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SEC "AUTHORITY" AND THE "MAJOR QUESTIONS" DOCTRINE

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ABSTRACT

When West Virginia v. EPA *appeared on the Supreme Court's docket, the Court was set to determine the authority of the U.S. Environmental Protection Agency ("EPA") to reduce the impact of climate change. However, the Court took the opportunity to impose a significant judicial restraint on all federal agency rulemakings. No doubt, the U.S. Securities and Exchange Commission ("SEC") and other agencies are reviewing their recently adopted rules and proposed regulatory agendas to conform to the Court's first comprehensive application of the "major questions" doctrine. The EPA decision will affect a host of SEC regulatory hot-button areas, such as ESG matters, corporate board diversity and cryptocurrency regulations.*

Justice Roberts, writing for the Court's majority, explained the major questions doctrine as one that should apply to "extraordinary cases" of administrative acts, where the history and the breadth of the authority asserted by the agency, and the economic and political significance of that assertion, provide "a reason to hesitate" before concluding that Congress meant to confer such authority. In such extraordinary cases, the agency instead must point to "clear congressional authorization" for the power it claims.

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This Article examines the major questions doctrine's impact on the SEC's future regulatory rulemaking under the federal securities laws. In doing so, the Article will engage in a case study using the SEC's recently proposed rules that would require climate-related risk disclosures to consider how the Court likely would evaluate these and other SEC regulations. The insights learned should portend a refined approach to the Commission's regulatory actions.

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INTRODUCTION

WHEN *West Virginia v. EPA*[1] appeared on the Supreme Court's docket, the Court was set to determine the authority of the U.S. Environmental Protection Agency ("EPA") to reduce the impact of climate change. However, the Court took the opportunity to impose a significant restraint on *all* federal agency rulemakings. The U.S. Securities and Exchange Commission ("SEC"), along with other agencies, no doubt are reviewing their recently-adopted rules and proposed regulatory agendas to conform to the Court's first comprehensive application of the major questions doctrine. The *West Virginia v. EPA* decision will affect a host of SEC regulatory hot button areas, such as climate-related risk disclosures for public companies, investment advisory considerations of environmental, social and governmental ("ESG") factors, and corporate board diversity disclosures.

Of course, the SEC has always been required to act within the scope of its legislative authority. As one court stated, "clearly the 'place limitations' language [with respect to broker-dealer sanctions] requires some concept of the relevant domain. Even the Commission doesn't suggest that the phrase allows it to bar one of the offending parties from being a retail shoe salesman, or to exclude him from the Borough of Manhattan."[2] Moreover, SEC regulations have been subject to judicial challenge on grounds that they did not sufficiently consider various economic standards; that they were adopted in an "arbitrary or capricious" manner; or that they violated commercial First Amendment rights. *West Virginia v. EPA* added another rulemaking hurdle, which the Court referred to as the major questions doctrine.[3]

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1 142 S. Ct. 2587 (2022).
2 Teicher v. SEC, 177 F.3d 1016, 1019 (1999).
3 *West Virginia*, 142 S. Ct. at 2605.

Justice Roberts, writing for the majority, explained the major questions doctrine as one that should apply to "*extraordinary cases*" of administrative acts, where the "history and the breadth of the authority" asserted by the agency, and the "economic and political significance of that assertion, provide *a reason to hesitate* before concluding that Congress meant to confer such authority."[4] In such extraordinary cases, the agency instead must point to "*clear congressional authorization*" for the power it claims.[5] In holding that the EPA rule at issue – which required that existing coal-fired power plants reduce their own production of electricity or subsidize increased electric generation by natural gas, wind, or solar sources – presented such a case, the Court struck down the rule.[6]

This Article examines the major questions doctrine's impact on the SEC's future regulatory rulemaking under the federal securities laws. First, the Article considers prior successful regulatory challenges against the agency. Takeaways from this precedent are summarized to put the major questions doctrine in proper context, given that future plaintiffs likely will add the doctrine to their arsenal of arguments that have worked in the past. Next, the Article considers the history of the major questions doctrine, which was explicitly addressed by a lower court prior to the Supreme Court's decision in *West Virginia v. EPA*. The Article will then analyze the *West Virginia v. EPA* decision, focusing in particular on the Court's framing of the major questions doctrine in the broader regulatory context, as well as Justice Gorsuch's concurring opinion, which proposes an alternative approach to the one set forth in the Court's majority opinion.

Thereafter, the Article will engage in a case study using the SEC's recently proposed rules that would require climate-related risk disclosures to consider how the Supreme Court likely would evaluate these and other SEC regulations. Based on this analysis, the article establishes that the SEC should be on relatively safe ground – regarding the proposed climate-related risk disclosures and certain other rulemaking priorities – provided that the agency proceeds with a well-documented basis for its actions.

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4 *Id.* at 2608 (citations omitted) (emphasis added).

5 *Id.* at 2609 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (emphasis added). Justice Gorsuch's concurring opinion tied the importance of this doctrine to the "explosive growth of the administrative state since 1970." *Id.* at 2619 (Gorsuch, J., concurring).

6 *Id.* at 2616-17.

I. SUCCESSFUL COURT CHALLENGES AGAINST SEC REGULATIONS

Since this article addresses how *West Virginia v. EPA* will affect future SEC regulations, we provide as background a discussion of successful regulatory challenges against the agency. Plaintiffs likely will add the major questions doctrine to arguments that have worked in the past. For example, plaintiffs have successfully claimed that:

1. The Commission exceeded its rulemaking "authority" under a particular provision of the federal securities laws or misinterpreted its Congressional mandate.[7]

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[7] Relevant to the doctrine of an administrative agency's "authority" is the "deference" – under the *Chevron* standard – that a court should provide an agency regarding the agency's interpretations of the statutes that it administers. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984). However, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990). Once an agency's authority has been determined, *Chevron* sets forth a two-step analysis:

- *Step One*. A court must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "[W]e begin with the language of the statute. If the . . . language is unambiguous and the statutory scheme is coherent and consistent . . . , the inquiry ceases." Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 171 (2016).
- *Step Two*. If the statutory provision is "silent or ambiguous with respect to the specific issue," the court then assesses the matter . . . to determine whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation." Michigan v. EPA, 576 U.S. 743, 751 (2015) (internal quotation marks and citations omitted).

See N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 552-53 (D.C. Cir. 2020). *Cf.* Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) (questioning the distinction between "an agency's exceeding its authority and an agency's exceeding authorized application of its authority"); *see* Bus. Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990). While the *Chevron* doctrine is settled law, actual judicial deference may vary depending on the court and the issues presented. Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of Mayo and Chevron*, 38 YALE J. ON REG. 818, 835 (2021); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J.511, 519 (1989).

Also related to the issue of a federal agency's authority is the non-delegation doctrine. The non-delegation doctrine provides that the Constitution assigns all legislative powers to Congress and does not permit Congress to delegate such powers to agencies or private entities. *See West Virginia*, 142 S. Ct at 2619 (Gorsuch, J., concurring). However, the Supreme Court has not vacated a federal regulation on these grounds since 1935. Pan. Ref.

2. The Commission did not sufficiently consider whether a rule would promote "efficiency, competition, and capital formation," as required by the federal securities laws.[8]
3. The Commission adopted a rule in an "arbitrary or capricious" manner, which the Administrative Procedures Act ("APA") prohibits.[9]
4. The Commission did not justify the rulemaking with an adequate economic analysis, *i.e.*, cost-benefit analysis.[10]
5. Certain mandatory SEC disclosures violated the First Amendment standard for commercial speech.[11]

The following are the significant rulemaking challenges going back to 2000 where the challengers successfully overturned the SEC's rulemaking. The cases

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Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see also* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

8 For example, Section 2(b) of the Securities Act of 1933 (the "Securities Act"), Section 3(f) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Section 2(c) of the Investment Company Act of 1940 (the "1940 Act") provide:

> *Whenever . . . the Commission is engaged in rulemaking* and is required to consider or determine whether an action is consistent with the public interest, *the Commission shall also consider*, in addition to the protection of investors, *whether the action will promote efficiency, competition, and capital formation.*

15 U.S.C. § 77b(b); 15 U.S.C. § 78c(f); 15 U.S.C. § 80a-2(c) (emphasis added).

9 The APA requires that a court to set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

10 No statute expressly requires the SEC to conduct a formal cost-benefit analysis as part of its rulemakings. "But as SEC chairmen have informed Congress since at least the early 1980s—and as rulemaking releases since that time reflect—the Commission considers potential costs and benefits as a matter of good regulatory practice whenever it adopts rules." *See* Memorandum from the Div. of Risk, Strategy, and Fin. Innovation and the Off. of the Gen. Couns. on Current Guidance on Economic Analysis in SEC Rulemakings to Staff of the Rulewriting Divs. and Offs. 1-2 (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf. Moreover, certain courts expect the SEC to conduct an economic analysis agency, analogous to what is required of executive agencies. *Id.* at 1-3. Therefore, every economic analysis in SEC rulemakings generally includes the following elements:

- A statement of the need for the proposed action;
- The definition of a baseline against which to measure the likely economic consequences of the proposed regulation;
- The identification of alternative regulatory approaches; and
- An evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.

Id. at 4.

11 The *Central Hudson* standard applies to commercial speech – including "state-compelled disclosures" – that is for reasons other than to prevent misleading advertising. *E.g.*, to promote a social objective. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); *see infra* Part I.E.

are grouped by cause of action. Certain cases were decided on multiple grounds and, therefore, those cases are discussed in multiple sections.

A. Exceeded SEC's Rulemaking "Authority"

2013	**Payments to Foreign Governments for Resource Development**
Case:	*Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013).
Regulation:	Rule 13q-1 under the Exchange Act required SEC reporting companies to disclose publicly, in filed reports, payments made to foreign governments in connection with the commercial development of oil, natural gas, or minerals.[12] The Commission had approved the rule by a 3:2 vote.[13]
Holding:	The court vacated the rule because "*the Commission misread the statute to mandate public disclosure of the reports*, and its decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious."[14]
Rationale:	The court reviewed Section 13(q) of the Exchange Act, which directs the Commission to issue final rules requiring an SEC Reporting that "engages in the commercial development of oil, natural gas, or minerals,"[15] "to include in an *annual report* … information relating to … any payment made to a foreign government or the [U.S.] Government for the purpose of the commercial development of oil, natural gas, or minerals."[16]

[12] Disclosure of Payments by Resource Extraction Issuers Final Rule, SEC Rel. No. 34-67717 (Sept. 12, 2012) (adopting Rule 13q-1).

[13] Rule 13q-1 was adopted on December 16, 2020. The breakdown of the votes was:

SEC Commissioner	**Rule 13q-1 Vote**
Jay Clayton (I), Chair	Approved
Hester M. Peirce (R)	Approved
Elad L. Roisman (R)	Approved
Allison H. Lee (D)	Not Approved
Caroline A. Crenshaw (D)	Not Approved

Final Commission Votes for Agency Proceedings, SEC. & EXCH. COMM'N, https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2020.xml (Aug. 18, 2021).

[14] Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 11 (D.D.C. 2013) (emphasis added).

[15] 15 U.S.C. § 78m(q)(1)(D).

