No. 24-1685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LEGAL & POLICY CENTER
and
OIL & GAS WORKERS ASSOCIATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONERS' EMERGENCY MOTION TO STAY ENFORCEMENT PENDING REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Petitioners make the following disclosures:

The National Legal and Policy Center has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Oil and Gas Workers Association has no parent corporation, and no publicly held company owns 10% or more of its stock.

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EMERGENCY MOTION

Pursuant to Federal Rule of Appellate Procedure 18, Petitioners file this emergency motion to stay enforcement, pending review, of the Enhancement and Standardization of Climate-Related Disclosures for Investors (the "Disclosure Rule"), 89 Fed. Reg. 21,668.

To obtain a stay, "[a] petitioner must ordinarily move first before the agency" or "show that [doing so] would be impracticable." Fed. R. App. P. 18(a). Moving first in the agency would be impracticable and futile here because (1) the months the agency could take to consider a request would cause irreparable harm, and (2) even substantial public opposition to the Disclosure Rule did not prevent the Rule's promulgation.

To avoid irreparable harm, Petitioners respectfully request a ruling on this motion by **April 12, 2024.**

INTRODUCTION

A vigorous national debate about climate change has been ongoing for years. Some have advocated that the United States and American companies adhere to climate commitments that would purportedly reduce global temperatures in the future—at great economic cost. They have turned to the legislative process and other advocacy, including shareholder proposals intended to pressure companies to reduce emissions. Others have questioned these proposals, especially as countries such as China emit ever more greenhouse gases and render pointless unilateral actions. They too have engaged in the legislative process and responded to shareholder proposals.

This case should not be about that policy debate. But one side in that debate, frustrated by its inability to enact its agenda through Congress and impatient with company-by-company engagement, turned to an unlikely source to require sweeping new climate disclosures aimed at forcing companies to reduce emissions: the Securities and Exchange Commission ("SEC"). SEC has long mandated disclosures intended to give investors and the public financial information about a company's securities, performance, and management. SEC has used a principles-

based approach to financial disclosures, generally requiring a company to disclose risks it views as material to its financial situation. Thus, to the extent companies identify specific climate issues as material to their finances, or such issues fall into a category of statutorily required disclosures, they must already be disclosed.

SEC's new Disclosure Rule would impose a much different regime by adding a new category to the statutes' financial disclosures. Again, these disclosures' goal is not to disclose material risks; such risks must already be disclosed. Instead, the goal is to pressure companies to act in certain ways on climate-related issues, such as greenhouse gas emissions, by forcing them to try to calculate and disclose metrics about qualitative scenarios that often depend on third parties.

Whether that is good or bad policy, Congress has not authorized SEC to pursue it. SEC does not set scientific policy; it regulates securities. And nothing in its authorizing acts—the Securities Act and the Securities Exchange Act—authorizes it to mandate climate disclosures. When Congress has wanted SEC to require new categories of disclosures, it has provided express authorization. It did not do so here.

Because nothing in the statutes authorizes SEC to promulgate it, the Disclosure Rule is unlawful.

The major questions doctrine confirms this. SEC is "asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022). The Rule addresses political and economic issues of general, wide-ranging importance and makes new rules that Congress has repeatedly refused to enact. As justification, SEC relies on vague terms in statutes passed in response to the Great Depression. And it is asserting a power that it has repeatedly disclaimed over issues on which it has no expertise. "Given these circumstances, [Supreme Court] precedent counsels skepticism toward" SEC's claim of authority, and it must "point to clear congressional authorization to regulate." *Id.* at 732 (cleaned up). But it can only point to general statutory terms about "public interest" and "investor protection," which do not provide clear congressional authorization to require novel climate disclosures.

Last, the Rule compels speech on controversial topics of intense public debate, forcing companies to speak in ways that inherently support particular viewpoints. That violates the First Amendment.

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Thus, Petitioners are likely to succeed on the merits of their challenge to the Disclosure Rule. The other stay factors equally support a stay. Companies must immediately begin preparing to comply with the Rule, including by collecting information and changing their business practices. These changes will impose irreparable harms on Petitioners. And the public interest favors avoiding these harms, which will impact investors and the economy as companies expend to comply. A stay is necessary.

