Nat'l Ass'n of Mfrs.*

Only days later, Chair Gensler held a closed-door meeting with a broad swath of the 2020 Rule's opponents—and none of its supporters—so that those organizations could "express[] general opposition to the 2020 Final Rules, including with respect to the [issuer-engagement] conditions." ROA.158-159 (*Proxy Voting Advice*, 86 Fed. Reg. 67,383, 67,385-67,386 & n.24 (Nov. 26, 2021)) ("2021 Proposed Rescission") (admitting that "Chair Gensler and members of the Commission staff" held this meeting with opponents of the 2020 Rule "on June 11, 2021," just over a week after the Chair announced that the 2020 Rule had been suspended).

Five months later, the SEC took formal action, proposing on November 26, 2021 to rescind key portions of the 2020 Rule. *See generally* ROA.156-175 (2021 Proposed Rescission, 86 Fed. Reg. 67,383); *but see* ROA.295-302 (dissent of Commissioner Elad L. Roisman); ROA.304-305 (dissent of Commissioner Hester M. Peirce).

After a 31-day comment period that encompassed portions of the Thanksgiving, Hanukkah, and Christmas holiday seasons, the SEC finalized that proposal by a divided 3-2 vote of the five Commissioners. *See* ROA.124-154 (2022 Rescission, 87 Fed. Reg. 43,168); *but see* ROA.307-311 (dissent of

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v. SEC, 2022 WL 16727731 (W.D. Tex. Sept. 28, 2022). The SEC did not appeal that decision.

Commissioner Hester M. Peirce) ROA.313-315 (dissent of Commissioner Mark T. Uyeda).

As relevant here, the 2022 Rescission rescinds the 2020 Rule's compromise issuer-engagement provisions, but identifies nothing new in the record to support the SEC's reversal of position.

Instead, the agency in the 2022 Rescission offered essentially a single justification for discarding the protections that had emerged from its prior, deliberative policymaking process: that "many investors and PVAB clients have continued to warn, both in response to the adoption of the 2020 [Rule] and again in comments on the 2021 [Proposed Rescission], that the [issuer-engagement] conditions risk impairing the independence and timeliness of proxy voting advice and imposing increased compliance costs on [proxy firms], without corresponding investor protection benefits." ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175). That is, regulated parties continued to express the same opposition that the SEC had considered and rejected in adopting the 2020 Rule in the first place.

B. Procedural history

Appellants filed suit against the SEC and Chair Gensler shortly after the 2022 Rescission was finalized, seeking to set it aside as both substantively and procedurally deficient under the APA. *See generally* ROA.7-39.

1. As to substance, Appellants first argued that the SEC's abrupt reversal failed to comply with the Supreme Court's mandate that the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" if the "new policy rests upon factual findings that contradict those which underlay [the agency's] prior policy," and that "[i]t would be arbitrary and capricious to ignore" the agency's own conflicting prior findings. *Fox*, 556 U.S. at 515; *see also, e.g.*, *Texas v. Biden*, 20 F.4th 928, 990-991 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022). In particular, the SEC in promulgating the 2020 Rule had found that its provisions "do[] not create the risk that [proxy voting] advice would be delayed or that the independence thereof would be tainted" (ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112))—yet the fundamental premise of the 2022 Rescission is that the 2020 Rule *does* create such risks, and the SEC did not acknowledge or grapple with its earlier, contrary finding.

Apart from this *Fox*-based failing, Appellants also argued that the SEC failed to justify its reliance on these supposed risks to timeliness and independence of proxy advice, in the face of comments explaining that the 2020 Rule posed no such risks (as, indeed, the agency had earlier found). ROA.84-108. Rather than reasonably explain the mechanism through which it felt its recently adopted rule could undermine timeliness and independence, the SEC simply parroted "concerns" raised by the regulated industry, and failed entirely to engage with comments explaining that those supposed risks were illusory. *See generally, e.g.*, *Data Mktg. P'ship*, 45 F.4th at 855 (reviewing court "must ensure that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision") (quotation marks omitted).[5]

Finally, Appellants argued that the abnormal procedure used by the SEC in rescinding the 2020 Rule violated the APA, relying on a robust and growing body of case law rejecting similarly shortened agency rulemakings. Specifically, the agency utilized a shorter than normal 31-day comment period, which was both set over the December holidays and conflicted with the end-of-fiscal-year reporting period for many public companies, a key group of stakeholders in the 2020 Rule. Nor did the agency give any reasons for thus shortening the comment period—and there was no need for urgent action, given that the SEC had suspended compliance with the 2020 Rule during the rescission process. As one dissenting SEC Commissioner explained at the time, this truncated comment period "was insufficient under the circumstances." ROA.314.

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[5] Appellants also argued that it was irrational for the SEC to base the rescission on voluntary self-regulation by proxy firms that, the agency said, would provide some of the same benefits as the 2020 Rule. ROA.15-18. In its responsive summary judgment brief, the SEC disclaimed this reasoning as a basis for its decision, and the district court did not address this argument. ROA.876, 1017-1034.

2. The district court rejected each of these arguments and entered summary judgment for the SEC.

As to Appellants' *Fox*-based argument, the district court held that the SEC's prior conclusion that the 2020 Rule posed no risk to the independence and timeliness of proxy voting advice "was not a factual finding" in the first place, and therefore did not trigger *Fox*'s detailed-justification requirement. ROA.1022-1024. The court based this conclusion on what it viewed as a "concession" by Appellants that the 2020 Rule and its rescission were "based on 'the same factual record'" (ROA.122); the court appears to have reasoned that because the "factual *record*" before the agency was the same in 2020 and 2022, the "factual *findings*" of the agency in both instances must also have been "the same" (ROA.1024) (emphasis altered)), precluding a claim that the later factual findings "contradict those that underlay [the] prior policy" (*Fox*, 556 U.S. at 515).

With respect to the merits of the agency's reasoning—relying on industry "concerns" about supposed risks to the timeliness and independence of proxy advice from the 2020 Rule to justify its rescission—the district court simply observed, as a general matter, that agencies are not "barred from incorporating public comments into the final rule." ROA.1028. The court did not address Appellants' contention that an agency must justify its decision to rely on certain comments, while disregarding other comments that undermine the agency's reasoning. Nor did the court meaningfully address the core logical failing identified by Appellants: That the SEC has never articulated *how* the 2020 Rule is supposed to have endangered timeliness or independence, when (unlike earlier proposals) the Rule requires proxy firms to share their analysis with the subject companies only after it is finalized and at the same time it is disseminated to the firms' clients.