[16] 15 U.S.C. § 78m(q)(2)(A) (emphasis added). The rule directs that the disclosures be made in a new form, Form SD, rather than existing shareholder reports. *Id.*

2013	**Payments to Foreign Governments for Resource Development**
	Concerning the rule's public disclosure mandate, the court summarized that, "Section 13(q) requires … disclosure of annual reports but says nothing about whether the disclosure must be public or may be made to the Commission alone. Neither the dictionary definition nor the ordinary meaning of 'report' contains a public disclosure requirement. And section 13(q) expressly addresses public availability of information in [another section], establishing a …more limited [SEC "compilation" of reported disclosures].… If this is Congress's way of unambiguously dictating that reports must be publicly filed, it is a peculiar one indeed."[17] In addition to the lack of authority-type ruling, the court went on to reason that, "[t]he Commission made another serious error that independently invalidates the Rule. The denial of *any* exemption for countries that prohibit payment disclosure was arbitrary and capricious."[18] The court cautioned that, "an agency decision as to exemptions must, like other decisions, be the product of reasoned decisionmaking."[19]

2020	**Pilot Program to Collect Market Data**
Case:	*N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541 (D.C. Cir. 2020).
Regulation:	Rule 610T under the Exchange Act implemented a Pilot Program designed "to gather data" so that the Commission might be able to determine in the future whether regulatory action was necessary.[20] The Program, among other things, placed certain restrictions on exchange fees and rebates. Exchange traded stocks were assigned to one of two test groups: half would be subject to a transaction fee cap for executing trades, and the other group would be subject to

[17] *Am. Petroleum Inst.*, 953 F. Supp. 2d at 16.
[18] *Id.* at 20 (emphasis added).
[19] *Id.* at 21.
[20] N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 544 (D.C. Cir. 2020); In the Matter of Rule 610T of Regulation NMS, SEC Rel. No. 34-85447 (Mar. 28, 2019).

	restrictions on payment rebates to brokers who send orders to an exchange for executions.[21] The Commission had approved the rule by a 5:0 vote.[22]
Holding:	The court vacated the rule because, "the Commission lacked delegated authority to adopt the Pilot Program."[23]
Rationale:	The court noted that "the Commission point[ed] out that, under the Exchange Act, it is empowered to 'to make such rules and regulations as may be necessary or appropriate to implement the provisions of [the Act],'" but that "[t]he Commission does not contend that it has explicit authority" to adopt the rule.[24] The court instructed that, "[n]ormally, unless an agency's authorizing statute says otherwise, an agency regulation must be designed to address identified problems . . . . Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address."[25] "The problem in this case is that the Commission acted in excess of its authority under the [E]xchange Act. It adopted the Pilot Program without any regulatory agenda. The Commission acted without explaining what problems with the existing regulatory requirements it meant to address."[26] "In short, the Commission's action exceeds its authority

21 17 C.F.R. § 242.610T (2023).

22 Rule 610T was adopted on December 19, 2018. The breakdown of the votes was:

SEC Commissioner	Rule 610 Vote
Jay Clayton (I), Chair	Approved
Kara M. Stein (D)	Approved
Robert J. Jackson (I)	Approved
Hester M. Peirce (R)	Approved
Elad L. Roisman (R)	Approved

Final Commission Votes for Agency Proceedings: Calendar Year 2018, SEC. & EXCH. COMM'N, https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2018.xml (Sept. 22, 2020).

23 *N.Y. Stock Exch. LLC*, 962 F.3d at 559.

24 *Id.* at 553.

25 *Id.* at 556-57. *See* 15 U.S.C. § 78w(a)(1).

26 *N.Y. Stock Exch.*, 962 F.3d at 557.

	under the Exchange Act. Therefore, the Commission is due no deference under *Chevron*."[27]

B. Insufficiently Considered "Efficiency, Competition, and Capital Formation"

2010	**Fixed Index Annuities**
Case:	*American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).
Regulation:	Rule 151A under the Securities Act provided that fixed indexed annuities (FIAs), which track the performance of a securities index, are not "annuity contracts" within the meaning of the Act.[28] As a result, FIAs would not be exempt from the Act's registration and disclosure requirements.[29] The Commission had approved the rule by a 4:1 vote.[30]
Holding:	The court vacated the rule because, "the Commission's consideration of the effect of Rule 151A on *efficiency, competition, and capital formation* was arbitrary and capricious."[31]

27 *Id.*

28 17 C.F.R. § 230.151(a) (2023).

29 Section 3(a)(8) of the Securities Act provides an exemption for an "annuity contract" that is subject to state insurance laws. 15 U.S.C. § 77c(a)(8); *see* Indexed Annuities and Certain Other Insurance Contracts, Exchange Act Release, SEC Rel. No. 33-8996 (Jan. 8, 2009) (adopting Rule 151A).

30 Rule 151A was adopted on January 8, 2009. The breakdown of the votes was:

SEC Commissioner	Rule 151A Vote
Mary L. Schapiro (I), Chair	Approved
Kathleen L. Casey (R)	Approved
Elisse B. Walter (D)	Approved
Luis A. Aguilar (D)	Approved
Troy A. Paredes (R)	Not Approved

Final Commissioner Votes, SEC. & EXCH. COMM'N (Jan. 2009), https://www.sec.gov/foia/docs/votes/2009-01.pdf. SEC Commissioner Paredes voted against the rule on the grounds that the rule was beyond "the proper scope of the [SEC's] authority." Troy A. Paredes, Comm'r, Sec. & Exch. Comm'n, Opening Remarks and Dissent Regarding Final Rule 151A: Indexed Annuities and Certain Other Insurance Contracts (Dec. 17, 2008), https://www.sec.gov/rules/final/2009/33-8996-dissent.pdf.

31 Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010). The court appeared to blend the securities law requirement of considering "efficiency, competition, and capital formation" with the APA requirement of not adopting a rule in an "arbitrary or

2010	**Fixed Index Annuities**
Rationale:	"The SEC purports to have analyzed the effect of the rule on competition, but does not disclose a reasoned basis for its conclusion that Rule 151A would increase competition."[32] "[T]he SEC's analysis is incomplete [regarding efficiencies] because it fails to determine whether, under the existing [state law] regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors."[33] "[T]he SEC's flawed efficiency analysis also renders its capital formation analysis arbitrary and capricious."[34]

2011	**Proxy Ballot Access**
Case:	*Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).
Regulation:	Rule 14a-11 under the Exchange Act required a public company, including a mutual fund, to include in proxy materials information about shareholder-nominated candidates for the board of directors. A company or fund that receives notice from an eligible shareholder or group would have to include the proffered information about their nominee(s) and include the nominee(s) on the proxy voting card.[35] The Commission had approved the rule by a 3:2 vote.[36]

capricious" manner. *Id.* The SEC subsequently withdrew Rule 151A as a result of this decision. SEC Rel. No. 33-9152 (Oct. 14, 2010).

32 Am. Equity Inv. Life Ins. Co., 613 F.3d at 177.

33 *Id.* at 179.

34 *Id.*

35 17 C.F.R. § 240.14a-11(a).

36 Rule 14a-11 was adopted on August 25, 2010. The breakdown of the votes was:

SEC Commissioner	**Rule 14a-11 Vote**
Mary L. Schapiro (I), Chair	Approved
Kathleen L. Casey (R)	Not Approved
Elisse B. Walter (D)	Approved
Luis A. Aguilar (D)	Approved
Troy A. Paredes (R)	Not Approved

Final Commissioner Votes, SEC. & EXCH. COMM'N (Aug. 2010), https://www.sec.gov/foia/docs/votes/2010-08.pdf. SEC Commissioners Paredes and Casey voted against the rule on theoretical and empirical grounds. *See* Troy A. Paredes, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt the Final Rule

Holding:	The court held that "the Commission failed adequately to consider the rule's effect upon efficiency, competition, and capital formation, as required by Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act of 1940;" therefore, the rule was vacated.[37]
Rationale:	"[T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters. For these and other reasons, its decision to apply the rule to investment companies was also arbitrary."[38]

C. "Arbitrary and Capricious"

2005	**Mutual Fund Governance**
Case:	*Chamber of Com. v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).
Regulation:	Rule 0-1(a)(7) under the 1940 Act provided that an investment company – commonly referred to as a mutual fund – must have a board with no less than 75% independent directors and an independent chairman in order to engage in certain transactions.[39] The Act only requires that at least 40% of the directors must be independent and does not address a board's chair. The Commission had approved the rule by a 3:2 vote.[40]

Regarding Facilitating Shareholder Director Nominations ("Proxy Access") (Aug. 25, 2010), http://www.sec.gov/news/speech/2010/spch082510tap.htm; Kathleen L. Casey, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations ("Proxy Access") (Aug. 25, 2010), http://www.sec.gov/news/speech/2010/spch082510klc.htm (faulting Commission for failing to act "on the basis of empirical data and sound analysis").

37 Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011); *see* 15 U.S.C. § 78c(f); *id.* § 80a-2(c).

38 *Bus. Roundtable*, 647 F.3d at 1148-49.

39 17 C.F.R. § 270.0-1(a)(7).

40 Rule 0-1(a)(7) was adopted on July 27, 2004. The breakdown of the votes was:

SEC Commissioner	**Rule 0-1(a)(7) Vote**
William H. Donaldson (R), Chair	Approved
Cynthia A. Glassman (R)	Not Approved
Harvey J. Goldschmid (D)	Approved

2005	**Mutual Fund Governance**
Holding:	The court vacated the rule because "the Commission [violated] the APA [prohibition against "arbitrary and capricious" rules] by failing adequately to consider the costs mutual funds would incur in order to comply with the conditions and by failing adequately to consider a proposed alternative to the independent chairman condition."[41]
Rationale:	The 1940 Act mandates that when the SEC engages in rulemaking, in addition to the public interest, the Commission must consider "whether the action will promote efficiency, competition, and capital formation."[42] While the court acknowledged the difficulty in estimating costs, it stated that "uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself … of the economic consequences of a proposed regulation…."[43] The court also held that "the Commission's failure to consider the disclosure alternative [suggested by the dissenting commissioners] violated the APA."[44] The

Paul S. Atkins (R)	Not Approved
Roel C. Campos (D)	Approved

SEC Rel. No. IC-25520 (Jul. 27, 2004) (comm'rs Glassman and Atkins dissenting). SEC Commissioners Glassman and Atkins voted against the Rule 0-1(a)(7) provisions regarding 75% independent directors and an independent chair. Cynthia A. Glassman & Paul S. Atkins, Comm'rs, Sec. & Exch. Comm'n, Dissent to Investment Company Governance, Rel. No. IC-26250 (Jul. 27, 2004), https://www.sec.gov/rules/final/ic-26520.htm#dissent. They were concerned that the two disputed conditions would come at "'a substantial cost to fund shareholders,' and they believed the existing statutory and regulatory controls ensured adequate oversight by independent directors." Chamber of Com. of U.S. v. SEC, 412 F.3d 133, 137 (D.C. Cir. 2005) (citations omitted). "Specifically, they faulted the Commission for not giving 'any real consideration to the costs' of the 75% condition; for failing adequately to justify the independent chairman condition; and for not considering alternatives to that condition." *Id.* (citations omitted).

41 *Chamber of Com.*, 412 F.3d at 136; 5 U.S.C. § 706(2)(A). The plaintiff also challenged the Commission's "authority" to adopt the disputed provisions, but the court concluded otherwise. *Chamber of Com.*, 412 F.3d at 138-40. The court held that, "here the Commission did not exercise its regulatory authority to effect a purpose beyond that of the statute from which its authority derives." *Id.* at 140.

42 *Chamber of Com.*, 412 F.3d at 142; 15 U.S.C. § 80a-2(c).

43 *Chamber of Com.*, 412 F.3d at 144.

44 *Id.*

2005	**Mutual Fund Governance**
	dissenting Commissioners endorsed requiring a fund "prominently to disclose whether it has an inside or an independent chairman and thereby allow investors to make an informed choice."[45] The court found that, "the disclosure alternative was neither frivolous nor out of bounds and the Commission therefore had an obligation to consider it."[46]

2010	**Fixed Index Annuities (2.0)**
Case:	*American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).
Regulation:	Rule 151A under the Securities Act.[47]
Holding:	The court vacated the rule because "the Commission's consideration of the effect of Rule 151A on efficiency, competition, and capital formation was *arbitrary and capricious*."[48]
Rationale:	The rationale for the court's ruling is discussed in Part I.B. above.

2013	**Payments to Foreign Governments for Resource Development (2.0)**
Case:	*Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013).
Regulation:	Rule 13q-1 under the Exchange Act.[49]
Holding:	The court vacated the rule because "the Commission misread the statute to mandate public disclosure of the reports, and *its decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious*."[50]
Rationale:	The rationale for the court's ruling is discussed in Part I.A. above.

D. Inadequate "Economic/Cost-Benefit Analysis"

45 *Id.*
46 *Id.* at 145.
47 For a discussion of Rule 151A, see *supra* Part I.B.
48 Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010) (emphasis added).
49 For a discussion of Rule 13q-1, see *supra* Part I.A.
50 Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 11 (D.D.C. 2013) (emphasis added).