BACKGROUND

A. Statutory and Regulatory Background

The Securities Act of 1933 and the Securities Exchange Act of 1934 ("the Acts") were enacted in response to the 1929 stock market crash and Great Depression. *See United States v. Naftalin*, 441 U.S. 768, 775 (1979). The Securities Act "was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). Its provisions "deal[] at some length with the required contents of registration statements and prospectuses." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728 (1975).

The Exchange Act "chiefly concern[s]" "the regulation of post-distribution trading on the Nation's stock exchanges and securities trading markets." *Id.* at 752. It "was intended principally to protect investors against manipulation of stock prices through regulation of transactions on securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges." *Ernst*, 425 U.S. at 195; *see* 15 U.S.C. § 78b.

"The basic purpose of the 1934 and 1933 regulatory statutes is to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 390 (2014) (cleaned up). The "Acts contain numerous carefully drawn express civil remedies and criminal penalties," and the Exchange Act also created SEC to enforce the Acts. *Ernst*, 425 U.S. at 195. But as the Supreme Court has repeatedly admonished SEC, "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law" but "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Id.* at 213–14 (cleaned up); *see also NYSE LLC v. SEC*, 962 F.3d 541, 546

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(D.C. Cir. 2020). And the Acts themselves say SEC "shall not adopt any . . . rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]." 15 U.S.C. § 78w(a)(2).

The Securities Act requires covered companies to provide a registration statement with enumerated financial and securities information. 15 U.S.C. § 77g(a)(1); *see id.* § 77aa. Because the Exchange Act requires similar disclosures, SEC created Regulation S-K "to harmonize disclosure required under both . . . by creating a single repository for disclosure regulation that applies to filings by registrants under both statutes." Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,918 (2016). The statutory disclosures' focus is "business and financial information," "identif[ying] certain categories of information that are generally viewed as material to investors." *Id.* at 23,921, 23,924.

"The concept of materiality has been described as the cornerstone of the disclosure system established by the federal securities laws." *Id.* at 23,924. "[I]nformation is material if there is a substantial likelihood that a reasonable investor would consider the information important in

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deciding how to vote or make an investment decision." *Id.* at 23,925; *see TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

To be sure, materiality is neither necessary nor sufficient for SEC to require disclosure. *See In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) ("[[A]n omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts," not "merely because a reasonable investor would very much like to know that fact."). Many of the Acts' and SEC's "rules require disclosure when information is material to investors." 81 Fed. Reg. at 23,925. "These rules rely on a registrant's management to evaluate the significance of information in the context of the registrant's overall business and financial circumstances and determine whether disclosure is necessary," an approach "often referred to as 'principles-based'" because it "articulate[s] a disclosure objective and look[s] to management to exercise judgment in satisfying that objective." *Id.* Some other rules "employ objective, quantitative thresholds to identify when disclosure is required, or require registrants to disclose information in all cases." *Id.* Such "requirements may result in disclosure that is not necessarily material or important to investors." *Id.* at 23,927.

As SEC has recognized, "[t]here are potential drawbacks associated with disclosure requirements": "Disclosure can be costly for registrants to produce and disseminate, and disclosure of certain sensitive information can result in competitive disadvantages," and "high levels of immaterial disclosure [could] obscure important information or reduce incentives for certain market participants to trade or create markets for securities." *Id.* at 23,919; *see also Northway*, 426 U.S. at 448–49 (emphasizing dangers of "bury[ing] the shareholders in an avalanche of trivial information," which is "hardly conducive to informed decisionmaking").

Thus, the Acts and SEC's rules have long reflected a balance: requiring specific categories of disclosure mandated by statute and otherwise relying on a principles-based approach to limit disclosures to material information falling within a statutory category of financial or securities information.

"From time to time, Congress has introduced [specific] disclosure requirements through other statutory mandates," including "disclosure that is not necessarily financial in nature." 81 Fed. Reg. at 23,922. For instance, the Iran Threat Reduction and Syria Human Rights Act

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"requires registrants to disclose certain business activities relating to Iran in their periodic reports." *Id.* But Congress has not imposed climate change-related disclosures.

