No. 24-1628

In the United States Court of Appeals for the Eighth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; TEXAS ASSOCIATION OF BUSINESS; and LONGVIEW CHAMBER OF COMMERCE,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petitions for Review of an Order of the Securities & Exchange Commission

EMERGENCY MOTION FOR STAY PENDING DISPOSITION OF PETITIONS FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, petitioners the Chamber of Commerce of the United States of America, Texas Association of Business, and Longview Chamber of Commerce make the following disclosures:

The Chamber of Commerce of the United States of America has no parent corporation, and no publicly held company owns 10% or more of its stock.

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

The Longview Chamber of Commerce has no parent corporation, and no publicly held company owns 10% or more of its stock.

Dated: March 26, 2024

Respectfully submitted,

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Petitioners respectfully seek a stay of a Securities and Exchange Commission rule that seeks to dictate national climate policy in the guise of securities regulation. The Fifth Circuit administratively stayed the rule after full briefing, but that stay was dissolved when cases challenging the rule were transferred to this Court. To avoid immediate, irreparable harm that petitioners and their members will suffer without a stay, petitioners respectfully request a ruling on this motion by **April 12, 2024**.

INTRODUCTION

For years the Executive Branch has repeatedly overstepped limits on its authority under environmental laws, *e.g.*, *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022), seeking to make national climate-change policy with or "without Congress," App.893. The Executive recently promised activists that it will advance its "climate agenda using every tool at [its] disposal" and has turned to other, inapt legal frameworks to pursue climate policy through the back door. App.892.

The SEC's climate rule is the latest and most egregious example of the Executive's no-holds-barred, "we don't need Congress" (App.893) approach to this issue. Purporting to protect investors, the SEC has invoked 90-year-old securities statutes to mandate sweeping and unprece-

dented disclosures on a single topic: climate change. That mandate looks nothing like the traditional disclosures long required of public companies. Far from filling a genuine informational gap, the rule would inundate investors with data they do not need. And it would cost public companies more than $2.3 *billion* each year—by the SEC's own understated estimate. This climate rule is the quintessential rule "in search of [a] regulatory proble[m]." *NYSE LLC* v. *SEC*, 962 F.3d 541, 556 (D.C. Cir. 2020).

The rule is unlawful several times over and should not be allowed to impose massive burdens on public companies while its legality is litigated. It would require businesses to begin gathering and processing massive amounts of climate-related information (which most do not currently collect) in just eight months. Complying with that edict will require creating, implementing, staffing, and testing costly new internal systems now. But all those efforts will have been a waste if the Commission's climate rule is ultimately held invalid. Businesses should not be forced to divert billions of dollars and millions of hours complying with an invalid regulation.

The proper course in these circumstances is straightforward: The Court should stay the rule while its lawfulness is tested. A stay would

avert irreparable injury to companies subject to the rule and poses no threat to the public interest because preexisting regulations *already* require disclosure of material climate-related information. The Commission cannot muster any evidence that the unprecedented disclosures it demands are warranted at all, let alone urgently needed to protect investors from any imminent harm. At a minimum, the Court should expedite proceedings so that it can render a merits decision in time to minimize irreparable harm.

BACKGROUND

Within days of taking office, the President announced his Administration's "policy" to "organize and deploy the full capacity of its agencies to combat the climate crisis" through "a Government-wide approach." Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7622 (Jan. 27, 2021). The President promised foreign leaders that "the United States will continue to push" on climate-change issues, App.924, and he unilaterally adopted a "target of a net-zero emissions economy by no later than 2050," Exec. Order No. 14,030, 86 Fed. Reg. 27,967, 27,967 (May 20, 2021).

The Administration has made clear that Congress's cooperation is optional. White House officials explained that "[t]he President will ad-

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vance his climate agency using * * * every tool at his disposal" and that, if Congress declines to authorize the President's climate agenda, "we'll just continue to do the whole-of-government approach * * * without Congress" because "we don't need Congress." App.893. The President specifically instructed agencies to pursue his 2050 net-zero-emissions goal by mandating "climate-related" disclosures. 86 Fed. Reg. at 27,967. And by joining the Glasgow Climate Pact, the Administration underscored the urgency of "action to make finance flows consistent with a pathway towards low greenhouse gas emission and climate-resilient development in a transparent and inclusive manner" and called upon developed countries to "accelerate the alignment of their financing activities with the goals of the Paris Agreement." App.933.