2005	**Mutual Fund Governance (2.0)**
Case:	*Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).
Regulation:	Rule 0-1(a)(7) under the 1940 Act.[51]
Holding:	The court vacated the rule because, that "the Commission…violate[d] the APA [prohibition against arbitrary and capricious rules] by failing adequately to consider the costs mutual funds would incur in order to comply with the conditions and by failing adequately to consider a proposed alternative to the independent chairman condition."[52]
Rationale:	The rationale for the court's ruling is discussed in Part I.C. above.

2011	**Proxy Ballot Access (2.0)**
Case:	*Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).
Regulation:	Rule 14a-11 under the Exchange Act.[53]
Holding:	The court held that "…the Commission failed adequately to consider the rule's effect upon efficiency, competition, and capital formation, as required by Section 3(f) of the Exchange Act and Section 2I of the Investment Company Act of 1940;" therefore, the rule was vacated.[54]
Rationale:	The rationale for the court's ruling is discussed in Part I.B. above.

E. Violated First Amendment for Commercial Speech

2015	**Conflict Minerals Disclosure**
Case:	*Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).
Regulation:	Section 13(g) of the Exchange Act and Rule 13p-1 thereunder required that SEC reporting companies using "conflict minerals" had to disclose in SEC reports and on their websites that their products were not "DRC conflict free," which denoted using gold, tantalum, tin, and tungsten

51 For a discussion of Rule 0-1(a)(7), see *infra* Part I.C.
52 Chamber of Com. v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005).
53 For a discussion of Rule 0-1(a)(7), see *supra* Part I.B.
54 Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011)*; see* 15 U.S.C. § 78c(f); *id.* § 80a-2(c).

2015	Conflict Minerals Disclosure
	originating in and around Democratic Republic of the Congo (DRC).[55] The Commission had approved the rule by a 3:2 vote.[56]
Holding:	The court held that the conflict minerals disclosure requirements "violate[d] the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have not been found to be 'DRC conflict free.'"[57]
Rationale:	The conflict minerals disclosure requirements violated the First Amendment standard for commercial speech set forth in the *Central Hudson* case, among other reasons.[58] The court

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55 15 U.S.C. § 78m(p); *see* 17 C.F.R. § 240.13p-1 (2023).

56 Rule 13p-1 was adopted on August 22, 2012. The breakdown of the votes was:

SEC Commissioner	Rule 13p-1 Vote
Mary L. Shapiro (I), Chair	Approved
Elisse B. Walter (D)	Approved
Luis A. Aguilar (D)	Approved
Troy A. Paredes (R)	Not Approved
Daniel M. Gallagher (R)	Not Approved

Final Commission Votes, SEC. & EXCH. COMM'N (Aug. 22, 2012), https://www.sec.gov/foia/docs/votes/2012-08.pdf. SEC Commissioners Paredes and Gallagher voted against the rule. Later in 2014, Gallagher and then-Commissioner Michael Piwowar issued a statement against the rule as the rule was making its way through the courts. They criticized the rule's "name and shame" approach, which presumes that issuers are guilty by association with the current tragedy in the Congo region unless proven otherwise. Daniel M. Gallagher & Michael S. Piwowar, Comm'rs, Sec. & Exch. Comm'n, Joint Statement on the Conflict Minerals Decision (Apr. 28, 2014), https://www.sec.gov/news/statement/2014-spch042814dmgmsp. The court referenced this statement in its decision. *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 n.31 (D.C. Cir. 2015).

57 *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530 (citations omitted).

58 *Id.* at 524, 530. As a general principle, the First Amendment protects commercial speech from unwarranted government regulations; with two exceptions:

- *Regulations to Prevent Misleading Advertising.* The Supreme Court held in the *Zauderer* case that government regulations may prohibit or require disclosures designed to prevent misleading commercial advertising, and a company's First Amendment rights "are adequately protected *as long as* disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).
- *Government Required Disclosures for Other Reasons.* In the *Central Hudson* case, the Supreme Court addressed "state-compelled disclosures" for reasons other than to prevent misleading advertising. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

2015	Conflict Minerals Disclosure
	accepted the government's interest in "ameliorat[ing] the humanitarian crisis in DRC,"[59] and "the prospect that some companies will … boycott mineral suppliers having any connection to this region of Africa" due to the required disclosure.[60] However, the court questioned how the disclosures would accomplish this government interest, stating: "The idea must be that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea—it is entirely unproven and rests on pure speculation."[61] "[W]hether [the statutory provision] will work is not proven to the degree required under the First Amendment to compel speech."[62]

II. TAKEAWAYS FROM PRIOR PRECEDENT

A. SEC Must be "Right" Every Time

An analysis of the reviewed court decisions leads to several conclusions. First and most importantly, plaintiffs typically plead their case based on several legal grounds. A plaintiff needs a court to agree with only one legal theory to have an SEC rule vacated, while the SEC must win on all counts to prevail. In other words, the SEC must be "right" every time.

The table below shows the claims that plaintiffs have made in the reviewed cases since 2000 and those claims in which they have been successful.

- The Court held that government regulation of otherwise protected commercial speech, *i.e.*, lawful, and not misleading, is permissible under the First Amendment, *provided* the asserted governmental interest that the regulation addresses is substantial, the regulation directly advances the governmental interest, and the regulation is not more extensive than necessary to serve that interest.

Id. at 561-66 (emphasis added).

[59] *Nat'l Ass'n of Mfrs.*, 800 F.3d at 524 (alternation in original).

[60] *Id.* at 525.

[61] *Id.*

[62] *Id.* at 527.

Petitioners' Claims to Vacate SEC Rules					
	Exceeded SEC's Rulemaking "Authority"	**Insufficiently Considered "Efficiency, Competition, and Capital Formation"**	**"Arbitrary and Capricious" Rulemaking**	**Inadequate "Economic/Cost-Benefit Analysis"**	**Violated First Amendment for Commercial Speech**
N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020)[63]	✓ (Successful claim)	✓	✓	✓	N/A
Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015)[64]	✓	✓	✓	✓	✓ (Successful claim)
Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013)[65]	✓ (Successful claim)	✓	✓ (Successful claim)	✓	✓
Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011)[66]	✓	✓ (Successful claim)	✓	✓ (Successful claim)	✓
Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010)[67]	✓	✓ (Successful claim)	✓ (Successful claim)	✓	N/A
Chamber of Com. v. SEC, 412 F.3d 133	✓	✓	✓ (Successful claim)	✓ (Successful claim)	✓

63 Brief for Petitioner at 6, N.Y. Stock Exch., LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020) (No. 19-1042).

64 Brief for Appellants at 2, 3, 4, 23, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015) (No. 13-5252).

65 Complaint at ¶¶ 78-124, Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013) (No. 12-1668).

66 Brief for Petitioners at 1-3, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011). The plaintiffs also alleged that the regulation at issue violated the Fifth Amendment to the Constitution. *Id.*

67 Brief for Petitioners at 2-9, Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).

Petitioners' Claims to Vacate SEC Rules					
	Exceeded SEC's Rulemaking "Authority"	**Insufficiently Considered "Efficiency, Competition, and Capital Formation"**	**"Arbitrary and Capricious" Rulemaking**	**Inadequate "Economic/Cost-Benefit Analysis"**	**Violated First Amendment for Commercial Speech**
(D.C. Cir. 2005)[68]					

No doubt, the major questions doctrine will be the next perennial claim added to plaintiffs' toolkit.

B. Judicial Influence of Dissenting SEC Commissioners

Another lesson taken from the reviewed cases is that a court in vacating an SEC rule may rely on the rationale of SEC commissioners who dissented to the rulemaking at issue. Commissioner dissents, especially in recent times, are accompanied by statements that are reasoned with supporting data. The reasoning may serve, at least in part, as the foundation in a court's analysis and holding.[69] Consider *National Association of Manufacturers. v. SEC*,[70] where the court held that the conflict minerals disclosure requirements violated the First Amendment. In reaching its decision, the court noted the joint statement of SEC Commissioners Gallagher and Piwowar who were against the rule. The court cited their statement, which criticized the rule's presumption that issuers are guilty by association with the current tragedy in the Congo region unless proven otherwise.[71]

Also consider *Chamber of Commerce v. SEC*, , where the court relied, in part, on the two dissenting SEC Commissioners.[72] In that case, the court vacated a fund governance rule requiring that a board have at least seventy-five percent independent directors and an independent chair.[73] The court based their holding, in part, on the statements of SEC Commissioners Glassman and

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68 Chamber of Com. v. SEC, 412 F.3d 133, 137, 141, 143 (D.C. Cir. 2005).

69 Since 2000, the courts have vacated or overturned SEC regulations on six occasions. In every case except one, there has been at least once commissioner who voted not to approve the rule. *See supra* Parts I. A.-C. Typically in these cases, the vote has been three to two – raising the stakes that a court challenge will be successful. *See supra* Parts I. A.-C.

70 800 F.3d 518 (D.C. Cir. 2015).

71 Gallagher & Piwowar, *supra* note 56. The court referenced this statement in its decision. *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 n.31 (D.C. Cir. 2015).

72 412 F.3d 133, 144-45 (D.C. Cir. 2005).

73 *Id.* at 145.

Atkins, who voted against the rule.[74] The Commissioners stated they were concerned that the two disputed conditions would come at "'a substantial cost to fund shareholders,' and they believed the existing statutory and regulatory controls ensured adequate oversight by independent directors."[75] "Specifically, they faulted the Commission for not giving 'any real consideration to the costs' of the 75% condition; for failing adequately to justify the independent chairman condition; and for not considering alternatives to that condition."[76] These statements buttressed the court's finding that the rule should be vacated.

Acknowledging the judicial influence of dissenting SEC commissioners also will become important in a major questions analysis, which we detail in Part IV of this Article.

III. SETTING THE STAGE FOR *WEST VIRGINIA V. EPA*

Until the Supreme Court case of *West Virginia v. EPA*, a high court majority opinion had not articulated the major questions doctrine as such. However, the doctrine's underlying principles have been long-standing. In addition, various lower courts have explicitly addressed the doctrine on several occasions. For example, in the 2017 case of *U.S. Telecom Association v. FCC,* Circuit Judge – now Justice – Brett Kavanaugh stated in a dissenting opinion that an agency regulation that has "great economic and political significance" requires the agency to have clear congressional authority, which he referred to as the major questions doctrine.[77] He contrasted this doctrine with the *Chevron* standard for "ordinary agency rules."[78]

The case before the *U.S. Telecom Association* court considered the authority of the Federal Communications Commission ("FCC") to adopt the Open Internet Order (commonly known as the "net neutrality rule").[79] In concluding that the FCC lacked such authority, Judge Kavanaugh explained that, for "ordinary agency rules," courts should apply what is known as *Chevron* deference to an agency's statutory interpretations. This approach is grounded on the principle "that a statutory ambiguity or gap reflects Congress's implicit

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74 *Id.* at 144-45.
75 *Chamber of Com.*, 412 F.3d at 137 (D.C. Cir. 2005) (citations omitted).
76 *Id.* (citation omitted).
77 855 F.3d 381, 419 (D.C. Cir. 2017) (en banc).
78 *Id.* The FCC's Open Internet Order was upheld by the court en banc, which later denied a petition for review. Then-Circuit Judge Kavanaugh dissented from the denial of rehearing.
79 *Id.* at 382.

delegation of authority for the agency to make policy and issue rules within the reasonable range of the statutory ambiguity or gap."[80]

However, Judge Kavanaugh stated, "in a narrow class of cases involving major agency rules of great economic and political significance, … Congress must *clearly* authorize" those regulations. This major rules doctrine (usually called the major questions doctrine) is based on two principles: "a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch", and "a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[81] Judge Kavanaugh concluded: "In short, while the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules."[82]

More recently, the major questions doctrine has been articulated in two Supreme Court dissenting opinions, in which Justices Gorsuch and Thomas gave the doctrine an undeveloped, passing mention. In the 2019 case of *Gundy v. U.S*., Justice Gorsuch cited the major questions doctrine in his dissenting opinion.[83] The case addressed the U.S. Attorney General's authority to apply a federal statute's sex offender registration requirements to sex offenders convicted under state law before the federal statute's enactment. Justice Gorsuch viewed the congressional delegation of such authority to the Attorney General as unconstitutional.[84] In reasoning that the major questions doctrine was a form of nondelegation, he wrote that under Court precedents, "an agency can fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers.[85] But we don't follow that rule when the 'statutory gap' concerns 'a question of deep "economic and political significance" that is central to the statutory scheme.'[86] … "[W]e apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[87]

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80 *Id.* at 419.
81 *Id.*
82 *Id.*
83 139 S.Ct. 2116, 2141-42 (2019).
84 *See id.* at 2131.
85 *Id.* at 2141 (citing United States v. Mead Corp., 533 U.S. 218, 219 (2001)).
86 *Id.* (citing King v. Burwell*,* 576 U.S. 473, 486 (2015)).
87 *Id.* at 2142.