Accordingly, starting in 1975, SEC has repeatedly refused to require separate, independent disclosure of "environmental and social" matters. 81 Fed. Reg. at 23,971. SEC has "concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements, although such considerations would be appropriate to further a specific congressional mandate." *Id.*

Of course, environmental matters are often subject to required disclosure as part of existing categories of financial or securities information on Schedule S-K. As SEC explained in 2010:

- "With respect to existing federal, state and local provisions which relate to greenhouse gas emissions, Item 101 requires disclosure of any material estimated capital expenditures for environmental control facilities for the remainder of a registrant's current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material."
- "Item 303 requires registrants to assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on the registrant's financial condition or results of operation."

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- "[B]usiness trends or risks . . . could have a significant enough impact on a registrant's business that disclosure may be required in its business description under Item 101."

- "Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents."

Comm'n Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,289, 6,295–97 (Feb. 2, 2010).

But SEC has heretofore declined to establish new categories of required disclosure for all firms' climate-change-related information.

B. The Disclosure Rule

The Disclosure Rule requires those registered with the SEC to make several disclosures related to climate change in their registration statement or annual report. *See* 89 Fed. Reg. 21668. Those include:

- A company's "climate-related target or goal" and "any progress made toward meeting the target or goal and how any such progress has been achieved";

- For large companies, both direct and indirect (i.e., third-party) greenhouse gas (GHG) emissions "if such emissions are material"—without elaboration of how to measure materiality of that metric—and constituent gases individually, along with explanations for all calculations;

- Attestations of those disclosures by a GHG emissions attestation provider—and disclosure of any disagreements with a former provider; and,

- Expenses "incurred during the fiscal year" if "severe weather events and other natural conditions, such as hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures, and sea level rise" are "a significant contributing factor," along with "contextual information" for the events like "policy decisions made . . . to calculate the specified disclosures."

C. Petitioners

Petitioner National Legal and Policy Center ("NLPC") is a nonprofit organization, founded in 1991, that promotes ethics in public life through research, investigation, education, and legal action. Exhibit 1, Declaration of Peter Flaherty ("Flaherty Decl.") ¶ 3. NLPC promotes integrity in corporate governance, including honesty and fair play in relationships with shareholders, employees, business partners and customers. *Id.* NLPC emphasizes a company's responsibility to advance the interests of the people who own the company (shareholders) against attempts to impose political objectives that erode the financial value of its shares. *Id.*

To protect this principle, NLPC owns shares in companies that are subject to the Disclosure Rule. *Id.* ¶ 4. NLPC frequently attends

shareholder meetings of companies of which it owns shares to advocate for shareholders' interests and oppose efforts to advance resolutions related to climate change. *Id.*

In addition, NLPC proposes its own resolutions to protect its shares' financial value, including at least twenty-five in 2022. *Id.* NLPC representatives make public remarks and vote their shares in favor of their resolutions to advance their mission as an organization. *Id.* The Disclosure Rule will injure NLPC's interest in protecting the principle of serving shareholders' financial interests because the Rule encourages companies to take actions regarding climate change that erode their shares' value. *Id.* ¶¶ 9-10. NLPC submitted a comment opposing the proposed version of the Disclosure Rule during its notice and comment period. *Id.* ¶ 11.

Petitioner Oil & Gas Workers Association ("OGWA") is a grassroots, independent, nonpartisan 501(c)(6) nonprofit trade association founded in 2015 by a worker in the oil and gas industry. Exhibit 2, Declaration of Matthew Coday ¶ 3. OGWA is dedicated to securing, growing, and sustaining American oil and gas jobs, representing the interests of all individuals working in the U.S. oil and gas industry, as well as those

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whose jobs that industry supports. *Id.* OGWA advocates for that workforce nationwide, collaborating with lobbyists, attorneys, consultants, and educators to advance the industry's image and represent workers on legislative and regulatory issues impacting their livelihoods. *Id.* ¶ 4.

The Disclosure Rule will harm OGWA's members, who work for companies subject to the new rule or in an industry directly affected by the rule. The SEC's rule compels companies that employ OGWA's members to undertake costly, burdensome, and intrusive measures to comply. *Id.* ¶ 5. These measures will not only impose significant financial burdens, but also will divert resources from core operational activities, threatening the sustainability and growth of the oil and gas jobs OGWA seeks to protect. *Id.*

The injuries OGWA and its members will suffer will be substantial and ongoing. *Id.* ¶ 6. They include, but are not limited to, increased operational costs, potential competitive disadvantages, compelled speech based on politically motivated disclosure standards, and dilution of shareholder focus on essential financial performance and risk factors—all of which threaten OGWA's members' livelihoods. *Id.*

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Petitioners' petition for review was timely filed on March 21, 2024, and consolidated in this Court with other petitions seeking review of the Disclosure Rule.