Finally, the court rejected Appellants' procedural claim regarding the irregularly truncated comment period permitted by the SEC on the grounds that accepting such an argument would "impose upon an agency [the court's] own notion of which procedures are best," in violation of the *Vermont Yankee* doctrine. ROA.1031 (quoting *Perez v. Morg. Bankers Ass'n*, 575 U.S. 92, 102 (2015)). The court therefore granted summary judgment to the SEC on all claims.

SUMMARY OF THE ARGUMENT

The 2022 Rescission must be set aside—and the district court erred in holding otherwise—for three principal reasons.

I. First, the 2022 Rescission "rests upon factual findings that contradict those which underlay [the] agency's prior policy. . . [y]et [the SEC] failed to give a 'detailed' (or *any*) discussion of the prior findings." *Texas*, 20 F.4th at 991 (quoting *Fox*, 556 U.S. at 515). Specifically, the SEC explicitly found in 2020 that the Rule's provisions posed no risk to the timeliness or independence of proxy advice. Two years later, and based on no new information, the agency found that the Rule *did* create such risks (or at least that concerns about such risks justified rescinding the Rule). Yet the 2022 Rescission does not even acknowledge its prior, diametrically opposed factual findings, much less "explain[] why they were mistaken, misguided, or the like." *Id.*

Under black-letter administrative law, "[t]hat's that"—the rescission is arbitrary and capricious for the SEC's "fail[ure] to reasonably consider its own factual findings regarding" the non-existent risks of the 2020 Rule. *Texas*, 20 F.4th at 991. The district court skirted this claim by concluding that the 2020 Rule's discussion of its risks, or lack thereof, to timeliness and independence was not actually a factual finding that triggers the *Fox* rule (ROA.1022-1024), but that conclusion is baseless. *See* pages 28-30, *infra*. *Fox* and *Texas* require reversal here.

II. Next, the SEC's stated reasoning for the 2022 Rescission is irrational and arbitrary on its own terms. The fundamental basis for the rescission was that, contrary to what the agency had earlier found, the 2020 Rule now *did* create risks to the timeliness and independence of proxy advice—yet the SEC provided no sound logical basis for why or how the 2020 Rule, as adopted, would cause these harmful effects. Indeed, there is no such logical basis: The Rule requires disclosure only after advice is finalized, and therefore does not affect the timeliness of that advice or give companies any opportunity to influence the ultimate content of the advice. The rescission is therefore neither "reasonable" nor "reasonably explained," and cannot survive APA review. *Data Mktg. P'ship*, 45 F.4th at 855 (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

In something of a non-sequitur, the district court rejected these arguments by holding that agencies are not prohibited from adopting the reasoning of commenters. ROA.1028. While that proposition may be correct, it is also beside the point, because (a) the adopted comments here *also* cannot withstand scrutiny; (b) an agency cannot adopt commenters' analysis "uncritically," as the SEC has done here (*Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1125 (D.C. Cir. 1984)); and (c) the SEC failed to respond to comments from other parties, including Appellants, that pointed out the flaws in the agency's reasoning—an additional APA violation.

III. Further, the rulemaking procedure employed by the SEC—including an inexplicably truncated 31-day comment period, which encompassed the Christmas and Hannukah holidays as well as affected companies' year-end reporting period—was also deficient. Courts around the country employ a multi-factor analysis to determine whether an agency has given the regulated public sufficient time to comment on a rulemaking proposal—but the district court short-circuited that analysis, holding that the *Vermont Yankee* doctrine forecloses any such inquiry into agency procedure. That is wrong: *Vermont Yankee* prohibits courts from imposing *new* procedural obligations on agencies, but it does not impede them from interpreting and defining the metes and bounds of the *existing* procedural requirements in the APA, such as the requirement of "an opportunity to participate in the rule making" through notice and comment. 5 U.S.C. § 553(c). And when the appropriate multi-factor analysis is applied here, the product of the SEC's abbreviated rulemaking process cannot stand. It must be set aside for this reason, too.

IV. Finally, the entirety of the 2022 Rescission must be struck, both because of the procedural violation and because additional provisions are non-severable from the substantively arbitrary and capricious portions.

ARGUMENT

Where, as here, "a district court sits as the initial reviewing court of an administrative agency's decisions," this Court "review[s] de novo" whether the agency violated the APA's arbitrary and capricious standard. *Fath v. Tex. Dep't of Transp.*, 924 F.3d 132, 136 (5th Cir. 2018). No deference is given to the district court's conclusions unless "the district court based its judgment on lengthy evidentiary proceedings, factual inferences, [or] witness credibility determinations," none of which is present here. *Id.*

The APA requires that "agency action be reasonable and reasonably explained." *Data Mktg. P'ship*, 45 F.4th at 855 (quoting *Prometheus Radio Project*, 141 S. Ct. at 1158). This means that a reviewing court "must ensure that 'the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision'" (*id.*), or, put slightly differently, that it has "articulat[ed] . . . a rational connection between the facts found and the choice made" (*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted)). "When a 'new policy rests upon factual findings that contradict those which underlay an agency's prior policy,'" even greater recognition and explanation is required of the agency. *Texas*, 20 F.4th at 991 (quoting *Fox*, 556 U.S. at 515). And if agency action is taken "without observance of procedure required by law," it must be set aside as well. 5 U.S.C. § 706(2)(D).

Applying these standards of review here, the SEC's action is plainly unlawful. The 2022 Rescission is both substantively arbitrary and capricious several times over, and was adopted without good-faith observance of the APA's mandated rulemaking procedures. The district court's stated reasons for rejecting these claims do not hold water, either as a matter of law or as a matter of logic. The rescission must be set aside.

I. THE SEC'S REVERSAL OF PRIOR POLICY IS UNLAWFUL UNDER *FOX* AND *TEXAS V. BIDEN*.

To begin, the rescission of the 2020 Rule's issuer-engagement provisions is arbitrary and capricious for failure to adequately explain the agency's 180-degree turn.

a. As the Supreme Court has explained, if an agency wishes to change a rule or policy, and its "new policy rests upon factual findings that contradict those which underlay [the agency's] prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515. This means that, in this Court's framing, an agency wishing to change policy by contradicting its prior factual conclusions must "reasonably consider its own factual findings" embodied in the prior policy, and "explain why they were mistaken, misguided, or the like." *Texas*, 20 F.4th at 990-991 (vacating DHS action because it "rested upon factual findings that contradict those which underlay" the agency's prior policy, "[y]et DHS didn't address its own prior factual findings at all when it terminated" that prior policy); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021) (similarly setting aside agency action for a *Fox* violation).