Meriting only two sentences, Justice Thomas referenced the major questions doctrine in a 2020 dissenting opinion in *Department of Homeland Security v. Regents of the University of California*, in which he expressed the view that the Obama Administration's adoption of Deferred Action for Childhood Arrivals ("DACA") was unlawful, and therefore, the Trump Administration's rescission of DACA was *per se* lawful.[88] Among the rationales supporting this position, Justice Thomas reasoned that DACA conflicted with the major question doctrine.[89]

Lastly, in a concurring opinion authored only six months prior to the *West Virginia v. EPA* decision, Justice Gorsuch questioned the authority of the Occupational Safety and Health Administration ("OSHA") to mandate COVID-19 workplace safety measures:

> The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress.[90]

Justice Gorsuch engaged in an analysis of the major questions doctrine, as articulated in his dissent in *Gundy*, and concluded that "OSHA's mandate fails that doctrine's test."[91]

With this background, we now examine *West Virginia v. EPA*.

IV. ***WEST VIRGINIA V. EPA***

In 2015, the EPA issued a new rule requiring that existing coal-fired power plants reduce their own production of electricity or subsidize increased electric generation by natural gas, wind, or solar sources. The EPA based its authority for the rule on a provision in the Clean Air Act. The issue framed by the Court in *West Virginia v. EPA* was "whether this broader conception of EPA's

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88 140 S.Ct. 1891, 1925 (2020).

89 *Id.* at 1925 (citing Util. Air Regul. Grp. v. EPA, 573 US. 302, 324 (2014)).

90 Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S.Ct. 661, 667 (2022) (Gorsuch J., concurring). Justices Thomas and Alito joined in the concurring opinion.

91 *Id.* at 667-670.

authority is within the power granted to it by the Clean Air Act."[92] With a six-justice majority, Chief Justice Roberts delivered the opinion of the Court ruling that the EPA exceeded its authority.[93] The case was decided on June 30, 2022. In deciding this case, the Court set forth its first comprehensive analysis of the major questions doctrine.

A. Summary of Facts

1. The Clean Air Act

Since 1970, the Clean Air Act has provided the basis for several regulatory programs to control air pollution emitted by stationary sources such as power plants. One such program—Section 111's New Source Performance Standards program—directs the EPA to publish "a list of categories of stationary sources" that it determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[94] For each of the listed categories, Section 111(b) directs the EPA to promulgate "Federal standards of performance for *new* sources within such category."[95] A new power source generally may "achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount 'achievable through the application of the best system of emission reduction….'"[96]

Once the EPA has set new source standards addressing emissions of a particular pollutant under Section 111(b), it must then address emissions of that

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92 West Virginia v. EPA, 142 S. Ct. 2587, 2600 (2022).

93 Joining Chief Justice Roberts were Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. *Id.* at 2599. Justice Gorsuch filed a concurring opinion, in which Justice Alito joined. *Id.* at 2616. Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined. *Id.* at 2626. The outcome of the Court's opinion, and the split among the nine Justices, are consistent with the "conservative majority" that currently comprises the Court. *See, e.g.*, Coral Davenport, *Republican Drive to Tilt Courts Against Climate Action Reaches a Crucial Moment*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/2022/06/19/climate/supreme-court-climate-epa.html; David G. Savage, *Supreme Court Decisions Due Soon on Abortion, Guns, Religion and Climate Change*, L.A. TIMES (May 31, 2022, 4:00 AM), https://www.latimes.com/politics/story/2022-05-31/supreme-court-decisions-due-on-abortion-guns-religion-and-climate-change.

94 42 U.S.C. § 7411(b)(1)(A).

95 *Id.* § 7411(b)(1)(B) (emphasis added).

96 *West Virginia*, 142 S. Ct. at 2601 (quoting 42 U.S.C. § 7411(a)(1)).

same pollutant by *existing* sources under Section 111(d), but only if that pollutant is not already regulated under other agency programs.[97]

In considering the EPA's authority with respect to existing sources, the Court placed great emphasis on the limitations of this provision, characterizing it as a "'gap-filler,' empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities."[98] The Court also emphasized the allocation of responsibility between the EPA and the States. Specifically, the EPA "retains the primary regulatory role" and "decides the amount of pollution reduction that must ultimately be achieved," whereas the States "set the actual rules" within those parameters.[99]

2. 2015 Program

In October 2015, as part of then-President Barack Obama's Climate Action Plan,[100] the EPA promulgated two rules addressing carbon dioxide pollution from power plants: one for *new plants*, and the other for *existing plants*. Both rules "were premised on the Agency's earlier finding that carbon dioxide is an 'air pollutant' that 'may reasonably be anticipated to endanger public health or welfare' by causing climate change."[101]

For new plants, the EPA established standards for emissions of carbon dioxide.[102] Consistent with the requirements of Section 111(b) of the Clean Air

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97 *See* 42 U.S.C. § 7411(d)(1) ("The [EPA] shall prescribe regulations . . . under which each State shall submit to the [EPA] a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of [Title 42] or emitted from a source category which is regulated under section 7412 of [Title 42] but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.").

98 *West Virginia*, 142 S. Ct. at 2601 (citing Am. Lung Ass'n v. EPA, 985 F.3d 914, 932 (D.C. Cir. 2021)).

99 *West Virginia*, 142 S. Ct. at 2601-02.

100 *See* EXEC. OFF. OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013), https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf.

101 *West Virginia*, 142 S. Ct. at 2602 (quoting Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,530 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, and 98)).

102 Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, and 98).

Act, these standards reflected "the degree of emission limitation achievable through the application of the best system of emission reduction (BSER)" that the EPA determined was adequately demonstrated for each type of power unit.[103] For existing coal-fired power plants, the EPA issued emissions guidelines for States to use in developing plans to limit carbon dioxide emissions.[104] As required by Section 111(d) of the Clean Air Act, the EPA selected a BSER for these existing plants. Unlike the BSERs that the EPA selected for new sources, however, the BSER for existing coal-fired power plants included measures that involved "generation shifting from higher-emitting to lower-emitting" sources of electricity, thereby resulting in a greater reduction of carbon dioxide emissions.[105] The EPA identified three ways in which an existing coal-fired plant operator could implement this shift:

1. Reduce the plant's own production of electricity.
2. Build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there.
3. Purchase emission allowances or credits from another power plant as part of a cap-and-trade regime.[106]

Therefore, existing coal-fired plants, "whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas."[107]

The EPA projected that this so-called "Clean Power Plan," when fully implemented, "will achieve significant reductions in [carbon dioxide] emissions by 2030, while offering states and utilities substantial flexibility and latitude in achieving these reductions."[108]

B. Court's Analysis

1. Framing the Issue

In considering the Constitutionality of the EPA's rule, the Court emphasized the practical effect this rule would have on the States and, in turn, existing power plants therein:

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103 *Id.* at 64,512.
104 *Id.*
105 *Id.* at 64,728.
106 *Id.* at 64,731-32.
107 West Virginia v. EPA, 142 S. Ct. 2587, 2603 (2022).
108 Carbon Pollution Emission Guidelines, 80 Fed. Reg. 64,662 (October 23, 2015) (to be codified at 40 C.F.R. pt. 60).

> From these significant projected reductions in generation, EPA developed a series of complex equations to 'determine the emission performance rates' that States would be required to implement. *The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above.* Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually stricter than the cap imposed by the simultaneously published standards for new plants. [¶] *The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar.*[109]

The Court framed the "issue" as follows: "whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction' within the meaning of Section 111."[110] The Court analogized this mechanism of restructuring to other so-called "'extraordinary cases'" of administrative acts, where 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."[111] "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[112] In extraordinary cases, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims."[113]

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109 *West Virginia*, 142 S. Ct. at 2604 (emphasis added) (citations omitted).

110 *Id.* at 2607 (citing 42 U.S.C. § 7411(a)(1)).

111 *Id.* at 2608 (emphasis added) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000)). On the issue of political significance, the Justices cited *Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (per curiam) [hereinafter *HHS*]. In the *HHS* decision, the Court concluded that the Centers for Disease Control and Prevention ("CDC") could not, under its authority to adopt measures necessary to prevent the spread of disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. *HSS*, 141 S. Ct. at 2490. The Court focused on the unprecedented nature of the CDC's action, "and the fact that Congress had failed to extend the moratorium after previously having done so." *West Virginia*, 142 S. Ct. at 2608 (citations omitted). Justice Gorsuch's concurring opinion tied the importance of this doctrine to the "explosive growth of the administrative state since 1970." *Id.* at 2619 (Gorsuch, J., concurring).

112 *West Virginia*, 142 S. Ct. at 2609 (citing Whitman v. Am. Trucking Ass'ns*,* Inc., 531 U.S. 457, 468 (2001)).

113 *Id.* (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

2. A Major Questions Case

The Court then engaged in a comprehensive analysis of the major questions doctrine. The Court stated that:

> *Under our precedents*, *this is a major questions case*. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." It located that newfound power in the vague language of an "ancillary provision[]" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d)*.[114]

The Justices emphasized the novelty of the EPA's rule, noting that prior to 2015, the "EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly."[115] They stressed that "[the EPA] had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.'"[116] Given these circumstances, the Justices reasoned that precedent "counsels skepticism" toward EPA's claim of administrative authority to "devise carbon emissions caps based on a generation shifting approach."[117] "To overcome that skepticism, the Government must—under the major questions doctrine—point to '*clear congressional authorization*' to regulate in that manner."[118]

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114 *Id.* at 2610 (emphasis added) (citations omitted).

115 *Id.*

116 *Id.* (citing Carbon Pollution Emission Guidelines 80 Fed. Reg. 64,662, 64,726, 64,738 (October 23, 2015) (to be enacted 40 CFR pt. 60)).

117 *Id.* at 2614.

118 *Id.* (citing *Util. Air Regul. Grp.*, 573 U.S. at 324 (emphasis added)).
Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion that offered additional observations about the major questions doctrine. First, the concurring opinion describes the circumstances that a court should look for when deciding whether the doctrine applies:

- An agency is claiming the power to resolve a matter of great "political significance" or end an "earnest and profound debate across the country."

3. No "Clear Authorization"

The Court dispatched the EPA's claim of authority based on the "best system of emission reduction" in Section 111: "As a matter of 'definitional possibilities,' generation shifting can be described as a 'system' . . . capable of reducing emissions. But of course almost anything could constitute such a 'system'; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents."[119] Therefore, the Court held that the EPA rule was not within the authority granted to the EPA in Section 111(d) of the Clean Air Act.[120] In the Justices' view, "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d)."[121] The decision "rests with Congress itself, or an agency acting pursuant to a clear delegation" of Congressional authority.[122] The Court, therefore, reversed the lower court and remanded the case for further proceedings.[123]

- An agency is seeking to regulate "a significant portion of the American economy" or require "billions of dollars in spending" by private persons or organizations.
- An agency is seeking to intrude into an area that is the particular domain of state law.

Id. (Gorsuch J., concurring) (citations omitted).