The SEC answered the President's call. In 2022, it proposed an unprecedented new regulation that would require companies to disclose massive amounts of non-financial climate information. 87 Fed. Reg. 21,334 (Apr. 11, 2022). A groundswell of comments from many stakeholders, including petitioners, urged the SEC to retreat from its proposal. *E.g.*, App.1344-49.

On March 6, 2024, nearly two years later, a divided SEC adopted the final, 886-page rule over two vigorous dissents. App.1-886 (final rule); see App.973-83 (Peirce, dissenting); App.984-87 (Uyeda, dissenting). Although the rule diverges in various ways from the proposal and omits some of the most extreme features, it adheres to the proposal's basic approach by dictating climate-related disclosures far beyond what existing law requires on any other topic, and far beyond what the securities laws authorize. For example, the rule demands reporting of greenhouse-gas emissions in many scenarios, and it requires prescriptive, forward-looking disclosure of climate-related impacts on a company's strategy, business model, and outlook. It also mandates disclosing climate-related targets and goals—which the SEC has never imposed for "other, more important matters * * * such as financial performance, product development, customer acquisition, or market expansion." App.985 (Uyeda, dissenting).

ARGUMENT

This Court should not allow the SEC to encumber American businesses with massively burdensome climate disclosures before their legality has been determined. The SEC's climate rule is not (as its Chair in-

sists) "securities regulat[ion]." App.991. It is "climate regulation" plain and simple—adopted to advance the President's publicly proclaimed climate agenda—and merely "promulgated under the Commission's seal." App.984 (Uyeda, dissenting). But the SEC has no authority (or expertise) to set climate policy. And the rule shows how far the SEC has strayed from its lane. It thrusts billions of dollars in compliance costs on public companies for no substantiated benefit; the rule seeks to solve an illusory problem by deluging investors with data they do not want or need.

The SEC's rule is not a responsible exercise of its authority. It should not take effect while judicial review is ongoing. The most straightforward solution is to stay the rule pending review. 5 U.S.C. § 705; *Nebraska* v. *Biden*, 52 F.4th 1044 (8th Cir. 2022) (per curiam). The SEC already opposed a stay (App.1273), making agency-granted relief "impracticable." Fed. R. App. P. 18(a)(2)(A)(i). Alternatively, the Court should expedite the case so that it can render a decision in time to minimize irreparable harm. 8th Cir. I.O.P. III.D; 28 U.S.C. § 1657(a).

I. THE COURT SHOULD STAY THE SEC'S CLIMATE RULE

The Court should stay the rule because it is irrational and unlawful, and at a minimum petitioners' challenges "involve substantial questions

of law." *Nebraska*, 52 F.4th at 1047 (citation omitted). And "the equities strongly favor [a stay] considering the irreversible impact the [Commission's] action would have." *Ibid.*

A. Petitioners Are Likely To Prevail On The Merits

The rule violates the Administrative Procedure Act (APA) because it does not reflect reasoned decisionmaking. It is the most expensive disclosure requirement the Commission has ever adopted. Yet the SEC cannot cite any example of an investor who was defrauded because a public company failed to disclose "climate-related risks," App.660-63; nor has it brought a single case against a company for failing to disclose a material climate-related risk to investors, App.1031. Moreover, the SEC's solution to this nonexistent problem exceeds its statutory and constitutional authority.

1. The SEC's climate rule is arbitrary and capricious

The rule "elevates climate above nearly all other issues facing public companies" and imposes unprecedented obligations, all to address an imagined investor-information problem. App.985 (Uyeda, dissenting). The complete disconnect between the agency's approach and the pur-

ported problem—and the SEC's abrupt, unexplained departure from its approach to other issues—is textbook arbitrary action under the APA.

a. The climate rule looks nothing like other securities-law requirements. For example, "[i]n no other context is a company required to provide an explanation of expenses that exceed one percent of income before taxes and analyze the significant contributing factor to the expense." App.985 (Uyeda, dissenting). And for "no other risk does the Commission require prescriptive, forward-looking disclosure of the risk's impacts on the company's strategy, business model, outlook, financial planning, and capital allocation." *Ibid.* The climate rule "requires disclosure of climate-related targets and goals"—which the SEC has never required for far more salient, bread-and-butter issues like "financial performance" and "market expansion." *Ibid.* And "the requirement to disclose [greenhouse-gas] emissions and obtain an attestation report on such disclosure is in a class of its own without comparison in the Commission's disclosure regime." *Ibid.*