But that is just what has happened here: The SEC's rescission of the 2020 Rule is premised on a factual finding—that the Rule may have posed risks to timeliness or independence of proxy voting advice—that directly contradicts the agency's own explicit, earlier finding that no such risks exist.

As noted above, the SEC's sole basis for rescinding the 2020 Rule's issuer-engagement provisions was that "many investors and [proxy advisory firm] clients have continued to warn, both in response to the adoption of the

2020 [Rule] and again in comments on the 2021 [Proposed Rescission], that the Rule 14a-2(b)(9)(ii) [issuer-engagement] conditions *risk impairing the independence and timeliness of proxy voting advice* and imposing increased compliance costs on [proxy firms]." ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175) (emphasis added); *see also* ROA.132 ("[W]e agree that the risks posed by the Rule 14a-2(b)(9)(ii) conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now.").

As the SEC has acknowledged, however, these "concerns" were not new (*see* ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175)); rather, they were "reiterated" from "the prior rulemaking process"—that is, the adoption of the 2020 Rule itself (ROA.308 (dissent of Commissioner Peirce)). *See also* pages 34-45, *infra* (explaining why these concerns are also baseless on the merits). And when presented with those same arguments in the earlier rulemaking—that is, that the issuer-engagement provisions would have negative effects on "independence and timeliness" of proxy advice—the agency *flatly rejected them*:

> [B]ecause [the 2020 Rule] does not require proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, the rule ***does not create the risk that such advice would be delayed or that the independence thereof would be tainted*** as a result of a registrant's pre-dissemination involvement.

ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112) (emphasis added).

Below, the government argued that this statement is consistent with its current notion "that the conditions may compromise the timeliness and independence of proxy advice in other ways" besides "a registrant's pre-dissemination involvement." ROA.877. But that is not how the SEC understood it at the time; to the contrary, the agency explained in the 2020 Rule itself that the lack of pre-dissemination review by registrants meant that the rule *as a whole* would not threaten the timeliness or independence of proxy advice: "*[B]ecause* the [2020 Rule] does not include a registrant review and feedback process that requires pre-publication review, it . . . *should not* discourage proxy voting advice business from making recommendations that oppose management or impose additional timing constraints on proxy voting advice businesses." ROA.234 (2020 Rule, 85 Fed. Reg. at 55,139).

These explicit findings that the 2020 Rule's issuer-engagement provisions "do[] not create . . . risk" to the independence or timeliness of proxy advice (ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112)) are unmistakably and irreconcilably contradicted by the 2022 Rescission's "*agree[ment]* [with commenters] that the risks posed by the [issuer-engagement] conditions to the cost, timeliness, and independence of proxy voting advice" justify rescinding those provisions (ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175) (emphasis added)). As this Court has explained, "[t]hat triggers the arbitrary-and-capricious rule set forth in *Fox*," requiring the agency to "explain why [the prior findings] were mistaken, misguided, or the like." *Texas*, 20 F.4th at 991. "Yet," as in *Texas*, the SEC here "failed to give a 'detailed' (or *any*) discussion of the prior findings." *Id.*

As this Court put it, under *Fox*, "[t]hat's that"—the unexplained departure from prior factual findings is arbitrary and capricious. *Texas*, 20 F.4th at 991; *see also Wages & White Lion*, 16 F.4th at 1139 (agency about-face was arbitrary and capricious where the agency "turned around and ignored its prior" findings and reasoning). This fundamental failing is therefore fatal to the 2022 Rescission.

b. The district court largely did not disagree with Appellants' account and application of the case law. Rather, the court rejected this claim solely on the grounds that, in the district court's view, the SEC's earlier discussion of the lack of risks to timeliness and independence under the 2020 Rule "was not a factual finding" at all, and the doctrine set out in *Fox* and *Texas* therefore does not apply in the first place. ROA.1022-1024. Instead, the court believed that "the 2020 Rule and the 2022 Rescission highlighted the same risk, but weighed it differently," meaning that "the factual findings didn't change," and only "the Commission's policy conclusion—that the risk to PVABs was not justified—did." ROA.1022.

That is incorrect: The SEC's 2020 conclusion that, "because the [2020 Rule] does not include a registrant review and feedback process that requires pre-publication review, it . . . should not" affect timing or independence (ROA.234 (2020 Rule, 85 Fed. Reg. at 55,139)), is a factual finding that cannot be disregarded under *Texas* and *Fox*. The court appears to have reached its contrary conclusion for two reasons, neither of which withstands scrutiny.

First, the district court believed Appellants had made a "concession" by arguing that the 2022 Rescission represented a change of course "*on the same factual record*." ROA.1022 (emphasis by the district court). That is, the court appears to have reasoned that because the *record facts* before the agency were the same for the two rulemakings, the agency's factual *findings* in both cases must have been the same as well. ROA.1022; *see also* ROA.1024 ("The 2022 Rescission did not add or remove factual findings from the 2020 Rule; Plaintiffs concede the 2022 Rescission was based on 'the same factual record.'").

But contrary to the district court's reasoning, the factual *record* before an agency is, by definition, a quite different thing than the *findings* the agency draws from that record. *Compare, e.g.*, *Rocky Mtn. Peace & Justice Ctr. v. U.S. Fish & Wildlife Serv.*, 40 F.4th 1133, 1160 (10th Cir. 2022) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.") (quotation marks omitted), *with*

Finding of Fact, *Black's Law Dictionary* (11th ed. 2019) ("A determination by a judge, jury, or administrative agency of a fact *supported by the evidence in the record.*") (emphasis added). That is, the factual record is the evidence before the agency, while factual findings are the conclusions the agency draws from that evidence.

That critical distinction demonstrates why, contrary to the district court's reasoning, Appellants have not made any harmful concession. While Appellants pointed out that the factual record before the agency was the same for the two rulemakings, the entire gravamen of Appellants' claim is that—despite the unchanged facts on the ground—the agency made contradictory factual findings based on that same, unchanged factual record, and yet did not acknowledge the conflict or explain why its earlier findings were wrong. Appellants' position is entirely consistent.

Second, apart from this nonexistent "concession," the district court cited two excerpts from the rulemaking process to support its conclusion that "the risk to PVABs [from the 2020 Rule] existed" even under the SEC's 2020 view of the world. ROA.1022. The first quotation is puzzling: It states that the changes made to the 2020 Rule during the rulemaking process—specifically, moving away from the proposed requirement that proxy firms share their analysis with companies prior to publication—"addressed the concerns raised by commenters . . . related to timing and the risk of affecting the independence of the advice." ROA.1022 (quoting ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112)). But this statement supports *our* position: It is a finding that, with the 2020 Rule in place rather than the 2019 proposal, there would *not* be "risk of affecting the independence of the advice." ROA.207.

