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RISKY BUSINESS: SHINING A LIGHT WITH CORPORATE CLIMATE-RELATED DISCLOSURES IN AN AGE OF AGENCY SKEPTICISM

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Introduction

> *Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.*[1]

On March 6, 2024, after two years of public debate and scrutiny, the Securities and Exchange Commission (the "SEC") finalized and adopted "The Enhancement and Standardization of Climate-Related Disclosures for Investors" by a 3-2 vote (the "Climate-Related Risk Disclosure Rule").[2] Almost immediately, legal battles emerged claiming the SEC had both gone

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1. Louis Brandeis, *Other People's Money,* 92 (Frederick A. Stokes Co., 1914).

2. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. Nos. 33-11275, 34-99678 (Mar. 6, 2024), 89 Fed. Reg. 21,668 (Mar. 28, 2024) [hereinafter Climate-Related Risk Disclosure Rule].

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too far[3] and not far enough[4] in issuing the disclosure mandate. On April 4, 2024, a little less than a month since publishing, the SEC voluntarily stayed the effective date of the final rule pending judicial review of these challenges.[5] This stay, however, was far from the SEC admitting defeat in the face of adversity.

The Biden Administration has tackled the two main financial risks related to intensifying climate-change: physical and transition risk.[6] Physical risks are both chronic (rising sea levels and temperatures) and extreme (increased frequency of fires, floods, and hurricanes), impacting physical capital like property damage, supply-chain disruption, or other losses in productivity.[7] Transition risks, though perhaps less recognized perhaps by the public, are the result of group action (government, investor, or consumer actions) or technological influences (innovations that make equipment, assets, or processes obsolete).[8] Both are significant threats to our economic way of life.[9] These physical and transitional climate-related risks pose financial risks ranging from property damages to climate regulation compliance and net-zero goals for corporations.[10]

Legal systems do and will continue to play an important governance role in facilitating responses to climate change across all levels of society.[11] The

3. *See* Nat. Res. Def. Council, Inc. v. SEC, No. 24-707 (2d Cir. filed Mar. 12, 2024); Liberty Energy Inc. v. SEC, No. 24-60109 (5th Cir. filed Mar. 6, 2024); Louisiana v. SEC, No. 24-60109 (5th Cir. filed Mar. 7, 2024); Tex. All. of Energy Producers v. SEC, No. 24-60109 (5th Cir. filed Mar. 11, 2024); Chamber of Commerce of U.S. of Am. v. SEC, No. 24-60109 (5th Cir. filed Mar. 14, 2024); Ohio Bureau of Workers' Comp. v. SEC, No. 24-3220 (6th Cir. filed Mar. 13, 2024); Iowa v. SEC, No. 24-1522 (8th Cir. filed Mar. 12, 2024); West Virginia v. SEC, No. 24-10679 (11th Cir. filed Mar. 6, 2024) [hereinafter Final Rule Lawsuits].

4. *See* Sierra Club v. SEC, No. 24-1067 (D.C. Cir. filed Mar. 13, 2024).

5. In re Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. Nos. 33-11280, 34-99908 (Apr. 4, 2024) (announcing voluntary stay).

6. Exec. Order No. 14,030, 86 Fed. Reg. 27967 (2021).

7. *Id*.

8. *Id.*

9. *Id.* ("[T]hese physical and transition risks threaten[] the competitiveness of U.S. companies and markets, the life savings and pensions of U.S. workers and families, and the ability of U.S. financial institutions to serve communities.").

10. Deckelbaum et al., *Introduction to ESG*, Harvard Law School Forum on Corporate Governance, (Oct. 22, 2022), https://corpgov.law.harvard.edu/2020/08/01/introduction-to-esg/.

11. *See* IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability.* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change Cambridge University Press. Cambridge University Press, Cambridge, UK and New York, NY, USA.

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Biden Administration has made its intent clear when it comes to tackling climate change: leveraging the "whole of government" to advance its climate agenda, with or without Congress.[12] In its toolbox, the SEC opened comments for proposed rulemaking on "The Enhancement and Standardization of Climate-Related Financial Disclosures for Investors" (the "Proposed Rule") in March 2022.[13] The Proposed Rule was hailed as a landmark regulatory effort aimed at climate change.[14] Others deemed it the light in the pathway toward informing and protecting not just investors, but all areas of economy.[15] With this praise also came intense scrutiny and threats of litigation.[16]

The Climate-Related Risk Disclosure Rule seeks to shed light on the physical and transition risks associated with climate-change in a mandatory and consistent fashion for investors. But as agencies like the SEC grapple with how to address the physical and transitional risks associated with climate change, courts will likewise grapple with nearly a century of administrative authority. As *Chevron* deference has shifted to skepticism in the face of major questions, the Climate-Related Risk Disclosure Rule

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12. Press Briefing, Principal White House Deputy Press Secretary Karine Jean-Pierre, (Oct. 21, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/21/press-briefing-by-principal-deputy-press-secretary-karine-jean-pierre-2/ [hereinafter 2022 Climate Change Report].

13. *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334, 21335 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) [hereinafter Proposed Rule].

14. Clyde Wayne Crews Jr., *SEC's Climate Disclosure Rules Advance Biden's Epic Whole-Of-Government Regulatory Agenda*, FORBES, Mar. 21, 2022, https://www.forbes.com/sites/waynecrews/2022/03/21/secs-climate-disclosure-rules-advance-bidens-epic-whole-of-government-regulatory-agenda/?sh=67f4b47b229f.

15. Katanga Johnson, *U.S. SEC Proposes Companies Disclose Range of Climate Risks, Emissions Data*, REUTERS (Mar. 21, 2022) (quoting Tracey Lewis, a policy counsel at advocacy group Public Citizen "[t]his proposed pule will be the light in a pathway toward addressing President Biden's priority of disclosing climate risk to investors and all areas of our society.").

16. Patrick Morrissey, et al., *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices*, Comment Letter on Proposed Rule (Aug. 16. 2022), https://ago.wv.gov/Documents/2022.08.16%20ESG%20Funds %20Comment.pdf. The Attorney Generals of West Virginia, Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansans, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming joined in once again to comment on the SEC's climate-related regulatory action. The same collective group of Attorney Generals previously submitted *Letter from States of West Virginia*, *et al.* to Vanessa Countryman, Secretary, SEC (June 15, 2022), https://bit.ly/3R8Z8YL [hereinafter State Letters].

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undoubtedly faces this interpretative hurdle to implementation. The scope and applicability of the major questions doctrine itself, however, is unclear and unsettled.

This comment evaluates the SEC's climate-risk disclosure response and addresses one of its greatest opponents: the major questions doctrine. Part I outlines recent trends in financial statement climate-related disclosures, including how the current voluntary corporate disclosure regime is inadequate to meet growing demand and impact on investor decision making. It also addresses the SEC's response, both formally and informally, to this growing demand and necessity. Part II identifies two postulated and outcome-determinative versions of the major questions doctrine and relies on precedent to consider whether the SEC's climate-related disclosure scheme is contextually "major". Part II distinguishes that this threshold question of *majorness* diverts when analyzing what agencies are attempting to regulate and how they go about it, though often the analysis bleeds into one another. This comment cautions against an overly broad definition of the major question and advocates for a more mindful application of the doctrine. It further reconciles with the need for a textualist approach that serves as a carve-out to *Chevron* as best suited for evaluating the Climate-Related Risk Disclosure Rule. Further, it contextually explores the outcome and dangers of resurrecting the strong version.

I. Background

A. Climate Change and (Some) Changed Attitudes

The science is clear to most: climate change presents a shared and immediate threat to human well-being and planetary health.[17] Perhaps most troubling, there exists a brief window of opportunity to mitigate and adapt to such catastrophic change.[18] Climate change impacts are global and span across ecosystems and human systems.[19] It is no longer a question of *if* but rather *to what extent* human and natural systems will be disrupted.[20] Our global climate resiliency depends on the next decade of concerted actions and choices.[21] As planet temperatures rapidly rise, a countervailing rapid reduction in greenhouse gas emissions ("GHG emissions") is needed.[22]

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17. *See* 2022 Climate Change Report, *supra* note 12.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

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Political pressure is also on the rise. Recognizing the clear and present danger of climate change, the Biden Administration has set ambitious regulatory targets for the not-so-distant future.[23] Such goals require concerted action from the private and public sectors, as well as individuals. Thus, the Biden Administration has taken aim at fiscal management impacted by both these transition goals and already prevalent climate-related physical risks.[24] In doing so, President Biden has called on the creativity, courage, and capital of the United States to face this crisis.[25] The call-to-action is hardly a new or unexpected one for the SEC, who in 2010 issued the interpretative release "Commission Guidance Regarding Disclosures Related to Climate Change" suggesting that mandatory climate-related risk disclosure could apply to existing disclosure requirements.[26] Following Executive Order 14030, the Financial Stability Oversight Council[27] identified climate change as an emerging and increasing threat to U.S. financial stability akin to those more traditional risks like credit, liquidity, and operational risk.[28]

Little official agency action followed in the years after the guidance. Companies, however, took notice and action of such shifting attitudes from regulators, consumers, stakeholders, and investors.[29] As a result, voluntary

23. Exec. Order No. 14,008, 86 C.F.R. 7619 (2021). President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad on January 27, 2021 emphasized the "narrow moment" the global community has to react to the "profound climate crisis" that requires "global reductions in greenhouse gas emissions and net-zero global emissions by mid-century or before."

