Case No. 24-1522 and all consolidated cases: Nos. 24-1624, 24-1626, 24-1627, 24-1628, 24-1631, 24-1634, 24-1685, and 24-2173

In the

United States Court of Appeals

for the Eighth Circuit

STATE OF IOWA, ET AL.
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Respondent,

DISTRICT OF COLUMBIA, ET AL.
Intervenors.

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

BRIEF OF UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES MEMBERS SENATORS SHELDON WHITEHOUSE AND BRIAN SCHATZ, AND REPRESENTATIVES SEAN CASTEN AND JUAN VARGAS AS AMICI CURIAE IN SUPPORT OF RESPONDENT THE SECURITIES AND EXCHANGE COMMISSION (SEC)

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AMICI CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amici curiae are members of the United States Senate and House of Representatives: Senators Sheldon Whitehouse and Brian Schatz, and Representatives Sean Casten and Juan Vargas.

Senator Sheldon Whitehouse represents the state of Rhode Island. First elected to the Senate in 2006, Senator Whitehouse is the Chair of the Senate Budget Committee, where he has held 17 hearings over the last 18 months examining climate-related economic, financial, and budgetary risks our country faces.

Senator Brian Schatz represents the state of Hawaii, a seat he has held since 2012. Senator Schatz has led key legislation to address climate change and the financial risks it poses, including the *Climate Change Financial Risk Act*.

Representative Sean Casten represents the 6th Congressional District of Illinois. First elected in 2019, Representative Casten serves on the House Financial Services Committee and is Vice Ranking Member of the House

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), *amici* state that no counsel for any party authored this brief in any part, and no person or entity other than *amici* or *amici's* counsel made a monetary contribution to fund its preparation or submission.

Science, Space, and Technology Committee. He has sponsored multiple pieces of legislation focused on analyzing and addressing climate-related financial risks.

Representative Juan Vargas represents the 52nd district of the state of California. First elected to the U.S. House of Representatives in 2012, Representative Vargas serves on the Committee on Financial Services. He is also the co-founder and co-chair of the Sustainable Investment Caucus.

Amici file this brief in support of the Respondent, the Securities and Exchange Commission (SEC) and to underscore the serious financial and economic risks posed by climate change, the importance of detailed corporate climate risk disclosures, and the necessity that the SEC compel climate risk disclosures. They also seek to demonstrate how the instant litigation fits into a larger attack on environmental, social, and governance (ESG) investing, which is an attack organized and financed by the fossil fuel industry, that is intended to obscure climate-related risks and pressure fiduciaries not to disclose them.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On March 6, 2024, the SEC adopted amendments to its rules to require public companies to disclose climate-related information in SEC registration statements and annual reports.[2] These changes "require information about a registrant's climate-related risks that have materially impacted, or are reasonably likely to have a material impact on, its business strategy, results of operations, or financial condition."[3] Additionally, "certain disclosures related to severe weather events and other natural conditions will be required in a registrant's audited financial statements."[4] Following multiple petitions for review, the cases were consolidated in the Eighth Circuit.[5] The SEC voluntarily stayed the effective date of the amendments to facilitate "orderly judicial resolution of those challenges" and "to avoid … potential regulatory uncertainty."[6]

Petitioners argue that the SEC lacks authority to require broad climate-related risk disclosures and that the rules should therefore be vacated.[7]

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[2] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 6, 2024) (to be codified at 17 CFR 210, 229, 230, 232, 239, and 249).
[3] *Id.*
[4] *Id.*
[5] *Iowa v. SEC,* No. 24-1522 (8th Cir. Mar. 12, 2024).
[6] *The Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors,* Securities Act Release No. 112280, Securities Exchange Act Release No. 99908, No. S7-10-22, (SEC Apr. 4, 2024).
[7] Br. for Pet'rs. of American Free Enterprise Chamber of Commerce et. al (June 14, 2024).

Petitioners could not be more wrong.[8] Climate change poses both individualized risks to companies across multiple industries, and it poses systemic risks to the economy with the potential to affect companies across every industry. These risks stem from physical effects of climate change, from economic effects of those physical risks in various markets, and from the coming global transition away from fossil fuels. Uniform, comprehensive disclosure of these material risks is vital for investors, and falls within both the SEC's statutory authority and its past pattern and practice with respect to risk disclosures.

The opposition to this rule, including the instant challenge, is part of a campaign organized and funded by the fossil fuel industry. The campaign generally opposes so-called "environmental, social and governance" investing, or "ESG," but its primary focus is on the "E," and specifically on fossil fuel emissions. As climate risks became so indisputable that they entered the fiduciary horizon of corporate reporting, the fossil fuel industry fought back with this campaign.