The SEC's unique and uniquely burdensome approach to climate issues demands a uniquely strong justification. Yet the Commission fails to draw even a "'rational connection between the facts found,'" *Motor Ve-*

hicle Manufacturers Ass'n of United States v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), and its "extraordinary exercise of regulatory authority," App.985 (Uyeda, dissenting). The Commission cites "no evidence" of investor harm connected to climate-related disclosures—a hallmark of irrational agency action. *National Fuel Gas Supply Corp.* v. *FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Kavanaugh, J.). And the SEC disregards unrebutted evidence that undermines its position. For example, the SEC ignored expert evidence that climate-related information is generally *not* material to investors. See, *e.g.*, App.1134 (expert "find[ing] *no evidence* of a statistically significant change in stock price or trading volume in response to [greenhouse-gas] disclosures" and that "on average" market behavior indicates "[greenhouse-gas] disclosures are not material"). And it has no answer to institutional investors' explanation that various aspects of the rule are unnecessary. See, *e.g.*, App.1158-79.

Although the SEC's approach to climate disclosures is singular, its failures to substantiate the problem it purports to address and to confront contrary evidence are familiar. SEC regulations have repeatedly been invalidated on those grounds before. See, *e.g.*, *Chamber of Commerce* v.

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SEC, 85 F.4th 760, 777 (5th Cir. 2023); *Business Roundtable* v. *SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *American Equity Investment Life Insurance Co.* v. *SEC*, 613 F.3d 166, 177-79 (D.C. Cir. 2010); *Chamber of Commerce* v. *SEC*, 412 F.3d 133, 140-44 (D.C. Cir. 2005).

b. The SEC cannot show that its newly dictated disclosures are needed to protect investors because companies already must disclose material information under existing law. As the Commission previously recognized in rejecting similar proposals from the same environmental groups that advocated the present rule, "[i]f environmental * * * information is material to investors, the Commission's rules *already* require the disclosure of such information." App.1192 n.1 (emphasis added). It has acknowledged, for example, that "registrants are *already* required to disclose the financial statement effect of material climate risks under existing rules" and have an "ongoing responsibility to consider material impacts, whether climate-related or not, when preparing their financial statements and related disclosures." App.478-79. And, despite these existing requirements, the Commission apparently has never brought a case against any company for failing to disclose a material climate-related risk. App.1031. If the SEC's true objective were to provide inves-

tors with material climate-related information, no new rule would be needed. That the SEC pressed forward anyway confirms that providing investors with material information is not its objective.

Instead, the rule demands disclosure of information that is *not* material under well-settled standards and decades of SEC precedent. Although the SEC purports to follow "traditional" materiality principles and "decorated the final rule with materiality ribbons," the rule "embraces materiality in name only." App.974 (Peirce, dissenting).

Traditional materiality concerns the importance of information to investors' voting or investment decisions. *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). But the final rule eschews that standard in several ways.

First, the rule requires disclosure not only of risks that are *actually* material, but also climate-related risks that are "*reasonably likely* to have a material impact." App.853 (emphasis added).

Second, the rule demands disclosure of information that is "material" to subordinate company plans and activities, *regardless* whether that information would affect a reasonable investor's analysis. It requires disclosures, for example, if an internal carbon price is "material

to" how a company evaluates or manages a climate-related risk, and if a carbon offset is a "material component" of the company's plan to achieve climate-related targets or goals. App.856, 858.

Third, the rule imposes *no* materiality limitation for certain disclosures, including those about board oversight of climate-related risks and financial-statement disclosure related to severe weather events. App.844-46, 852.

Finally, the rule announces a presumption that "any risks elevated to the board level *will be* material to the company." App.172 (emphasis added). It thereby forces companies to consider climate-related issues in circumstances, and at a level, where otherwise they typically would not, and then—having pressured boards to consider those climate-related matters—*deems* them to be material risks. Through this bootstrapping the rule will compel companies to disclose vast swaths of information that is not material under settled law.