24. Exec. Order No. 14,030, *supra* note 6. President Biden's Executive Order on Climate-Related Financial Risk on May 20, 2021 set forth what he believes is his Administration's responsibility to "to advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related risk."

25. *Id.* at 27697.

26. U.S. Sec. Exch. Comm'n, *Commission Guidance Regarding Disclosures Related to Climate Change*, 75 Fed. Reg. 6290 (Feb. 8, 2010) (suggesting that climate-related risks had the potential to be material, a well-known standard in securities law that has been used in relation to environmental disclosures since the early 1970s, under the disclosure requirements of Regulation S-K and S-X).

27. Financial Stability Oversight Council, *Report on Climate-Related Financial Risk*, fn. 1, 2021. The council's ten voting members include heads of the heads of the Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, National Credit Union Administration, Commodity Futures Trading Commission, and the SEC.

28. *Id.* at 107–110.

29. *See* Kenneth P. Pucker, *Overselling Sustainability Reporting*, HARVARD BUSINESS REVIEW, (May 2021), https://hbr.org/2021/05/overselling-sustainability-reporting (finding

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corporate social responsibility reporting has increased a hundredfold in the past two decades.[30] Between 2019 and 2020, 33% of all annual reports filed by public companies contained climate-related disclosures with two-thirds of the S&P 500 having established a target for carbon emissions.[31]

Many industry leaders increasingly recognize the cost of running business merely by the status quo; rather, it is more apparent than ever that climate change poses risk and uncertainty that impact financial health.[32] Take for example Exxon Mobil. For decades this global energy provider downplayed their own impact on climate-change and generally challenged the connection between human activity and rising global temperature only to publicly vow steps toward sustainability like pledging to be net zero by 2050.[33] Recent proxy seasons also reflect a growing concern as shareholders voice concern on environmental issues.[34] Overall, these voluntary disclosure efforts represent progress, but regulation and standardization have failed to "keep pace" with the market.[35]As many experts argue, even high voluntary disclosure participation is insufficient and ultimately costly to the market.[36]

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that voluntary disclosures in corporate social responsibility reports have grown more commonplace for global corporate powerhouses across industries).

30. *See* Nicole Sullivan, *Unpacking the 490-Page Proposed SEC Climate Disclosure Rule*, (Dec. 1, 2022), https://carbonbetter.com/story/sec-climate-disclosure/.

31. *Id.* (quoting SEC Commissioner Crenshaw's Remarks at the Inaugural ECGI Capitalism Summit on Nov. 1, 2022); *see also* S&P 500 and ESG Reporting, Center for Audit Quality (Aug. 9, 2021), https://www.thecaq.org/sp-500-and-esg-reporting. In 2020, 271 companies published environmental, social, & governance data, an increase from 188 companies in 2019.

32. *See* Melissa K. Scanlan, *Climate Risk is Investment Risk*, 36 J. ENV'T LAW AND LITIGATION 1 (2021).

33. Press Release, ExxonMobil, ExxonMobil announces ambition for net zero greenhouse gas emissions by 2050 (Jan. 18, 2022), https://corporate.exxonmobil.com/News/Newsroom/News-releases/2022/0118_ExxonMobilannounces-ambition-for-net-zero-greenhouse-gas-emissions-by-2050.

34. Chuck Callan, et al., *2022 Proxy Season Preview,* Harvard Law School Forum on Corporate Governance (Mar. 14, 2022), https://corpgov.law.harvard.edu/2022/03/14/2022-proxy-season-preview/#9b ("[S]upport among all shareholders increased from 33% overall in 2020 to 37% in 2021. Voting by institutional investors drove the greater level of support, as 40% of their voted shares were cast in favor of these proposals in 2021, up from 35% in 2020.").

35. *See* Statement, U.S. Sec. Exch. Comm'n, *ESG—Keeping Pace with Development Affecting Investors, Public and the Capital Markets*, (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121.

36. Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923, 944-952 (2019) (evaluating the shortcomings of a voluntary disclosure regime); George S.

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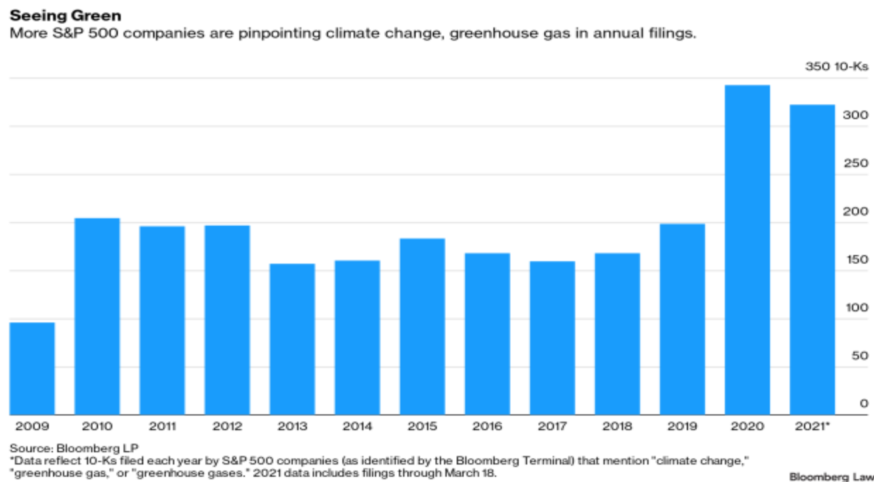

Figure 1: S&P 500 Companies Voluntarily Pinpointing Climate Change, Greenhouse Gases in Annual Fillings[37]

Other shareholders and stakeholders at the center of this disclosure debate are large global financial asset managers, who, are notably the largest supporters of climate disclosure initiatives.[38] Support and demand, however, is not limited to asset managers.[39] Recently, a nonpartisan

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Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 718-22 (2021) (highlighting the benefits of standardized disclosure frameworks); *see also* Climate-Related Risk Disclosure Rule *supra* note 2 at 11 ("climate-related information that these companies currently provide, however, is inconsistent and often difficult for investors to find and/or compare across companies.").

37. Andrew Ramonas, *Climate Change Risks Surge in Companies' Annual Reports to SEC*, BLOOMBERG LAW, (Mar. 25, 2021), https://news.bloomberglaw.com/securities-law/climate-change-risks-surge-in-companies-annual-reports-to-sec.

38. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405 (2020) (explaining that "large asset managers like BlackRock, State Street, and Vanguard" are the "chief supporters" of initiatives like climate-related disclosures).

39. *See* Americans for Financial Reform Education Fund, *Results of a Nationwide Survey: Retail Investors' Support for the SEC Mandating Climate-Related Financial Disclosures from Public Companies,* EMBOLD RESEARCH, (Apr. 28, 2022), https://ourfinancialsecurity.org/wp-content/uploads/2022/04/FINAL-Report_Climate-Disclosure-Survey-Results_AFR-PC-2.pdf. The results were based on 2,621 completed surveys current (n=2532, 97%) and future investors (n=89, 3%), between March 18 and March 29, 2022. "Current investors" were those who listed having one or more of the following investments: Retirement account, such as a pension, 401k, 403b, 457b, or Individual Retirement Account

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investor survey showed strong investor support and demand for regulated climate-related disclosure.[40] The survey revealed that 70% of investors were on board with standardized and mandatory climate-related disclosure for companies financial risks, both physical and transitional.[41] Another 65% of investors indicated that they felt it was important for corporations, banks, and other financial institutions to disclose to investors not only climate change risks, but also strategies to address such risks.[42] Of that same group, 58% revealed that such information would likely be material in their investment decisions.[43] Many of these investors emphasized trust as a current issue with 36% indicating they trusted the current system of voluntary disclosures.[44] This demand cannot be wholly satisfied by voluntary climate-related disclosures because its inconsistency and incomparability fail to adequately inform investors in a meaningful way.[45] Moreover, often public companies are relegating these voluntary disclosures to departments more concerned with corporate branding than investor due diligence, making the area ripe for additional issues like greenwashing.[46] Other reports support the direct financial impact and observed costs felt by investors and businesses alike.[47]

(IRA), Stocks, Bonds, Government Certificates of Deposit (CDs), Mutual funds, Exchange traded funds or index funds. "Future investors" were those who indicated that they plan to begin investing independently (excluding real estate or cryptocurrency) or through an employer sponsored retirement plan within the next five years. The survey was fielded among a representative sample of Americans, 57% of whom have at least one form of investment, the most common type being retirement accounts (49%), followed by stocks (31%), then mutual funds (18%).

40. *Id.*

41. *Id.*

42. *Id.* at 3.

43. *Id.* at 1.

44. *Id.*

45. Fisch, 107 GEO. L. J. 923 at 951 ("Critically, SEC action is necessary because investors are allocating capital and businesses are basing operational decisions on sustainability information that is unreliable. As a result, the economic value of sustainability practices cannot be assessed effectively.").

