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

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TABLE OF CONTENTS

Table of Authorities ii
Introduction 1
Argument 4
I. The SEC failed to justify breaking from its prior findings. 4
II. The SEC cannot rescue its unsupported substantive reasoning. 10
A. Timeliness. 11
B. Independence. 15
III. The rulemaking process was unlawful. 20
IV. The agency has not demonstrated severability. 25
V. The Court should order the standard remedy of vacatur. 27
Conclusion 28

TABLE OF AUTHORITIES

Cases

Am. Fed'n of Gov't Emps. v. FLRA,
24 F.4th 666 (D.C. Cir. 2022) 26

Appalachian Power Co. v. EPA,
208 F.3d 1015 (D.C. Cir. 2000) 25

California v. Azar,
911 F.3d 558 (9th Cir. 2018) 23

Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.,
2021 WL 3609986 (D.D.C. 2021) 22

City of Arlington v. FCC,
668 F.3d 229 (5th Cir. 2012) 23

Ctr. for Food Safety v. Regan,
56 F.4th 648 (9th Cir. 2022) 28

Data Mktg. P'ship, LP v. U.S. Dep't of Labor,
45 F.4th 846 (5th Cir. 2022) .... *passim*

Dubnow v. McDonough,
30 F.4th 603 (7th Cir. 2022) 19

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) .... *passim*

Hispanic Affairs Project v. Acosta,
901 F.3d 378 (D.C. Cir. 2018) 12, 19

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.,
463 U.S. 29 (1983) .... *passim*

N.C. Growers' Ass'n, Inc. v. United Farm Workers,
702 F.3d 755 (4th Cir. 2012) 21

Nat'l Ass'n of Mfrs. v. SEC,
2022 WL 16727731 (W.D. Tex. 2022) 28

Rural Cellular Ass'n v. FCC,
588 F.3d 1095 (D.C. Cir. 2009) 20

Cases—continued

Sierra Club v. U.S. Fish & Wildlife Serv.,
245 F.3d 434 (5th Cir. 2001) 23

Texas v. Biden,
20 F.4th 928 (5th Cir. 2021)..*passim*

U.S. Steel Corp. v. EPA,
595 F.2d 207 (5th Cir. 1979) 23, 25

United States v. Johnson,
632 F.3d 912 (5th Cir. 2011) 23, 24

United Steel v. Mine Safety & Health Admin.,
925 F.3d 1279 (D.C. Cir. 2019) 27

Wages & White Lion Invs., L.L.C. v. FDA,
16 F.4th 1130 (5th Cir. 2021)... 6, 13, 20

Williams v. Walsh,
__ F. Supp. 3d ___, 2022 WL 17904227 (D.D.C. 2022)........................... 27

Statutes

5 U.S.C. § 553(b), (c)... 22

Other Authorities

Op-ed: Biden's ESG Veto Is Revealing, Wall St. J.
(Mar. 3, 2023) 4

SEC, *Comments on Proposed Rule: Proxy Voting Advice,*
File No. S7-17-21 25

INTRODUCTION

New agency leadership may change a predecessor's policies. But, when changing course, an agency cannot disregard as a matter of convenience the prior actions that the agency itself undertook, or the findings that it made. Rather, when an agency rescinds an existing policy, the APA's requirement of reasoned decisionmaking entitles the regulated public to "a reasoned explanation" from the agency "for disregarding facts and circumstances that underlay … the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

As we have explained, the SEC failed that requirement here. When the Commission promulgated the 2020 Rule, it did so on the express understanding that the Rule's issuer-engagement provisions would not pose a meaningful threat to the timeliness or independence of proxy advice. Yet when the Commission, under new leadership, rescinded those provisions two years later (after unlawfully preventing them from taking effect), its action was based on the opposite conclusion—and the agency did not attempt to "explain why" its earlier findings "were mistaken, misguided, or the like." *Texas v. Biden*, 20 F.4th 928, 990-991 (5th Cir. 2021), *rev'd on other grounds*, 142 S.Ct. 2528 (2022).

In its brief, the SEC's main tack—rather than defending the district court's reasoning—is to attempt to recast both the 2020 Rule and the 2022

Rescission. In the SEC's current telling, its statement in 2020 that the Rule "should not discourage proxy voting advice business[es] from making recommendations that oppose management or impose additional timing constraints" (ROA.234 (2020 Rule at 55,139)) actually meant that the Rule *would* discourage proxy firms and impose unreasonable timing constraints. Only through that revisionist history can the SEC contend that the 2022 Rescission did not contradict its earlier findings.

Such post hoc reinterpretation of an agency's challenged action cannot save an unlawful rule from vacatur. And even if the agency's 2020 conclusion was that these risks were merely de minimis—rather than totally nonexistent—that finding is *still* contradicted by the 2022 conclusion that those exact same risks had somehow become "sufficiently significant such that it is appropriate to rescind the [2020 Rule] now." ROA.132 (2022 Rescission at 43,175). As such, the 2022 Rescission is unlawful under *Fox* and *Texas* even under the SEC's post hoc reading of the 2020 Rule.