The rule thus refutes the SEC's stated objective of ensuring that investors have the information they need. Indeed, in an earlier filing in a consolidated case, the SEC gave the game away, insisting that under the law it is *not* limited to requiring disclosure of material information.

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See App.1292-93. The key point is that the SEC did not and cannot rationally explain why its rule is necessary to address the purported problem. The Commission certainly has not demonstrated any securities-law benefit that the rule achieves to justify its multi-billion-dollar cost.

2. The climate rule exceeds the SEC's authority

The SEC's climate rule is independently unlawful because Congress never authorized the SEC to mandate climate disclosures in this fashion. The rule sweeps far beyond the type of material, financial disclosures Congress authorized the Commission to require. And it does not advance the only objectives that the SEC *is* authorized to pursue.

a. The Commission claims "'very broad'" authority to require unprecedently expansive climate-related disclosures based on generic provisions of 1930s-era securities statutes that authorize "'necessary or appropriate'" financial disclosures. App.59-61 & n.181. But those provisions, "'read in their context,'" underscore the *limits* on the Commission's authority. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022).

The Commission relies primarily on a residual clause in Section 7(a)(1) of the Securities Act. App.59-60. But that clause follows a list of enumerated disclosures and merely authorizes the Commission to re-

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quire "such other information" it deems "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1). Such residual clauses are used "restrictively," *Washington State Department of Social & Health Services* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003), and reach "'only objects similar in nature to those objects enumerated by the preceding specific words,'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). The Commission's reading fails in two important ways.

First, as the Commission itself has previously acknowledged, those disclosures concern information "financial in nature" and *material* to an investor's evaluation of "'a security.'" 81 Fed. Reg. 23,916, 23,921 (Apr. 22, 2016); see 15 U.S.C. §§ 77g(a)(1), 77aa. That is worlds away from this rule's broad climate-related disclosures. Other provisions the SEC invokes reinforce the financially-focused limits on its authority. Exchange Act Section 12(b), for example, authorizes the Commission to require disclosure of "information" "as necessary or appropriate in the public interest or for the protection of investors"—but only "*in respect of*" specific categories of information that are (again) *financial* and materially re-

lated to the company's financial condition. 15 U.S.C. § 78*l*(b)(1) (emphasis added).

Tellingly, when Congress *has* permitted the SEC to require disclosures outside that traditional, financial-information domain, Congress has said so expressly. In 2010, for example, Congress explicitly authorized the Commission to require companies to disclose use of "conflict minerals." 15 U.S.C. § 78m(p). Congress thus knows how to confer disclosure-requiring power outside the SEC's traditional ken.

Second, in attempting to shoehorn its rule into those limitations, the Commission conflates the objective of "protect[ing] investors" with responding to "investors' * * * demand[s]." App.62-63. Those things are not the same. Certain investors "might" *demand* information for many reasons. *TSC Industries*, 426 U.S. at 449. But investors need *protection* only from fraud and latent material risks. See 81 Fed. Reg. at 23,924 ("materiality" is the "cornerstone" of the "securities laws"). The securities laws echo their common-law antecedents, *Dura Pharmaceutical, Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005), which "'could not have conceived'" of imposing legal obligations "'without proof of materiality,'" *Universal Health Services, Inc.* v. *United States*, 579 U.S. 176, 193 (2016). As dis-

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cussed above, the rule departs from traditional materiality principles, and the SEC has not shown the rule's disclosures are material. See pp.10-13, *supra*.

The SEC similarly confuses the "public interest" under the securities laws, *e.g.*, 15 U.S.C. § 77g(a)(1), with promoting *any* social goal the Commission favors. The public interest in this context encompasses things like promotion of capital formation, *e.g.*, *id.* § 77b(b), but excludes ambitions "unrelated to the objectives of the federal securities laws," 81 Fed. Reg. at 23,970 n.663. The SEC cannot invoke abstract policy goals to aggrandize its authority beyond disclosure of "financial" information material to investors. *E.g.*, 15 U.S.C. § 78*l*(b)(1)(L).