46. *Id.* at 950 (Criticizing that sustainability reports are "often prepared by public relations or marketing personnel and, as a result, contain disclosures that do not meet the standards applied to securities filings."). Greenwashing permits companies to falsely tout sustainable practices in order to win over consumers and other warranted benefits, without accountability for such practices and a risk of great harm to not only investors but consumers as well. For more information on the practice and dangers of green misconception *see* Bryant Cannon, *A Plea for Efficiency: The Voluntary Environmental Obligations of International Corporations and the Benefits of Information Standardization*, 19 N.Y.U. ENVTL. L.J. 454, 478 (2012) and Cadesby B. Cooper, *Rule 10b-5 at the Intersection of*

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Comments to the Proposed Rule also revealed seemingly widespread support from a variety of stakeholders. As of February 1, 2023,[48] the Proposed Rule received nearly 16,000 comments.[49] A volume that, when compared to the not-even 150 comments the SEC received for its proposed disclosure enhancement on cybersecurity, contextualizes the sheer magnitude and even anomaly of such public commentary.[50] It is not just the volume, but rather the unusual percentage of individualized comment letters that is noteworthy.[51] Nearly 16% of comments were individualized comment letters and approximately 54% expressed support, while about 42% were opposed, around 4% remained neutral.[52] Of those supportive letters 24% argued that the Proposed Rule would enable investors to make more informed choices and 21% recognized how the Proposed Rule would enable investors to protect themselves and their investments from climate-related risk.[53] Desire for standardization, transparency, and global regulatory alignment were also common supportive themes.[54] It is important to remember, however, that these pro-disclosure letters are not dispositive. The most common support theme, found in 28% of letters, applauded the Proposed Rule's ability to help protect the environment—a matter not at the heart of the SEC's disclose regime authority or purpose.[55] This emerging theme reiterates the question of whether such climate-related disclosures are serving special, rather than investor, interests.[56] The vast majority of comments, form letters, expressed broad support for the Proposed Rule.[57] While facially this statistic might indicate towering public

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Greenwash and Green Investment: The Problem of Economic Loss, 42 B.C. ENVTL. AFFS. L. REV. 405, 408 (2015).

47. *See* FSOC Report, *supra* note 27.

48. In its final rule, the SEC noted that it had received 4,500 unique comment latter and 18,000 form letters. Climate-Related Risk Disclosure Rule, *supra* note 2 at 16.

49. Jacob Hupart, et. al., *What Public Comments on the SEC's Proposed Climate-Related Rules Reveal—and the Impact They May Have on the Proposed Rules*, MINTZ (July 20, 2022), https://www.mintz.com/insights-center/viewpoints/2301/2022-07-20-what-public-comments-secs-proposed-climate-related-rules#_edn3.

50. *Id.*

51. *Id.* For comparison, of the 300,000 comments to the proposed SEC rule on compensation disclosure, only about 0.5% were individualized comment letters.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* Nearly 84% of public comments submitted were form letters. Approximately 83% of such forma letters expressed broad support for the Proposed Rule.

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support, behind much, though not the majority, of that volume are a few concerted organizations.[58]

Support for formalized and mandatory climate-related disclosures was not universal. Climate-related risk disclosure continues to be a sparring point in Congress.[59] Meanwhile, just in the last two years, over eighteen states have introduced or adopted state legislation or regulation barring the use of climate-related considerations negative screening strategies in investments.[60] Likewise, some states have sought to protect certain industries especially posed for climate-related risks, from what they claim amounts to investor discrimination through enacting or releasing state laws, investment resolutions, and attorney general or state treasurer opinions.[61]

B. The SEC's Proposed Rule on Climate-Related Disclosure

By early 2021, the SEC had more than felt the shifting tectonic plates of the ESG landscape[62] and, along with invigorated executive branch support, put the ball in motion for new climate-related disclosure mandates.[63] In

58. *Id.* ("Union of Concerned Scientists in support of the proposed climate disclosures were submitted 6,886 times—more than 52% of the total volume of form letters. Additionally, the form letters proposed by the Climate Action Campaign and the National Wildlife Federation in support of the SEC's proposed disclosures were also quite voluminous among the submissions—1,208 and 1,061 comment letters, respectively.").

59. H.R. 2570, 117th Congress (2021-2022) (seeking to direct the SEC to require an issuer of securities to annually disclose information regarding climate change-related risks posed to the issuer, including an issuer's strategies and actions to mitigate these risks, including direct and indirect greenhouse-gas emissions and disclose their fossil fuel-related assets.) *compare with* H.R. 32, 118th Congress (2023-2024) (supporting the current definition of materiality in the securities laws and opposing new disclosure requirements outside the core mission of the Securities and Exchange Commission.).

60. *Update: Four More States Move Toward Anti-ESG Regulations*, MORGAN LEWIS: ML BENEFITS (Oct. 13, 2022), https://www.morganlewis.com/blogs/mlbenebits/2022/10/update-four-more-states-move-toward-anti-esg-regulations.

61. In Texas, the legislature passed Senate Bill 19 to protect the fossil fuel industries from discrimination based on negative screening of a company's environmental, social, and governance (ESG) rating by any asset manager or other company that does business with the state.

62. On March 15, 2021, then SEC Acting Chair Allison Herren Lee spoke at the Center for American Progress and cited "the magnitude of the shift in investor focus . . . toward the analysis and use of other climate and other ESG risks and impacts in investment decision making" before welcoming comments and public input on climate change disclosures.

63. Just weeks before Lee's address at the Center for American Progress, the SEC also announced the Climate and ESG Task Force as new 22-member team part of the SEC's Division of Enforcement with a mission to "develop initiatives to proactively identified ESG-related misconduct. *See* Press Release, U.S. Sec. Exch. Comm'n, *SEC Announces*

March 2022, the SEC proposed the long-anticipated rules mandating climate related disclosures in companies' annual reports and registration.[64]

The Proposed Rule was based on the Task Force on Climate-Related Financial Disclosure ("TCFD") recommendations.[65] As such, they contained both qualitative and quantitative metrics.[66] The Proposed Rule covered four topic areas: governance, strategy, risk management, and metrics & targets. It would, at a high level, require disclosure of the following:

- Scope 1, Scope 2, and Scope 3 greenhouse gas (GHG) emissions.
- Climate-related risks and opportunities.
- Climate risk management processes.
- Climate targets and goals.
- Governance and oversight of climate-related risks. [67]

The Proposed Rule included Scope 1, 2, and 3 emissions based on the GHG Protocol framework, the most widely used international tool for accounting and categorizing GHG emissions. Such a framework was reflected in the Proposed Rule.[68] The Proposed Rule sought to require a registrant to disclose information about both its direct GHG emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2).[69] Additionally, and arguably most controversial,[70]a registrant

Enforcement Task Force Focused on Climate and ESG Issues, (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

64. *See* Press Release, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46; *see also* Proposed Rule, *supra* note 13.

65. The Task Force on Climate-Related Financial Disclosure is an industry-led taskforce headed up my Michael Bloomberg that, as of 2021, more than 2,600 organizations with more than $25 Trillion market cap and 1,069 financial institutions managing $194 million have expressed support on behalf of. For more information on the TCFD, visit https://www.fsb-tcfd.org/.

66. *Id*.

67. *Id*.

68. *Id*.

69. *Id*.

70. Hilary Holmes, et. al*., Energy Industry Reacts to SEC Proposed Rules on Climate*, GIBSON, DUNN, & CRUTCHER, LLP (Sept. 5, 2022). As of September 2022, 90% of public company letters and 90% of industry association letters commented on the GHG emissions reporting requirements, with particular focus on the disclosure requirements in the Proposed Rule as compared to existing GHG emissions reporting requirements of the Environmental

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would have been required to disclose GHG emissions from upstream and downstream activities in its value chain (Scope 3), if considered material or if the registrant had set a GHG emissions target or goal that includes such emissions.[71] The SEC justified these disclosures as decision-useful information pertaining to both climate-related physical and transition risk.[72]

The Proposed Rule provided a safe harbor for all from Scope 3 emissions disclosure and an exemption for smaller reporting companies.[73] The safe harbor insulated the Scope 3 disclosures from fraudulent statements liability, unless made or reaffirmed without a reasonable basis or disclosed other than in good faith.[74] Other than the foregoing Scope 3 disclosure safe harbor, the Proposed Rule did not include any new safe harbors.[75] Additionally, the Proposed Rule would have required companies to describe "climate-related risks reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest over the short, medium, and long term."[76] Included were both physical and transition risks.[77]

Support by some of the world's largest and most powerful companies for the Proposed Rule was cautious and conditional. Overall, one of the most common concerns from would-be abiding public companies centered on liability.[78] These companies advocated for furnishing rather than filing such climate-related disclosures, claiming the outlined disclosures were ripe with uncertainty.[79] Beyond liability, companies urged the SEC to consider the costly burden of would-be mandated climate-related disclosures and suggested the agency adopt existing frameworks considering financial materiality like the TCFD.[80] Other Fortune 500 companies urged the SEC

Protection Agency ("EPA"), the materiality of GHG emissions as defined, particularly with respect to Scope 3 emissions, and safe harbors for GHG emissions disclosure.

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*.

75. *Id*.

76. Proposed Rule, *supra* note 13.

77. *Id.; see also* Exec. Order No. 14,030, *supra* note 6.