LEGAL STANDARD

In determining whether to stay of an agency rule, courts consider: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that the other party will be harmed if the court grants the stay; and (4) the public interest. *Nken v. Holde*r, 556 U.S. 418, 425-26 (2009).

ARGUMENT

I. Petitioners will likely succeed on the merits.

Petitioners are likely to succeed on their claim that the Securities Act and the Securities Exchange Act (the "Acts") do not authorize the Disclosure Rule. This conclusion is confirmed by the major questions doctrine, which requires that Congress *clearly* authorize an agency to enact a rule implicating significant economic and political decisions. Because Congress has not authorized SEC to adopt this Disclosure Rule implicating disputed questions of scientific and energy policy, the Rule

exceeds the SEC's statutory authority. Also, the Rule's compulsion of speech violates the First Amendment.

A. The Securities Act and the Exchange Act do not authorize the Disclosure Rule.

The Acts generally authorize the SEC to promulgate rules compelling entities to disclose information about securities, financial statements, and director and management decisions. When Congress has directed SEC to go outside such financial disclosures, it has expressly authorized specific disclosures. But Congress has not authorized SEC to promulgate rules on the environmental and climate issues implicated by the Disclosure Rule. Thus, SEC lacked statutory authority to promulgate the rule.

1. The Acts require companies to disclose financial information, not environmental information.

The various sections of the Acts the SEC has cited as statutory authority authorize the SEC to compel disclosure of traditional financial data, not environmental data.

On the Securities Act, SEC invokes Sections 7, 10, 19(a), and 28. 89 Fed. Reg. at 21,912. In Section 7, the statute requires those issuing securities to file a registration statement. 15 U.S.C. § 77g. Registration

statements, according to the statute's text, require disclosures of traditional financial data only—for example, the "name under which the issuer is doing or intends to do business," a "balance sheet" showing liabilities, and a "profit and loss statement." 15 U.S.C. § 77aa(1), (25), (26). The original House report summarized these requirements as the "essential facts concerning the property in which [the investor] is invited to acquire an interest," "concerning the identity and the interests of the persons with whom he is dealing," and concerning "the price and cost of the security." H.R. Rep No. 73-85, at 18–19 (1933); *see id.* at 3 ("The items required to be disclosed . . . are items indispensable to any accurate judgment upon the value of the security.").

Next, Section 10 requires that advertisements, such as a "prospectus," include registration-statement information along with certain "other information" required by the Commission (addressed below). 15 U.S.C. § 77j.

Section 19(a) allows the SEC to promulgate rules to carry out the Securities Act's provisions, including those related to registration statements and prospectuses. 15 U.S.C. § 77s(a). This includes "defining accounting, technical, and trade terms." *Id.* It can also "prescribe the

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form or forms in which required information shall be set forth," including the "the items or details to be shown in the balance sheet and earning statement." *Id.* In "issuing such rules the SEC can use generally accepted accounting practices." *Id.*

Last, Section 28 authorizes the SEC to "conditionally and unconditionally exempt" a "person, security, or transaction" from many of the requirements above, including the SEC's regulations. 15 U.S.C.§ 77z–3.

In the Exchange Act, the SEC cites Sections 3(b), 12, 13, 15, 23(a), and 36 for its authority to promulgate the Disclosure Rule. 89 Fed. Reg. at 21,912. But these too generally pertain to financial disclosures, not environmental information.

Section 3(b) has nothing to do with disclosures. It simply deems certain agreements exempted by the Commodity Futures Trading Commission "securities" for purposes of "securities laws." 15 U.S.C. § 78c–2.