Congress has never authorized the SEC to dictate climate disclosures. To the extent it has authorized regulations of climate-related matters—such as emissions reductions, the avowed goal of many of the rule's proponents, App.1312-16—Congress reserved those issues to the *EPA*. See, *e.g.*, 42 U.S.C. § 7414(a)(1) (EPA); *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007).

b. Even if the provisions the SEC invokes could plausibly be construed to authorize climate disclosures, the major-questions doctrine still

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precludes the Commission's power grab. That doctrine bars an agency from working a "transformative expansion in its regulatory authority" by invoking newly "discover[ed]," previously "unheralded power" in "long-extant statute[s]." *West Virginia*, 142 S. Ct. at 2610 (brackets and citations omitted). When an agency claims power over a question of "'vast economic and political significance,'" it is not enough that its interpretation is "colorable"; its authority must be "'clear.'" *Id.* at 2605, 2609; accord *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2375 (2023).

The major-questions doctrine plainly applies to the SEC's claimed authority to make climate policy through massively burdensome disclosures. The rule attempts to regulate a "'significant portion of the American economy,'" *West Virginia*, 142 S. Ct. at 2608, and would require "billions of dollars in [private] spending," *King* v. *Burwell*, 576 U.S. 473, 485 (2015). By the Commission's own estimate, the rule will impose $2.33 billion in direct costs *per year*—in addition to the three million "internal" hours of annual compliance work, plus numerous other costs, see p.2, *supra*. The rule's "'political significance'" also makes it a major question. *West Virginia*, 142 S. Ct. at 2605. The comment file is likely among the

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largest in SEC history and is filled with concerns from every quarter. App.1344-49.

Had Congress truly intended the SEC to regulate issues of such "'earnest and profound debate across the country,'" it would have said so clearly. *West Virginia*, 142 S. Ct. at 2614. But it did not. The 1930s-era securities statutes have never been construed to confer such power. As the SEC once recognized, these laws ensure "that issuers provide investors with 'complete information relative to the *financial condition* of the issuer.'" 67 Fed. Reg. 44,964, 44,966 (July 5, 2002) (emphasis added). In the SEC's words, "providing investors with financial information concerning publicly-held corporations is the *raison d'etre* of the disclosure provisions of the securities laws." App.1245 n.68. The enormous power the SEC asserts to mandate disclosures on other, non-financial topics has not been sitting in its back pocket—unused—for 90 years.

The circumstances surrounding the rule's adoption confirm that the SEC is not wielding authority clearly conferred by Congress but instead is seeking to circumvent the legislative process. Like OSHA in adopting its vaccine mandate, *NFIB* v. *Department of Labor*, 595 U.S. 109, 113 (2022), and the Department of Education in adopting its student-loan for-

giveness program, *Nebraska*, 143 S. Ct. at 2373, the Administration was unable to muster congressional support for its climate agenda.

On "multiple" occasions, Congress has "'considered and rejected'" bills that would do exactly what the rule attempts. *West Virginia*, 142 S. Ct. at 2614; see, *e.g.*, Climate Risk Disclosure Act of 2019, H.R. 3623; Climate Risk Disclosure Act of 2019, S. 2075. So the Administration "pored over the U.S. Code in search of authority, or a 'work-around,'" to "impos[e]" the desired measures unilaterally. *BST Holdings, LLC* v. *OSHA*, 17 F.4th 604, 612 (5th Cir. 2021). The Administration has been unabashed in this approach, vowing to advance its "climate agenda using every tool at [its] disposal"—with or "without Congress"—and to "continue to do the whole-of-government approach" on its own if Congress does not cooperate. App.892-93. The vaccine-mandate pattern is thus repeating: Despite Congress's decisions not to act, climate regulations are now "pop[ping] up" across the federal bureaucracy. Tr. of Oral Arg. 81, *NFIB*, *supra* (No. 21A244); see, *e.g.*, 87 Fed. Reg. 68,312 (Nov. 14, 2022) (proposing mandatory climate disclosures for federal contractors).

This illegitimate "work-around" did not work for COVID, and it does not work for climate. *BST*, 17 F.4th at 612. The Constitution does

not permit the Executive to regulate "without Congress," App.893, merely because that co-equal Branch has not advanced the President's policy goals in the manner or at the pace he prefers.