Indeed, the *very next sentence* of the 2020 Rule is the one that we cite above: "Specifically, because [the 2020 Rule] does not require" sharing of proxy advice prior to dissemination, "the rule *does not* create the risk that such advice would be delayed or that the independence thereof would be tainted as a result of a registrant's pre-dissemination involvement." ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112) (emphasis added). That is, the "concerns" about "risk[s]" that the district court cites are concerns related to provisions of the 2019 proposal that the SEC believed the 2020 Rule, as adopted, had eliminated.

The district court's second citation is no more convincing. That citation is not to the 2020 Rule at all, but instead to the 2022 Rescission, which states that the agency in 2022 was "weigh[ing] . . . competing concerns differently" in rescinding the rule. ROA.1022-1023 (quoting ROA.125, 131-132 (2022 Rescission, 87 Fed. Reg. at 43,168, 43,174-43,175)). But it is black-letter administrative law that an agency's later characterization of its prior action is not controlling; rather, it is what the agency says *at the time* that matters. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907-1911 (2020) (applying the "foundational principle of administrative law" that "[a]n agency must defend its actions based on the reasons it gave when it acted"); *id.* (same rule applies, regardless of whether the "*post-hoc* rationalization[]" is offered by the agency's lawyers "or by agency officials themselves").

The SEC's post-hoc characterization of the 2020 Rule thus cannot overcome what the SEC said at the time: "[B]ecause the [2020 Rule] does not include a registrant review and feedback process that requires pre-publication review, it . . . should not discourage proxy voting advice business from making recommendations that oppose management or impose additional timing constraints on proxy voting advice businesses." ROA.234 (2020 Rule, 85 Fed. Reg. at 55,139); *see also* ROA.207 (2020 Rule, 85 Fed. Reg. at 55,112) ("[T]he rule does not create the risk that such advice would be delayed or that the independence thereof would be tainted as a result of a registrant's pre-dissemination involvement.").

That is precisely the kind of factual finding that *Fox* and *Texas* do not permit agencies to simply disregard without explanation. Indeed, as we described below, it is commonplace throughout the law that the existence or non-existence of a particular risk is a question of fact that must be established through formal factfinding. *See, e.g.*, *Ball v. LeBlanc*, 792 F.3d 584, 592 (5th Cir. 2015) ("The predicate findings of a substantial risk of serious harm" to prison inmates, for an Eighth Amendment claim, "are factual findings reviewed for clear error."); *United States v. Mitchell*, 709 F.3d 436, 440 n.6 (5th Cir. 2013) (discussing statute that "requires commitment" of an incompetent defendant "if the court finds by clear and convincing evidence that the person['s] . . . release would create a substantial risk of bodily injury") (quotation marks omitted); *Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993) (disability discrimination claim under the Rehabilitation Act requires "findings of facts . . . about (a) the nature of the risk . . . (b) the duration of the risk . . . [and] (c) the severity of the risk") (alteration incorporated).

By contrast, what the agency choses to *do* about such a risk may be a "policy decision" (*cf.* ROA.1023), but whether the risk *exists* is a factual finding, and thus subject to *Fox*. *Cf. also Texas*, 20 F.4th at 990-992 (effectiveness of rescinded agency program at achieving its policy goals, including the existence of "perverse incentives" absent the policy, was a factual finding that could not be ignored by agency without discussion).

To be sure, agencies are permitted to change their minds and, as the district court put it, "changing political winds may factor into an agency's policy preference." ROA.1033. But the fundamental procedural safeguards of the APA require agencies to do so forthrightly: If the adoption of a policy was premised on the agency's explicit, expert conclusion that the policy would not create certain risks, rescinding the policy *on the basis of those very risks* requires “a ‘detailed’ . . . discussion of the prior findings” and the agency’s reason for contradicting them now. *Texas*, 20 F.4th at 991 (quoting *Fox*, 556 U.S. at 515). Because such a detailed explanation is missing here, “[t]hat’s that”—the 2022 Rescission is arbitrary and capricious, and must be set aside. *Id.*

II. THE SEC’S JUSTIFICATION FOR THE 2022 RESCISSION IS IRRATIONAL, AND THE AGENCY DISREGARDED COMMENTS POINTING OUT THIS IRRATIONALITY.

Not only does the SEC’s stated justification for rescinding the 2020 Rule’s issuer-engagement provisions “contradict [the SEC’s] own [2020] findings” (*Texas*, 20 F.4th at 991), but it is arbitrary and capricious on its own terms, as well. *See, e.g.*, *Data Mktg. P’ship*, 45 F.4th at 855 (“[A]gency action [must] be reasonable and reasonably explained.”); *id.* (reviewing court “must ensure that ‘the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision’”) (quoting *Prometheus Radio Project*, 141 S. Ct. at 1158). In sum, the SEC has never provided a rational reason why the supposed “concerns” about the 2020 Rule’s effect on the timeliness and independence of proxy advice are well founded, and has failed to respond to comments raising this deficiency to the agency.

a. The SEC has articulated no rational explanation for the very cornerstone of its action: the notion, discussed above, that the 2020 Rule’s issuer-engagement provisions somehow risk undermining the “independence and timeliness of proxy voting advice." ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175). To the contrary, the 2022 Rescission simply repeats, without further explanation, that "concerns" about timeliness and independence have been voiced by the 2020 Rule's opponents (*see, e.g.*, ROA.132), and ultimately states that the agency "agree[s]" with those concerns (ROA.132). But nowhere does the agency rationally explain *why* a requirement that proxy advice be provided to registrants contemporaneously with the proxy firm's clients, and that those clients be made aware of a registrant's response, would affect the timeliness or independence of proxy advice. *Cf., e.g.*, *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 472 (4th Cir. 2013) (agency's "failure to explain why it used [a particular] assumption renders [its action] arbitrary and capricious").

Nor could the SEC have provided a satisfactory explanation for this reasoning. As the NAM explained in its comment letter:

> [T]he concerns raised about the timeliness and independence of proxy voting advice are simply not credible. The 2020 rule's issuer engagement provisions provide significant flexibility to PVABs and require exactly zero action on their part before a recommendation is finalized. *It is implausible that a PVAB's ability to publish independent, unbiased voting advice could be impacted by a requirement that it send its voting recommendations to businesses after they are finalized.*

ROA.615 (emphasis altered). Instead, these "concerns" are merely recycled from the 2019 Proposed Rule, which would have required consultation with public companies on proxy firms' *draft* reports regarding those companies.

