No. 24-1628
(consolidated with Nos. 24-1522, 24-1624, 24-1626, 24-1627, 24-1631, 24-1634, 24-1685, and 24-2173)

In the

United States Court of Appeals

for the

Eighth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

– v. –

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent,

&

DISTRICT OF COLUMBIA, *et al.*,
Intervenors for Respondent.

On Petition for Review of a Final Rule
of the Securities and Exchange Commission

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND VACATUR

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Appellate Rule 26.1A, *amicus* discloses that:

The National Association of Manufacturers (NAM) is a nonprofit, tax-exempt organization located in the District of Columbia. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in it.

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million people in the U.S., contributes approximately $2.89 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Manufacturers in the United States are leaders in combatting climate change and solving the enormous problems it poses for the economy and the world. After all, it is manufacturers who will make the products and technologies needed to face this generational challenge—clean energy, carbon capture, batteries, microgrids, advanced vehicles, and more. And, manufacturers believe in the importance of material climate-related disclosures by

[1] All parties have consented to the filing of this brief. The brief was not authored by any party's counsel, in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person, other than the *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of the brief.

public companies—provided that the information truly is material to a reasonable investor.

However, whether the SEC's climate disclosure rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21,668 (Mar. 28, 2024), appropriately and lawfully advances this laudable goal is questionable. Notwithstanding that the final rule is significantly more workable for manufacturers than the SEC's original proposal (*see, e.g.*, Nat'l Ass'n of Mfrs., *Press Release: Worst-Case Scenario Avoided, SEC Scales Back Climate Rule in Response to Manufacturers' Concerns* (Mar. 6, 2024) (discussing changes from the proposed rule to the final rule), perma.cc/JF96-UFN9), serious questions remain about the SEC's authority to adopt it in the first place.

In particular, while the final rule is framed in terms of disclosing material information, several features suggest that the SEC is in actuality attempting to make substantive climate policy—something the agency lacks the power to accomplish. And while the final rule has removed some of the most burdensome aspects of the proposed rule, it still imposes massive compliance costs on manufacturers and other publicly traded companies: Even the SEC itself assumes average compliance costs between $197,000 and $739,000 per issuer per year, resulting in a very significant aggregate burden. 89 Fed. Reg. at 21,875; *cf.* Chamber Br. 37-44 (highlighting problems

with the Commission's economic analysis that result in an artificially low cost estimate). Especially in light of these acknowledged costs, the Court must carefully scrutinize the SEC's authority—or lack thereof—for adopting the final rule.

ARGUMENT

A. The NAM has serious concerns that the SEC is attempting to utilize securities regulation to institute substantive climate policy, rather than provide for material disclosures for investors.

We start with common ground: The NAM agrees that the SEC has the power to require disclosure of information that would be material to a reasonable investor. *See, e.g.*, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (materiality requires "a substantial likelihood that the disclosure of the [relevant] fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," such that the "fact would have assumed actual significance" in the investor's "deliberations"); *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988) ("[M]ateriality depends on the significance the reasonable investor would place on the [relevant] information.").

As the Commission has previously explained, Section 7(a)(1) of the Securities Act requires, by cross-reference to a numbered schedule, disclosure of "categories of information that are generally viewed as material to investors." *Business and Financial Disclosure Required by Regulation S-K*,

81 Fed. Reg. 23,916, 23,924 (Apr. 22, 2016); *see* 15 U.S.C. §§ 77g(a)(1), 77aa. The statute goes on to empower the Commission to require by regulation "such other information … necessary or appropriate in the public interest or for the protection of investors." *Id.* § 77g(a)(1).

Under familiar principles of statutory interpretation, then, this catch-all disclosure provision is bounded by the same materiality limitation as the integrated list that precedes it. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (where Congress provides "a list of specific items … followed by a general or collective terms," the "inference" to be drawn is "that Congress remained focused on the common attribute when it used the catchall phrase."); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018) (under the "*ejusdem generis* canon," when "a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). Thus, as the Commission has explained, "[t]he concept of materiality" is "the cornerstone of the disclosure system established by the federal securities laws." 81 Fed. Reg. at 23,924 (quotation marks omitted).

The NAM further agrees that climate-related information *can* be material under the Supreme Court's traditional materiality formulation. And indeed, to the extent that climate-related information *is* financially material

to a company's performance or gives investors insight into financially material risks faced by the business, issuers already have an existing obligation to appropriately disclose this information to the market. *See generally Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6,290, 6,290 (Feb. 8, 2010) (SEC guidance document that "outlines [the Commission's] views with respect to [its] existing disclosure requirements as they apply to climate change matters.").

As to this final rule, however, a number of characteristics of the rulemaking suggest that the SEC has strayed from its permissible domain of "elicit[ing] investment decision-useful information that is necessary or appropriate to protect investors" (*The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334, 21,340 (Apr. 11, 2022) (proposed rule)), and into an attempt to prescribe environmental or climate policy. *Cf. Dep't of Commerce v. New York*, 588 U.S. 752, 783 (2019) (concluding that an agency acted pretextually based on "a significant mismatch between the decision the Secretary made and the rationale he provided").

First, while the final rule uses the language of materiality—variations of the word "material" are used over a thousand times—its sheer breadth suggests a different purpose. As dissenting Commissioner Peirce put it, "the Commission has decorated the final rule with materiality ribbons," but "the

rule embraces materiality in name only." Comm'r Hester M. Peirce, *Green Eggs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024) (Peirce Dissent), perma.cc/8FQY-3E8T. Indeed, as just noted, much climate-related information is already required to be disclosed under existing law if material, making the final rule's requirements unnecessary. *See* 75 Fed. Reg. 6,290. The depth and breadth of the SEC's largely unnecessary dive into climate-related information about public companies suggests that the rule's true purpose goes beyond the provision of material disclosures for investors.