The agency attempts a similar maneuver in response to our demonstration that the 2022 Rescission's reasoning is irrational, attempting to locate in the text theories of harm to proxy firms that are not actually there—and that are irrelevant and self-contradictory in any event. In sum, the agency does nothing to rebut our demonstration that the 2022 Rescission is unlawful.

* * *

Over the course of a decade, while led by Chairs of both political parties, the SEC painstakingly developed a detailed factual record regarding the grave concerns posed by proxy firms, including through the all-too-common distribution of inaccurate or misleading information about public companies, the firms' outsized influence on corporate decisionmaking, and pervasive conflicts of interest. *See* Former SEC Officials Am. Br. 6-14 (recounting this decade-long policymaking process in detail). As *amici* explain, "PVAB voting recommendations are *often* premised on inaccurate or incomplete information"—surveyed CEOs, for example, almost uniformly report experience with factual errors in proxy-firm advice—and because "most PVAB recommendations are issued just days prior to the vote in question," those errors tend to be uncorrectable, "undoubtedly diminish[ing] shareholder value." Chamber of Commerce Am. Br. 10-13, 30 (emphasis added).

The SEC ultimately issued a compromise rule—substantially watered down to ameliorate concerns about the 2019 proposal's impact on timeliness and independence—comprising basic steps to protect investors, registrants, and the markets. Yet with the change of administration, other political priorities—in particular, a cross-agency focus on promoting an environmental, social, and governance (ESG) agenda—took center stage.[1]

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[1] *See, e.g.*, Opening Br. 6 (ISS recommended voting in favor of ESG resolutions 79% of the time in 2019); Ltr. from 21 Attorney Generals to ISS & Glass Lewis (Jan. 17, 2023), perma.cc/8Y3L-F7UD (describing how proxy advisory

There is no doubt that new agency leadership can change agency policy, including for overtly political reasons. But agencies cannot disregard the fact-finding that came before—and must ensure that their reasoning, even if ultimately motivated by political factors, is analytically rigorous and reasonably explained. Because the SEC did not do so here, its action cannot stand.

ARGUMENT

I. THE SEC FAILED TO JUSTIFY BREAKING FROM ITS PRIOR FINDINGS.

a. Our brief explained that the SEC has failed the straightforward standard announced by the Supreme Court in *Fox* and recently applied by this Court in *Texas*: "When a 'new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy,'" the agency must "address its prior factual findings—explaining why they were mistaken, misguided, or the like." *Texas*, 20 F.4th at 991 (quoting *Fox*, 556 U.S. at 515).

As we demonstrated (Br. 24-34), the SEC in promulgating the 2020 Rule made factual findings that, because the Rule as adopted did not contain the most muscular features of the 2019 proposal, it "does not create the risk that [proxy] advice would be delayed or that the independence thereof would

firms' "actions appear more like those of an activist forcing companies to comply with rules that governments will not otherwise institute"); *Op-ed: Biden's ESG Veto Is Revealing*, Wall St. J. (Mar. 3, 2023) (discussing President Biden's recent ESG actions, and noting that proxy firms are "voting force multipliers on ESG shareholder resolutions"); *cf.* ESG Legal Services Am. Br.

be tainted." ROA.207 (2020 Rule at 55,112); *see also* ROA.234 (2020 Rule at 55,139) ("*[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.").

Two years later, however, the agency rescinded the rule based on the exact opposite conclusion: "We agree [with commenters] that the risks posed by the [issuer-engagement] conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now." ROA.132 (2022 Rescission at 43,175). While sharply changing course, the 2022 Rescission "failed to discuss any of [the agency's] prior findings" that no meaningful risks existed under the 2020 Rule—"much less explain why they were wrong," rendering the rescission arbitrary and capricious. *Texas*, 20 F.4th at 991.

b. In its brief, the SEC does not dispute that the 2022 Rescission fails to explain why the statements we highlight from the 2020 Rule "were mistaken, misguided, or the like." *Texas*, 20 F.4th at 991. Instead, the agency now contends that in 2020, it actually *did* believe that the 2020 Rule risked the timeliness and independence of proxy advice, but adopted the Rule anyway. SEC Br. 35-38. Not so.

First, to the extent the SEC now claims that the 2020 Rule acknowledged the same "significant" risks that motivated the 2022 Rescission (ROA.132 (2022 Rescission at 43,175)), that contention is pure post hoc rationalization. *See Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) ("In reviewing an agency's action, we may consider only the reasoning 'articulated by the agency itself'; we cannot consider post hoc rationalizations.") (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983)).