78. Alphabet, Amazon, Autodesk, eBay, Facebook, Intel, Salesforce issued a joint letter acknowledging a need for mandatory corporate disclosures but fearing that companies would be subjected to "undue liability, including from private parties." Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8907252-244227.pdf.

79. *Id.*

80. *Id.*

to consider a phased approach and the use of safe harbor provisions to address the same liability concerns.[81]

C. The SEC's Final Rule on Climate-Related Disclosure

On March 6, 2024, after two years of public debate and scrutiny, the SEC finalized and adopted "The Enhancement and Standardization of Climate-Related Disclosures for Investors" by a 3-2 vote.[82] Beginning with registration statements and annual reports for the year ending on December 1, 2025, registrants must provide climate-related disclosures.[83] Despite pleas otherwise,[84] these required climate-related disclosures will be as "filed" and therefore subject to potential liability under Section 18 of the Exchange Act as well as subject to potential liability under Section 11 of the Securities Act if included in or incorporated by reference into a Securities Act registration statement.[85] Certain new disclosures may, however, fall under safe harbors.[86]

The Climate-Related Risk Disclosure Rule creates a new subpart of Regulation S-K[87] and Article 14 of Regulation S-X.[88] At a high level the new subpart 1500, *Climate-Related Disclosure,* to Regulation S-K mandates disclosure of (1) material climate-related risks impacting the business,[89] (2) climate-related action,[90] and (3) GHG emissions.[91]

81. Jessica D. Jackson, *A Future of Mandatory Environment, Social, and Governance (ESG) Disclosures: A Review of Public Comments as a Case Study in the Impact of ESG*, 9 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 120, 139 (2022) (reviewing Chevron's Comment Letter and postulating that the company likely hoped to persuade the SEC and demonstrate that even the energy sector has been disclosing voluntary similar information by noting a decade-long history of reporting climate-related information like its U.S. greenhouse gas emissions, to the EPA).

82. Climate-Related Risk Disclosure Rule, *supra* note 2.

83. *Id.* at 587–90.

84. *See* Jackson, *supra* note 81 at 138–40.

85. Climate-Related Risk Disclosure Rule, *supra* note 2 at 583-84.

86. *.Id.* at 35. Under Item 1507, certain climate-related disclosures will constitute "forward-looking statements" and fall under the protections of the Private Securities Litigation Reform Act of 1995 (PSLRA) safe harbors. *See also* Pub. Law 104-67, 109 Stat. 737.The PSLRA safe harbor extends to forward-looking statements (excluding historical facts) in the disclosures pertaining to transition plans (Item 1502(e)), scenario analysis (Item 1502(f)), use of internal carbon pricing (Item 1502(g)), and targets and goals (Item 1504).

87. *See* SEC, Regulation S-K, 17 CFR § 229.

88. The new required footnotes to certain financial statements are outside the scope of this comment. Details can be found at Climate-Related Risk Disclosure Rule, *supra* note 2 at II.K.2.

89. *Id.* § II.C., D.

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First, under new Item 1502(a), a company must disclose climate-related risks that are "reasonably likely to have a material impact on the registrant's business strategy, operational results, or financial condition."[92] Under new Item 1502(b), a company will be required to describe the actual and potential material impacts of any climate-related risks identified in response to Item 1502(a) on the company's strategy, business model, and outlook.[93] The Climate-Related Risk Disclosure Rule provides a non-exclusive list of potential material impacts.[94] Moreover, under new Item 1502(d)(1), a company will be required to discuss how any climate-related risks identified in response to Item 1502(a) have actually materially impacted or are reasonably likely to materially impact the company's business, results of operations, or financial condition.[95]

Next, under new Item 1501(a) and 1501(b) companies must describe the board and management's roles, respectively, oversight or management of climate-related risks.[96] Unlike Item 1501(a), Item 1501(b) has a materiality qualifier, which potentially narrows its applicability. Under new Item 1502(b) companies must identify activities adopted to mitigate or adapt to climate-related risks, including the adoption of new technologies or processes.[97] Under new Item 1502(d)(2), companies must quantitatively and qualitatively describe the material expenditures and material impacts on financial estimates results from activities undertaken to mitigate or adapt to climate-related risks, including the adoption of new technologies or processes. Item 1502(c) requires a company to discuss whether and how they consider any material impacts described in response to Item 1502(b) as part of their strategy, financial planning, and capital allocation.[98] In addition, if there is a target or goal disclosed pursuant to Item 1504, as discussed below, or a transition plan disclosed pursuant to Item 1502(e)(1),

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90. *Id.* §§§ II.E.3., II.F.3., II.G.3.

91. *Id.* § II.H.3.

92. *Id.* at 94; *see also* 17 CFR 229.1502(a). For identified climate-related risks, a company must disclose whether the risk is a physical or transition risk, and whether such risks are reasonably likely to manifest in the short term and separately in the long term. A company must also provide information necessary to an understanding of the nature of the risk presented and the extent of the company's exposure to the risk. Disclosure also demands additional details set forth in non-exclusive lists regarding the nature of the risk.

93. *Id.* at 114–116; *see also* 17 CFR 229.1502(b).

94. *Id.*

95. *Id.* § II.D.1.c. *see also* 17 CFR 229.1502(d)(1).

96. *Id.*§ II.E.

97. *Id.* at 179–81.

98. *Id.* at 118; *see also* 17 C.F.R. 229.1502(c).

https://digitalcommons.law.ou.edu/onej/vol9/iss4/5

as discussed below, the final rules will also require disclosure of whether and how the board oversees progress against the target or goal or transition plan.

Notably absent from the Climate-Related Risk Disclosure Rule is mandated disclosure of Scope 3 emissions.[99] Moreover, in Item 1505 disclosure of Scope 1 and 2 GHG reporting was narrowed or and loosened in in three ways: (1) smaller publicly traded companies are now completely exempt from emission reporting and (2) qualifying large, accelerated filers[100] or accelerated files[101] must only disclose if Scope 1 and/or Scope 2 emissions are material to the registrant.[102]

The overall largest, and likely most welcomed,[103]change is the addition of various materiality qualifiers.[104] The SEC decided against prescribing a new materiality standard in this context.[105] Specifically, in Item 1506 the

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99. *Compare* Proposed Rule*, infra* § I.B. *with* Climate-Related Risk Disclosure Rule, *supra* note 2 at § II.H.3.c.

100. A large accelerated filer is an issuer with an aggregate worldwide market value of $700 million or more who is subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months and that has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act and is not otherwise excluded under Rule 12b-2. 17 CFR 240.12b-2 (defining LAF and providing how and when an issuer determines whether it qualifies as a large accelerated filer).

101. An accelerated filer is an issuer after with an aggregate worldwide market value $75 million or more, but less than $700 million, who is subject to the requirements of Section 13(a) or 15(d) of the Exchange Act and filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and s not otherwise excluded under Rule 12b-2. *Id.* (defining and providing how and when an issuer determines whether it qualifies as an accelerated filer).

102. Climate-Related Risk Disclosure Rule, *supra* note 2 at 244; *see* 17 CFR 229.1505(a)(1).

103. Cynthia Williams, et. al., *Review of Comments on SEC Climate Rulemaking*, Harvard Law School Forum on Corporate Governance*,* (Nov. 23, 2022), https://corpgov.law.harvard.edu/2022/11/23/review-of-comments-on-sec-climate-rulemaking/. In the original comments period, more than 400 comments referred to this materiality concept. As part of The Commonwealth Climate and Law Initiative, the group conducted an analysis of the more than 1,000 comments made by trade associations, politicians, non-profits and third sector entities, companies, investors and academics, as well as lawyers, professional organizations, regulators and standards bodies to the Proposed Rule's initial comment period ending in June 2022.

104. *See e.g*., 17 CFR 229.1502(a,b,d); 17 CFR 229.1506. *See also* Climate-Related Risk Disclosure Rule, *supra* note 2 at § I.B.1 (discussing modification of the Proposed Rule through the addition of materiality qualifiers in several areas).

105. The materiality definition is a fact-specific, qualitative and quantitative determination, rooted in a fiduciary duty to investors and shareholders and defined by the SEC. *See 17* C.F.R 230.405. The SEC noted that these disclosure materiality qualifiers align

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SEC notes that materiality should not be determined merely by the amount of the emissions, but rather by a consideration of whether a reasonable investor would consider disclosure of the information important when making an investment or voting decision.[106]

D. No Green Deed Goes Unchallenged

In August 2022, more than twenty state legal officers filed a formal comment criticizing the Proposed Rule.[107] This letter argued mandatory climate-related disclosures must be viewed in light of the major questions doctrine, claiming the SEC was exhibiting "newfound power"[108] through a "fundamental revision" of what Congress had statutorily authorized.[109] The letter further challenged the SEC's administrative knowledge, experience, and overall expertise in the area of climate-change and the environment.[110] This letter was merely a sign of legal challenges to come for the SEC. Within the first ten days of adopting the Climate-Related Risk Disclosure Rule, nine lawsuits were filed against the SEC.[111] The lawsuits were brought by individual companies, US states, non-governmental organizations, and climate advocates arguing that the SEC had both done too much and not enough in its Climate-Related Risk Disclosure Rule.[112]

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with Supreme Court precedent. Climate-Related Risk Disclosure Rule, *supra* note 2 at 244, n.381 (citing Basic Inc. v. Levinson, 485 U.S. 224, 231 (1998) and TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438, 449 (1977)).