3. *The SEC's climate rule violates the First Amendment*

The SEC's climate rule also violates the First Amendment, which "prohibits the government from telling people what they must say." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 61 (2006). The rule flouts that foundational principle by forcing companies to engage in costly speech against their will on matters of contentious political debate.

a. Strict scrutiny applies twice over. First, the rule is "necessarily * * * content-based" because it "[m]andat[es] speech that a speaker would not otherwise make" on specific subjects. *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988). The rule requires companies to publicly pronounce their subjective judgment calls about future risks—requiring, for example, "determination[s] of" which risks to their businesses are "climate-related." App.91. It thereby forces them into politically charged discussions about why they do or do not have certain climate-related policies or expertise. See, *e.g.*, App.680 (predicting that these disclosures will be scrutinized and used to

"deter potential greenwashing"). Second, the rule unavoidably "burden[s] political speech" by compelling it. *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010). Climate change is a high-profile political issue subject to robust debate and raises many contested questions, including climate change's long-term consequences and corporations' responsibilities to address it. The First Amendment protects each person's right to speak, or not, as it chooses on climate change; the government can no more compel than prohibit speech on this crucial matter of public debate.

The rule cannot survive strict scrutiny. The government cannot "rest on 'speculation or conjecture.'" *NAM* v. *SEC*, 800 F.3d 518, 526 (D.C. Cir. 2015). It must prove that a compelling problem exists and that this restriction is essential to solve it. See, *e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993). But the record lacks any evidence that the rule furthers any "compelling" government interest. *NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018). The only arguably compelling interest the Commission could identify was protecting investors from fraud or other material risks; there is no compelling interest "simpl[y]" in providing "additional relevant information" for its own sake. *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 348 (1995). But the SEC has not shown

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investors are not *already* receiving climate-related information when material or are harmed by a lack of additional disclosures, let alone that the rule is necessary to fill any gap. See pp.10-13, *supra*. Regardless, the rule is not narrowly tailored to that unsubstantiated compelling interest. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). The SEC has not shown why disclosure requirements cannot be limited by traditional conceptions of materiality, nor why Commission guidance and enforcement authority cannot suffice for its purposes.

b. Less stringent First Amendment standards have no application and cannot save the climate rule anyway. The Supreme Court has subjected certain disclosure requirements to lesser scrutiny only in "exception[al]" circumstances, *Book People, Inc.* v. *Wong*, 91 F.4th 318, 338 (5th Cir. 2024), where disclosures involved (1) "commercial advertising" and (2) "purely factual and uncontroversial information," *NAM*, 800 F.3d at 522-523; see *NIFLA*, 138 S. Ct. at 2372. Neither requirement is met here. The rule goes far beyond advertising and "commercial speech" that merely "propos[es] a commercial transaction." *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). And the required disclosures "are neither factual nor uncontroversial";

they "requir[e] [companies] to undertake contextual analyses, weighing and balancing many factors" that "ha[ve] already proven controversial" and are subject to vigorous debate. *Book People*, 91 F.4th at 338-340. The SEC is forcing companies to opine on hypothetical future risks, draw controversial connections between weather events and global climate change, and report misleading, inaccurate emissions figures. See pp.20-21, *supra*.

"[C]limate change" is also the paradigmatic "controversial subjec[t]" requiring "'special protection'" at "'the *highest* rung of'" the First Amendment ladder. *Janus*, 138 S. Ct. at 2476 (emphasis added). Speech that the rule compels inevitably will be used to "stigmatize" companies and attempt to "shape [their] behavior"—the very features that doomed the Commission's attempt to force "conflict minerals" disclosures. *NAM*, 800 F.3d at 520, 530. Indeed, the SEC acknowledges that its rule is partly designed to combat "greenwashing," anticipating that environmental activists will flyspeck the disclosures to criticize companies and call for increased regulation or other concerted action. *E.g.*, App.680-82; see App.1362 (citing examples). The SEC's attempt to skew the debate

by arming one side with ammunition for "'publi[c] condemn[ation]'" makes it even "'more constitutionally offensive.'" *NAM*, 800 F.3d at 530.

Regardless, the Rule fails intermediate or "exacting" scrutiny because the Commission has not shown "narro[w] tailor[ing] to the government's asserted interest." *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373, 2383 (2021); *see NAM*, 800 F.3d at 556 (invalidating prior SEC disclosure requirements on these grounds). For all the reasons discussed above, the rule is far more extensive than necessary for the Commission's purpose. See *supra* pp.7-13. The Rule is thus "'unjustified,'" "'unduly burdensome,'" and "'broader than reasonably necessary'" to survive even lesser scrutiny. *NIFLA*, 138 S. Ct. at 2377.