While the SEC cites a number of statements from the 2020 Rule that characterize the changes from the 2019 proposal as "mitigat[ing]" risks as opposed to eliminating them entirely (SEC Br. 37-38), the agency's overall message in 2020 was clear: The amendments eliminated any significant, meaningful risk to the timeliness or independence of proxy advice.

The 2020 SEC's own summary of its reasoning leaves no room for doubt: "By adopting this approach, as discussed above, *we believe we have addressed* the concerns raised by commenters … including those related to timing and the risk of affecting the independence of the advice." ROA.207 (2020 Rule at 55,112) (emphasis added). Or, as the agency also put it in 2020: "[W]e believe the final amendments will *substantially address, if not eliminate altogether*, the concerns raised by commenters related to objectivity and timing pressure associated with the proposed engagement process." ROA.233-

234 (2020 Rule at 55,138-55,139) (emphasis added). To claim that the 2020 SEC "recognized the existence" of the same risks cited in 2022 (SEC Br. 16) is a transparent exercise in post-hoc rationalization.

That is, if there was any "residual risk," as the agency now contends (*e.g.* SEC Br. 24), that risk was de minimis in the SEC's 2020 estimation. And that finding of—at most—de minimis risk to the timeliness and independence of proxy advice is flatly incompatible with the Commission's 2022 finding that the same purported risks were "sufficiently significant" that the 2020 Rule had to be rescinded. ROA.132 (2022 Rescission at 43,175). "That triggers the arbitrary-and-capricious rule set forth in *Fox.*" *Texas*, 20 F.4th at 991. And under *Texas* and *Fox*, "[t]hat's that." *Id.*

Second, if the SEC is instead arguing that our position fails if even a de minimis risk was contemplated in 2020, that argument misunderstands the relevant standards.

The crux of the *Fox* rule is that, when an agency makes factual findings in the course of adopting a policy, those findings become "an important aspect of the problem" that must be addressed if the agency intends to rely on contrary findings later (*State Farm*, 463 U.S. at 43): "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay … the prior policy." *Fox*, 556 U.S. at 515-516.

That remains true, and remains an obstacle here, whether the 2020 Rule is understood to be based on a finding of *zero* risk to the timeliness and independence of proxy advice, or simply of *minimal* risk. Either way, that finding contradicts the agency's 2022 position that the same supposed risks—again, risks that the SEC found in 2020 to have been "substantially address[ed], if not eliminate[d] altogether" by the final rule (ROA.233-234 (2020 Rule at 55,138-55,139))—were suddenly "significant" enough to rescind it (ROA.132 (2022 Rescission at 43,175)).

Texas is instructive on this point. The prior findings in question in that case were statements by the Department of Homeland Security "regarding the benefits of MPP"—the "Migrant Protection Protocols," an immigration policy. 20 F.4th at 990-991. In 2019, DHS "found that MPP addressed the perverse incentives created by allowing those with non-meritorious claims to remain in the country," and that the policy was effective because those individuals "were beginning to voluntarily return home." *Id.* at 991 (quotation marks omitted; alterations incorporated). Then, after a change of presidential administrations, DHS terminated MPP based in part on findings "'that MPP had mixed effectiveness in achieving several of its central goals' and that 'MPP does not adequately or sustainably enhance border management' in a cost-effective manner." *Id.*

The upshot of this Court's analysis in *Texas* is that successive agency findings need not be black-and-white opposites to trigger the *Fox* inquiry. There, it was sufficient that DHS in 2019 considered MPP to be generally successful at "address[ing] … perverse incentives," as compared to its 2021 finding that the policy "had mixed effectiveness" and was not "adequately … cost-effective." *Texas*, 20 F.4th at 991. These conclusions, though far from polar opposites, sufficiently "contradicted" each other such that the agency needed to "discuss[] … the prior findings" in order to comply with *Fox*. *Id.* Yet if the SEC's position here were correct, the Court should have *rejected* the challengers' arguments, because DHS's 2021 finding was only that the policy "had mixed effectiveness" and did not justify its costs—not that it was *completely* ineffective.

Just so here. Even if the 2020 Rule is understood merely to have found that risks to the independence and timeliness of proxy advice were minimal—rather than non-existent—that finding would still "contradict[]," in the sense used by *Texas* (20 F.4th at 991), the agency's 2022 finding that those same risks were "sufficiently significant" to justify rescinding the Rule (ROA.132 (2022 Rescission at 43,175)).

Again, none of this is to say that the SEC—or any agency—cannot change its mind, or change its view of the facts. To do so, *Texas* and *Fox* require the Commission to acknowledge that it said one thing in 2020 (that the

2020 Rule "substantially address[es], if not eliminate[s] altogether" the cited risks (ROA.233-234 (2020 Rule at 55,138-55,139)), yet said a different, conflicting thing in 2022 (that those same risks are "sufficiently significant" to justify rescinding the Rule (ROA.132 (2022 Rescission at 43,175)), and rationally explain the inconsistency. *See Texas*, 20 F.4th at 991 (agency need only "address its prior factual findings—explaining why they were mistaken, misguided, or the like"). Because the SEC did not do so here, *Texas* and *Fox* require vacatur.