106. Climate-Related Risk Disclosure Rule, *supra* note 2 at 245.

107. State Letters, *supra* note 16.

108. State Letters, *supra* note 16. ("The SEC no longer protects investors from mere fraud. Now, it has assumed the responsibility of fighting climate change and other social ills. It wishes to use mandatory disclosure to pressure companies and investors to change their behavior. And to advance that agenda, it means to impose tens of thousands of additional man hours on regulated investors. Until recently, the SEC had never used its power this way.").

109. *Id.* ("Before, the Commission protected the public against the "abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." Cap. Gains Rsch. Bureau, 375 U.S. at Now, the Commission has set out on a mission to solve new problems pressed by the powerful few. But if the Commission can mandate disclosures on anything it wants, "[i]t is hard to see what measures this interpretation would place outside [its] reach." Ala. Ass'n of Realtors, 141 S. Ct. at 2489.").

110. *Id.* ("The SEC's expertise is in the securities market. It is not in climate change, social consciousness, or any other supposed ESG factor.").

111. Final Rule Lawsuits, *supra* note 3.

112. *Id.*

II. The Major Questions Doctrine versus Climate-Related Disclosures

An agency exercising quasi-legislative power faces the threshold question of whether it has the authority to promulgate such a rule. The main legal restraints on that authority include those powers delegated by Congress in an enabling statute. Under the familiar principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts will apply a two-step inquiry into an agency's interpretation of its statutory authority.[113] Step One: a court asks, "whether Congress has directly spoken to the precise question at issue," and if so, the court "must give effect to the unambiguously expressed intent of Congress."[114] Step Two: if the statutory provision is ambiguous such that "Congress has not directly addressed the precise question at issue," the court must defer to any "permissible construction of the statute" by the agency and may "reverse [an] agency's decision only if it [is] 'arbitrary, capricious, or manifestly contrary to the statute."[115] Under this previously practically ubiquitous approach for reviewing agency rulemaking, even without "climate-related disclosures" glossing the pages of its enabling statute, a court would almost certainly find that the Climate-Related Risk Disclosure Rule fill within the broad umbrella of the SEC's disclosure regime.[116] Any ambiguity here could likely be resolved by the SEC's policy choice, given its broad text, aligned purpose, and pre-and-post enactment history, in favor of promulgating climate-related disclosures. The tides of deference, however, are changing.

A. Major Questions about the Doctrine

For nearly four decades courts have deferred to reasonable agency interpretations under the *Chevron* doctrine.[117] Such deference has not been without controversy and skepticism throughout the years.[118] Most recently, the Supreme Court's decision in *West Virginia v. Environmental Protection Agency* announced the advent of a type of agency action review:

the major questions doctrine.[119] But the origins of narrowing, or even eliminating, deference in certain, major agency actions can be traced back

113. 467 U.S. 837 (1984).
114. *Id.* at 842-43.
115. *Id.* at 844.
116. *Id.* at 842–43 (footnotes omitted).
117. *Id.* at 844.
118. Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (arguing that *Chevron* "wrests from Courts the ultimate interpretive authority to 'say what the law is and hands it over to the Executive").
119. 142 S.Ct. 2587 (2022).

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further than that.[120] This doctrine of skepticism poses two dispositive questions for the SEC as it seeks to implement and enforce the Climate-Related Risk Disclosure Rule: are climate-related disclosures a "major" policy question, and if so, which version of the major questions doctrine will the courts invoke?

1. Drawing the Line Between Major Policy and Major Power

The arrival of the major questions doctrine, as well as its historical footings, have

failed to outline a clear formula for distinguishing major from nonmajor as to trigger application. As to this threshold inquiry, the Supreme Court has provided a variety of non-exclusive factors and contextual considerations:

- Whether the agency claims power to resolve a matter of great "political significance" [121] that Congress "conspicuously and repeatedly declined to enact itself." [122]
- Whether the agency seeks to regulate "'a significant portion of the American economy."[123]
- Whether the agency would require "billions of dollars in spending" in private entity or individual compliance.[124]
- Whether an agency seeks to "intrud[e] into an area that is the particular domain of state law."[125]
- Whether the agency "claims to discover in a long-extant statute an unheralded power."[126]

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120. *See e.g.*, Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468 (2001) (finding *Chevron* two-step applicable where an agency uses "vague terms and ancillary provisions" to alter "the fundamental details of a regulatory scheme" the agency's assertion of authority is forbidden).

121. NFIB v. OSHA, 142 S.Ct. 661, 665 (2022) (per curiam). Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

122. West Virginia v. EPA, 142 S. Ct. at 2607.

123. Util. Air Regul. Grp., v. EPA, 573 U. S. 302, 324.

124. King v. Burwell, 576 U.S. 473, 485 (2015); *see also* Biden v. Nebraska, 143 S.Ct. 2355, 2369 (2023).
("43 million Americans and $430 billion in federal debt").

125. *West Virginia v. EPA* 142 S. Ct at 2621 (2022) (Gorsuch, J., concurring) (internal citation omitted).

126. *Id.* at 2597 (citing Utility Air, 573 U. S., at 324).

- Whether the agency seeks a "transformative expansion in [its] regulatory authority."[127]
- Whether the agency claims authority derives from a "gap-filler" or otherwise rarely used provision of the statute.[128]
- Whether there is a mismatch between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power."[129]

Upon review, these factors and inputs ask two distinct questions: what is the agency trying to regulate, and how are they trying to regulate it? The former is an inquiry into the *majorness* of policy, [130] the latter an inquiry into the *majorness* of captured authority. [131]

2. One Doctrine, Two Outcome Determinative Versions

Professor Cass Sunstein argues that the major questions doctrine has two versions: a weak one that operates as a "*Chevron* carve-out" and a strong, clear statement, principle one that "flatly prohibits agencies from interpreting ambiguous statutes."[132] These dual heads of the same major questions beast, Sunstein argues, have radically different implications and justifications.[133] They might, however, share an origin.[134]

First, the weak version would strip agencies of judicial deference to their interpretations of authority under *Chevron* when such actions involve resolving or regulating a question of deep economic and political

127. *Util. Air Regul. Grp.*, 573 U. S. at 324.

128. Brown & Williamson, 529 U. S. at 159–160; *see also* West Virginia v. EPA, 142 S. Ct. 2587.

129. Biden v. Nebraska, 143 S. Ct. 2355, 2382 (2023) (Barrett, J. concurring) (citation omitted); *see also* Whitman, 531 U. S. at 468 (2001) (Congress does not "hide elephants in mouseholes").

130. *See e.g.,* Brown & Williamson., 529 U.S. at 159–160 (2000); King, 576 U.S. at 486 (2015) (questions of "deep economic and political significance").

131. *See e.g.,* Brown & Williamson, 529 U. S. at 160 (rejecting an expansive construction to authority to regulate a new product); *West Virginia v. EPA*, 142 S. Ct. at 2610 (finding a "transformative" change in the agency's authority and assertion of "unheralded" power); *Biden*, 143 S. Ct. at 2358 (finding the executive branch exercised novel, transformative power outside its expertise in student loan forgiveness).

132. Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 475.

133. *Id.* at 477.

134. *Id.* at 481-84 (noting that both versions are at play in *Brown & Williamson*).

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significance.[135] Whereas *Chevron* hinges on the notion of implicit delegation from a general grant of authority from Congress, the weak version counters that assumption and injects judicial skepticism because of the nature and context of the policy question.[136]

This version can be traced to *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court declined to extend *Chevron* deference when the Food and Drug Administration (the "FDA") interpreted its enabling statute, namely the ill-defined term "drugs", to give it jurisdiction over tobacco products.[137] Applying just *Chevron*, a dissenting Justice Breyer argued the lawfulness of the FDA's interpretation.[138] Despite his plea for deference, the majority invoked carved out "extraordinary instances" where *Chevron* was inapplicable and "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[139] This carve-out weakens rather than irradicates agency action.[140] In *King v. Burwell*, the Supreme Court held that the Internal Revenue Service (the "IRS") could regulate tax credits in the Affordable Care Act.[141] Ignoring the agency's interpretation, the Court independently resolved the IRS's breadth of authority in favor of the agency's asserted authority.[142]

More than just a carve-out, the strong version takes extra issue with an expansion or transformation of agency authority. An attempt to capture more authority when assumed contextually in significant area of the economy or society demands Congress conferring such authority in plain terms; ambiguity is insufficient.[143] This double red flag invokes the clear statement principle and applies to an even more narrow class[144] of major questions, wherein skepticism is triggered by both an attempt to regulate "a significant portion of the American economy" and does so through

135. *Id.* at 482 (quoting Burwell, 576 U.S. at 484–86 (citations omitted)).

136. *Id.* at 480 (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

137. 529 U.S. 120, 159-160 (2000).

138. *Id.* at 161–62, 170–71 (Breyer, J., dissenting).

139. *Id.* at 159.

140. Sunstein, *supra* note 132 at 482, ("It does not prohibit agencies from producing certain substantive outcomes. Instead, it says that courts will make an independent decision about whether agencies can produce certain substantive outcomes.").

