Nos. 24-1522, 24-1264, 24-1626, 24-1627, 24-1628, 24-1631, 24-1634, 24-1685 and 24-2173

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF IOWA, ET AL.,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

DISTRICT OF COLUMBIA, ET AL.,

Intervenors.

Petition for Review of an Order of the
United States Securities and Exchange Commission

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF FORMER SEC OFFICIALS AND SCHOLARS OF LAW, FINANCE AND ECONOMICS IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

1. Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Former SEC Officials and Scholars of Law, Finance and Economics hereby move for leave to file a brief as amici curiae in support of Respondent, the United States Securities and Exchange Commission. The prospective amici curiae have sought consent for this filing from parties' counsel. The Petitioners and Respondent have consented. The proposed amicus brief is filed herewith.

2. Movants include eight former Chairs, Acting Chairs, Commissioners, General Counsel, and Division Directors of the United States Securities and Exchange Commission (the "SEC") who served during both Republican and Democratic administrations, and 25 of the nation's most senior practitioners and scholars of securities law. Movants write solely to convey to the Court the broad, bipartisan consensus regarding the SEC's longstanding exercise of its statutory authority to require disclosure related to environmental matters.

For the foregoing reasons, the Former SEC Officials and Scholars of Law, Finance and Economics respectfully request leave to file the brief of amici curiae.

Dated: August 15, 2024

Respectfully submitted,

s/ Thomas W. Elrod

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Motion complies with Fed. R. App. P. 27(a) and the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 177 words.

The undersigned further certifies that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally-spaced typeface using Microsoft Word Version 2016 in Times New Roman 14 point font.

Dated: August 15, 2024

s/ Thomas W. Elrod
Thomas W. Elrod
Attorney for Amici

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 15, 2024, an electronic copy of the Motion was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that all participants are registered CM/ECF users and that service of the Motion will be accomplished by the CM/ECF system.

s/ Thomas W. Elrod
Thomas W. Elrod

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT AND RULE 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), there is no parent corporation or publicly held corporation that owns 10% or more of stock of any *amici curiae* described below.

Pursuant to Rule 29(a)(4)(E), undersigned counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

/s/ Thomas W. Elrod
Thomas W. Elrod

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INTEREST OF AMICI CURIAE

Amici include eight former Chairs, Acting Chairs, Commissioners, General Counsel, and Division Directors of the U.S. Securities and Exchange Commission ("SEC") who served during both Republican and Democratic Administrations, and 25 of the Nation's most senior practitioners and scholars of securities law.[1] *Amici* write solely to convey to the Court the broad, bipartisan consensus regarding the SEC's longstanding exercise of its statutory authority to require disclosure related to environmental matters. A complete list of *amici* is provided in the Appendix.

SUMMARY OF THE ARGUMENT

The SEC's statutory authority to require disclosure related to environmental matters is grounded in the clear language and structure of the Securities Act of 1933 and the Securities Exchange Act of 1934. The legislative history of both statutes makes that authority clear, the statutory language provides an intelligible limit to its scope, and the SEC has exercised it without question or challenge to mandate disclosure on environmental matters since the Nixon Administration.

Indeed, a bipartisan group of senior former SEC officials, academics, and leading securities practitioners responded to the SEC's proposal with an analysis concluding that there is "no legal basis to question SEC authority to mandate climate-related disclosures at public companies[, and although] we hold a wide

[1] *Amici* write solely in their individual capacities. Institutional affiliations are provided for identification only.

range of views on the specifics of the SEC's proposals . . . we are unanimous in our conclusion that the [SEC] has statutory authority to mandate climate-related disclosures."[2] Below, *amici* provide that analysis for the Court's consideration.

ARGUMENT

The language and structure of both the Securities Act and Exchange Act give the SEC authority to mandate disclosure related to securities-related risks and opportunities, limiting that authority to requirements "necessary or appropriate in the public interest or for the protection of investors."[3] For fifty years, the SEC has exercised that authority to require disclosures related to environmental matters.

Accordingly, a bipartisan group of former SEC officials, legal scholars and senior practitioners responded to the SEC's proposed rule by describing that long history, noting that, as recently as 2010, even opponents of SEC rules in this area did not doubt that the SEC had authority to mandate climate-related disclosures.[4]

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[2] Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, from Hons. Arthur Levitt, Harvey Pitt, Mary Schapiro & Elisse Walter et al. (June 16, 2022) (hereinafter "Bipartisan SEC Officials, Academics, and Leading Practitioners Letter"), *available at:* https://www.sec.gov/comments/s7-10-22/s71022-20131670-302060.pdf.