II. THE SEC CANNOT RESCUE ITS UNSUPPORTED SUBSTANTIVE REASONING.

We further explained that, even setting aside its departure from the 2020 Rule's findings, the 2022 Rescission's treatment of risks to the "independence and timeliness of proxy voting advice" (ROA.132 (2022 Rescission at 43,175)) was neither "reasonable [nor] reasonably explained." *Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 855 (5th Cir. 2022). Specifically, the 2022 Rescission fails to explain why the proxy industry's "concerns" about these risks are well-founded. Opening Br. 34-45.

In response, the SEC again jettisons the district court's reasoning (*cf.* Opening Br. 41-45) and attempts to locate several justifications for those concerns in the text of the 2022 Rescission. *See* SEC Br. 20-35. But none of these purported justifications save the agency's action.

A. Timeliness.

The SEC's brief advances a single theory for why the 2020 Rule could have "posed" "risks" to the "timeliness … of proxy voting advice" even though the 2020 Rule requires no action until after that advice is finalized (ROA.132 (2020 Rule at 43,175)): simply that "adding new compliance burdens may make a regulated party's timely completion of existing obligations more difficult" in the aggregate (SEC Br. 25).

First, one has to squint hard at the 2022 Rescission to actually discern this argument. The SEC (at 24) points to a *single* sentence raising this idea, summarizing a comment received by the agency. *See* ROA.128 (2022 Rescission at 43,171) (quoting comment: "additional compliance burdens … muddle the timely delivery of materials to fund managers"). As we have explained (Opening Br. 39-40), that particular comment did *not* come from a proxy firm or anyone else with first-hand knowledge of proxy-firm operations.

By contrast, the 2022 Rescission also cited a number of *general* concerns about timeliness (*cf.* SEC Br. 24-25)—but none of those concerns express the reasoning that the SEC now presses in litigation. And that makes sense because, as dissenting Commissioner Peirce observed, these "concerns" were "reiterated from the prior rulemaking process." ROA.308. At that time, the agency was considering the 2019 proposal, which interposed additional steps that proxy firms had to undertake *before* distributing their analysis to clients. *Cf.* SEC Br. 23-24. Under those circumstances, concerns about timeliness at least arguably made sense. But without more explanation, those recycled concerns provide no justification for the rescission of the notice provisions adopted in the *2020* Rule, which require action by proxy firms only *after* their recommendations are finalized.

The SEC suggests that it need not have spelled out its current theory in any greater detail in the 2022 Rescission because it "reflects a common-sense proposition": More work means less time to do existing work. SEC Br. 25. Even if this supposedly common-sense idea actually applied here (*but see* pages 13-15, *infra*), the law does not permit agencies to rely on unstated theories of harm—even if supposedly commonsensical. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (agency bears an "affirmative burden to explain all of the key assumptions" underlying a rulemaking "even if no one objects during the comment period.").

That burden is only heightened where—as here—the existence of harm is called into question by opposing comments. Commenters including the NAM explained that these "concerns … are simply not credible," given that "[t]he 2020 rule's issuer engagement provisions … require exactly zero action on [proxy firms'] part before a recommendation is finalized" ROA.615; *see* Opening Br. 40-41. Yet the SEC did not respond to these comments by announcing the aggregate-burden theory of timeliness risk it now presses on appeal; in fact, other than the single comment summary noted above, this theory does not appear in the 2022 Rescission at all. Apart from being an independent APA violation (Opening Br. 40-41), this failure to respond to comments with what the SEC now claims is an easy answer suggests that the agency's present argument is post-hoc rationalization.[2]

Second, and in any event, the SEC's newfound theory fails. To be clear, the SEC has now essentially abandoned its claim that the 2020 Rule's obligations risk timeliness concerns in the usual case; that argument never made sense because the 2020 Rule requires actions *after* the delivery of proxy advice. And the SEC's new argument that the *aggregate* burden would somehow endanger the timeliness of proxy advice is completely contradicted by the agency's own findings regarding the specific time burdens the 2020 Rule would impose.

As recounted in the 2022 Rescission, the SEC in 2020 calculated a precise compliance burden for the 2020 Rule, as required under the Paperwork

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[2] The SEC also cites a survey in the comment record that it claims supports its position. SEC Br. 25. But the survey response in question—apart from being absent from "the reasoning 'articulated by the agency itself'" (*Wages & White Lion*, 16 F.4th at 1136)—appears to concern the "ability to 'review-and-comment' on *draft* proxy advisory firm recommendations" as contemplated by the 2019 proposal, *not* the issuer-engagement provisions adopted in 2020. ROA.332 (emphasis added). Moreover, the survey reported that 85% of respondents "said that such a mechanism *would not* create any unnecessary delays or confusion in the proxy voting process" (ROA.333 (emphasis added)); it reported nothing about the responses of the other 15%.