Section 12 makes it illegal to trade a security on an exchange unless it is registered. 15 U.S.C. § 78*l*. Registration requires a company to file an application containing certain information prescribed by SEC, such as

organizational structure, rights of shareholders, terms on the securities, company officials with 10% more of stock, executive compensation, and bonuses. *See id.*

Section 12 authorizes the SEC to create broad exemptions from these disclosures while "require[ing] in lieu thereof the submission of such other information of comparable character as it may deem applicable to such class of issuers." 15 U.S.C. § 78*l*(c). "Comparable character" restricts these submissions to traditional financial data.

Section 13 requires companies to file supporting documents for registration statements and annual reports "as the [SEC] may prescribe." 15 U.S.C. § 78m. It allows the SEC to prescribe these reports' "form," including the "items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in . . . the differentiation of investment and operating income." *Id.* § 78m(b)(1). Section 15 also requires that brokers and dealers file registration statements. 15 U.S.C. § 78o.

Section 23(a) authorizes the SEC to issue rules "as may be necessary or appropriate to implement the [Exchange Act]." 15 U.S.C. § 78w(a)(1). To the extent other provisions do not authorize compelling

disclosure about environmental issues, this provision would not apply, because a rule compelling extraneous disclosures would be neither necessary nor appropriate to implement the Exchange Act's other provisions. *See NYSE*, 962 F.3d at 556 ("[A] 'necessary or appropriate' provision in an agency's authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized.").

Section 23(a) also requires the SEC to consider "competition" when making rules and forbids the SEC from imposing "a burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act. 15 U.S.C. § 78w(a)(2). Far from authorizing climate disclosures, this makes them even more inappropriate. Compelling climate disclosures would hamper domestic competition by imposing costs that larger firms can more readily absorb than smaller firms, and would hamper international competition by forcing U.S. firms to comply with rules that do not apply to foreign competitors.

Last, Section 36 authorizes the SEC to exempt people and companies from the Exchange Act's requirements and regulations. 15

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U.S.C. § 78mm. That power to exempt does not, of course, create a power to compel disclosures of other types of data.

In sum, the Acts' specific authorizations focus on financial and core management disclosures, not social or environmental concerns. Indeed, SEC previously "concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements" absent "a specific congressional mandate." Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,971 (Apr. 22, 2016). Sometimes, Congress has provided such mandates. The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 both "introduced additional disclosure requirements" "focused on corporate responsibility[and] corporate governance." *Id.* at 23,922. Other statutes have "mandated disclosure that is not necessarily financial in nature." *Id.* For instance, Congress amended the Exchange Act to require that certain companies disclose their use of "conflict minerals" that "directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country." 15 U.S.C. §§ 78(p)(1)(A)(ii), 78(p)(1)(D), 78(p)(2)(B). Other statutory authorizations have pertained to environmental

compliance and litigation disclosure, mine safety, and business activities in Iran. *See* 81 Fed. Reg. at 23,922. If Congress believed the Acts already authorized SEC to require disclosures of such peripheral issues, it need not have provided express statutory authorization. Congress's action further shows that, in the main, SEC's statutory authorization is limited to core financial information relevant to the sale and exchange of securities, not extraneous environmental information.

2. In context, statutory authorization to act "in the public interest or for the protection of investors" does not transform SEC's purview.

SEC has pointed to several provisions in the Acts that generally authorize it to promulgate rules requiring disclosure of information the SEC believes is "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); *id.* § 78*l*; *see id.* §§ 77j, 78m, 78*o*. But "'public interest' is never an unbounded term": "broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation.'" *Bus. Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990) (quoting *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976)). And the context of both Acts shows that SEC's authority to make rules for the "public interest" and "protection of investors" is

defined and circumscribed by association with its authority to make rules about disclosures of financial information.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Under "the commonsense canon of *noscitur a sociis*," "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008); *see Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1470 (2020) ("context often imposes limitations").

Thus, "[the] open-ended standard[s]" of "investor protection" and "public interest" must be understood in light of the statutes' "larger list of more specific standards concerning" securities. *Bus. Roundtable*, 905 F.2d at 413. Again, Congress has generally limited required disclosures to financial information, management and director decisions, and securities details. And the interests SEC "shall also consider, in addition to the protection of investors" are tied to financial issues: "whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b); *see id.* § 78w(a)(2). Given the statutory context, the

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"public interest" and "investor protection" standards do not authorize SEC to promulgate expansive rules mandating non-financial disclosures.