141. King v. Burwell, 576 U.S. 473, 485-486 (2015).

142. *Id.*

143. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419, 421 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

144. *Id.*

"unheralded power."[145] As such, even reasonable agency interpretations are insufficient. As Professor Sunstein notes, this version prohibits the wielding of textual ambiguity and instead, favors modesty.[146] Sunstein, however, reconciles this heightened skepticism and modesty as deeply contextual and thus narrow and targeted.[147]

This strong version is rooted in the nondelegation doctrine.[148] The nondelegation doctrine prohibits Congress from delegating their legislative power to another entity, especially one not accountable by the political process.[149] Generally, an administrative agency's power to promulgate legislation is cabined by congressional delegation found in an agency's enabling statute.[150] More often than not, these general grants of authority are still not carte blanche prescriptions of legislating power.[151] Since 1973, courts have tended to construe general grants of rulemaking authority broadly against this looming, and now reinvigorated, shadow of the nondelegation doctrine.[152] For years, this broad approach has effectively mirrored an agency's scope of general rulemaking to its scope of substantive authority.[153] That function is constitutional so long as Congress sets forth an intelligible principle to guide an agency's promulgation of laws and policy.[154]

B. Regulation as Usual Under the Weak Version

In Sunstein's view the threshold question of majorness is not easily drawn and is deeply contextual.[155] Still, the potential economic impact of

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145. Util. Air Regul. Grp v. EPA, 573 U.S. at 24 (quoting. Brown & Williamson., 529 U.S. at 159).

146. Sunstein, *supra* note 132 at 489, (noting that defense of this version rests on the idea that such agency authority "ought not to be a product of congressional silence, inadvertence, or accident.).

147. *Id.* at 489–91 (reconciling the decisions in Utility Air Regulatory Group v. EPA with Massachusetts v. EPA).

148. *Id.* at 476, 489.

149. U.S. CONST. art. 1 § 1.

150. *See, e.g., West Virginia v. EPA*, 142 S.Ct. 2587.

151. *Id.* at 2632 (J., Kagan, dissenting) ("Congress . . . knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion") (citing Arlington v. FCC, 569 U. S. 290, 296 (2013)).

152. *See* National Petroleum Refiners Ass'n. v. FTC, 340 F. Supp. 1343 (D.D.C. 1972).

153. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

154. See, e.g., J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

155. Sunstein, *supra* note 132 at 487 (2021) ("A question might be major in the ordinary language sense, but the agency's resolution might not result in such an expansion."); *see also* Kagan dissent, *infra* note 163.

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the Climate-Related Risk Disclosure Rule could roll into major territory.[156] The Court in *West Virginia* seemed to set a threshold of $1 billion in economic impact, of which Climate-Related Risk Disclosure Rule compliance is capable of surpassing based on various and varying economic estimates.[157] Deep economic significance aside, the Climate-Related Risk Disclosure Rule broaches a topic that is often deemed more political than scientific in nature.[158] At least one current Supreme Court Justice is on record labeling the climate disclosure as a political matter.[159] The failure of the Climate-Related Disclosure Act of 2021 also raises a political red flag.[160]

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156. Paul Kiernan, *Wall Street Rails Against Costs of Chairman Gary Gensler's Regulatory Agenda at the SEC*, WALL STREET JOURNAL (Aug. 27, 2022), https://www.wsj.com/articles/wall-street-rails-against-costs-of-chairman-gary-genslers-regulatory-agenda-at-sec-11661592600.

157. *See* Proposed Rule, *supra* note 13 at 390-401 (In its Proposed Rule, the SEC does not offer either quantitative or qualitative assessments of the anticipated costs and benefits associated with the rule, beyond providing data on possible compliance costs and generally describing anticipated benefits to investors. The SEC does acknowledge that the rule likely would more than double the total cost and company employee time associated with preparing the ten major reports that would be amended by the rule with estimated compliance dollar amounts of $640,000 per year in the first year and $530,000 per year in subsequent years); *see also* Mark Lee, et. al. *Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors*, THE SUSTAINABILITY INSTITUTE BY ERM, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/2022/costs-and-benefits-of-climate-related-disclosure-activities-by-corporate-issuers-and-institutional-investors-17-may-22.pdf (surveying 30 cross-sector organizations on current corporate costs to climate-related disclosures on a voluntary basis and finding institutional investors were spending, pre-SEC Proposed Rule, an average of $1,372,000 annually to collect, analyze, and report climate data to inform their investment decisions and that what corporate issuers already spend on the climate-related disclosure activities that would be required by the SEC is comparable to the SEC's own assessment); *compare with* (sampling a comment letter from the energy that notes "'[w]e are . . . concerned about the cost, complexity and practicability of complying . . . [we] expect implementation costs in the $100-500 million range, and annual costs for on-going compliance in the $10-25 million range — costs that will ultimately be borne by investors and the public markets.'").

158. *See supra* § I.D.

159. Nomination of the Honorable Amy Coney Barrett to be the U.S. Supreme Court Questions for the Record, (Oct. 16, 2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf ("It would be inappropriate for me, as a sitting judge and as a judicial nominee, to opine further on any subject of *political controversy*.") (emphasis added).

160. In June 2021, the House of Representatives passed a climate risk disclosure bill that would require companies to disclose climate-related risk exposure and risk management

While responses to climate may be a major policy question, the SEC's disclosure tool is not a transformative or expansive use of authority. The dispositive question then becomes: do mandated climate-related disclosures represent the SEC's traditional regulatory function or a transformative expansion of its regulatory authority? A textual approach favors a match between SEC authority and disclosure mandates.[161] The SEC's traditional regulatory function can be ascertained through the purpose, structure, and content of securities regulation itself. Historically, Congress has provided the SEC with a broad scope of rulemaking authority, giving deference to the agency's expertise in selecting [162] The SEC's mandatory climate-related disclosures are unlike the FDA's attempt to creep its jurisdiction over an entirely new, and incredibly vast, industry like tobacco.

Rather, the SEC is regulating the same industry—publicly traded companies—and is doing so through methods that stretch nearly a century—disclosures. Moreover, the SEC's disclosure regime has not been limited to a single area. It has instead limited itself to materiality and rooted itself in a call to protect investors. Where there is financial risk and mandating disclosure of such risk can serve investors, the SEC is well within its jurisdiction. Akin to the IRS's authority over tax subsidies in the Affordable Care Act which intersected and implicated healthcare policy, the question of identifying financial risk falls squarely within the SEC's authority, even if it intersects and implicates environmental matters. Notably, the Climate-Related Risk Disclosure Rule does not mandate a change in business practices or governance.[163] The Climate-Related Risk

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strategies. *See* Climate Risk Disclosure Act of 2021, H.R. 1187, 117th Cong. § 402(8) (2021). However, the Senate has not yet passed such a bill. See also Brown & Williamson, 529 U. S., at 144

161. *See* West Virginia v. EPA, 597 U.S. at 767 (Kagan, J., dissenting). Justice Kagan, joined by Justices Breyer and Sotomayor, criticized the majority's approach to the major questions doctrine as a "magically appear[ing] get-out-of-text free card[ ]". The dissent argued for a more limited application of the doctrine when, after considering "the fit between the power claimed, the agency claiming it, and the broader statutory design," there is a "mismatch between the agency's usual portfolio and a given assertion of power." *See also* Biden v. Nebraska, 143 S.Ct. 2355, 2400 (2023) (Kagan, J., dissenting).

162. *Nat. Res. Def. Council, Inc. v. SEC,* 606 F.2d 1031, 1045 (1979) ("Rather than casting disclosure rules in stone, Congress opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable.").

163. Jill Fisch, et, al., *Climate Change, West Virginia v. EPA, and the SEC's Distinctive Statutory Mandate*, Columbia Law School's Blog on Corporations and the Capital Markets, (Sept. 6, 2022), https://clsbluesky.law.columbia.edu/2022/09/06/climate-change-west-virginia-v-epa-and-the-secs-distinctive-statutory-mandate/ (The Proposed Rule "does not require firms to adopt particular governance structures to oversee climate risk, to set carbon

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Disclosure Rule does not demand how and if companies set net-zero goals or the like, but it has identified that in trying to meet such goals, companies are incurring risks that reasonable investors should know about. As such, deep economic and political ties alone do not warrant the Supreme Court's strong-armed, nondelegation death sentence.

If courts find that the Climate-Related Risk Disclosure Rule is a major policy question, but not an expansion of authority, precedent favors applying the weak version.[164] This weak version is not fatal for agencies.[165] The effect, rather, is that courts will independently resolve whether or not an agency can bring about a certain substantive outcome.[166] In looking at the textual basis for the SEC's authority, as well as the purpose behind full and fair disclosure and the history of dynamic disclosure, courts should independently resolve in favor of the SEC's authority to adopt and enforce the Climate-Related Risk Disclosure Rule to registrants.