Reduction Act. Specifically, the compliance burden attributable to the 2020 issuer-engagement conditions was estimated at 11,380 hours per year for each proxy firm (ROA.149 (2022 Rescission at 43,192 n.322)), which the SEC projected would be cut roughly in half (subtracting 5,640 hours) if, as the agency "expect[ed]," proxy firms chose to utilize standardized information-sharing agreements. ROA.242-243 (2020 Rule at 55,148-55,149).

The SEC cannot meaningfully contend that this burden motivated the 2022 Rescission for a straightforward reason: In the Rescission, the SEC never connected its quantification of the compliance burden with its action. The conspicuous absence of these readily available figures from the reasoning of the 2022 Rescission makes plain that this was not actually the basis of the action, making the SEC's argument now nothing more than an "impermissible *post hoc* rationalization[]." *Data Mktg. P'ship*, 45 F.4th at 858. While the Court "cannot consider" such "*post hoc* rationalizations" as justification, "the fact that an agency provided a *post hoc* rationalization is relevant evidence that the action is arbitrary and capricious." *Id*. at 856.

Nor is the estimated compliance burden one that could reasonably be thought to threaten proxy firms' timeliness. The likely compliance burden works out to roughly an additional 2.2 hours of work *per year* for each of ISS's roughly 2,600 employees. *See* ROA.140 (2022 Rescission at 43,192 n.322). Or, put slightly differently, a proxy firm could have fully internalized this burden with *three* full-time-equivalent employees, rather than—as the SEC now suggests—falling down on the job and providing untimely work product to its clients.

Given these quantifications of the compliance burdens imposed by the 2020 Rule, it would have been "a clear error of judgment" for the SEC to find in 2022 that the Rule imposed such risks, simply through an increased overall workload, that it had to be rescinded. *Data Mktg. P'ship*, 45 F.4th at 855. Against this backdrop, the SEC cannot reasonably assert that concerns about the timeliness of proxy firm advice actually motivated its action—especially since there is no discussion of this aggregate-burden theory in the 2022 Rescission itself.

B. Independence.

As to the supposed "risks" to the "independence of proxy voting advice" cited in the Rescission (ROA.132 (2022 Rescission at 43,175)), the SEC on appeal offers three theories for how such risks could have been engendered by the 2020 Rule. *See* SEC Br. 25-28. None is sufficient to justify the Rescission.

1. First, the SEC goes back to the well on the theory we have already debunked: that proxy firms "may feel pressure to … avoid critical comments from companies that could draw out the voting process and expose the firms to costly threats of litigation." SEC Br. 27 (quoting ROA.132 n.118). Our brief explained why this statement does not provide rational support for the Commission's action: the issuer-engagement provisions do not actually increase litigation risk beyond what exists without them, and "draw[ing] out the [shareholder] voting process" is completely irrelevant to the independence of proxy advice. Opening Br. 37-39 & n.7. Indeed, as we explained, one of the SEC's *goals* with this rulemaking was to "facilitate more complete and robust dialogue and information sharing," and thus to "more closely approximate the discussion that could occur at a meeting with physical attendance and participation by shareholders and other parties." ROA.202 (2020 Rule, at 55,107).

In response, the Commission calls these "quibble[s]" (SEC Br. 27), but its substantive responses are meritless. The SEC first states that "the conditions did 'draw out' *PVABs' role* in the 'voting process'" (*id.*)—but again, it is hard to see how an allegedly extended "role" would affect the independence of proxy firms' advice, and the SEC offers no explanation. As to litigation risk, the Commission switches gears, asserting in its brief that the 2020 Rule "expose[d] PVABs to potential 'threats of litigation' *over the adequacy of the mechanism* used to make their clients aware of the response." *Id.* (emphasis added). But the Commission cites nothing in the 2022 Rescission proposing this mechanism-based litigation risk—and for good reason: It does not appear there, making this another "impermissible *post hoc* rationalization." *Data Mktg. P'ship*, 45 F.4th at 858.

2. Next, the SEC argues that the 2020 Rule "threat[ened] … PVABs' independent *role* precisely because [it] enlisted PVABs … to amplify only registrants' perspectives." SEC Br. 28 (emphasis added); *see also id.* at 26-27 ("[T]he conditions forced PVABs to serve as a conduit for disseminating registrants' (and only registrants') views to their clients.").