To hold otherwise would "transform[]" the Acts, again in contradiction of basic interpretive principles. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). If the Acts authorized disclosures with any relation to SEC's conception of the public interest, SEC's power would be practically unlimited. The agency could promulgate rules with tenuous connections to any financial or securities issues, whenever it thought the rules had some relation to a social good. That would contradict the statutory focus on specific financial and securities issues—and render meaningless the statutory limits and explanations of the appropriate areas for disclosures. *Contra* H.R. Rep. 73-1383, at 23 (1934) (noting the Exchange Act was not designed to give SEC "unconfined authority to elicit any information whatsoever").

The Disclosure Rule is contrary to the plain meaning of the Acts' provisions on which the SEC relied in adopting it. For that reason, along with the reasons presented by the U.S. Chamber of Commerce Emergency Motion for Stay in No. 24-1628 about the Rule's arbitrary and capricious nature, Petitioners are likely to prevail on the merits.

B. The major questions doctrine confirms that Congress did not authorize SEC to promulgate a Rule with vast political and economic implications.

Even if the statutes' plain meaning did not foreclose it, the Disclosure Rule would still exceed the SEC's authority under the major questions doctrine, by which courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast 'economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021). At minimum, the Acts contain no *clear* statement authorizing SEC to adopt a climate-change Disclosure Rule, so that Rule is unlawful.

Courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 597 U.S. at 723 (cleaned up). This "major questions" doctrine applies when "'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." *Id.* at 721. And when an agency has adopted a rule on a major question, a "colorable textual basis" is not enough; "[t]he agency must

instead point to 'clear congressional authorization' for the power it claims." *Id.* at 722-23.

The major questions doctrine applies here. As explained here and in the U.S. Chamber's emergency motion, the Disclosure Rule implicates important economic and political questions regarding climate change and the environment. And Congress cannot be said to have *clearly* given SEC authorization to address those questions. Thus, the Rule exceeds SEC's statutory authority.

C. The Rule violates the First Amendment.

Last, for the reasons explained in the U.S. Chamber of Commerce's emergency motion, adopted here by reference, the Rule violates the First Amendment by compelling speech without adequate justification.

II. The remaining factors also support a stay.

A. The absence of a stay will irreparably harm Petitioners.

The absence of a stay will irreparably harm Petitioners because the Disclosure Rule immediately coerces companies "into curtailing the production and use of fossil fuels," which will increase costs and decrease profits, thus reducing the value of NLPC's stocks. Flaherty Decl. ¶¶ 4, 9. And NLPC's primary interest in investing in companies is to advocate for

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increasing shareholder value and against policies such as those that the Disclosure Rule requires. *Id.* Thus, NLPC has an "interest in protecting [shareholder value], in investing their funds, and in voting their shares in a . . . manner" consistent with protecting shareholder value. *Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 389 F. Supp. 689, 697 (D.D.C. 1974), *aff'd* 606 F.2d 1031 (D.C. Cir. 1979). If not stayed, the Disclosure Rule will harm NLPC's efforts to stop climate-related disclosures. Additionally, the Rule will harm NLPC by reducing the opportunities it has to engage in advocacy and education, which will hurt its ability to fundraise. Flaherty Decl. ¶ 10. The Rule will likewise irreparably harm OGWA's members for the reasons presented above.

Though the Rule provides for phased-in compliance, 89 Fed. Reg. at 21,676, companies will have to start taking immediate actions to prepare. Given the breadth of the required disclosures, and the pressures eventual disclosure will put on companies to change their emissions, companies will likely take immediate steps to change their business practices. Those steps will cost money. Therefore, they will harm entities like Petitioners, and that harm will start accruing immediately. A stay is warranted.

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B. The public interest favors a stay.

The last two stay factors—asserted harm to the opposing party and the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

A stay will prevent the economic harm that will occur if the Disclosure Rule is allowed to pressure companies to forgo productivity in favor of other concerns. Requiring companies to disclose information regarding their environmental decisions will chill activity that would otherwise increase profitability and result in increased jobs, salaries, and wealth for shareholders and society. Jobs will be lost; salaries will decrease; wealth will diminish; gas prices will go up. A stay will thus further the public interest.