[3] *See*, *e.g.*, Section 7 of the Securities Act of 1933, 15 U.S.C. § 77g; *see also* Sections 12, 13, and 15 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 78m, 78o.

[4] Bipartisan SEC Officials, Academics, and Leading Practitioners Letter, *supra* n.2, at notes and text accompanying notes 12-17 ("Even opponents of [the SEC's 2010 guidance in this area] agreed that the SEC has authority to mandate environmental-related disclosures—and that such disclosures have long encompassed climate-

Amici provide that group's analysis of the SEC's long regulatory history related to disclosure of environmental matters for the Court's consideration below.

I. CONGRESS GAVE THE SEC BROAD AUTHORITY OVER THE CONTENT OF DISCLOSURES.

The legal authorities relied upon by the Commission in promulgating the challenged rules have served as the conventional authority for SEC disclosure rules for nearly a century.[5] These authorities are general in nature and, in unambiguous text, encompass disclosure of a range of securities-related risks and opportunities.

A. The Statutory Authority in the Securities Act.

Section 7 of the Securities Act of 1933 gives the Commission[6] unambiguous authority to specify the contents of disclosure documents used to register securities

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related matters." (citing Commissioner Troy Paredes, *Commission Guidance Regarding Disclosure Related to Climate Change* (Jan. 27, 2010) ("[A] number of [SEC] disclosure requirements have long related to environmental matters," and leading law firms have provided "analyses . . . explaining" SEC "disclosure requirements regarding climate change"))).

[5] This analysis is drawn substantially from comments submitted by *amicus* Professor John Coates to the Commission in response to its proposing release. *See* Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, from Professor John C. Coates, John F. Cogan Professor of Law and Economics, Harvard Law School (June 2, 2022), *available at:* https://www.sec.gov/comments/s7-10-22/s71022-20130026-296547.pdf.

[6] The relevant "Commission" at the time the 1933 Act became law was the Federal Trade Commission, which briefly was the Nation's principal securities regulator—until Congress created the SEC in the 1934 Act. *See*, *e.g.*, Commissioner Robert Jackson, *Competition: The Forgotten Fourth Pillar of the SEC's Mission*, n.14 (Oct. 11, 2018) (citing Letter of Felix Frankfurter to Franklin D. Roosevelt, President of the United States (May 23, 1934)).

for sale to the public. As explained below, the text, structure, and history of the statute conveys the Commission's authority clearly—and provides an intelligible limiting principle to its exercise.

1. Statutory text and structure. As relevant here, Section 7(a)(1), governing the content of registration documents, essentially has three parts. First, Section 7(a)(1) states that companies are required to disclose a specified list of information and documents set out in Section A thereto. That schedule contains not only financial items, but also qualitative, open-ended information, such as the "general character" of the company's business, compensation, and material contracts.[7]

Second, Section 7(a)(1) reinforces the breadth of information required by Schedule A by requiring consents from any "accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made" in a registration statement.[8] Thus, Congress expected that registration statements may include information from engineers and other non-financial professionals (for example, experts on environmental matters). If useful for "the protection of investors," Congress instructed, disclosure was not to be limited to the four corners of, or even to commentary on, financial statements.[9]

Third, the final sentence of Section 7(a)(1) makes clear that:

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[7] 15 U.S.C. § 77aa.

[8] *Id.* § 77k(a)(4).

[9] *Id.* §§ 77g, 77j(c).

> Any such registration statement shall contain such *other information*, and be accompanied by such other documents, *as the Commission may by rules* or regulations require as being necessary *or appropriate* in the public interest *or* for the protection of investors.[10]

Thus, the plain language of the 1933 Act makes clear that Congress expected and directed the Commission to go beyond the content for registration statements specified in the Act, even granting authority to mandate more than what is "necessary" to include what the Commission concludes is "appropriate" for the protection of investors or in the public interest.[11] Congress expected the newly formed Commission to use expert judgment to update disclosure mandates over time as new or newly identified issuer risks and opportunities emerged.