This argument contains a subtle—but enormously important—shift from what the SEC actually said in the 2022 Rescission. There it raised concerns regarding the "independence of proxy voting *advice*." ROA.132 (2022 Rescission at 43,175) (emphasis added). The SEC sought to ensure that the substance of proxy advice is not influenced by outside factors or "pressure to tilt voting recommendations." ROA.132 (*id.* n.118). The SEC's stated reasoning in 2022 did not extend to some more amorphous concern regarding the generalized "role" played by proxy firms in "serv[ing] as a conduit" for information from registrants. SEC Br. 26-27. Because this "conduit" notion of independence was not the reasoning "articulated by the agency itself" in 2022, it is no basis for upholding the SEC's action. *State Farm*, 463 U.S. at 50.[3]

[3] Indeed, the Commission in 2020 *rejected* commenters' First Amendment objections to disseminating registrants' information (*see* ROA.212-213 (2020 Rule at 55,117-55,118)), making it even more of a stretch to suggest that the Commission in 2022 re-packaged this concern into its discussion of the "independence of proxy advice" *sub silentio*.

3. Finally, the SEC's brief asserts that "adding new compliance burdens triggered only when a registrant responds to a PVAB's advice creates an incentive for PVABs" to favor management. SEC Br. 27.

a. To begin, that theory is notably absent from the 2022 Rescission. The SEC now cites a passage from the *2020 Rule*, which states that "one commenter suggested that the proposed rules, by increasing the costs of the proxy advice that opposes management, would impede investors' ability to monitor company management." ROA.234 (2020 Rule at 55,139); *see* SEC Br. 26. But the 2020 SEC did not adopt this commenter's reasoning and, critically, in the *2022 Rescission*—the action on review here—the agency did *not* advance this theory. *See generally* SEC Br. 26-28. To the extent the SEC is now suggesting that its current theory "may reasonably be discerned" (*State Farm*, 463 U.S. at 43) in the 2022 Rescission (which is silent as to this theory) because the 2020 Rule referenced, without adopting, a comment raising it in a single sentence of its 74 Federal Register pages, that assertion beggars belief.[4]

Instead of citing any language from the 2022 Rescission, the agency baldly asserts that it did not *need* to actually articulate its reasoning in 2022, because the theory on which it now relies is a "common-sense proposition

[4] Additionally, the comment referenced in the 2020 Rule would necessarily have been referring to the provisions of the 2019 *proposed* rule—which, as noted, was materially *more* burdensome.

[that] may readily be discerned without the Commission having to repeat" it. SEC Br. 28.

That is wrong; it is fundamental that an agency *does* need to actually "articulate" the "rational connection between the facts found and the choice made" (*State Farm*, 463 U.S. at 43), including an "affirmative burden" to "examin[e]" and "explain all of the key assumptions embedded in" its decision (*Hispanic Affairs Proj.*, 901 F.3d at 385). *Accord, e.g.*, *Dubnow v. McDonough*, 30 F.4th 603, 610 (7th Cir. 2022) ("[T]he agency must provide a 'logical bridge' between the evidence and its conclusion."). And as we earlier explained (at 42-43), that burden is only heightened where (as here) commenters challenge the agency's assumptions or theories (not to mention that the agency is reversing course).

b. In any event, the agency's current coercion-by-compliance-burden theory is fatally undercut by its own evaluation and quantification of those burdens. *Cf.* pages 13-15, *supra*.

As noted above, the SEC in 2020 quantified the compliance burdens that the 2020 Rule would impose—including specifically breaking out the portion attributable to the requirement that proxy firms make registrant rebuttals of proxy advice available to the proxy firm's clients. As the agency found, making these rebuttals available imposes an average cost of *thirty minutes* of staff time per registrant. ROA.242-244 (2020 Rule at 55,147-

55,149)). The idea that this minimal cost would sway the independent judgment of a 2,600-person company like ISS (*see* ROA.140 (2022 Rescission at 43,192 n.322)) is fanciful. It certainly would require more justification than appears in the 2022 Recission, which, again, does not even mention this theory in the first place.

For all these reasons, the SEC has failed to rebut our demonstration that its reasoning is neither "reasonable" nor "reasonably explained" (*Data Mktg. P'ship*, 45 F.4th at 855), and therefore cannot survive the "serious bite" of APA review (*Wages & White Lion*, 16 F.4th at 1136).

III. THE RULEMAKING PROCESS WAS UNLAWFUL.

We further demonstrated that the unusually short, inconveniently timed rulemaking process conducted by the SEC after Chair Gensler's ascension did not provide "a meaningful opportunity" for public comment (*Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009)), and thus failed to satisfy the agency's APA obligations. Opening Br. 45-54. Specifically, courts evaluating similar claims conduct a holistic inquiry, looking to factors including the length of the comment period; other known circumstances making the timing foreseeably inconvenient for respondents; and a comparison of comment-period duration and number of comments received, respectively, in adopting and then rescinding a rule. Each of those factors favors finding an insufficient comment opportunity here. Opening Br. 46-52.

a. In response, the SEC again parts ways with the district court, not attempting to defend the court's idiosyncratic application of the *Vermont Yankee* doctrine. *Cf.* Opening Br. 52-54. Instead, the agency endeavors to find various grounds to distinguish each of the cases on which we rely (SEC Br. 40-45)—but it cannot meaningfully dispute that these cases collectively constitute a robust and growing consensus that a rulemaking is open to APA attack when the comment period and other features of the process indicate that the comment opportunity was not sufficiently meaningful.