Next, assuming a court concludes the major questions doctrine applies, the concurring opinion outlines the factors the court should consider when applying the doctrine:

- Look to the legislative provisions on which the agency seeks to rely "with a view to their place in the overall statutory scheme."
- Examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. Congress will not likely make an "extraordinary grant of regulatory authority" through "vague language."
- Examine the agency's past interpretations of the relevant statute. A "contemporaneous" and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency.
- Skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. When an agency has no comparative expertise in making certain policy judgments, Congress presumably would not charge it with doing so.

Id. (Gorsuch, J., concurring) (citations omitted).

119 *Id.* (citing FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)).

120 *Id.* at 2616.

121 *Id.*

122 *Id.*

123 *Id.* Justice Kagan, with whom Justice Breyer and Justice Sotomayor joined, wrote a dissenting opinion. Justice Kagan wrote: "Today, the Court strips the [EPA] of the power Congress gave it to respond to climate change, 'the most pressing environmental challenge

V. MAJOR QUESTIONS DOCTRINE FRAMEWORK

The major questions doctrine that the Supreme Court articulated in *West Virginia v. EPA* almost assuredly will become a claim in a plaintiff's toolkit when challenging novel SEC regulations, along with the other possible allegations discussed earlier in this Article.[124] It is unclear, however, whether future courts will follow the major questions' framework of Justice Robert's majority opinion or Justice Gorsuch's more detailed concurring opinion, or some combination of the two. Therefore, plaintiffs and the SEC should, at least, plan for both analyses, which are outlined in the table below.

***West Virginia v. EPA* – Major Questions Doctrine Framework**		
	Majority Opinion	**Concurring Opinion**
Does the major questions doctrine apply?	The doctrine applies to an "extraordinary case" where: • 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.[125]	The doctrine may apply when: • An agency is claiming the power to resolve *a matter of great "political significance" or end an "earnest and profound debate across the country."* • An agency is seeking to regulate "a significant portion of the American economy" or require "billions of dollars in spending" by private persons or organizations. • An agency is seeking to intrude into an area that is the particular domain of state law.[126]

of our time."' *Id.* at 2626. (Kagan, J., dissenting) (citations omitted). "This Court has obstructed EPA's effort from the beginning." *Id.* at 2627. "The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote." *Id.* at 2628.

124 For a discussion of plaintiff's claims, see *supra* Part II.A.

125 *Id.* at 2608 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)) (emphasis added).

126 *Id.* at 2620-21 (Gorsuch, J., concurring) (citations omitted) (emphasis added).

***West Virginia v. EPA* – Major Questions Doctrine Framework**		
If the doctrine does apply, the following standard must be satisfied.	There must be "*clear congressional authorization*" for the power the agency claims.[127] • "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'"[128] • "Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[129]	For "*clear congressional" authority*: • "Look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme.'"[130] • "[E]xamine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address . . . Congress [will not likely make] an '[e]xtraordinary gran[t] of regulatory authority' through 'vague language.'"[131] • "[E]xamine the agency's past interpretations of the relevant statute. A 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge."[132] • "[S]kepticism may be merited when there is a mismatch between an agency's challenged action

127 *Id.* at 2609 (emphasis added) (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
128 *Id.* at 2609 (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
129 *Id.* at 2609 (citing *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)).
130 *Id.* at 2622 (Gorsuch, J., concurring) (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (2000)).
131 *Id.* at 2623 (Gorsuch, J., concurring) (citing *Util. Air Regul. Grp.*, 573 U.S. at 324).
132 *Id.* (Gorsuch, J., concurring) (citing United States v. Philbrick, 120 U.S. 52, 59 (1887)).

***West Virginia v. EPA* – Major Questions Doctrine Framework**		
		and its congressionally assigned mission and expertise . . . '[w]hen an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not charge it with doing so.'"[133]

In assessing the major questions doctrine, the Supreme Court has, in effect, added another element to the decades-old question of whether an administrative agency has exceeded its rulemaking "authority." The EPA ruling has raised the bar for "extraordinary cases" when the "history and breadth" of the asserted authority is extraordinary, and the rulemaking addresses a matter of great "economic and political significance." In these cases, there must be "clear congressional authorization." That said, as with all judicial proceedings, the facts of any case create the boundaries of a legal doctrine. Therefore, the facts of any case at issue should be compared to the facts of the EPA case to predict the outcome of a major questions analysis.

Considering the SEC's current rulemaking agenda,[134] the proposed climate-related risk disclosures for publicly traded companies arguably is ripe for a subsequent challenge.[135] This Article examines these proposed regulations,

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133 *Id.* (Gorsuch, J., concurring) (citing *Util. Air Regul. Grp.*, 573 U.S. at 324).

134 *See* Press Release, Sec. & Exch. Comm'n, SEC Announces Spring 2022 Regulatory Agenda (June 22, 2022), https://www.sec.gov/news/press-release/2022-112.

135 *Climate Change Disclosure*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM87 (last visited May 18, 2023) ("The [SEC's] Division [of Corporation Finance] is considering recommending that the Commission adopt rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities."). Other controversial topics on the SEC's current rulemaking agenda are not far beyond regarding a possible challenge. These would include:

- The proposed environmental, social and governance (ESG)-related disclosures for investment companies and investment advisers. SEC, Proposed Rule on Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors (Spring 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM96 (Abstract: The SEC's Division of Investment Management is considering recommending that the Commission propose requirements for

which are intended to serve as case studies for how a court may work through a major questions legal challenge in a securities regulation context.

VI. CORPORATE CLIMATE-RELATED RISK DISCLOSURES

On March 21, 2022, the SEC proposed rule amendments that would require publicly traded companies to disclose certain climate-related information in their registration statements and annual reports, including a company's material climate-related risks and a company's greenhouse gas ("GHG") emissions.[136] The breakdown of Commissioner votes on the rulemaking was:

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investment companies and investment advisers related to environmental, social and governance (ESG) factors, including ESG claims and related disclosures.).

- Proposed corporate board diversity disclosures. SEC, Proposed Rule on Corporate Broad Diversity (Spring 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AL91 (Abstract: The SEC's Division of Corporation Finance is considering recommending that the Commission propose rule amendments to enhance registrant disclosures about the diversity of board members and nominees.)

While not on the SEC's official rulemaking agenda, the agency also is considering regulations with respect to cryptocurrencies and other digital assets. *See* Gary Gensler, Chair of the U.S. Sec. & Exch. Comm'n, Statement on Financial Stability Oversight Council's Report on Digital Asset Financial Stability Risks and Regulation Before the Financial Stability Oversight Council Open Meeting (Oct. 3, 2022) https://www.sec.gov/news/speech/gensler-statement-fsoc-meeting-100322; Ephrat Livni, *S.E.C. Chair Doubles Down on the Need to Regulate Cryptocurrencies*, N.Y. TIMES (Sept. 23, 2022, 10:07 AM), https://www.nytimes.com/2022/09/09/business/sec-chair-crypto-regulation.html?smid=url-share. However, the authors believe the proposed climate-related risk disclosures is a sufficient case study for purposes of this Article.

136 The Enhancement and Standardization of Climate-Related Disclosures for Investors, SEC Rel. Nos. 33-11042, 34-94478 (proposed Mar. 21, 2022) [hereinafter *SEC Climate-Related Risk Proposal*].

SEC Commissioner	**Climate-Related Disclosure Vote**[137]
Gary Gensler (I), Chair[138]	Approved
Hester M. Peirce (R)[139]	Not Approved
Allison H. Lee (D)[140]	Approved
Caroline A. Crenshaw (D)[141]	Approved

The SEC's climate-related risk proposal was issued three months before the *West Virginia v. EPA* case was decided on June 30, 2022. Therefore, while the proposal addressed the SEC's "authority" for the rulemaking in this area, it did not directly address the major questions doctrine. That said, it is still possible to engage in a reasoned analysis of the major questions doctrine based on publicly available information.

A. Summary of Proposed Rules

The SEC's climate-related risk proposal utilizes a risk disclosure framework that was modeled in part on recommendations of the Task Force on Climate-Related Financial Disclosures ("TCFD") and the GHG Protocol, which is considered a leading accounting and reporting standard for greenhouse gas emissions.[142] The Commission cited these significant developments in support of its proposed rulemaking, noting that the TCFD has developed a climate-

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137 *Final Commission Votes for Agency Proceedings,* SEC. & EXCH. COMM'N, HTTPS://WWW.SEC.GOV/ABOUT/COMMISSION-VOTES/ANNUAL/COMMISSION-VOTES-AP-2022.XML (Jan. 11, 2023).

138 Mr. Gensler was nominated by President Joseph Biden to serve as Chair of the Commission. He has served in that role since April 2021. *Chair Gary Gensler Biography*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioners/gary-gensler (last visited May 26, 2023).

139 Ms. Peirce was appointed by President Donald Trump to the Commission. She has served in that role since January 2018. *Commissioner Hester M. Peirce Biography*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioners/hester-m-peirce (last visited May 26, 2023).

140 Ms. Lee was appointed by President Trump to the Commission. She served in that role from July 2019 to July 2022. *Commissioner Allison Herren Lee Biography*, SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioners/allison-herren-lee (last visited May 26, 2023).

141 Ms. Crenshaw was nominated by President Trump to fill a Democratic vacancy on the Commission. She has served in that role since August 2020. Commissioner Caroline A. Crenshaw Biography, SEC. & EXCH. COMM'N, https://www.sec.gov/about/commissioners/caroline-a-crenshaw (last visited May 26, 2023).

142 *SEC Climate-Related Risk Proposal*, *supra* note 136, at 34, 41.

related reporting framework that has become widely accepted by both companies and investors. "Both the TCFD and the GHG Protocol have developed concepts and a vocabulary that are commonly used by companies when providing climate-related disclosures in their sustainability or related reports."[143]

Within this framework, the proposal would require a publicly traded company to disclose information about, among other things:

- "The oversight and governance of climate-related risks by the company's board and management;"[144]
- "How any climate-related risks identified by the [company] have had or are likely to have a material impact on its business and consolidated financial statements, [over different time periods];"[145]
- "How any identified climate-related risks have affected or are likely to affect the [company]'s strategy, business model, and outlook;"[146]
- Certain Scopes 1 and 2 GHG emissions metrics;[147] and
- "Scope 3 GHG emissions and intensity, if material, or if the [company] has set a GHG emissions reduction target or goal that includes its Scope 3 emissions".[148]

The proposal would also require a publicly traded company to:

- "[P]rovide the climate-related disclosure in its registration statements *and* Exchange Act annual reports;"[149]
- Provide new Regulation S-K mandated climate-related disclosure in its registration statement *or* annual report, which would include the company's climate-related risks that are reasonably likely to have

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143 *Id.* at 34.

144 *Id.* at 42.

145 *Id.*

146 *Id.*

147 *Id.* at 42-43.

148 *Id.* at 43. The GHG Protocol provides that Scope 1 emissions are direct company GHG emissions. These might include emissions from company-owned machinery or vehicles, or methane emissions from petroleum operations. *Id.* at 39. Scope 2 emissions are those emissions primarily resulting from the generation of electricity purchased and consumed by the company. Because these emissions derive from third-party activities, they are considered indirect emissions. *Id.* "Scope 3 emissions are all other indirect emissions not accounted for in Scope 2 emissions. These emissions are a consequence of the company's activities but are generated from company sources. These might include emissions associated with the production and transportation of goods a company purchases from third parties, employee commuting or business travel, and a third-party's processing or use of the company's products." *Id.* at 39-40.