1. A Textual Basis for Broad Disclosure Authority

Statutory authority matters when evaluating administrative actions for political and liberty interests.[167] Over the last century, the modern administrative state has grown in influence and power, bringing a renewed examination into the delegation of power from the legislative branch.[168] Harmonizing and respecting the separation of powers, administrative agencies are confined to their place in assisting the executive branch in the President's "faithful execution of the laws."[169] Broadly, the SEC's legitimacy in disclosure rulemaking asks for whom the disclosures are

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goals, or to implement a climate transition plan. Instead, it provides a standardized disclosure framework that allows investors and markets to value firms by ensuring that they can price in various factors, including climate-related risks, climate-related trends and uncertainties, and climate-related business opportunities.").

164. *See* discussions, *supra* § II.B.2.

165. Sunstein, *supra* note 132 at 482.

166. *Id.*

167. *See* Whitman, 531 U.S. 457 (2001).

168. *See e.g.,* Gundy v. United States, 139 S. Ct. 2116 (2019) (J., Gorsuch, dissenting) (In their dissent, Justices Gorsuch, Roberts, and Thomas emphasized the Court's responsibility to determine "whether Congress has unconstitutionally divested itself of its legislative responsibilities whereas the "mutated version of the 'intelligible principle'" standard that developed after the 1930s had "no basis in the original meaning of the Constitution."). A compromise between this skepticism and the *Chevron* doctrine was foreshadowed in *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the Chevron Doctrine,* 12 N.Y.U L. J.L. & LIBERTY 189, 212 (2019) and realized in *West Virgina v. EPA*.

169. U.S. CONST. art 1, 2, 3.

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intended to serve?[170] Rooted in their authority to protect investor interests, critics of the climate-related disclosure regime claim that the SEC has instead been captured by special interests.[171] As Professor Georgiev points out, this is not a binary choice and fails to consider the contents of rulemaking, ultimately punishing the inevitability of "social resonance" and impact of climate-related disclosure.[172] The SEC maintains, however, it is agnostic to climate-change itself.[173]

The Securities Act of 1933 ("Securities Act') and Securities Exchange Act of 1934 ("Exchange Act"), enable the SEC to determine and promulgate disclosures "necessary or appropriate in the public interest or for the protection of investors."[174] Despite nearly a century of SEC practice of self-limiting disclosure regulation to material matters, the Securities Act sets forth a much broader delegation of rulemaking authority.[175] Rather, the SEC's authority is textually confined to what is necessary *or* appropriate; such congressional language is not an exacting prescription of what is needed. Rather, the SEC's regulatory authority is rooted in agency purpose and what the agency, through its fact-finding and expert judgement, finds appropriate.[176] This broad and dynamic authority is reflected elsewhere in the statutes.[177] Congress limited the SEC's ability to mandate disclosure of

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170. George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101, 108-111 (2022) (arguing the SEC has neither been captured by special interests nor does it seek to mitigate the threat of climate-change; it merely seeks to expose them for investor decision-making).

171. *Id.* at 108.

172. *Id.*

173. Climate-Related Risk Disclosure Rule, *supra* note 2 at 18 ("The Commission has been and remains agnostic about whether or how registrants consider or manage climate-related risks.").

174. Securities Act of 1933, 15 U.S.C. § 77a et seq.; Securities Act of 1934, 15 U.S.C. § 78a et seq.

175. For a more in-depth analysis supporting the SEC's broad authority *see* Jill E. Fisch, et. al., Comment Letter of Securities Professors on the *Enhancement and Standardization of Climate-Related Disclosures for Investors* (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf.

176. *See* Securities Act of 1933; Securities Act of 1934.

177. Securities Exchange Act of 1934, § 3(b), § 78m(a)(1), § 13(a)(1); (Section 13(a)(2) of the Exchange Act, requires companies to disclose information under rules the Commission "may prescribe as necessary or appropriate for the proper protection of investors and to ensure fair dealing in the security . . . such annual reports . . . and such quarterly reports . . . as the Commission may prescribe." Likewise, section §3(b) of the Exchange Act gives the Commission authority to "define technical, trade, accounting, and other terms used [in the statute].").

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information to that which sought to "protect[] [] investors." [178] This language reflects an implicit gap left by Congress for the SEC to exercise discretion as to the categories required in disclosures. Such broad and dynamic authority within the bounds of investor protection is reflected elsewhere in the Acts.[179]

Section 7(a)(1) of the Securities Act provides that a registration statement for a public offer must contain the information and documents specified in Schedule A of the act.[180] Schedule A lists 32 categories which include the *nature of the business*, the terms of outstanding securities, descriptions of directors, officers, and major shareholders, material contracts, balance sheets, profit and loss statements, and other financial statements.[181] While "nature of the business" is broad enough to generally contemplate climate-related disclosures, Schedule A must also read in accordance with the rest of the statute. Congress also empowered the SEC waive some of the requirements of Schedule A.[182]

The House report explaining the main bill that became law summarizes the disclosures required by the 32 items in Schedule A as essential facts about the property in which a person would be investing, "essential facts concerning the identity and the interests of the persons with whom he is dealing or to whom the management of his investment is entrusted," and "essential facts in regard to the price and cost of the security he is buying and its relation to the price and cost of earlier offerings."[183] The report mentions that Schedule A required disclosure of basic financial statements and hidden interests that usually have not been revealed to buyers. The requirements were "designed to reach items of distribution profits, watered values, and hidden interests that usually have not been revealed to the buyer despite their indispensable importance in appraising the soundness of a

178. Securities Act of 1933, §77g, § 7(a)(1); Securities Exchange Act of 1934, § 78l, §12.

179. Securities Exchange Act of 1934, 15 U.S. C. § 78m(a)(1), § 13(a)(1); § 3(b) (Section 13(a)(2) of the Exchange Act, requires companies to disclose information under rules the Commission "may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security . . . such annual reports . . . and such quarterly reports . . . as the Commission may prescribe." Likewise, section §3(b) of the Exchange Act gives the Commission authority to "define technical, trade, accounting, and other terms used [in the statute].").

180. Securities Act of 1933, § 7(a)(1) (1933).

181. *Id.* Schedule A, 48 Stat. 88.

182. *Id.* § 7(a)(1).

183. House Report on Securities Act, H.R. Rep. No. 85, 73d Cong., 1st Sess. 3 (1933).

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security."[184] The report also says, "[t]he items required to be disclosed, set forth in detailed form, are items indispensable to any accurate judgment upon the value of the security" and to the proper direction of capital resources.[185] But again, Congress added two qualifications to the disclosures required by Schedule A.[186] Schedule A of the Securities Act informs the SEC's disclosure regime in a detailed template but also reserved the ability for the SEC to waive and mandate disclosures on information types outside the original categories of information. Notably, Schedule A has no language about materiality, demonstrating the SEC's disclosure decision discretion to be calibrated in accordance with relevant risks of the time period.

2. A Purpose of Full and Fair Disclosure to Drive Market Regulation

Unanimously enacted and unamended during the aftermath of the Great Depression, the purpose of the Exchange Act is two-fold: elimination of security marketplace abuses and informing investors.[187] In setting up the SEC itself, the Exchange Act anticipated and even hoped for residual benefits like discouraging fraudulent behavior.[188] The Securities Act explicitly seeks to protect investors through "full and fair disclosure."[189] President Roosevelt and Congress's explicit denouncements of fraud and stock manipulation reiterates this purpose and methodology.[190] Most recently in 1996, Congress took further action to embolden the SEC's

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184. *Id.*

185. *Id.*

186. Securities Act of 1933, § 7(a)(1). First, the SEC may, by rule, exclude some of the information if it concludes that the information is not necessary for adequate disclosure to investors in particular classes of issuers. Second, the SEC also may adopt rules to require a registration statement to include other information or documents as "necessary or appropriate in the public interest or for the protection of investors."

187. *See* Securities Act of 1933; *see also* William O. Douglas and George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171-73. (1933).

188. SEC v. Cap. Gains Rsch. Bureau, 375 U.S. 180, 186 (1963) (noting that the "fundamental purpose" of federal securities legislation is to "substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry").

189. *See* Securities Act of 1933 ("An Act [t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.").

190. S. Rep. No. 47 at 6-7 and H.R. Rep. No -. 85 at 1-2, 73d Cong., 1st Sess. (1933); *see also First Inaugural Address of Franklin D. Roosevelt (Mar. 4, 1933),* Reprinted in *Documents of American History* 239, 240 (H. Commager 9th Ed. 1973*); Letter from Franklin D. Roosevelt To Sam Rayburn* (Mar. 26, 1934).

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policymaking and impact on the market as a whole.[191] This recognized that the SEC's role in capital market regulation serves not just investor protection, but also the broader interests of the American economy.

3. A History of a Dynamic and Diverse Disclosure Regime

Congress passed the federal securities laws more than 80 years ago as a means to "close the channels of…commerce to security issues unless and until a full disclosure of the character of such securities has been made."[192] Even at enactment, the SEC contemplated the interests of present *and* prospective investors, thus setting forth the SEC's dynamic authority to meet the inevitably ever more complex securities market.[193] Disclosure regulation has always been a part of the SEC's pursuit of truth and ethics in the securities industry.[194] The SEC is, as Commissioner Ruder put it in 1988, "constantly being confronted with new disclosure problems."[195] Congress empowered the SEC to withstand new technologies and the inherent complexities of securities regulation with only the certainty of change.[196] The SEC has responded with a "dynamic and ever evolving" approach.[197] Sometimes market evolution demands scaling back on disclosures. [198]And other times, the SEC must respond in real-time to risk

191. *See* 15 U.S.C. §§ 77b(b), 78c(f), 78w(a)(2) (amending for the SEC to consider "whether [a disclosure requirement] will promote efficiency, competition, and capital formation.").