The agency's remaining arguments miss the mark too. For example, the SEC attempts to evade the fact that the 2020 Rule was adopted with a 60-day comment period as opposed to the 31 days allowed for its rescission—and that the adoption of the Rule garnered *ten times* more comments than the rescission (*cf., e.g.*, *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012); Opening Br. 49-51)—by noting that "only five additional comments" were submitted after the deadline. SEC Br. 45. That cannot be the test: The fact that only five entities broke the rules by filing late says nothing about whether those rules were reasonable in the first place, and does not account for would-be commenters who abided by the deadline and stayed silent.

Similarly, the SEC downplays the relevance of Chair Gensler's assurances to Congress that the agency will "always" allow comments for at least

60 days from the Commission's vote or 30 days from Federal Register publication, whichever is later (*see* Opening Br. 49), stating that these comments "[d]o not alter the APA's baseline." SEC Br. 40 n.8. But our point is not that his comments "alter" the APA; it is that the agency has represented to lawmakers what it believes qualifies as reasonable, deviated from that here, and has provided no explanation for that departure. *See Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 2021 WL 3609986, at *3 (D.D.C. 2021) ("[I]t is troubling that defendants failed to abide by these [60-day] guidelines or explain their departure from them.").[5]

Ultimately, in the words of Commissioner Uyeda, "the 30-day comment period for the proposal was insufficient under the circumstances"—given that it "overlapped with major holidays," "fell during the first holiday season since the rollout of COVID vaccines," and "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. That is not a meaningful opportunity for comment.

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[5] As for the SEC's assertion that the NAM had actual notice several days prior to the Federal Register publication, Section 553's mandate that "the agency shall give interested parties an opportunity" for comment is triggered by "notice required *by this section*," that is, "notice … published in the Federal Register" (5 U.S.C. § 553(b), (c) (emphasis added)), so those days are not relevant to the Court's analysis.

b. The agency's harmless-error argument (at 46-49) is also misplaced. Harmless error "is to be used only when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached"; the court "cannot assume that there was no prejudice to petitioners." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979); *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) ("[A]bsence of such prejudice must be clear for harmless error to be applicable."). As many courts have held, failing to follow the notice-and-comment procedure is prejudicial regardless of whether plaintiffs "identify any specific comment they would have submitted": "There is no such requirement for harmless error analysis." *California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018).

The SEC suggests a distinction between complete failures to conduct notice and comment and mere technical violations in the process. But here, the violation is much closer to a complete denial of notice than to the cases cited in the SEC's brief. In *City of Arlington*, for example, the agency properly "received and considered comments," but simply gave its Federal Register notice the wrong title. *City of Arlington v. FCC*, 668 F.3d 229, 244-245 (5th Cir. 2012). And in *Johnson*—where a defendant sought to overturn his sex-offender registration conviction—the Court explicitly cautioned that "Johnson's case is unique" for harmless-error purposes, and emphasized that "we must focus on the factual circumstances" rather than "generaliz[ing] results based on the kind of error." *United States v. Johnson*, 632 F.3d 912, 932 (5th Cir. 2011) (relying on, *inter alia*, the lack of "nuanced and detailed regulations" under consideration and the fact that all issues had already been ventilated before the agency took action).

Here, by contrast, "the factual circumstances" tell a different story. The shortened comment period led to a *ten-fold decrease* in comments received, confirming that interested parties were unable to provide their input. *See* page 21, *supra*; Opening Br. 50-51.[6] Indeed, one of the SEC's own Commissioners stated that the shortened period "likely deterred some interested persons from submitting comment letters" and thus "may have resulted in the Commission … failing to capture relevant data and perspectives." ROA.314.

Moreover, while the NAM itself was able to submit a comment, many of its members were not. *Cf.* ROA.118 (NAM asserting associational standing, which went unchallenged). Indeed, our papers below highlighted six NAM members that filed comments in support of the issuer-engagement provisions in the 2020 Rule—only *one* of which commented on the rescission of *those very provisions* during the SEC's truncated, holiday-season comment period.

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[6] The government suggests that this 90% drop in participation is attributable to the fact that the 2022 Rescission rescinded only part of the 2020 Rule. SEC Br. 44-45. But the issuer-engagement provisions rescinded in 2022 were one of the *two* primary pillars of the 2020 Rule, making this suggestion incredible.

Compare ROA.410 n.1, ROA.449-542 (comments from NAM members supporting issuer-engagement in 2020), *with* SEC, *Comments on Proposed Rule: Proxy Voting Advice*, File No. S7-17-21 (of those NAM members, only one commented on the rescission), perma.cc/MB78-6CKQ. Had the Commission been apprised of the full measure of opposition to its proposed action, the outcome could well have been different. Under all these circumstances, the Court "cannot assume that there was no prejudice to petitioners." *U.S. Steel*, 595 F.2d at 215.