Moreover, the 1933 Act includes a general limit to the SEC's authority: it may mandate *disclosure*, but not *conduct*, requirements, so the law does not allow the Commission to limit securities offerings—for example, to those that are not unduly risky—but only to require disclosure. The Act also contains a specific limit to the SEC's securities-related disclosure authority, that it be used for the "protection of investors." These limits are meaningful and distinguish the SEC's

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[10] *Id.* § 77g(a)(1) (emphases added).

[11] By contrast, other statutory authorities—including some given to the Commission, such as its powers pursuant to Section 19(a) of the Securities Act—are limited to what is "necessary" (and not merely "appropriate") for specific purposes. 15 U.S.C. § 77s(a) ("The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter . . . .").

role from that of other agencies. Subject to those limits, however, the Act does not limit the SEC's authority in other ways, such as to limit disclosures to those that are "related" or "similar" to the items in Schedule A, or "material" or "financial," despite the fact that Congress frequently used those very qualifiers elsewhere in the statute.[12]

The structure of the 1933 Act and the context of this authorizing language reinforces these conclusions. Section 7 follows sections defining relevant terms,

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[12] The modifier "similar" is used thirty-five times as a qualifier in the 1933 Act (for example, in Sections 2(a)(4), 2(a)(13), 2(a)(18), 2A(b)(4), 3(a)(2), 3(a)(5), 4(c)(1)(A), and 27A(h)), and seventy-one times in the 1934 Act (for example, in Sections 3(a)(4), 3(a)(6), 3(a)(7), and 3(a)(11)). Congress used the word "related" many times, too (for example, in Sections 3(b)(2)(G), 4(c)(1)(A), and 4A(a)(3) of the 1933 Act and Sections 3(a)(4), 3(a)(40), 3(a)(53A) and 6(h)(3) of the 1934 Act). The word "financial" is used 35 times in the 1933 Act and the word "material" is used 37 times, but neither is used in the heading to the section governing disclosure requirements, "Information Required in the Registration Statement," or otherwise used to limit the authorities described above. *See*, *e.g.*, *Utah Power & Light Co. v. I.C.C.*, 747 F.2d 721, 727 (D.C. Cir. 1984) (noting that such "heading[s]" can "indicate[] the intent of the legislature"); *see also id.* at 744 (Ginsburg, J., concurring).

Because the general requirement of disclosure of "such other information" as the Commission requires does not follow Schedule A or any specific list of disclosures, and instead rests in a separate sentence, separated from the mention of Schedule A by sentences addressing other topics, with its own sentence-specific qualification ("for the protection of investors") that is not part of the Schedule A sentence, the *ejusdem generis* cannot be understood to add any further implied limit on its meaning, and in the ninety years since the Act became law no court has, to *amici*'s knowledge, located such a limit. In context, it is clear that the statutory phrase "such other information" does not refer back to Schedule A, but refers forward to the limiting phrase, "as the Commission may by rules . . . require . . . for the protection of investors." 15 U.S.C. § 77g(a)(1).

such as "securities," limiting the law to interstate commerce or use of the mails, consistent with the Constitution's limits on federal authority, and requiring registration of securities offerings, which establishes the role for the disclosure mandates authorized by Section 7. The caption to Section 7—"Information Required in Registration Statement"—contains no qualifiers on "information." The authorizing language in Section 7(a)(1) is limited by Section 7(a)(2), but only for a designated class of "emerging growth companies," and not as to content.[13] The limitations in Section 7(a)(2) were imposed in 2012—by which time, as further explained below, the Commission had repeatedly relied on the language in Section 7(a)(1) to require environmental-related disclosures.[14] Congress in 2012 thus ratified longstanding Commission exercises of the unambiguous authority conferred by Section 7(a)(1).

2. Legislative history. As noted above, the plain language of the 1933 Act could not be clearer in directing the Commission to do what it did in the challenged rule: specify the details of disclosure appropriate to protect investors, based on its

[13] 15 U.S.C. § 77g(a)(2).

[14] Bipartisan SEC Officials, Academics, and Leading Practitioners Letter, *supra* n.2, at 2 ("[T]he SEC and practitioners have understood for years [the 1933 Act] authorize[s] the Commission to mandate climate-related disclosure for public companies.").

factfinding and expert judgment.[15] This plain language finds support in the legislative history—and in generations of legislative, executive, and judicial understanding of the statute's meaning.