ROA.615; *see also* ROA.308 (dissent of Commissioner Peirce) (explaining that the "letters in support" of the rescission "did not include new information to justify the Commission's U-Turn. Instead, they reiterated concerns that commenters had raised during the prior rulemaking process," when commenters were considering a *pre-publication* consultation requirement).

That is, while the NAM has argued that even the 2019 Proposed Rule would not have harmed the independence or timeliness of proxy voting advice, those concerns at least made arguable sense in the context of a requirement that proxy firms share and receive feedback on their advice prior to publishing it to their clients. Here, where the 2020 Rule requires a proxy advisory firm to take action only *after* its recommendations are finalized and disseminated, the cited concerns do not hold water—and the SEC has not proffered any reason why they would.

b. In response to this analysis, the district court pointed to two passages from the 2020 Rule that, it says, evince a rational explanation for "why the [2020 Rule] affected the timeliness or independence of proxy voting advice." ROA.1027. They do not.[6]

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[6] The district court also discussed the SEC's evaluation of the compliance costs of the 2020 Rule. *See* ROA.1026-1027. However, as we explained below, the SEC has never stated that increased compliance costs are an independently sufficient reason to rescind the 2020 Rule, so the rationality of that evaluation of costs is beside the point. ROA.1005.

The first is a quotation from a comment asserting that, under the 2020 Rule, proxy advisory firms "may feel pressure to tilt voting recommendations in favor of management more often, to avoid critical comments from companies that could draw out the voting process and expose the firms to costly threats of litigation." ROA.1027 (quoting ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175 & n.118)). But as we explained to the district court (ROA.1003-1004), this assertion is missing a critical logical step: It is entirely unclear (and the agency fails to explain) why the existence of the 2020 Rule—which, again, does not require proxy firms to share draft recommendations—would "expose the firms to costly threats of litigation" any more than is the case otherwise.

That is because, even without the 2020 Rule, issuers will still access proxy firms' recommendations—a point that the SEC appears to have affirmatively endorsed. ROA.134 (2022 Rescission, 87 Fed. Reg. at 43,177) (relying on commenter's statement that "ISS and Glass Lewis already provide registrants with access to their advice at the same time it is disseminated to their clients"). Any "threats of litigation" will thus exist regardless, and are not exacerbated by the 2020 Rule. Nor does the SEC explain how the 2020 Rule's mechanism enabling registrants to effectively respond to proxy firm advice *by communicating with their own shareholders* (*see* ROA.208 (2020 Rule, 85 Fed. Reg. at 55,113)) somehow magnifies any litigation risk.

The district court and the SEC also failed to explain the relevance of the cited commenter's concern that proxy firms may seek to avoid "draw[ing] out the [shareholder] voting process." ROA.1027. The 2022 Rescission's repeated mentions of the "timeliness . . . of proxy voting advice" (*e.g.* ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175)) refer to proxy firms' internal, pre-publication processes, rather than the shareholder voting process writ large. And with respect to proxy firms' independence, the SEC does not attempt to, nor would it be able to, explain how a "draw[n] out" voting process by shareholders would somehow compromise the independence of proxy firm advice. *Cf.* n.7, *infra*. Finally, to the extent the shareholder voting process is drawn out by the availability to shareholders of additional material information, the SEC has already explained that that is a *good* thing. *See, e.g.*, ROA.202 (2020 Rule, 85 Fed. Reg. at 55,107) ("[T]he principle that more complete and robust information and discussion leads to more informed investor decision-making, and therefore results in choices more closely aligned with investors' interests, has shaped our federal securities laws since their inception.").

The same gap in reasoning affects the second passage quoted by the district court: the Commission's assertion in the 2022 Rescission that the 2020 Rule might result in "PVABs erring on the side of caution in complex or contentious matters." ROA.1027 (quoting ROA.146 (2022 Rescission, 87 Fed. Reg. at 43,189)). The SEC raises this possibility in the 2022 Rescission, but again, does not explain *why* the 2020 Rule would cause this result. That is, why would facilitating companies' ability to respond to proxy advice, thus increasing the amount of material information available to shareholders, cause proxy firms to be more cautious in providing that advice—unless the advice proxy firms are providing under the status quo is inaccurate or misleading? That is the lacking analysis, and the reason why the SEC has not "articulat[ed] . . . a rational connection between the facts found and the choice made" here. *State Farm*, 463 U.S. at 43; *see, e.g.*, *Sw. Elec. Power Co. v. EPA*, 920 F.3d. 999, 1014 (5th Cir. 2019) ("[U]nexplained and seemingly illogical decisions are arbitrary and capricious.") (quotation marks omitted).

As to the timeliness of proxy advice, the district court does not identify any explanation given by the SEC. *See generally* ROA.1027.[7] Below, the gov-

[7] A comment identified by the district court asserts a fear that the 2020 Rule could "draw out the *voting process*." ROA.1027 (quoting ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175 n. 118)) (emphasis added); *see* page 38, *supra*. However, drawing out the shareholder voting process by exposing shareholders to additional material information—as opposed to delaying proxy firms' internal processes that lead to the provision of proxy advice—was not among the SEC's stated bases for its decision, and therefore cannot justify the agency's action. *See, e.g.*, *Wages & White Lion*, 16 F.4th at 1136 ("In reviewing an agency's action, we may consider only the reasoning articulated by the agency itself; we cannot consider *post hoc* rationalizations.") (quotation marks omitted). To the contrary, a drawn-out voting process involving an abundance of material information for shareholders "more closely approximate[s] the discussion that could occur at a meeting with physical attendance

ernment pointed to a single comment—notably, *not* a comment by a proxy firm—asserting that "additional compliance burdens" could "disrupt[] the preparation and delivery of proxy voting advice." ROA.869 (quoting ROA.128 (2022 Rescission, 87 Fed. Reg. at 43,171 & n.47)); *see also* ROA.938-940 (comment of the Managed Funds Association). A single, unsourced sentence that "additional compliance burdens" might "muddle the timely delivery" of proxy advice, in a single comment letter from a party without first-hand knowledge of proxy firms' operations (*see* ROA.939), cannot form a rational basis for concluding that the 2020 Rule risked impairing the timeliness of proxy advice. *See, e.g.*, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 91 (D.D.C. 2019) ("[A]n agency cannot simply rely on the speculation of commenters. Instead, the agency must conduct a critical examination of comments on which it relies.") (collecting authorities).