149 *Id.* at 43 (emphasis added).

material impacts on its business or consolidated financial statements, and GHG emissions metrics that could help investors assess those risks;[150]

- "[P]rovide new Regulation S-X mandated climate-related financial statement metrics and related disclosure in a note to the company's audited financial statements"[151]; and
- "[F]ile rather than furnish the climate-related disclosure."[152]

The proposal would further require a company with a specified large market capitalization to include, in the relevant filing, an attestation report covering the disclosure of its Scope 1 and Scope 2 emissions and to provide certain related disclosures about the service provider.[153]

The proposal contemplates phased-in dates for compliance to provide companies—especially smaller companies—with additional time to prepare for the proposed disclosures.[154]

B. General "Authority"

In proposing a new rule or regulation, the SEC is fully aware that it must not exceed its statutory authority under the federal securities laws, otherwise the new rule or regulation could be overruled or vacated by a court.[155] Therefore, the SEC's climate-related risk proposal relies on the following statutory provisions, among others:[156]

- Section 7(a)(1) of the Securities Act – "Any… registration statement shall contain such other information [in addition to certain specified disclosures], … as the Commission may by rules or regulations require as being *necessary or appropriate in the public interest or for the protection of investors*."[157]
- Section 10(c) of the Securities Act – "Any prospectus shall contain such other information [in addition to certain specified disclosures] as

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[150] *Id.* at 40, 43.
[151] *Id.* at 44 (emphasis added).
[152] *Id.* at 44.
[153] *Id.*
[154] *Id.* at 289-90.
[155] *See* N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020); Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013); Teicher v. SEC, 177 F.3d 1016 (D.C. Cir. 1999); Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990); *see supra* note 7.
[156] *See, e.g.*, *SEC Climate-Related Risk Proposal*, *supra* note 136, at 7 n.3, 444, 450.
[157] 15 U.S.C. § 77g(a)(1) (emphasis added).

the Commission may by rules or regulations require as being *necessary or appropriate in the public interest or for the protection of investors*."[158]

- Section 12(b) of the Exchange Act – "A security may be registered on a national securities exchange by the issuer filing an application … which … shall contain … [s]uch information, … 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 organization, financial structures, and nature of the business …."[159]
- Section 13(a) of the Exchange Act – "Every issuer of a [publicly traded] security… shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as *necessary or appropriate for the proper protection of investors and to insure fair dealing in the security* – (1) such information… as the Commission shall require to keep reasonably current the information… to be included in… an application or registration statement…., [and] (2) such annual reports…, as the Commission may prescribe."[160]

Reflecting the cited statutory provisions noted above, the proposal affirms that the Commission "has broad authority to promulgate disclosure requirements that are 'necessary or appropriate in the public interest or for the protection of investors,'" and that the Commission has "*considered this statutory standard and determined that disclosure of information about climate-related risks and metrics would be in the public interest and would protect investors*."[161]

In rationalizing the disclosures regarding climate-related risks and metrics that would be required by the proposal, the Commission explained that this information can impact a public company's "financial performance or position and may be material to investors in making investment or voting decisions."[162] "For this reason, many investors – including shareholders, investment advisers,

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[158] *Id.* § 77j(c) (emphasis added).

[159] *Id.* § 78l(b) (emphasis added).

[160] *Id.* § 78m(a) (emphasis added).

[161] *SEC Climate-Related Risk Proposal, supra* note 136, at 7 (citation omitted) (emphasis added). In support of the SEC's broad general authority, the Commission cited climate-related risk proposal comment letters from Jill E. Fisch and eighteen other law professor signatories and the Natural Resources Defense Council. *Id.* at 23 n.51. For copies of the comment letters, see Jill E. Fisch et al., *Climate Change,* West Virginia v. EPA, *and the SEC's Distinctive Statutory Mandate*, ADMIN & REGUL. L. NEWS, Summer 2022, at 9, https://www.sec.gov/comments/s7-10-22/s71022-20154853-323117.pdf; Sec. & Exch. Comm'n, Comment Letter on the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132356-302921.pdf.

[162] *SEC Climate-Related Risk Proposal*, *supra* note 136, at 7.

and investment management companies – currently seek information about climate-related risks from companies to inform their investment decision-making."[163] "Investors have noted that climate-related inputs have many uses in the capital allocation decision-making process including, but not limited to, insight into governance and risks management practices, integration into various valuation models, and credit research and assessments."[164] Therefore, the SEC strongly believed that, "it is squarely" within the SEC's authority to require such disclosure because "climate-related risks have present financial consequences that investors in public companies consider in making investment and voting decisions."[165]

In addition, the Commission expressed concern that the existing disclosures of climate-related risks did not adequately protect investors, and that additional disclosure requirements "may be necessary or appropriate to elicit climate-related disclosures and to improve the consistency, comparability, and reliability of climate-related disclosures."[166] The Commission also commented that company information provided outside of SEC filings is not subject to the full range of liability and other investor protections that help ensure complete and accurate disclosures.[167]

While the Commission acknowledged that climate-related risks implicate broader concerns – and are subject to various other regulatory schemes – its objective was to advance the SEC's "mission to protect investors, maintain fair, orderly and efficient markets, and promote capital formation, not to address climate-related issues more generally."[168] The Commission also pointed out that the proposal builds on the SEC's previous rules and guidance on climate-related disclosures, which date back to the 1970s.[169]

The Commission further stated:

> Although the various requirements we are proposing are supported by overlapping rationales, we emphasize that the different aspects of the proposal serve independent, albeit complementary, objectives. In addition, *we have carefully considered how to craft this proposal to best advance investor protection*

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163 *Id.*

164 *Id.* at 9.

165 *Id.*

166 *Id.* at 8.

167 *Id.*

168 *Id.* at 9-10.

169 *Id.* at 13.

> *and the public interest, consistent with the Commission's disclosure authority and regulatory mission* . . . .[170]

The proposal, therefore, hinges on "investor protection and the public interest" and the fact that these risks "can have an impact" on a public company's "financial performance or position."[171]

C. Major Questions Analysis

As discussed in Part V, the Supreme Court has raised the bar for "extraordinary cases" that provide a court with a "reason to hesitate" before concluding that Congress meant to confer the asserted authority.[172] According to the Court, the bar should be raised when the "history and breadth" of the asserted authority is extraordinary, and the rulemaking addresses a matter of great "economic and political significance."[173] In these cases, there must be "clear congressional authorization."[174] The SEC's climate-related risk proposal should be viewed through this prism.[175]

1. A "Reason to Hesitate"?

In considering whether there is a "reason to hesitate," a court would first consider whether the SEC's proposed rulemaking constitutes an "extraordinary case" where the "history and breadth" of the asserted authority is extraordinary, and the rulemaking addresses a matter of great "economic and political significance."[176] In *West Virginia v. EPA*, the EPA had issued a new rule

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170 *Id.* at 15 (emphasis added).

171 *Id.* at 7, 15. In addition to addressing the Commission's "authority" concerning the proposed climate-related disclosure rulemaking, the agency also maintained that the proposal, if adopted, would promote "efficiency, competition, and capital formation" and would not violate the First Amendment. *Id.* at 20-23, 392-400. The Commission also evaluated the "benefits and costs" of the proposal, as well as considering "reasonable alternatives." *See id.* at 333-341, 405-419. This SEC analysis is intended to demonstrate that the proposal is not "arbitrary or capricious." These arguments in support of the climate-related rulemaking, however, are outside the scope of this Article, which focuses solely on the major questions doctrine.

172 West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (citations omitted).

173 *Id.*

174 *Id.* at 2609.

175 Again, the awkwardness for the SEC is that the proposal was approved several months prior to the Court decision. Therefore, the Commission may supplement is rationale when it finalizes the rulemaking.

176 *West Virginia*, 142 S. Ct. at 2608.

requiring that existing coal-fired power plants reduce their own production of electricity or subsidize increased electric generation by natural gas, wind, or solar sources.[177] The EPA standard would have required the restructuring the Nation's overall mix of electricity generation, to transition from thirty-eight percent coal to twenty-seven percent coal by 2030.[178]

In holding that the EPA rule was an "extraordinary case," the Court reasoned that the EPA located its newfound power in the vague language of an "ancillary [statutory] provision" – one that had "rarely been used in the preceding decades."[179] Moreover, the Court observed that the EPA's "discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress"' provided the EPA with this authority.[180]

2. "Economic Significance"?

In evaluating the "economic significance" of the SEC's proposed rulemaking, the estimated costs to implement the rule should be considered. In the *West Virginia v. EPA* case, the Court stressed that the EPA's standard would have required the "restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030…."[181] Moreover, "[t]he [EPA's standard] calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation…."[182]

Considering the proposed SEC rule, the Commission acknowledged that it could qualitatively describe the factors that may affect disclosure costs, but it was "unable to accurately quantify these costs" at the rule proposal stage.[183] "Costs related to preparing climate-related disclosures are generally private information known only to the [particular company], hence such data is not readily available to the Commission."[184] These costs also likely vary considerably "depending on a [company's] size, industry, complexity of

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[177] *Id.* at 2602.
[178] *Id.* at 2604.
[179] *Id.* at 2610 (citation omitted).
[180] *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).
[181] *Id.* at 2607.
[182] *Id.* at 2604.
[183] *SEC Climate-Related Risk Proposal, supra* note 136, at 333.
[184] *Id.*

operations, and other characteristics, which makes comprehensive estimates difficult for the Commission to obtain."[185]

Nevertheless, using its best efforts, the Commission estimated the annual costs over the first six years of compliance with the proposed rules.[186] For a large publicly traded company, the direct "costs in the first year of compliance were estimated to be $640,000 ($180,000 for internal costs and $460,000 for outside professional costs), while annual costs in subsequent years were estimated to be $530,000 ($150,000 for internal costs and $380,000 for outside professional costs)."[187] For a smaller publicly traded company, the direct "costs in the first year of compliance were estimated to be $490,000 ($140,000 for internal costs and $350,000 for outside professional costs), while annual costs in subsequent years were estimated to be $420,000 ($120,000 for internal costs and $300,000 for outside professional costs)."[188] The Commission expected these costs "to decrease over time for various reasons, including increased institutional knowledge, operational efficiency, and competition within the market for relevant services."[189]

The Commission further stated that "[i]ncremental [direct] compliance costs may be relatively lower for [companies] that already meet some of the disclosure . . . requirements."[190] For example, companies "that are currently subject to the EPA's Greenhouse Gas Reporting Program would incur lower incremental costs in reporting certain scopes of emissions relative to a firm that does not have an emissions measurement system in place."[191] Similarly, companies "that currently provide extensive qualitative disclosures on climate-related risks, which tend to be large [companies] and [companies] in high emission industries, may [incur] lower incremental costs."[192] "[Companies] with operations in foreign jurisdictions where disclosure requirements are based on the TCFD's framework . . . would also face lower incremental costs."[193] Moreover, the Commission suggested that costs may be mitigated since there will be a regulatory transition period, which would allow companies to transition to the new reporting regime gradually.[194]

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185 *Id.*
186 *Id.* at 373.
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.* at 383.
191 *Id.*
192 *Id.*
193 *Id.* at 384.
194 *Id.*

"Indirect costs [would] include heightened litigation risk and the potential disclosure of proprietary information."[195] However, the Commission maintained that these risks should be mitigated because of safe harbors for projections of the future impact of climate-related risks and the extended phase-in compliance period for the new rules.[196]

The near-term direct and indirect compliance costs with the new climate-related risk disclosures are material, but a court likely would not equate the costs to the "economic significance" in the *EPA* case. In that case, the EPA would have required existing coal-fired power plants to basically restructure their industry. Importantly, no existing coal plants were in compliance when the new rule was adopted. This cannot be said concerning compliance requirements with the SEC proposal. Currently, there are companies that are subject to the Greenhouse Gas Reporting Program, other companies provide extensive disclosures on climate-related risks, while others comply with the TCFD framework regarding operations in foreign jurisdictions. As with the other SEC rule safe harbors for forward-looking statements, the safe harbors for the future impact of climate-related risks should sufficiently mitigate litigation risk. Long-term compliance costs should decrease over time due to greater institutional knowledge, operational efficiencies and other factors.

3. "Political Significance"?

In *West Virginia v. EPA*, the Court reasoned, in part, that the EPA's "[statutory] discovery allowed [the agency] to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[197] The Court appeared to use the status of congressional action and deliberations as a proxy for political significance. Therefore, a court considering the possible "political significance" of the SEC's proposed rulemaking would likely consider the status of congressional action, or lack thereof, as a benchmark.