A draft of what would become the 1933 Act in the Senate listed disclosure items directly in the statute, but it did not contain the language described above directing the Commission to issue rules that go beyond that list when appropriate for the protection of investors. The addition of this language in the final bill indicates that the broader authority contemplated by that language was consciously added during the legislative process.[16]

By contrast, proposals to give the Commission discretion to approve or disapprove of the "soundness" of stock offerings was rejected by Congress; instead, the 1933 Act in the end embraced full and fair disclosure as the method to protect investors.[17] This legislative choice—disclosure, but not merit review—is an important and intelligible principle limiting the Commission's general authority.

At hearings on what became the 1933 Act, the Senate heard testimony advocating longer or shorter periods of time to be addressed by financial

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[15] *Cf. Gundy v. United States*, 588 U.S. 128, 158 (2019) (Gorsuch, J.) ("[O]nce Congress prescribes [a] rule governing private conduct, it may make the application of that rule depend on executive fact-finding.").

[16] *Hearings before S. Comm. on Banking & Currency*, S. 875, 73d Cong., 1st Sess. (March 31 to April 8, 1933) [hereinafter "Senate Hearings"].

[17] *Id.* at 63.

statements, specific proposals for additions to, or eliminations from, the list of disclosure items, arguments about whether audits should be done by reference to industry peers, and how expensive audits would be. The resulting awareness of the need for detailed specification of disclosures led to the delegation of authority reflected in the 1933 Act. During the hearings, a former FTC Chair and Commissioner, and advisor to President Roosevelt, explained that:

> [W]e were trying not to have this bill [be] too long. I think it is only about 30 pages, while the British Companies Act is over 300 pages. But we do have a provision in the bill which permits the Commission to set up rules and regulations which will have the effect of law. In those rules and regulations we expected them, in drafting their forms, to go more into detail with regard to [disclosure] requirements.[18]

In other words, the 1933 Act's delegation to the Commission was deliberate, specifically intended to apply to required disclosures, and reflected the sensible conclusion that Congress itself could not reasonably work out in detail the choices needed to develop and keep up to date an appropriate securities disclosure regime.

B. The Statutory Authority in the Exchange Act.

One of the primary purposes of the Securities Exchange Act of 1934 was to augment the 1933 Act by giving the SEC authority to require ongoing reports—beyond the time of the initial sale of securities governed by the 1933 Act—by

[18] *Id.* at 72 (quoting testimony of Huston Thompson).

companies with securities traded on stock exchanges.[19] The Exchange Act's text and legislative history make clear that Congress conveyed to the Commission authority to prescribe the content of those reports.

1. Statutory text. Section 12 of the Exchange Act conditions exchange-trading privileges on disclosure by companies with registered securities of:

> *[S]uch information, in such detail*, as to the [company] . . . as the *Commission may by rules and regulations require*, as necessary *or appropriate* in the public interest *or for the protection of investors*, in respect of the following: . . . the organization, financial structure, and nature of the business.[20]

Section 13(a) of the 1934 Act goes further still, and requires companies to disclose under rules that the Commission:

> [M]ay prescribe as necessary *or appropriate for the proper protection of investors* and to insure fair dealing in the security . . . [and to provide information in] such annual reports . . . and such quarterly reports . . . as *the Commission may prescribe*.[21]

Again, this language is not limited to what is "necessary" to protect investors but gives the Commission discretion to specify what information is "appropriate" to protect investors and markets based on expert factfinding. As with the 1933 Act,

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[19] *See Gallagher v. Abbott Labs.*, 269 F.3d 806, 809 (7th Cir. 2001) (Easterbrook, J.) ("The 1933 Act requires firms to reveal information only when they issue securities"; the 1934 Act "add[ed] that the SEC may require issuers to file annual and other periodic reports").

[20] 15 U.S.C. § 78l(b)(1) (emphases added).

[21] *Id.* § 78m(a) (emphases added).

this statutory language imposes no subject-matter restriction on the Commission's authority to mandate these reports.[22]

As with the 1933 Act, the SEC's authority over periodic reports is not unbounded: it is limited to trading in the interstate securities markets or involving use of the mails and by the phrase "appropriate for the proper protection of investors."[23] Consistent with Congress's careful crafting of these provisions, the 1934 Act requires that SEC rules be appropriate "to insure fair dealing in the security," reflecting the fact that the 1934 Act was designed to govern securities that were already trading on securities markets.