Moreover, the final rule singles out one category of information about a company—its climate risks and impacts—for unique treatment, over and above any other type of information an investor may want to receive. As dissenting Commissioner Uyeda explained, the final rule "elevates climate above nearly all other issues facing public companies":

> In no other context is a company required to provide an explanation of expenses that exceed one percent of income before taxes and analyze the significant contributing factor to the expense.
>
> For no other risk does the Commission require prescriptive, forward-looking disclosure of the risk's impacts on the company's strategy, business model, outlook, financial planning, and capital allocation.
>
> Today's rule also requires disclosure of climate-related targets and goals, even though the Commission has no similar requirements for a company's targets and goals related to other, more

> important matters affecting the company, such as financial performance, product development, customer acquisition, or market expansion.
>
> Finally, the requirement to disclose GHG emissions and obtain an attestation report on such disclosure is in a class of its own without comparison in the Commission's disclosure regime.

Comm'r Mark T. Uyeda, *A Climate Regulation under the Commission's Seal: Dissenting Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024) (Uyeda Dissent), perma.cc/B9B5-F9G2; *see also* Peirce Dissent, *supra* (the final rule's "fundamental flaw" is "its insistence that climate issues deserve special treatment and disproportionate space in Commission disclosures and managers' and directors' brain space.").

This unprecedented special treatment of climate-related issues, among all possible issues faced by an issuer, suggests that the Commission's rulemaking is fundamentally focused on enacting climate policy—and not on protecting investors. There is no indication, and the Commission has certainly provided none, that investor protection requires detailed, prescriptive disclosures about climate-related information when existing disclosure frameworks suffice for information much more central to the issuer's operations and prospects. This "significant mismatch" (*Dep't of Commerce*, 588 U.S. at 783) suggests an intent to make substantive climate policy, despite the Commission's facial invocation of materiality language.

Finally, the final rule "replaces [the SEC's] current principles-based regime," which conditioned disclosure requirements on materiality rather than subject matter, "with dozens of pages of prescriptive climate-related regulations" that "mandate[] specific granular disclosures." Peirce Dissent, *supra*. Again, the prescriptive nature of the disclosures that the final rule requires once a risk or other piece of information is deemed material indicates that the final rule is aimed at climate policymaking, rather than the protection of investors under the "inherently fact-specific" materiality standard. *Basic Inc.*, 485 U.S. at 236 ("Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.").

B. The SEC lacks authority to prescribe climate policy.

To the extent the final rule is indeed climate policy masquerading as securities regulation, the Commission's attempt to promulgate it constitutes unlawful regulatory overreach.

"An agency … 'literally has no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). And when "the 'history and

the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority," the agency "must point to 'clear congressional authorization' for the power it claims," rather than "a merely plausible textual basis." *West Virginia v. EPA*, 597 U.S. 697, 721, 723 (2022) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), then quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

As the Chamber of Commerce ably explains, these principles prevent the SEC from regulating climate policy (*see* Chamber Br. 54-59): Climate change, and the contributions and responses to climate change by American public companies, are surely issues of great "economic and political significance" (*West Virginia*, 597 U.S. at 721), and regulating climate change through the back door of the securities laws would require "discover[ing] in a long-extant statute an unheralded power" (*id.* at 724). *See also* Uyeda Dissent, *supra* ("Today's rulemaking is an extraordinary exercise of regulatory authority by the Commission that involves an economically and politically significant policy decision.")

More, the major questions doctrine applies with special force when an agency acts outside its traditional regulatory sphere. In one of the founda-

tional major questions cases, the Supreme Court found "[t]he idea that Congress … through an implicit delegation," "gave the Attorney General … broad and unusual authority" to "make quintessentially *medical* judgments"—rather than "*legal* … one[s]"—"not sustainable," and therefore rejected his claim of regulatory authority. *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (emphases added); *see also West Virginia*, 597 U.S. at 724 (citing *Gonzalez* as part of the "identifiable body of law" whose "common threads" make up the major questions doctrine).

The same regulatory mismatch principle animated the Court's more recent decision that the CDC—a health agency whose governing "statute … authorizes it to implement measures like fumigation and pest extermination"—lacked authority to "impose[] a nationwide moratorium on evictions." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 760 (2021). So too here: To the extent the United States has a climate agency, that agency is the EPA, not the SEC. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) ("We have little trouble concluding" that "the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change.").

The regulatory mismatch in this case is stark: The breadth and depth of the final rule's climate-related requirements suggest that the SEC is attempting to extend its regulatory reach beyond "investment decision-useful information that is necessary or appropriate to protect investors" (87 Fed. Reg. at 21,340), and into substantive climate policy. Such a diversion is beyond the Commission's lawful power—which of course is bounded by Congress's express grant of regulatory authority. *See, e.g.*, *Ted Cruz for Senate*, 596 U.S. at 301.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review.

Dated: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7) because it contains 2,257 words, 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 2016 and is set in New Century Schoolbook LT Std font in a size equivalent to 14 points or larger.

Dated: June 24, 2024 <u>/s/ *Paul W. Hughes*</u>

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I electronically filed the foregoing brief with the Clerk of this Court using the CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

Dated: June 24, 2024 /s/ *Paul W. Hughes*