To date, there has been no final congressional action and congressional deliberations appear to be a work in progress. Consider a congressional hearing in February 2021 related to climate change and investing, which was held by the U.S. House of Representatives' Subcommittee on Investor Protection,

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[195] *Id.* at 371.
[196] *Id.* at 388.
[197] West Virginia v. EPA, 142 S.Ct. 2587, 2595 (2022). (citations omitted).

Entrepreneurship, and Capital Markets.[198] Although the hearing was held approximately one year prior to the SEC's proposal, its subject matter overlapped significantly with the SEC's rulemaking, with one noteworthy exception: hearing participants discussed climate change from the perspectives of corporate financial performance and social policy,[199] whereas the SEC's rulemaking only focuses on corporate financial performance.[200]

There was a consensus among participants in the hearing that investors today view climate-related risk as an important factor in making investment decisions. The participants could not agree, however, on whether this factor should *mandate* relevant disclosures. Democrats expressed the view that disclosures should be mandatory, while Republicans thought disclosures should be voluntary.

In opening remarks by Representative Brad Sherman (D-CA), Chair of the Subcommittee, he stated that for hundreds of years, boards of directors and investors have focused pretty much on one thing: "Can the corporation pay dividends?", the chief measure of which was earnings per share.[201] A board would "instruct its executives to do whatever was legal and ethical . . . to achieve earnings per share. And this met societal expectations, since society simply wanted corporations to create and maintain profitable businesses."[202] Chair Sherman stated that today, however, investors and stakeholders "want to know, how is the corporation affected by future climate change, how will it be affected, and how is its behavior designed to minimize climate change?"[203] "We want to change the behavior of corporations, both in causing them to prepare for climate change and to hopefully minimize their effect on climate change."[204]

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198 *Climate Change and Social Responsibility: Helping Corporate Boards and Investors Make Decisions for a Sustainable World: Virtual Hearing Before the Subcomm. on Inv. Prot., Entrepreneurship, and Cap. Mkts. of the H. Comm. on Fin. Servs.*, 117th Cong. (2021).

199 *See infra* text accompanying notes 204-207.

200 *See, e.g.*, *SEC Climate-Related Risk Proposal*, *supra* note 136, at 7 ("We are proposing to require disclosures about climate-related risks and metrics reflecting those risks because this information can have an impact on public companies' financial performance or position and may be material to investors in making investment or voting decisions."); *id.* at 51 ("[T]he required disclosure is fundamental to investors' understanding the nature of a registrant's business and its operating prospects and financial performance, and therefore, should be presented together with other disclosure about the registrant's business and its financial condition.").

201 *Id.* at 2 (statement of Rep. Bradley Sherman, Chairman, H. Fin. Servs. Subcomm. on Inv. Prot., Entrepreneurship, and Cap. Mkts.).

202 *Id.*

203 *Id.*

204 *Id.*

"[T]here are those who argue that this is not important, it is not material, that the only things that are material are things that change earnings per share by at least a few pennies."[205] First, these issues are material to shareholders. Second, there is a reputational risk that will affect earnings per share. "And investors themselves are interested in these social issues, not just on earnings per share."[206]

The Subcommittee's ranking member, William Huizenga (R-MI), took a different tack, arguing that environmental, social and governance ("ESG") data "spans a range of issues, [and] deals with what are frankly policy decisions, not business decisions."[207] "It is clear that demands for ESG information have increased recently."[208] "Because of these increased demands, many companies have responded by voluntarily increasing the amount of ESG information that they disclose."[209] "What should not happen is that the government mandates ESG disclosures . . . doing this voluntarily is proper."[210] Mr. Huizenga concluded that, "[i]nstead of focusing on policies that solve societal ills, the SEC must remain focused on protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation."[211] "The subcommittee should be looking for ways to make our public markets more attractive, and more competitive, not examining ways to increase regulatory and compliance burdens on the private sector."[212] "[W]hat we need to do is to make sure that we are dealing with policy, not social engineering, plain and simple."[213]

Concurrently with the February 2021 hearing, Representative Juan Vargas (D-CA) introduced a bill that would amend the Exchange Act to require public companies to implement certain ESG-related disclosures, including disclosures relating to the link between certain ESG metrics and a company's long-term business strategy, and a description of any process the company uses to assess the impact of ESG metrics on the company's long-term business strategy.[214] The bill also would require SEC rulemaking in this area.[215] The bill was passed

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205 *Id.* at 2-3.
206 *Id.* at 3.
207 *Id.* (statement of Rep. William Huizenga, Ranking Member, H. Fin. Servs. Subcomm. on Inv. Prot., Entrepreneurship, & Cap. Mkts.).
208 *Id.*
209 *Id.* at 4.
210 *Id.*
211 *Id.*
212 *Id.* at 5.
213 *Id.*
214 H.R. 1187, 117th Cong. (as passed by House, June 16, 2021).
215 *Id.* at § 103(b).

by the House of Representatives in June 2021 and referred to the Senate Committee on Banking, Housing, and Urban Affairs as the Corporate Governance Improvement and Investor Protection Act.[216] As of the date of this Article, no further action has been taken.

Related to the general topic of climate-related risk is the passage of the Inflation Reduction Act, which, among other actions, allocated substantial funds to reduce climate change.[217] For example, the legislation provides (i) grants and tax credits to reduce emissions from industrial and manufacturing processes; (ii) over $9 billion for federal procurement of American-made clean technologies to create a stable market for clean products; and (iii) $27 billion for nonprofit, state, and local climate finance institutions that support the rapid deployment of low- and zero- emission technologies to help communities reduce and avoid pollution.[218] The President signed the legislation into law on August 16, 2022.[219]

Considering the uncertain status of congressional action at this time, the possible "political significance" of the SEC's proposal is a close call. The outcome would likely depend on whether a court follows Justice Roberts' majority opinion in the *EPA* decision or Justice Gorsuch's concurring opinion. While there has been debate and a House vote regarding climate-related risk disclosure, Congress has not "conspicuously and repeatedly declined" to enact legislation in this area. That type of congressional rebuke was highlighted in the *EPA* and *HHS* decisions. In those cases, agency action could be viewed as a workaround of congressional intent.

However, the SEC's proposed rulemaking does not necessarily implicate the political significance issue. Notably, both Democrats and Republicans during the hearing observed that there is investor demand for climate-related risk information. Rather than purely financial relevance, Republicans considered this type of information to represent social goals. The SEC acknowledged that its proposal served "overlapping rationales;" however, it stressed that the rulemaking was carefully crafted "to best advance investor protection and the public interest, consistent with the Commission's disclosure

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216 *Id.*

217 Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

218 *Id. See also* Fact Sheet, Nancy Pelosi, Speaker, House of Representatives, Fact Sheet for Senate Amendment to H.R. 5376 (Aug. 11, 2022), https://mccollum.house.gov/sites/mccollum.house.gov/files/documents/Senate%20Amendment%20to%20H.R.%205376,%20the%20Inflation%20Reduction%20Act.pdf.

219 Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

authority and regulatory mission" under the federal securities laws.[220] Therefore, a court applying the rationale of Justice Roberts' majority opinion likely would conclude that the SEC's proposed rulemaking does not rise to the level of "political significance."

Justice Gorsuch's concurring rationale may lead to a different conclusion when considering the 2021 congressional hearing and House vote, even though these congressional actions are more the norm than not. Justice Gorsuch stated a "major question" may be present if an agency is claiming the power to end an "earnest and profound debate."[221] For Justice Gorsuch, the agency may be attempting to "'work [a]round' the legislative process."[222] Thus, a court applying this rationale may point to the 2021 hearing and House vote as evidence that an earnest and profound debate is ongoing. However, a court could also consider the passage of the Inflation Reduction Act, which allocated substantial funds to reduce climate change, as evidence of getting close to resolving any lingering debate concerning climate-related risk.

4. "History and Breadth" of Asserted Authority?

In holding that the EPA rulemaking was an "extraordinary case," the Court's majority opinion noted that the agency located its newfound power in the vague language of an "ancillary [statutory] provision" – one that had "rarely been used in the preceding decades."[223] The Court reasoned that, "[r]eflecting the ancillary nature of [statutory provision], EPA has used it only a handful of times since the enactment of the statute in 1970."[224]

In the climate-related risk proposal, the SEC primarily relied on Sections 7(a)(1) (registration statements) and 10(c) (prospectuses) of the Securities Act, and Sections 12(b) (securities exchange applications) and 13(a) (annual reports) of the Exchange Act.[225] As discussed in Part VII.B., the relevant standard in these statutes is whether the proposed rules or regulations are "*necessary or appropriate in the public interest or for the protection of investors*."[226] As such, there must be a clear nexus between the proposed rules and the SEC's long-stated mission

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220 *SEC Climate-Related Risk Proposal*, *supra* note 136, at 15.
221 West Virginia v. EPA, 142 S.Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (citation omitted).
222 *Id.* at 2621.
223 *West Virginia*, 142 S.Ct. at 2610 (citation omitted).
224 *Id.* at 2602.
225 *See SEC Climate-Related Risk Proposal*, *supra* note 136, at 7 n.3.
226 *Id.* at 7 (emphasis added).

"to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[227]

The standard noted above is not novel to the SEC; rather, it is the agency's mainstay when proposing new rules and regulations and has been relied upon by the agency countless times since the passage of the Securities Act and Exchange Act in 1933 and 1934, respectively.[228] Indeed, the agency has cited

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[227] *About the SEC*, SEC. & EXCH. COMM'N, https://www.sec.gov/about.shtml (Nov. 22, 2016); *see also* SEC. & EXCH. COMM'N, STRATEGIC PLAN FISCAL YEARS 2022-2026 5 (2022), https://www.sec.gov/files/sec_strategic_plan_fy22-fy26_draft.pdf. In reviewing an agency's general statutory authority, the Supreme Court has stated that, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). For example, "the 'place limitations' language [with respect to broker-dealer sanctions] requires some concept of the relevant domain. Even the Commission doesn't suggest that the phrase allows it to bar one of the offending parties from being a retail shoe salesman, or to exclude him from the Borough of Manhattan." Teicher v. SEC, 177 F.3d 1016, 1019 (1999).

[228] As just a sample of the SEC's reliance on these statutory provisions to adopt and amend disclosure forms, the forms listed in the table below were adopted and amended under the cited legal standard.

SEC Securities Registration Forms under the Securities Act		
Disclosure Form	***Type of Issuer Description/Offerings***	***Last Updated***
S-1	General Registration Statement Form	Feb. 2021
S-3	Reporting Companies	May 2019
S-4	Exchange Offers	Sept. 2021
S-6	Certain Unit Investment Trusts	Apr. 2021
S-8	Employee Plans	Sept. 2018
S-11	Certain Real Estate Issuers	Sept. 2021
S-20	Standardized Options	Feb. 2021
F-1	General Foreign Private Issuers	Sept. 2021
F-3	Reporting Company Foreign Private Issuers	Sept. 2021
F-4	Foreign Private Issuers and Certain Business Combinations	Feb. 2021
F-6	American Depositary Receipts	Nov. 2018
F-7	Certain Canadian Issuers and Exercise of Rights	May 2019
F-8	Certain Canadian Issuers and Exchange Offers or a Business Combination	May 2019

Securities Act of 1933 Forms List, SEC. & EXCH. COMM'N, https://www.sec.gov/forms?aId=edit-field-act-target-id&field_audience_target_id=All&field_act_target_id=83 (last visited May 26, 2023).

this standard each time it has updated public offering and periodic reporting disclosure requirements for public companies.[229] The agency's consistent reliance on the noted statutory provisions is in stark contrast to the EPA's reliance on a singular provision in the Clean Air Act that had only been used a "handful of times" and which the Court described as a "gap filler."[230]

In addition to the SEC's general use of the noted disclosure provisions, the Commission explained that its rule proposal "builds on the Commission's previous rules and guidance on climate-related disclosures, which date back to the 1970s."[231] The SEC first addressed the disclosure of material environmental issues in the early 1970s when it stated that public companies should consider disclosing the financial impact of compliance with environmental laws.[232] Throughout the 1970s, the agency continued to explore the need for specific rules mandating disclosure of information relating to compliance with laws that relate to environmental protection. "These topics were the subject of several rulemaking efforts, extensive litigation, and public hearings."[233]

"After almost a decade of consideration, the [SEC] adopted rules in 1982 mandating disclosure of information relating to litigation and other business costs arising out of compliance with . . . laws that regulate the discharge of materials into the environment or otherwise relate to [environmental

SEC Periodic Reporting Forms under the Exchange Act		
Disclosure Form	***Type of Issuer Description/Offerings***	***Last Updated***
10-K	Annual Reports	May 2021
10-Q	General Quarterly Reports	Sept. 2021
8-K	Current Reports	Feb. 2021
11-K	Annual Reports of Employee Stock Purchase Plan	Jan. 2021
6-K	Report of Foreign Private Issuers	Sept. 2018

Securities Exchange Act of 1934 Forms List, SEC. & EXCH. COMM'N, https://www.sec.gov/forms?aId=edit-field-act-target-id&field_audience_target_id=All&field_act_target_id=89 (last visited May 26, 2023).