That is especially true when other commenters, including the NAM and NGS, explained the common-sense proposition that because "[t]he 2020 rule's issuer engagement provisions . . . require exactly zero action on [proxy firms'] part before a recommendation is finalized," "the concerns raised about the timeliness . . . of proxy voting advice are simply not credible." ROA.615 (NAM comment); *see also* ROA.628 (NGS comment). Indeed, the agency bears an

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and participation by shareholders and other parties," one of the SEC's stated *goals* with its proxy-firm regulations. 2020 Rule, 85 Fed. Reg. at 55,107.

"affirmative burden to explain all of the key assumptions" underlying a rule-making "*even if no one objects during the comment period*." *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (quotation marks omitted; emphasis added). It follows that this burden is even greater when commenters *do* object. *See, e.g.*, *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 91 ("Without explaining why, an agency cannot rely on some comments while ignoring comments advocating a different position.").

c. Rather than engaging with this reasoning, the district court below erected a straw-man version of our arguments, considering and rejecting the proposition that "agenc[ies] [are] barred from incorporating public comments into the final rule," and holding instead that "agencies can find 'support in various comments submitted in response to the proposed rule.'" ROA.1028 (quoting *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009)).

But that is simply not responsive to our point: We do not argue that agencies cannot rely on comments *at all*—of course they can. Rather, our point is that agencies cannot do so "*uncritically*," relying on comments that state fundamentally illogical propositions or assumptions without providing any underlying reasoning. *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1125 (D.C. Cir. 1984) (emphasis added); *id.* (distinguishing situation in which agency "very carefully threaded its way through the opposing claims

. . . evaluating the sufficiency of those comments"); *see also, e.g.*, *Bradford v. U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 842 (D. Colo. 2022) ("The agency may rely on comments submitted during the notice and comment period as justification for the rule, so long as the submissions are examined critically"); *Am. Great Lakes Ports Ass'n v. Zukunft*, 296 F. Supp. 3d 27, 39 (D.D.C. 2017) (same); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 17, 183 (D.D.C. 2015) (same); *Nat'l Restaurant Ass'n v. Solis*, 870 F. Supp. 2d 42, 57 (D.D.C. 2012) (same). That is precisely the failing that Appellants have identified here.

Moreover, the necessity of critically examining propositions borrowed from commenters is doubly important when other commenters point out flaws in the reasoning the agency is planning to adopt. That is because, in order to satisfy the arbitrary-and-capricious standard, "the agency must explain *why* it chose to rely on certain comments rather than others." *AARP v. EEOC*, 367 F. Supp. 3d 14, 32 (D.D.C. 2017); *see also Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 91 ("Without explaining why, an agency cannot rely on some comments while ignoring comments advocating a different position."). The SEC did not do so here.

Indeed, by relying on assumptions and propositions drawn from comments that other commenters called into question, without offering a response to those other commenters, the SEC committed an independent APA violation. *See, e.g.*, *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (agency "must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision"); *accord Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 449 (5th Cir. 2021) (same) (quoting *Carlson*, 938 F.3d at 344).

Here, commenters, including the NAM and NGS, explained that the central basis of the SEC's decision—the notion of protecting against "risks . . . to the . . . timeliness[] and independence of proxy voting advice" (ROA.132 (2022 Rescission, 87 Fed. Reg. at 43,175))—was simply not implicated by the simultaneous-disclosure version of issuer engagement adopted by the 2020 Rule, as opposed to the more fulsome pre-publication engagement contemplated by the 2019 Proposed Rule. ROA.615; ROA.628; *see* pages 12-14, *supra*.

But rather than respond to these comments—which attacked the key basis for the agency's decision to rescind—by explaining *why* the agency believed such a light-touch regulation posed timeliness and independence concerns (*cf.* pages 34-41, *supra*), the SEC simply "acknowledge[d]" the existence of hostile comments and failed entirely to respond to their content (ROA.131 (2022 Rescission, 87 Fed. Reg. at 43,174)). And it is well established that merely "[n]odding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking," and does not satisfy the agency's APA obligations. *Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) (quoting *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020)); *cf. Carlson*, 938 F.3d at 346 ("These public comments called into question the justifications offered by the [agency], and therefore [it] should have evaluated" the comments' merits). We urged this failing before the district court as an independent basis for setting aside the 2022 Rescission, but the district court's order does not discuss it at all. *See generally* ROA.1017-1034.

d. Apart from dismantling a straw man regarding the propriety of adopting reasoning from comments, the district court offers a single paragraph of conclusory analysis on the merits of Appellants' claim, stating that it cannot "substitute its judgment for that of the agency" on the question whether "the notice-awareness conditions pose . . . a risk to PVABs." ROA.1029 (quoting *Fox*, 556 U.S. at 513). But this cursory approach goes beyond deference to abrogation of responsibility: While a court cannot substitute its policy judgment for the agency's, this Court has been clear that judicial "review is not toothless," and the court "must ensure that the agency . . . has reasonably considered the relevant issues and reasonably explained the decision." *Wages & White Lion*, 16 F.4th at 1136 (quotation marks omitted); *see also id.* ("[A]fter *Regents*, [APA review] has serious bite.").

Here, by deferring to commenters' concerns about the risks of the 2020 Rule without seriously analyzing whether such risks actually exist (as discussed above, they do not), the SEC failed to "reasonably consider[] the relevant issues and reasonably explain[] the decision." *Wages & White Lion*, 16 F.4th at 1136 (quotation marks omitted). That failure is fatal. *See, e.g.*, *Susquehanna Int'l Grp., LLP v. SEC,* 866 F.3d 442, 447 (D.C. Cir. 2017) (SEC acted arbitrarily and capriciously when it "took [the regulated party's] word for it" rather than "critically review[ing] [that party's] analysis or perform[ing] its own"); *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review."). The district court thus erred in its merits analysis, as well.

III. THE SEC'S TRUNCATED RULEMAKING PROCESS WAS UNLAWFUL.

The district court was also wrong to reject Appellants' procedural challenge to the entirety of the 2022 Rescission. *See generally* 5 U.S.C. § 706(2)(D) ("The reviewing court shall . . . set aside agency action" taken "without observance of procedure required by law."). In short, the SEC's choice to employ a shortened comment period, timed to coincide with the December holidays and many public companies' end-of-year reporting periods, did not provide opponents of the rescission a meaningful opportunity to comment on the proposal.

a. When an agency adopts a binding legislative rule, like the 2022 Rescission here, the APA requires it to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Importantly, as the D.C. Circuit has explained, this "opportunity for comment must be a meaningful opportunity." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *accord, e.g.*, *Coal. For Workforce Innovation v. Walsh*, 2022 WL 1073346, at *7 (E.D. Tex. Mar. 14, 2022) ("[C]ourts require that agencies provide a 'meaningful' opportunity for comment.").