A stay will not harm the SEC, especially given that it has previously disclaimed the power to require environmental disclosures and has promulgated a delayed compliance period. In other words, although the rule will immediately start imposing irreparable compliance costs, SEC could claim no benefit from disclosure for years. A stay would maintain the status quo without subjecting Petitioners and the public to significant costs from an unlawful regulation.

CONCLUSION

The Court should stay implementation and enforcement of the Disclosure Rule.

Respectfully submitted,

/s/ Jeffrey Schwab

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Counsel for Petitioners

April 3, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2024, an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

/s/ Jeffrey Schwab
Jeffrey Schwab
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts exempted under Federal Rule of Appellate Procedure 27(d)(a)(2)(B), it contains 5,187 words.

I certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

I further certify that this motion has been scanned for viruses and is virus-free.

/s/ Jeffrey Schwab
Jeffrey Schwab
Counsel for Petitioners

April 3, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

National Legal & Policy Center and Oil & Gas Workers Association, Petitioners, v. Securities Exchange Commission, Respondent.	Case No. 24-1685

DECLARATION OF PETER FLAHERTY

Pursuant to 28 U.S.C. § 1746, Peter Flaherty declares as follows:

1. I am over 18 years old and have personal knowledge of the facts described herein.

2. I am the Chairman of the National Legal and Policy Center ("NLPC"), which is a Petitioner in this case.

3. NLPC is a nonprofit, public interest, and policy center founded in 1991, whose overall mission is to promote ethics in public life. NLPC has a Corporate Integrity Project that promotes integrity in corporate governance, including honesty and fair play in relationships with

shareholders, employees, business partners and customers. In doing so, NLPC places special emphasis on the responsibility of the company to defend and advance the interests of the people who own the company, the shareholders, against attempts to impose politically controversial interests that are at odds with shareholder value.

4. As part of its mission, NLPC has purchased and currently owns shares of stock in forty-three companies, including Chevron Corp., ConocoPhillips Inc., Diamondback Energy Inc., Dominion Energy Inc., and ExxonMobil Corp. NLPC frequently attends shareholder meetings at companies in which it owns shares. It attends to advocate the interests of shareholders and oppose calls by activists to advance one-sided special interests that are often hypocritical, including climate related issues. NLPC has proposed at least twenty-five shareholder resolutions this year alone. Many of these resolutions are designed to elicit information and/or address corporate activism on "climate change," actions that are beneficial to shareholders, but that would be defeated by implementation of the Disclosure Rule. When it proposes a shareholder resolution, NLPC representatives often give remarks in favor of the resolution to the company's representatives at the meeting

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and the other shareholders who are present. NLPC also votes its shares on the resolutions that it proposes.

5. On May 10, 2022, NLPC proposed a resolution at ConocoPhillips Incorporated's annual shareholder meeting calling for more transparency in the company's lobbying expenditures. NLPC made this proposal because the company is a member of the American Petroleum Institute, which favors a carbon dioxide tax, and members of the company's leadership advocated for a carbon dioxide tax. It is irresponsible for a company that produces fossil fuels to advocate for such a tax, which will hurt its financial bottom line and therefore its shareholders' interests.

6. On May 17, 2022, NLPC proposed a resolution at JPMorgan Chase & Co.'s annual shareholder meeting that would require the company to take steps to increase viewpoint diversity on its board. NLPC proposed this resolution given that JPMorgan's CEO had said that the company is "committed to align key sectors of our financing portfolio with the goals of the Paris Agreement." The Paris Agreement on "climate change" calls for sharp reductions in carbon emissions.

7. On June 9, 2022, NLPC submitted a resolution at Salesforce, Inc.'s annual shareholder meeting that would require the board to implement a policy to require the chair of the board of directors to be an independent member from the CEO. This was partly due to the chairman's use of the company to promote his political views on "climate change."

8. NLPC has money that it wants to invest in a way that maximizes its financial returns and in a socially responsible manner. NLPC believes that expanding fossil fuel production will benefit society by fueling economic growth, which will increase the standard of living for the poor and middle class. Because alleviating poverty is a laudable goal, the "Moral Case for Fossil Fuels" is strong. *See* Alex Epstein, *The Moral Case for Fossil Fuels* (2014). Not only that, low-cost fossil fuels underwrite the economic and military strength of the United States and are therefore important for national security. This nation's continued leadership on the global stage ensures the security of Americans' freedom and the freedoms enjoyed throughout the rest of the free world. Therefore, investing in companies that produce and use fossil fuels is socially responsible.