2. Legislative history. As explained above, the 1934 Act's language is clear; resort to legislative history is not necessary to understand its meaning. Nevertheless, that history supports the statute's plain, broad grant of authority to the Commission.

Congress's grant of disclosure authority under the 1934 Act addressed more than the need to protect the initial investor acquiring securities. The purpose of disclosure was also to protect markets and market pricing, and improve the resulting allocation of capital. As the House Report accompanying the 1934 Act explained:

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[22] The statute does not say, for example, that the Commission may mandate only the content of "annual *financial* reports," but "annual reports." *Id.* § 78m(a)(2).

[23] *Id.* § 78m(a).

> The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value. . . . The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market.[24]

Indeed, disclosure operates to align market prices with investment risk and returns, albeit sometimes with delay and error. Congress's recognition of that fact is consistent with its grant of authority to the Commission to make ongoing refinements in disclosure requirements as circumstances warrant.

Congress also recognized that full and fair disclosure would enhance investor confidence. Without such confidence, Congress reasoned:

> [E]asy liquidity of the resources in which wealth is invested is a danger rather than a prop to the stability of [the market] system. When everything everyone owns can be sold at once, there must be confidence not to sell.[25]

These understandings help explain Congress's decision to direct the SEC to specify the content of additional disclosures under the 1934 Act. Congress expected that emerging risks and opportunities would require the Commission to

[24] H.R. Rep. No. 73-1383, 73d Cong., 2d Sess., at 11 (1934).

[25] *Id.* at 5.

adapt that content as necessary to maintain efficient capital market pricing and investor confidence over time, and gave the SEC authority to do so.

Although "we emphasize" that both the Securities Act and the Exchange Act have long given the SEC "free[dom] to make" the "policy judgment" whether any specific disclosure item should be limited to material information,[26] it may be "prudent" for the Commission to make that policy judgment in some cases.[27] Here, between proposing and finalizing the challenged rules, the Commission received commentary indicating that investors "require access" to "material [climate]-related information from corporate issuers that is accurate, comparable, and timely."[28] In response to that commentary, the Commission chose to limit many of the challenged provisions on the basis of materiality. That choice places the rules even more comfortably within the SEC's longstanding statutory authority.

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[26] Letter to Vanessa Countryman from Jill E. Fisch & George S. Georgiev et al., at 14-15 (June 6, 2022), *available at:* www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf.

[27] Letter to Vanessa Countryman from Hons. Paul Atkins, Richard Breeden, Philip R. Lochner, Harvey L. Pitt, & Richard Y. Roberts, at 2 (June 17, 2022), *available at:* www.sec.gov/comments/s7-10-22/s71022-20132519-303005.pdf.

[28] INVESTMENT COMPANY INSTITUTE, ICI BOARD UNANIMOUSLY CALLS FOR ENHANCED ESG DISCLOSURE BY CORPORATE ISSUERS (Dec. 7, 2020), *available at:* https://www.ici.org/news-release/20_news_esg.

II. THE SEC'S LONGSTANDING EXERCISE OF ITS AUTHORITY TO REQUIRE DISCLOSURE ON ENVIRONMENTAL MATTERS.

Since the Nixon Administration, the Commission has exercised the broad authority conveyed by the Securities Act and Exchange Act to require disclosure on environmental matters. During the comment period preceding adoption of the challenged rule, a bipartisan swath of fifteen former SEC officials (including four Chairs, five Commissioners, five General Counsels, and four Directors of the Division of Corporation Finance), along with seventeen senior scholars of corporate, securities, and administrative law, accounting and finance, and leading securities practitioners, documented that history in detail.[29]

That bipartisan group differed in their views on the policy choices the Commission had made in its proposing release—and might make in a final rule. But they expressed their "unanimous view [that] the SEC has clear statutory authority to mandate additional climate-related disclosures for publicly traded

[29] *See*, *e.g.*, *U.S. Telecom Assoc. v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("The key reason for the [major-questions and delegation] doctrine[s] . . . is the strong presumption of *continuity* for major policies unless and until Congress has deliberated about and enacted a change in those major policies." (emphasis added) (quoting WILLIAM N. ESKRIDGE, JR., INTERPRETING THE LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288 (2016)); *see also Biden v. Missouri*, 595 U.S. 87, 95 (2022) (*per curiam*) ("Of course the vaccine mandate goes further than what the Secretary has done in the past . . . . But . . . there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what he does.").