IV. THE AGENCY HAS NOT DEMONSTRATED SEVERABILITY.

Additional aspects of the agency's rulemaking—the rescission of Note (e) to the Commission's anti-fraud rule, and of the Robo-Voting Guidance—should be set aside as inseverable from the rescission of the 2020 Rule's issuer-engagement provisions. Opening Br. 54-56.

In response, the SEC points to a severability clause. SEC Br. 53. That has no bearing on our procedural argument, which requires invalidation of the entire 2022 Rescission. Opening Br. 55-56.[7] And even if that clause implicates the severability of the rescission of Note (e), it does not have the same effect on the rescission of the Robo-Voting Guidance. *Cf., e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (refusing to give effect

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[7] The SEC (at 54-55) provides no authority for its assertion that a single Federal Register action adopted through an unlawful process can be sliced and diced into separate actions.

to similar "boilerplate" language in agency document regarding the legal effects of that document).

Moreover, the agency gets it backwards when it argues that "the notice-and-awareness conditions could 'function sensibly' without … the [Robo-Voting] Guidance." SEC Br. 54. The proper inquiry is whether the SEC would still have *rescinded* the guidance if its rescission of the issuer-engagement conditions was set aside, meaning that those conditions entered back into force. *Am. Fed'n of Gov't Emps. v. FLRA*, 24 F.4th 666, 674 (D.C. Cir. 2022) (courts "will invalidate [agency] action as a whole if [they] are not 'sure' the provisions are 'wholly independent.'").

The answer to that question is no: As the agency explained, it was rescinding the guidance *because* the 2020 Rule's issuer-engagement provisions were no longer in force. ROA.135 (2022 Rescission at 43,178 & n.161) (adopting commenters' position that "because the [guidance] was tied to the 2020 Final Rules, any rescission of those rules should also include the [guidance]"). The Court certainly cannot be "sure" that rescinding the guidance was "wholly independent" of rescinding the issuer-engagement conditions (*Am. Fed'n of Gov't Emps.*, 24 F.4th at 674), because the SEC flatly stated that it was not. The rescission of the Robo-Voting Guidance thus must be vacated.

V. THE COURT SHOULD ORDER THE STANDARD REMEDY OF VACATUR.

Finally, although it recognizes that, "by default, remand *with* vacatur is the appropriate remedy" (*Texas*, 20 F.4th at 1000), the SEC argues for remand *without* vacatur in the event its action is held unlawful. SEC Br. 49-52. "Because vacatur is the default remedy[,] defendants bear the burden to prove that vacatur is unnecessary." *Williams v. Walsh*, __ F. Supp. 3d ___, 2022 WL 17904227, at *18 (D.D.C. 2022) (collecting authorities). Courts will depart from the "ordinary practice" of vacatur only "[i]n rare cases." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019).

This Court considers "two factors" in the vacatur inquiry: "(1) the seriousness of the deficiencies of the action …; and (2) the disruptive consequences of vacatur." *Texas*, 20 F.4th at 1000. The SEC makes *no* argument regarding the second factor, greatly heightening its burden as to the first. *See* SEC Br. 49.

But the SEC has not made a viable showing—much less a strong one—that it "will be able to justify its decision on remand." *Texas*, 20 F.4th at 1000. As we have demonstrated (*supra*, at 10-20; Opening Br. 34-45), the agency's substantive reasoning regarding the supposed risks of the 2020 Rule to the timeliness and independence of proxy advice is not only unjustified, but unjustifiable: Even the largely post hoc theories of harm pressed by the agency on appeal cannot withstand scrutiny, and thus would be no more effective on remand than in this Court. Indeed, the SEC's sole argument to the contrary is essentially a recapitulation of its merits position. SEC Br. 50. This is thus not a circumstance "where an agency is likely to be able to offer better reasoning and adopt the same rule on remand." *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 664 (9th Cir. 2022).

Moreover, the circumstances here cry out for vacatur. As noted in our opening brief (at 14 & n.4), before formally rescinding the 2020 Rule, the SEC suspended it without notice and comment. In separate litigation, appellants have shown that that action was unlawful. *See Nat'l Ass'n of Mfrs. v. SEC*, 2022 WL 16727731 (W.D. Tex. 2022). If the Court concludes that the 2022 Rescission is yet another unlawful attempt to undermine the 2020 Rule, vacatur is imperative to preclude even more stalling: The modest reforms in the 2020 Rule should finally take effect, protecting investors, registrants, and the market as a whole.

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: March 13, 2023

CERTIFICATE OF SERVICE

I certify that that on March 13, 2023, I caused the foregoing brief to be served electronically on all parties via the Court's CM/ECF system.

Dated: March 13, 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 6,488 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: March 13, 2023 /s/ *Paul W. Hughes*