192. U.S. House of Representatives, "Securities Act of 1933," in U.S. Government Printing Office, *House Reports: 73d Congress, 1st and 2d Sessions, March 9, 1933–June 18, 1934* (Washington: 1934).

193. See *Legislative History of The Securities Act Of 1933 And Securities Exchange Act Of 1934*, (J. Ellenberger & E. Mahar Eds. 1973).

194. SEC, Disclosure to Investors–A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts (The Wheat Report) 10 (1969) ("[d]isclosure is and has from the outset been a central aspect of national policy in the field of securities regulation.").

195. Speech, U.S. Sec. Exch. Comm'n, *The Evolution of Disclosure Regulation by the Securities Exchange* Commission, David S. Ruder, (Mar. 10, 1988), https://www.sec.gov/news/speech/1988/031088ruder.pdf (recognizing that although the disclosure system and market has changed drastically in five decades, the SEC is constantly guided by investor protection as it makes regulatory responses to the problems of the day under a balancing philosophy of sorts).

196. Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1045 (1979) (noting that the SEC's role is to "make decisions against the background of rapidly changing conditions.").

197. *See* Commission Conclusions and Rulemaking Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11733, 8 S.E.C. Docket 73 (Oct. 14, 1975).

198. In 2019, the SEC dramatically reduced the information required to be disclosed in connection with material contracts, determining that the benefits from those disclosures were

through enhanced disclosure.[199] Despite opportunities over the last century to pare down the SEC's ability to react and regulate through its disclosure regime, Congress has remained complicit.[200] Likewise, Congress has chosen not to explicitly constrain the SEC to certain disclosure topics.[201]

Despite not being a per se energy regulator, the SEC has drawn up specialized framework for the sector, dating back to the 1970s.[202] Even more broadly, in 1971 the SEC required all registrants to "disclos[e] [] legal proceedings and [provide] a description of the registrant's business as these requirements relate to material matters involving the environment and civil rights."[203] This does not give the SEC regulatory carte blanche.[204] Its delegated authority rests with implementing disclosure frameworks that protect investors, create order and efficiency in the market, and facilitate capital formation.[205]

C. Death by the Strong Version

But what if climate-related disclosures are a transformative overreach[206] of SEC authority? In 2016, SEC acknowledged the limitations of its own climate-related disclosures.[207]

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outweighed by the costs. *See* Cydney Posner, *SEC's Amendments to Simplify Disclosure for Public Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 9, 2019).

199. *See* U.S. Sec. & Exch. Comm'n, Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers, 63 Fed. Reg. 41,394 (Aug. 4, 1998).

200. Usha Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 436, 453-68 (2017) (chronicling Congress's amendments to securities laws).

201. *Id.*

202. *See e.g.,* Modernization of Oil and Gas Reporting, Securities Act Release No. 33-8995, Exchange Act Release No. 59192, 74 Fed. Reg. 2158, 2159 (Jan. 14, 2009) (discussing the history of the oil and gas disclosure framework and drawing up the technical expertise of others to inform their own regulation).

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

204. H.R. Rep. No. 73-1383, at 23 (1934) The House report for the Securities Exchange Act said the bill was not to give the SEC "unconfined authority to elicit any information whatsoever.

205. Milton H. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1340-42 (1966) (reiterating and reminding that the Securities Act was drafted as *Truth in Securities* and such pursuit of truth guides their authority).

206. While it is certainly possible for the major questions doctrine's transformative authority inquiry to apply to a transformative shrinkage in jurisdiction, the seminal cases on the matter attack on agency authority expansion See *Brown & Williamson*, 529 U.S. at 126–127 (attempting to expand jurisdictional authority to regulate tobacco products); Util. Air

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Courts could also disfavor SEC authority where Congress has already assigned certain climate-related disclosure authority elsewhere in the executive branch.[208] Corporate climate reporting is a concurrent, rather than exclusive, area of authority.[209] Under Clean Air Act authority, the Environmental Protection Agency's ("EPA's") Greenhouse Gas Reporting Program currently collects greenhouse gas data from certain sources including large direct greenhouse gas emitters, fuel and industrial gas suppliers, and carbon dioxide injection sites in the United States. The Climate-Related Risk Disclosure Rule is a distinct workstream because the EPA data collection aims to develop or assisting in the development of standards, regulations, and plans to control air pollution under; not as a means of investor protection from climate-related risks.[210]

Regardless, a full revival of the nondelegation doctrine in this context is still unlikely.[211] The strong version's clear statement, applied here, would still present pragmatic issues that could threaten not only the Climate-Related Risk Disclosure Rule, but the entire securities disclosure regime.[212] Some note that these pragmatic issues are inherent protections of democracy in American jurisprudence.[213]

Regul. Grp., 573 U.S. at 310–12 (exceeding statutory authority in an attempt to reduce GHG emissions).

207. The SEC noted that "a specific congressional mandate" would be required before it adopted rules ordering climate disclosures. SEC, *Business and Financial Disclosure Required by Regulation S-K*, Rel. No. 33-10064, 34-77559 (Apr. 13, 2016), at 209-10.

208. *See* Greenhouse Reporting Program, 40 C.F.R. Part 98. The Clear Air Act expressly assigned authority to the EPA to create a Greenhouse Gas Reporting Program—a program that already measures and publicly discloses the source of 85% to 90% of US-based emissions.

209. Under H.R. 5376, the EPA has explicit authority and wide latitude to work on corporate climate reporting. EPA has collected emissions data from large emitters, fuel suppliers, and other facilities since 2009 under its Greenhouse Gas Reporting Program. The agency uses that information to track emissions trends, which are in turn used to shape policy.

210. *See* Clean Air Act, 42 U.S.C. 7414(a); *see also* 74 Fed. Reg. 56260 (Oct. 30, 2009).

211. *See* Mark Nevitt, *Delegating Climate Authorities*, 39 YALE J. REG. 778 (2022) (examining the possibility of the nondelegation doctrine's resurgence in climate action, namely through the EPA, and arguing its rightful place among the executive branch because of the interplay with foreign relations, emergency authority, and national security).

212. Sunstein, *supra* note 132 at 492 (describing the strong version as "Congress-forcing" and questioning the likelihood of such force prompting congressional actions due to political and practical reasons).

213. West Virginia v. EPA, 142 S. Ct at 2621 (2022) (Gorsuch, J., concurring) ("Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new

The statutory language and context are enough in this case to dispel judicial skepticism as the SEC uses its century-old method regulatory tool of choice: disclosures.[214] The SEC has well-established delegations of power to promulgate disclosure regulations in the Securities Act and Exchange Act for investor protection.[215] And unlike the Proposed Rule, the Climate-Related Risk Disclosure Rule incorporates the constraints of materiality.[216]

III. Conclusion

Just as the science on climate change is clear, and the demand for related disclosures is strong, so too are the judicial winds of the major questions doctrine. The doctrine has already had sweeping consequences for administrative law and the SEC will not be immune to this renewed age of agency skepticism. The days of blanket *Chevron* deference seem all but numbered. Under Professor Sunstein's *Chevron*-carve out weak version, the Climate-Related Risk Disclosure Rule is just business as usual: the SEC shining light on corporate risks. But for climate-related disclosures and beyond, survival turns which head of the major questions doctrine comes for an agency exercise of authority. Under Professor Sunstein's clear statement strong version, the SEC would be relegated to a disclosure regime cabined by the laments of a century gone by and the list of the Schedule A too stale for modern market regulation. Even since the Proposed Rule, the global state of climate-related disclosure regulation has changed dramatically,[217] further contemplating how legislative and regulatory compliance will shape and impact the financial performance of companies and investor returns.[218]

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laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty.") (citations omitted).

214. *See* discussion *supra* § II.B.

215. *Id.*

216. *See* discussion *supra* § I.C.

217. *See, e.g.,* CA SB 253 (requiring requires companies with over $1 billion in total annual revenue that do any business in the state of California disclose their Scope 1, 2, and 3 emissions annually); Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU European Union's Corporate Social Reporting Directive (requiring large companies with a presence in the European Union to disclose their Scope 1, 2, and 3 emissions).

218. Climate-Related Risk Disclosure Rule, *supra* note 2 at 21, § II.C.

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When it comes to the Climate-Related Risk Disclosure Rule, applying a *Chevron*-carve strikes a balance between constitutional and pragmatic concerns. Anything more, and the judicial branch will be forcing the seemingly unwilling hands of Congress to account for regulating the physical and transition risks stemming from climate change. Investor demand is not rooted in activism or special interest; rather, the realities of the marketplace. Climate-related risk is shaping corporate financials as companies respond to increasing natural disasters, meet global compliance standards, set their own net-zero targets, and adapt to consumer preferences. As such, the SEC's Climate-Related Risk Disclosure Rule is the disinfecting sunlight on the physical and transition risks companies face and investors should know about. Climate-related risk *is* financial risk, and, unlike our planet, it has no plans to cool down any time soon.

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