companies" and that there is "no legal basis to doubt the Commission's authority to mandate public-company disclosures related to climate."[30]

Amici agree, and adopt the careful analysis set forth by that group.[31] Rather than paraphrase, *amici* reproduce their work below for the Court's consideration:

> In a 1971 release, the SEC "called attention to the requirements" under the Securities Act of 1933 and the Securities Exchange Act of 1934 "for disclosure of legal proceedings and a description of the registrant's business as these requirements relate to material matters involving the environment and civil rights."[32]

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[30] Bipartisan SEC Officials, Academics, and Leading Practitioners Letter, *supra* n.2, at 1-2. Note too that the SEC's Chairman during the Trump Administration described in detail the agency's efforts related to climate disclosures, making clear that the SEC had been "actively engaged on [climate related disclosure efforts] for over a decade." Chairman Jay Clayton, U.S. Sec. & Exch. Comm'n, *Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures* (Jan. 30, 2020), https://www.sec.gov/newsroom/speeches-statements/clayton-mda-2020-01-30. *Compare* Jay Clayton & Patrick McHenry, *The SEC's Climate-Change Overreach*, Wall St. J. (Mar. 20, 2022), https://www.wsj.com/articles/the-secs-climate-change-overreach-global-warming-risks-lawmakers-invertors-market-data-11647801469.

[31] Three of the former officials, the late Harvey Pitt, Roberta Karmel, and Giovanni Prezioso, passed away after the letter was filed with the Commission. The letter's analysis drew especially heavily on a law review article authored by former Chairman Pitt, who also previously served as SEC General Counsel. Theodore Sonde & Harvey Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!,"* 16 HOWARD L.J. 831, 850 (1971).

The block quote in the text is drawn directly from the group's submission, *see* Bipartisan SEC Officials, Academics, and Leading Practitioners Letter, *supra* n.2. *Amici* do not reproduce the letter in its entirety, but note that its remaining content is consistent with the excerpted text. *Compare supra* n.27, Letter to Vanessa Countryman from Atkins et al. at 4 ("The standard for any additional disclosure requirements regarding climate-related risks should remain financial materiality.").

[32] Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Release Nos. 33-5170, 34-9252, 36 Fed. Reg. 13,989, 13989 (July 29, 1971)

> Thus, nearly fifty years ago, the SEC concluded that environmental disclosure would "promote investor protection."[33] At the same time, the SEC found, such disclosure would "promote the purposes of" the National Environmental Policy Act of 1969 ("NEPA"), which was adopted months before President Nixon created the Environmental Protection Agency ("EPA"). That the SEC had authority to require that disclosure was not controversial. One future General Counsel and Chairman of the Commission wrote then that the SEC "should impose affirmative environmental disclosure requirements upon all corporate entities subject to its jurisdiction"; "[t]hat the Commission's authority is not so limited as to preclude such an approach," he thought, "is apparent from a reading of its statutory authority."[34]
>
> In 1975, the SEC considered petitions for further disclosure mandates on environmental matters. After 19 days of public hearings producing a 10,000-page record, the Commission concluded that NEPA did not *require* the SEC to mandate such disclosures, and the courts later agreed.[35] While the SEC in the 1971 release had limited disclosure to

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(hereinafter "1971 Release"); *see also* Sonde & Pitt, *supra* n.31, at 850. The SEC informed issuers not disclosing information under the 1971 Release that it would be "the practice of the Division of Corporation Finance to request registrants to furnish" to the SEC a "description of the omitted information" and a "statement of the reasons for its omission." 1971 Release at 13,989.

[33] Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release Nos. 33-5386, 34-10116, 38 Fed. Reg. 12,100 (May 9, 1973) (citing NEPA, 42 U.S.C. §§ 4321 *et seq.*). These rules reflected growing issuer disclosures in this area. For example, in 1970 the Florida Power and Light Company, Armco Steel Corporation, and the Consolidated Edison Company all provided disclosures to investors regarding environmental matters. Sonde & Pitt, *supra* n.31, at 854 (citing Consolidated Edison Co., Inc., SEC File No. 2-38155 (Sept. 17, 1970) (noting issuer's commitment "to use 0.37% sulfur content fuel oil for its entire system")).

[34] Sonde & Pitt, *supra* n.31, at 850.