9. Given NLPC's views on fossil fuels, NLPC opposes the SEC's Enhancement and Standardization of Climate-Related Disclosures for Investors ("Disclosure Rule"). The rule would coerce companies into curtailing the production and use of fossil fuels to appease "climate change" activists. Not only that, the Disclosure Rule would also increase the compliance costs of companies in which NLPC owns shares. And the lengthy disclosures would overload investors like NLPC with immaterial information and undermine the whole of purpose of the disclosures in the first place—helping investors gauge the financial strength of a company. Thus, the Disclosure Rule would harm NLPC's financial interests and its desire to invest in a socially and financially responsible way.

10. Additionally, because NLPC buys stocks and makes shareholder proposals to educate investors and the public about companies' political agendas, the Disclosure Rule would harm NLPC by reducing the opportunities it has to engage in advocacy and education. Indeed, without the Disclosure Rule, climate change activists likely would make shareholder proposals of their own, calling for the company to make disclosures that are similar to what the Disclosure Rule requires. If that

occurred, NLPC would have the opportunity to propose resolutions of its own calling for the company not to make such disclosures. This would allow NLPC to engage in advocacy and educate the public. But if the Disclosure Rule takes effect, it would be less effective for NLPC to propose shareholder resolutions calling for the company not to disclose its contributions to "climate change" because the company could simply say that it has no choice but to comply with the Disclosure Rule. The loss of opportunities to engage in advocacy and education on this matter through shareholder resolutions and speeches at shareholder meetings likely would cause NLPC to lose donations that it otherwise would have received. This would harm NLPC's financial interests and, therefore, its ability to carry out its mission of holding companies accountable and educating the public.

11. NLPC submitted a comment opposing the proposed version of the Disclosure Rule during its notice and comment period.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 3, 2024.

Peter Flaherty

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

National Legal & Policy Center and Oil & Gas Workers Association, Petitioners, v. Securities Exchange Commission, Respondent.	Case No. 24-1685

DECLARATION OF MATTHEW CODAY

Pursuant to 28 U.S.C. § 1746, Matthew Coday declares as follows:

1. I am over 18 years old and have personal knowledge of the facts described herein.

2. I am the President of the Oil & Gas Workers Association, which is a Petitioner in this case.

3. ("OGWA") is a grassroots, independent, nonpartisan 501(c)(6) nonprofit trade association founded in 2015 by a worker in the oil and gas industry. OGWA is dedicated to securing, growing, and sustaining American oil and gas jobs, representing the interests of all individuals

working in the U.S. oil and gas industry, as well as those whose jobs are supported by this vital sector.

4. OGWA operates across the United States, advocating for the oil and gas workforce. It collaborates with lobbyists, attorneys, consultants, and educators to advance the industry's image and represent American workers on legislative and regulatory issues impacting their livelihoods.

5. OGWA's member oil and gas workers will be harmed by the SEC's rules mandating climate-related disclosures, who work for companies subject to the new rule or in an industry directly affected by the rule. The SEC's rule compels companies that employ OGWA's members to undertake costly, burdensome, and intrusive measures to comply with the disclosure requirements. These measures will not only impose significant financial burdens, but also will divert resources from core operational activities, thereby threatening the sustainability and growth of the oil and gas jobs that OGWA seeks to protect on its members' behalf.

6. The injuries OGWA and its members will suffer of the SEC's new compelled disclosures will be substantial and ongoing. They include, but are not limited to, increased operational costs, potential competitive disadvantages, compelled speech based on politically motivated

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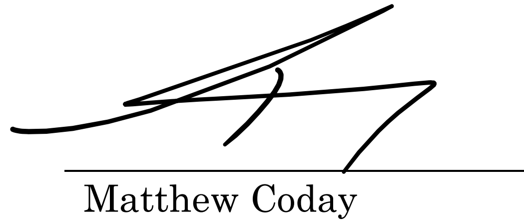
disclosure standards, and dilution of shareholder focus on essential financial performance and risk factors—all of which threaten the livelihoods of OGWA's members working in the oil and gas industry.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 3, 2024.



Matthew Coday

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