B. The Balance Of Equities Strongly Supports A Stay

Each of the remaining stay factors supports immediate relief.

1. The SEC's climate rule will cause irreparable harm

Allowing the rule to take effect would immediately and irreparably harm petitioners and their members. As detailed in the accompanying declaration, compliance with the rule would require petitioners' members to incur significant costs in the next several months and overcome substantial implementation challenges. See App.1397-1417.

To make the disclosures required in 2026, companies must begin tracking and recording a vast amount of climate-related information at the beginning of fiscal year 2025. App.589-90. To start collecting and processing that information in January 2025, companies must undertake substantial preparation *now*. For example, companies will need to determine where the required information is located across their companies; adopt policies and procedures to collect and analyze that information and to determine which information is "material" under the SEC's rule; develop IT systems to track and aggregate the data; hire additional employees and train current ones; retain external consultants; and test their internal infrastructure—all before 2025 begins. Petitioners and their members thus must begin work and incur compliance costs immediately.

These immense compliance costs constitute irreparable harm. Damages are not available to compensate petitioners or their members. See *Rogers Group, Inc.* v. *City of Fayetteville*, 629 F.3d 784, 789 (8th Cir. 2010). The APA waives the United States' sovereign immunity only for actions "seeking relief other than money damages." 5 U.S.C. § 702. Courts thus recognize that "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable com-

pliance costs." *Texas* v. *EPA*, 829 F.3d 405, 433 (5th Cir. 2016). The immediate, disruptive changes the rule will require in companies' business practices will only exacerbate that harm.

The rule will also inflict irreparable constitutional harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam).

2. The public interest strongly supports a stay

The third and fourth stay factors, "assessing the harm to the opposing party and weighing the public interest," "merge when the Government is the opposing party." *Nken* v. *Holder*, 556 U.S. 418, 435 (2009).

A stay would avoid irreparable harm to petitioners and their members and would cause no harm to investors or the public. Securities laws *already* require disclosure of material climate-related information. See 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010). A stay would simply "'preserve the status quo until the merits are determined,'" a status quo in which disclosures of this kind have never been required. *Morehouse Enterprises, LLC* v. *ATF*, 78 F.4th 1011, 1016 (8th Cir. 2023).

The SEC cannot credibly claim that delaying implementation of its rule threatens any urgent public interest. The disclosures it seeks to mandate have never been required. And the SEC took two years after promulgating its proposal to issue the final rule.

A stay is also in the public interest because "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations,'" and "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of United States* v. *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

II. Alternatively, The Court Should Expedite the Appeal

If the Court does not grant a stay, it should "expedite the appeal" to resolve it on an "accelerated schedule." 8th Cir. I.O.P. III.D. The Court may do so for "good cause," 28 U.S.C. § 1657(a), which amply exists here. Absent a stay, expedited briefing and argument would allow the Court to reach a final decision in time to prevent or mitigate the irreparable harm the rule will inflict on petitioners' members and other regulated parties. See, *e.g.*, *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 48 F.3d 373,

375 (8th Cir. 1995) ("order[ing] an expedited appeal" with accelerated briefing).

Accordingly, the Court should expedite consideration of this case and the consolidated cases. Petitioners propose the following schedule to enable a decision by the end of September 2024, prior to the start of the quarter in which companies need to test the systems they must now create:

April 15, 2024	Agency record filed
May 1, 2024	Petitioners' opening briefs
May 8, 2024	Briefs of Intervenors and Amici supporting Petitioners
June 3, 2024	Respondent's brief
June 10, 2024	Briefs of Intervenors and Amici supporting Respondent
June 17, 2024	Petitioners' reply briefs
July-August 2024	Oral argument

CONCLUSION

The Court should stay the climate rule and toll all compliance deadlines, or alternatively order expedited briefing and oral argument.

Dated: March 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2024, an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts exempted under Federal Rule of Appellate Procedure 27(d)(a)(2)(B), it contains 5,197 words.

I certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point New Century Schoolbook LT.

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

Dated: March 26, 2024

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