[35] *Nat. Res. Def. Council v. SEC*, 606 F.2d 1031, 1043, 1051 (D.C. Cir. 1979) (Congress has given SEC "complete discretion" "to require in corporate reports" "such information as it deems necessary" "to protect investors," and "NEPA made environmental considerations part of the SEC's mandate").

"material matters," in 1975 the Commission mandated disclosure of all environmental proceedings to which a government was a party, whether or not the amounts at issue were material. The SEC explained:

> [W]e believe that NEPA requires and authorizes the Commission to consider the promotion of environmental protection along with other considerations in determining whether to require affirmative disclosures by registrants under the Securities Act and the . . . Exchange Act . . . . [W]hile the disclosure of non-material information is generally not required for the reasons discussed [above], adding the promotion of environmental protection to the other factors considered by the Commission in the administration of the disclosure process causes a different balance to be struck here. . . .
>
> . . . . By requiring a description of all such litigation, regardless of whether the amount of money involved is itself material, the Commission believes it has given recognition to both the importance of the national environmental policy and the far-reaching effects, both financial and environmental, of violations of environmental laws.[36]

[36] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, Release No. 5627 (Oct. 14, 1975), at 3; Notice of Commission Conclusions and Final Action on the Rulemaking Proposals Announced in Securities Act Release No. 5627 Related to Environmental Disclosure, Release No. 5704 (May 6, 1976), at 7.

While the courts have made clear that NEPA does not require agencies to take particular action, it is equally clear that NEPA permits consideration of environmental issues in an agency's administration of its organic statutes. The SEC thus promulgated environmental-disclosure rules under the 1933 and 1934 Acts that were prompted by the enactment of NEPA. Notice of Commission Conclusions and Rulemaking Proposals, Release No. 33-5627 (Nov. 6, 1975) ("[t]he [SEC] has concluded that" "it is authorized and required by [NEPA] to consider the promotion of environmental protection as a factor in exercising its rulemaking authority"). The Council of Environmental Quality (CEQ) has promulgated NEPA regulations making clear that each agency "shall interpret

> Importantly, the SEC also concluded that Congress expected SEC disclosure authority to be used to "require the dissemination of information which is or may be economically significant" for investors. In 1975, the SEC found, "there [was] virtually no investor interest in voluminous information" related to climate.[37] That was true, in part, because there was no "uniform method by which the environmental effects of corporate practices may be described," and in part because "both the costs to registrants and the administrative burdens involved . . . would be excessive." But the Commission also made clear that the SEC's "broad discretion to require disclosure provides necessary latitude to expand or contract disclosure rules in light of changes in the relevant context in which securities issuers conduct their business."[38]
>
> Thus, the SEC mandated extensive disclosure of environmental proceedings, making clear that the Commission would recalibrate this disclosure standard over time. And indeed the SEC did so, responding

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[NEPA] as a supplement to its existing authority and as a mandate to view policies and missions in the light of the Act's national environmental objectives." 40 C.F.R. § 1500.6. Although the CEQ "comprehensively updated" its NEPA rules in July 2020, the Trump Administration retained that interpretive text. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,359 (2020).

[37] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* n.36, at 51,658; *Nat. Res. Def. Council*, 606 F.2d at 1039 (the securities laws, "in the [SEC]'s view, were designed" "to require disclosure of financial information in the narrow sense only.").

[38] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* n.36; Sonde & Pitt, *supra* n.31, at 850 ("[T]he federal securities laws embody a flexible approach to corporate disclosure designed to be molded to the needs of the times." (citing then-Professor, and later Supreme Court Justice, Felix Frankfurter, *The Securities Act: Social Consequences*, FORTUNE (1933), at 53 ("social standards newly defined [may] establish themselves as new business habits")).

to Staff experience with that standard by making adjustments to these rules in the 1980s.[39]

In 2010, in light of decades of experience with these disclosures, the SEC took further regulatory action in the form of Commission-level guidance regarding when climate-change developments require disclosure under SEC rules. Noting that legislation, regulation, international accords, business trends, and physical impacts of climate change could all affect a registrant's operations or results, the release "remind[ed] companies of their obligations under existing federal securities laws" "to consider climate change and its consequences as they prepare documents to be filed with us and provided to investors."[40]