229 *Securities Act of 1933 Forms List*, SEC. & EXCH. COMM'N, https://www.sec.gov/forms?aId=edit-field-act-target-id&field_audience_target_id=All&field_act_target_id=83 (last visited May 26, 2023); *Securities Exchange Act of 1934 Forms List*, SEC. & EXCH. COMM'N, https://www.sec.gov/forms?aId=edit-field-act-target-id&field_audience_target_id=All&field_act_target_id=89 (last visited May 26, 2023).

230 West Virginia v. EPA, 142 S. Ct. 2587, 2602, 2610 (2022).

231 *SEC Climate-Related Risk Proposal, supra* note 136, at 13.

232 *Id.* at 15.

233 *Id.* at 16.

protection].”[234] Along with those specific disclosure requirements, the agency’s “other disclosure rules requiring, for example, information about material risks and a description of the [company’s] business, could give rise to an obligation to provide disclosure related to the effects of climate change.”[235]

Furthermore, in the SEC’s 2010 guidance, “the Commission observed that, in response to investor demand for climate-related information, many companies were voluntarily reporting climate-related information outside” their SEC filings.[236] “The Commission emphasized that ‘registrants should be aware that some of the information they may be reporting pursuant to these mechanisms also may be required to be disclosed in filings made with the Commission pursuant to existing disclosure requirements.’”[237] Regarding the current rulemaking, the Commission concluded that the proposals would “augment and supplement the disclosures already required in SEC filings.”[238]

Given the above considerations, a court would likely conclude that the statutory provisions on which the Commission relies are a mainstay for the SEC and have been used for related purposes since the 1970s. The noted provisions of the Securities Act and the Exchange Act are the opposite of an agency “gap filler,” as referenced in the *EPA* case.[239] Although a court may take the position that “necessary or appropriate in the public interest or for the protection of investors” is “vague language” for the purpose at hand, given the broad and varied general uses of the regulatory standard and the climate-related uses in particular, a court more likely would conclude that the Commission is not asserting a newfound power in vague, rarely used statutory provisions.

5. Dissenting Commissioner Statement

As previously noted, the Commission proposed the climate-related risk disclosure rules on a three-to-one vote, with Commissioner Peirce dissenting. Commissioner Peirce issued a statement outlining the basis for her position, commenting that, “[m]any people have awaited this day with eager anticipation. I am not one of them.”[240] Among her criticisms, she believed that the

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234 *Id.*

235 *Id.*

236 *Id.* at 17.

237 *Id.* (quoting SEC Rel. No. 33-9106 (Feb. 8, 2010)).

238 *Id.*

239 West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

240 Hester M. Peirce, Comm’r, Sec. & Exch. Comm’n, Statement: We are Not the Securities and Environment Commission—At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

rulemaking did not have "[a]n adequate statutory basis for the proposal."[241] In this regard, the Commissioner stated that, "[t]his proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment limitations on compelled speech."[242]

Along with a First Amendment argument, Commissioner Peirce set forth her view that the SEC may be exceeding its authority, especially in a case that she viewed as having "vast economic and political significance."[243] She stated that:

> Focusing on information that is material to a company's value proposition [rather than concerns about the climate] … keeps us from exceeding the bounds of our statutory authorization. The further afield we are from financial materiality, the more probable it is that we have exceeded our statutory authority. … Indeed, in the rare instances when Congress has wanted us to go beyond those subject-matter boundaries, it has told us to do so. *We do not have a clear directive from Congress, and we ought not wade blithely into decisions of such vast economic and political significance as those touched on by today's proposal.*[244]

The Commission is proposing "to require companies to disclose information that may not be material to them and recasts materiality to encompass information that investors want based on interests other than their financial interest in the company doing the disclosing."[245] Commissioner Peirce concluded that the SEC "would do well to heed the admonition of the Supreme Court" in an EPA case (which was decided prior to *West Virginia v. EPA*).[246] "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[247]

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241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.* (emphasis added).

245 *Id.*

246 *Id.*

247 *Id.* Commissioner Peirce cited *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (citations omitted), which is a predecessor to *West Virginia v. EPA* – recasting the rationale as the "major questions" doctrine. Along the same lines, the U.S. Chamber of Commerce

Commissioner Peirce wrote her statement prior to the publication of *West Virginia v. EPA*; however, her statement punches many of the "majority questions" buttons based on precedent. The core of her argument was that certain of the Commission's proposals are "afield… from financial materiality" and recast materiality to include what investors want for non-financial reasons. The Commission, however, clearly stated its objectives were the disclosure of information that is material to a company's "financial performance or position."[248] Nevertheless, recall that courts unsympathetic to SEC actions have referenced statements of dissenting Commissioners to buttress their holdings.[249]

6. What if a "Reason to Hesitate"?

A court, on balance, likely would not conclude that the SEC's climate-related risk disclosure proposal provides the predicate for a "major questions" case, *i.e.*, the proposal does not create "a reason to hesitate." As previously discussed, a court likely would not conclude that (i) the Commission's proposed rulemaking is a matter of "great economic and political significance" or (ii) the "history or breadth" of the asserted authority shows that the agency is seeking newfound power in the vague language of a rarely used statute.

However, if a court were to conclude otherwise, the court then would require the Commission to demonstrate that there is "clear congressional

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argued in its comment letter to the rulemaking that, "[t]he SEC does not have general authority to impose climate- and environmental-focused regulation in the comprehensive fashion contemplated by the Proposed Rules." Chamber of Com. of the U.S., Comment Letter on the Enhancement and Standardization of Climate-Related Disclosures for Investors 8 (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf. "[W]e do not believe that Congress intended for the SEC to set major environmental policy for American businesses or resolve major questions relating to climate change." *Id.* The Chamber went on to discuss the "major questions" doctrine and cited *U.S. Telecom Association v. FCC*, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of reh'g *en banc*). *Id.* at 25. The letter also contended that the SEC repeatedly conflates the "protection of investors" with "investor demand." *Id.* at 29. "Investors may demand information for a variety of reasons. Some may wish to guide their investing based on moral beliefs . . . others may wish to pursue a political agenda . . . none of this concerns the 'protection of investors.' Investors need protection from fraud and material risks." *Id.*

248 *See, e.g.*, *SEC Climate-Related Risk Proposal, supra* note 136, at 7 ("We are proposing to require disclosures about climate-related risks and metrics reflecting those risks because this information can have an impact on public companies' financial performance or position and may be material to investors in making investment or voting decisions.").

249 *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015); Chamber of Com. v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

authorization" for its rulemaking. The *EPA* Court's majority cautioned that, "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[250] "Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[251]

As previously noted, the standard in each of the relevant statutory provisions requires a clear nexus between a proposed rule and the SEC's regulatory mission. In addition to the SEC's general use of the regulatory standard, the agency explained that its rule proposal "builds on the Commission's previous rules and guidance on climate-related disclosures, which date back to the 1970s."[252] Once again, the relevant legal provisions would be the opposite of an agency "gap filler," as referenced in the *EPA* case.

Nevertheless, a court may question whether "necessary or appropriate in the public interest or for the protection of investors" is too "vague" for the Commission's proposed disclosure rules. In the *EPA* decision, the Supreme Court was not persuaded by the agency's claim of authority based on the "best system of emission reduction" in Section 111 of the Clean Air Act: The Justices reasoned that, "as a matter of 'definitional possibilities,' generation shifting can be described as a 'system' . . . capable of reducing emissions.[253] "But of course almost anything could constitute such a 'system'; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents."[254] In the Justices' view*, "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d)."*[255] The decision "rests with Congress itself, or an agency acting pursuant to a clear delegation" of Congressional authority.[256]

Unlike the legislative standard that was considered by the Court in the *West Virginia v. EPA* decision, the legislative standard upon which the SEC relied is a mainstay for many, if not most, of its corporate disclosure provisions. Again, regarding climate-related disclosures, the Commission has relied on that regulatory standard dating back to the 1970s. Therefore, a court likely would not conclude that the SEC is seeking to "adopt its own regulatory scheme" vis-à-vis the "necessary or appropriate in the public interest or for the protection of investors" standard. However, a court may view the current SEC proposal

250 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citations omitted).
251 *Id.* (citations omitted).
252 *SEC Climate-Related Risk Proposal, supra* note 136, at 13.
253 *West Virginia*, 142 S. Ct. at 2614 (citing FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)).
254 *Id.*
255 *Id.* at 2616 (emphasis added).
256 *Id.*

is a matter that is sufficiently significant from an economic or political perspective that specific legislation is required.

Along with an analysis using the EPA Court's majority framework, a court also may turn to Justice Gorsuch's concurring opinion. Justice Gorsuch further suggested that a court examine the age and focus of the relevant statute in relation to the problem the agency seeks to address, as well as the agency's past interpretations of the statute. For the SEC, the statutory provisions have been in existence since 1933 and 1934, respectively. A court, therefore, would likely focus on the problem the Commission is seeking to address, which is to provide investors with material climate-related risk disclosures. The court could go down the path that there are likely numerous other disclosures that relate to a publicly traded company's "financial performance or position." In this regard, the Commission seeks to provide material risk disclosures, with improved "consistency, comparability and reliability."

A court also could take the path that the disclosures, as proposed, require a specific congressional directive because the disclosures are "afield … from financial materiality," as dissenting Commissioner Peirce suggested.[257] That said, a court likely will take note that the SEC's past interpretations of its authority have included climate-related risk disclosures. Therefore, the Commission has met its burden to demonstrate that it is moving forward with "clear authorization."

CONCLUSION

West Virginia v. EPA should cause federal agencies to reevaluate their recently adopted rules and proposed regulatory agendas to ensure compliance with the Supreme Court's major questions doctrine. As the SEC's proposed climate-related risk disclosures demonstrate, the Commission should be on safe ground, provided the agency proceeds with a well-documented record on the basis for its actions. As part of this record, the agency should demonstrate that each rulemaking does *not* present an "extraordinary case" that provides a court with a "reason to hesitate" regarding the Commission's authority. The agency should carefully consider each element of the doctrine: economic and political significance and the history and breadth of its asserted authority.

If a court were to conclude that an SEC rule presents a "reason to hesitate," the Commission should have documented that there is "clear congressional authorization" for the rule. If there is not a specific congressional mandate, the public record should show that the relevant statutory provision provides a clear

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[257] Peirce, *supra* note 240.

nexus between the rule and the SEC's regulatory mission, and that the statutory provision is a mainstay for the agency. In addition, the agency should document that the rule builds on the Commission's previous regulatory actions.

Moreover, given that dissenting SEC Commissioners often provide a court with predicate facts for a negative outcome for the agency, rulemakings should represent a consensus among the Commissioners, if practicable. Better to have a solid regulation that is fully supported rather than not – which would likely be more susceptible to judicial challenge.

Along with the proposed climate-related risk disclosures, other regulatory action items for the SEC may implicate the major questions doctrine, in particular investment advisory consideration of ESG factors and corporate board diversity disclosures. The SEC's considered regulation of cryptocurrencies and other digital assets also may be on the list. Nevertheless, the Commission should remain on solid ground, provided its actions continue to remain within the bounds of its authority and the agency maintains appropriate supporting public records.

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