Courts therefore regularly set aside rules adopted in purported compliance with APA notice-and-comment procedures where the specifics of the procedure employed—particularly, the length of the comment period—did not provide a meaningful opportunity for public participation. *See, e.g.*, *Coal. For Workforce Innovation*, 2022 WL 1073346, at *7-8 (holding that "the [agency] did not provide a meaningful opportunity to comment" "due to the limited time frame for comments"); *California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1176-1177 (N.D. Cal. 2019) (similar); *Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 819-821 (N.D. Cal. 2020) (similar); *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *3 (D.D.C. Apr. 4, 2021) (similar).

These courts employ a multi-factor analysis to determine whether a comment period is too short, looking to factors including the raw length of the period; the inconvenience to foreseeable commenters of the period's timing, including applicable holidays; the relative durations and comments received during the adoption and rescission of a rule; objections by commenters; and the existence or lack of a valid explanation for the shortened period. This Court should adopt the approach exemplified by these cases.

First, the length of the truncated comment period itself strongly indicates that the procedures were inadequate. "While the APA is silent as to what constitutes sufficient time to comment," the courts of appeals have "described 30 days as 'generally the *shortest* time period for interested persons to meaningfully review a proposed rule and provide informed comment.'" *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 (quoting *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019)) (emphasis added); *see also, e.g.*, *Coal. For Workforce Innovation*, 2022 WL 1073346, at *7 (noting "a minimum thirty-day period") (quoting *Chem. Mfrs. Ass'n v. EPA*, 899, F.2d 344, 347 (5th Cir. 1990)); *cf. Petry v. Block*, 737 F.2d 1193, 1202 (D.C. Cir. 1984) (30-day timeline "cut the comment period to the bone").

Here, the SEC's proposal to rescind the 2020 Rule was published in the Federal Register on November 26, 2021—the day after Thanksgiving—and allowed comments only until December 27, 2021, thirty-one days later. *See*

ROA.156 (2021 Proposed Rescission, 86 Fed. Reg. at 67,383). Not only was this period only a single day longer than the "shortest," "minimum" or "cut . . . to the bone" comment period generally permissible, but it was functionally even shorter, as it included the Christmas and Hanukkah holidays and set the comment deadline during the week between Christmas and New Year's Day, when "many businesses may close entirely." *Pangea*, 501 F. Supp. 3d at 819 n.24. What is more, this timing placed the comment period during the end-of-fiscal-year rush for many public companies, one of the main constituencies that supported the 2020 Rule. Courts have not hesitated to find similarly shortened and inconveniently timed comment periods unlawful. *See id.* at 819-820 (30-day comment period insufficient when it "spanned the holidays"); *Centro Legal de la Raza v. Executive Office for Immigration Review*, 524 F. Supp. 3d 319, 954-955 & n.26 (30-day comment period that "included Labor Day, a federal holiday, . . . and overlapped with the comment periods for" related rules unlawful).

Indeed, even one of the SEC's own Commissioners came to the same conclusion, explaining that "the 30-day comment period for the proposal was insufficient under the circumstances," given that the "period overlapped with major holidays, including Thanksgiving, Christmas, Hanukkah, and the beginning of Kwanzaa"; "the comment deadline fell during the first holiday season since the rollout of COVID vaccines, which allowed families to gather in person safely for the first time in nearly two years"; and the deadline "came at a time when many public companies with calendar year-end fiscal years were in the midst of preparing and auditing their financial statements." ROA.314 (dissent of Commissioner Uyeda); *accord* ROA.308 (dissent of Commissioner Peirce) ("comment period" was "unnecessarily short"). That conclusion, from inside the Commission itself, is telling.

By contrast, Chair Gensler has stated in congressional testimony that the SEC would "always" set the comment deadline "the later of" 60 days from the SEC's vote or one month from Federal Register publication—but the agency did not do so here. House Appropriations Committee, *Fiscal Year 2023 Budget Request for the Federal Trade Commission and the Securities and Exchange Commission* (May 18, 2022), perma.cc/UM6V-PUDR (video at 54:53-55:50); *see* Letter from Sens. Hagerty & Tillis to Chair Gensler (July 12, 2022) (criticizing the shortened procedure here in light of this inconsistency), perma.cc/7WT2-HMWT.

Moreover, "[i]n cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as [] well as the number of comments received during that time-period." *California*, 381 F. Supp. 3d at 1177 (citing *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012)). Both factors indicate that the comment period here was insufficient.

When it proposed adopting the 2020 Rule, the SEC allowed 61 days for public comment. ROA.252 (2019 Proposed Rule, 84 Fed. Reg. at 66,518). Yet in rescinding that same rule, the agency cut the comment period to only 31 days—and, critically, gave no reason whatsoever for the shortened period. *See, e.g.*, *Centro Legal*, 524 F. Supp. 3d at 955 (finding 30-day period insufficient in part because the agency "did not identify any exigent circumstances requiring a compressed comment period"); *Catholic Legal Immigration Network*, 2021 WL 3609986, at *3 ("[I]t is troubling that defendants failed to abide by these [60-day] guidelines or explain their departure from them."). Nor could it have: The agency had already suspended enforcement of the 2020 Rule while it contemplated regulatory changes, so there was simply no urgency that could have justified rescinding the rule via an irregular and shortened comment procedure.

A comparison between the comments received during these two unequal periods is even more revealing: The 2022 Rescission garnered less than *one tenth* of the comments received during the rulemaking that led to the adoption of the 2020 Rule. *Compare* SEC, *Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, File No. S7-22-19 (667 comments on 2019 Proposed Rule), perma.cc/29HH-26TS, *with* SEC, *Comments on Proposed Rule: Proxy Voting Advice*, File No. S7-17-21 (61 comments on 2021 Proposed Rescission), perma.cc/MB78-6CKQ. It appears that—as was fully predictable—many entities and individuals concerned with these issues were unable to submit comment letters on a compressed timeframe, over the holidays and during the close of many companies' fiscal years. Thus, "the number of comments received on the [2022 Rescission] also shows the comment period was inadequate." *Pangea*, 501 F. Supp. 3d at 820; *see also, e.g.*, *N.C. Growers' Ass'n*, 702 F.3d at 770 (finding that similar order-of-magnitude discrepancy in comments received indicated that shortened period was insufficient).