Even opponents of the guidance agreed that the SEC has authority to mandate environmental-related disclosures—and that such disclosures have long encompassed climate-related matters. One Commissioner who dissented on policy grounds nevertheless noted that the SEC's "disclosure regime related to environmental issues *including climate change* is highly developed and robust, and registrants are well aware of, and have decades of experience complying with, these disclosure requirements."[41] Another dissenting Commissioner said that "a number of [SEC] disclosure requirements have long related to environmental matters," pointing to many "analyses from law firms

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[39] In 1981 the SEC proposed to limit these disclosures to cases involving proceedings that produce fines exceeding $100,000 in light of Staff experience under the prior standard. Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings, 46 Fed. Reg. 25,638, 25,639 n.17 (May 8, 1981) (citing SEC, Staff Report on Corporate Accountability, 96th Cong., 2d Sess. (Comm. Print 1980)); Adoption of Integrated Disclosure System, 47 Fed. Reg. 11380 (March 16, 1982).

[40] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469, FR-82 (Feb. 8, 2010).

[41] Commissioner Kathleen Casey, Interpretive Release Regarding Disclosure of Climate Change Matters (Jan. 27, 2010) (emphasis added); *see also id.* (arguing that the 2010 guidance was premised on the "false notion that registrants may not recognize that disclosure related to 'climate change' issues may be required" under the securities laws).

> explaining" SEC "disclosure requirements regarding climate change."[42] And Members of Congress who wrote the SEC to object to the guidance as a policy matter agreed that "the SEC has had the long standing authority to impose requirements on companies to disclose environmental risk."[43]
>
> Moreover, in response to the Commission's 2010 guidance dozens of major law firms counseled clients regarding their climate-change related disclosure obligations under the securities laws.[44] Although law firm memoranda on that subject were often signed by former or future Commission officials, and many described policy objections to the guidance in detail, sophisticated counsel did not contend that the SEC lacked authority to require disclosure in this area.[45]

To the degree that judicial oversight of agency authority is, as then-Judge Kavanaugh explained, concerned with the "strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a

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[42] Paredes, Commission Guidance Regarding Disclosure Related to Climate Change, *supra* n.4.

[43] Letter to Hon. Mary Schapiro from Congressman Bill Posey et al. (Mar. 15, 2010).

[44] *See*, *e.g.*, SULLIVAN & CROMWELL LLP, SEC PROVIDES GUIDANCE TO PUBLIC COMPANIES ON CLIMATE CHANGE DISCLOSURE (Feb. 5, 2010) (advising clients that the 2010 guidance addressed "application of the SEC's existing disclosure requirements to climate change matters").

[45] DAVIS POLK, ENVIRONMENTAL DISCLOSURE IN SEC FILINGS—2011 UPDATE (Jan. 11, 2011) (cataloging objections to the guidance from regulated energy producers and Members of Congress that the guidance "require[d] too much speculation by registrants," could "discourage voluntary disclosures," and "advance[d] a political agenda," but not that the SEC had exceeded its authority with the guidance or previous environmental disclosure mandates (citing Letter to Hon. Mary Schapiro from Richard McMahon, Executive Director, Edison Electric Institute (July 13, 2010) and Letter to Hon. Mary Schapiro from Representative Spencer T. Bachus et al. (Feb. 2, 2010)).

change in those major policies," *amici* note for the Court that the Commission has, for fifty years, continuously exercised its authority under the 1933 and 1934 Acts to require disclosures related to the environment.[46] As the Supreme Court recently observed in rejecting claims similar to those advanced here, "[o]f course the" challenged rule "goes further than what the [SEC] has done in the past," "[b]ut" "there can be no doubt that" mandating disclosure "is what [the SEC] does."[47]

CONCLUSION

Environmental disclosures, including those related to climate-change risk, fall well within the disclosure authorities granted by Congress to the SEC. This is clear from the text and structure of both the Securities Act and Exchange Act. That authority, as reflected in the broad bipartisan consensus described above, has been continuously exercised by the SEC for over half a century.

August 15, 2024.

[46] *U.S. Telecom Assoc.*, 855 F.3d at 422 (Kavanaugh, J.).

[47] *Missouri*, 595 U.S. at 95.

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CERTIFICATE OF SERVICE

I certify that on August 15, 2024, I served a copy of the foregoing on all counsel of record by CM/ECF.

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CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) & (7)(B). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 5,744 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: August 15, 2024.

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