Finally, in addition to Appellants NAM and NGS, several entities objected to the SEC's timeframe, explaining that it did not permit the public to effectively comment. *See, e.g.*, ROA.349 (comment of the Chamber of Commerce of the United States, discussing insufficiency of compressed holiday comment period, and explaining that the Chamber requested an extension of the comment deadline, which the agency did not grant); ROA.406 (letter of the American Securities Association, similarly noting timing concerns, and requesting an extension, which was not granted); Letter of the Society for Corporate Governance 6, File No. S7-17-21, *Proxy Voting Advice* (Dec. 30, 2021) (similar), perma.cc/VM7P-HFJC.[8] This, too, is evidence of insufficient procedure. *Centro Legal*, 524 F. Supp. 3d at 955 (highlighting, in finding

[8] This letter is not part of the ROA, but was part of the administrative record before the agency, and this Court may take judicial notice of it. *See* Fed. R. Evid. 201.

comment period insufficient, that "numerous commenters" "noted" that "a 30 day comment period is extremely limited"). In sum, multiple factors indicate that the unduly and unexplainedly abbreviated comment period here did not provide a meaningful opportunity to comment, thus requiring vacatur.

b. Again, rather than engage with the substance of this claim—that, under a multi-factor analysis, the balance of the factors here indicates an improperly foreshortened comment opportunity—the district court rejected it based on a single, idiosyncratic holding: in effect, that the Supreme Court's *Vermont Yankee* doctrine prohibits courts from inquiring into the sufficiency of any comment period, so long as the period is at least 30 days. ROA.1030-1031 (quoting *Perez*, 575 U.S. at 102, which in turn cites *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978)).

That holding grossly misreads *Vermont Yankee* and its progeny. "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *see Perez*, 575 U.S. at 102 (courts may not "impose upon agencies . . . additional procedural rights" "[b]eyond the APA's minimum requirements") (quotation marks omitted). Thus, for example, the Supreme Court in *Perez* struck down "a judge-made procedural right" to notice-and-comment rulemaking "when an agency changes its interpretation of one of the regulations it enforces," a scenario in which the APA itself does not require notice and comment. *Perez*, 575 U.S. at 102; *see also Pension Ben. Guar. Corp.*, 496 U.S. at 655 (lower court's imposition of additional procedures "r[an] afoul of *Vermont Yankee*" because "the court did not point to any provision in ERISA or the APA which gives . . . the procedural rights the court identified").

But the *Vermont Yankee* doctrine certainly does not prevent courts from interpreting and giving content to procedural mandates that *do* appear in the text of the APA. *See, e.g.*, *Ass'n of Nat'l Advertisers v. FTC*, 617 F.2d 611, 619 n.10 (D.C. Cir. 1979) (*Vermont Yankee* "restricts the ability of courts to refashion normal rulemaking procedures with judicially-conceived notions of administrative fair play. It *has no bearing* on the power of courts to interpret and apply congressional directives.") (emphasis added); 1 Kristen E. Hickman, et al., *Administrative Law Treatise* § 5.8, p. 631 (6th ed. 2019) (*Vermont Yankee* prohibits imposition of procedures "not even arguably required by statute," but courts "remain free to engage in . . . interpretation of statutory requirements").

Thus, for example, this Court requires agencies to "respond to significant points . . . raised by the public comments" (*Huawei*, 2 F.4th at 449), because doing so gives content to the statutory requirement that the agency "shall give interested persons an opportunity to participate in the rulemaking through submission of written data" and the prohibition on "arbitrary[] [and] capricious" action. 5 U.S.C. §§ 553(c), 706(2)(A). Just so here: An agency has not *really* "give[n] . . . an opportunity to participate in the rulemaking" (5 U.S.C. § 553(c)) if the comment period is too short to be meaningful, and courts utilize the factors laid out above to decide whether that has happened.

Thus, contrary to the district court's reasoning, *Vermont Yankee* is no impediment to Appellants' procedural claim here. The 2022 Rescission must be set aside for this reason, as well.

IV. THE COURT SHOULD ORDER VACATUR OF THE 2022 RESCISSION AS A WHOLE.

Below, Appellants also challenged two additional aspects of the 2022 Rescission: the deletion of an explanatory note that the 2020 Rule had added to the SEC's anti-fraud provision at 8 C.F.R. § 240.14a-9, and the rescission of the agency's robo-voting guidance, *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 85 Fed. Reg. 55,155, 55,155 (Sept. 3, 2020), which the SEC had adopted simultaneously with the 2020 Rule to communicate to investment advisers utilizing proxy firms' robo-voting services how they could implement review of the issuer response statements newly available to them pursuant to the Rule. *See* ROA.135-139 (2022 Rescission, 87 Fed. Reg. at 43,178-43,182) (deleting anti-fraud note); ROA.135 (*id.* at 43,178) (rescinding robo-voting guidance).

The district court rejected Appellants' arbitrary-and-capricious challenge to the deletion of the explanatory note based on its view that this edit to the Code of Federal Regulations was not final agency action (ROA.1033); the court did not address the rescission of the robo-voting guidance, which Appellants had argued should be set aside because it was premised on the rescission of the 2020 Rule's issuer-engagement provisions, which was itself arbitrary and capricious (*see* ROA.110-111).

Regardless of whether these decisions by the district court were correct, the rescissions of the anti-fraud note and of the robo-voting guidance must be set aside along with the rest of the 2022 Rescission, for two reasons:

First, Appellants' procedural challenge (*see* pages 45-54, *supra*) applies to the entirety of the SEC's rulemaking process, with the result that—if the procedure was flawed—the entire output of that process is void.

Second, Appellants' substantive challenges require vacatur of the entire 2022 Rescission because the individual elements of that rulemaking are not severable from one another. As the D.C. Circuit has explained, "we may limit invalidation to defective portions of an agency's action and leave others standing when 'they operate entirely independently of one another,' but will invalidate the action as a whole *if we are not 'sure'* the provisions are 'wholly independent.'" *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 24 F.4th 666, 674 (D.C. Cir. 2022) (emphasis added; citation omitted). Because the court "cannot be certain that the agency would have" rescinded the robo-voting guidance and the anti-fraud note without the accompanying rescission of the issuer-engagement provisions, the arbitrary and capricious nature of that decision taints the entirety of the 2022 Rescission, which must be set aside. *ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court with instructions to vacate the 2022 Rescission.

Respectfully submitted,

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Dated: January 6, 2023

CERTIFICATE OF SERVICE

I certify that that on January 6, 2023, I caused the foregoing brief to be served electronically on all parties via the Court's CM/ECF system.

Dated: January 6, 2023 /s/ *Paul W. Hughes*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Plaintiff-Appellants certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,903 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: January 6, 2023 /s/ *Paul W. Hughes*