[8] *Omnicare, Inc. v. Laborers Dist. Council Contr. Indus. Pension Fund,* 575 U.S. 175 (2015) (The Court explained that the Securities Act of 1933 "protects investors by ensuring that companies issuing securities make a 'full and fair disclosure' of information relevant to the public offering"); *Nat. Res. Def. Council, Inc. v. SEC,* 606 F.2d 1031, 1045 (D.C. Cir.1979) (The Court states that SEC is empowered to determine what information is required to be disclosed in corporate filings).

ARGUMENT

I. THE SEC HAS THE AUTHORITY TO REGULATE IN THIS SPACE

The Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act") give the SEC the authority to require public companies to disclose any information or documents deemed to be "necessary or appropriate in the public interest or for the protection of investors."[9] These disclosures facilitate the aims of our securities laws to protect investors and promote "efficiency, competition, and capital formation."[10]

The SEC has frequently exercised this authority in past rulemaking and required "disclosures that provide investors with information on risk-facing registrants."[11] In August 1998, the SEC published disclosure guidelines

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[9] 15 U.S.C. § 77a *et seq.*

[10] *Id.* § 77b.

[11] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 at 63 (Mar. 28, 2024) (citing 17 CFR 229.105(a); *see also* Adoption of Integrated Disclosure System, Release No. 33-6383, 47 Fed. Reg. 11380 (Mar. 16, 1982) ("1982 Release"). Prior to 1982, the SEC stated in guidance that, if the securities to be offered are of a highly speculative nature, the registrant should provide "a carefully organized series of short, concise paragraphs summarizing the principal factors that make the offering speculative." See Guides for Preparation and Filing of Registration Statements, Release No. 33-4666, 29 Fed. Reg. 2490 (Feb. 15, 1964)]. A guideline to disclose a summary of risk factors relating

concerning the material effects of the Y2K (Year 2000) computer bug on public companies,[12] given the growing role of computers in the financial sector. In August 2020, the SEC approved disclosure guidelines concerning material human capital resources,[13] given the role of human capital in a company's long-term success. In July 2023, in response to a proliferation of cybersecurity incidents, the SEC adopted disclosure rules "regarding cybersecurity risk management, strategy, governance, and incidents by public companies."[14] The climate risks facing public companies and investors are far more material than those risks.[15]

Petitioners would have the Court believe that the SEC is trying to regulate climate change or greenhouse gas emissions via the instant

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to an offering was first set forth by the SEC in 1968 and included consideration of five factors that may make an offering speculative or risky, including with respect to risks involving "a registrant's business or proposed business." *See* Guide 6, in Guides for the Preparation and Filing of Registration Statements, Release No. 33-4936, 33 Fed. Reg. 18617 (Dec. 17, 1968)].

[12] Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Securities Issuers, 17 C.F.R. § 231, 241, 271, 276. (1998).

[13] Modernization of Regulation S-K Items 101, 103, and 105, 17 C.F.R.§ 229, 239, 240 (2020).

[14] Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 17 C.F.R. 229, 239, 240, 249. (2023).

[15] *See, e.g., Global warming is coming for your home*, THE ECONOMIST (Apr. 11, 2024), https://www.economist.com/leaders/2024/04/11/global-warming-is-coming-for-your-home.

rulemaking.[16] Nothing in the instant rule regulates climate change or greenhouse gas emissions. What the rule does require is the *disclosure* of climate-related *risks*. Petitioners are devoted to denying those risks,[17] and so oppose the reporting of them by fiduciaries. But the risks are real.

Given the scale of the risks involved, the SEC's statutory authority would have permitted a far stronger disclosure rule. If anything, the agency actually undershot the mark. The rule that remains, without disclosure requirements for scope three emissions, falls short of providing issuers and investors with information adequate to fully understand a public company's climate risk. Nevertheless, the resulting rule falls well within the agency's authority.

The SEC routinely amends disclosure requirements, with the blessing of courts,[18] as changing realities require more consistency and clarity for

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[16] Br. for Pet'rs. of American Free Enterprise Chamber of Commerce et. al (June 14, 2024).

[17] *See,* Staff of House Committee on Oversight and Accountability Democrats and Senate Committee on the Budget, 118th Cong., *Denial, Disinformation, and Doublespeak; Big Oil's Evolving Efforts to Avoid Accountability for Climate Change,* UNITED STATES SENATE COMMITTEE ON THE BUDGET, (April 2024), https://www.budget.senate.gov/imo/media/doc/fossil_fuel_report1.pdf.

[18] *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (adopts definition of materiality); *SEC v. Life Partners Holdings, Inc*., 854 F.3d 765 (5th Cir. 2017) (applying regulations of disclosure of risks); *Panther Partners Inc v. Ikanos Communs.,* Inc., 681 F.3d 114 (2d Cir. 2012) (disclosures were inadequate under Item 303 of regulation S-K).

investors. As climate-related risks mount and climate disasters increase in frequency and severity, investors need more clarity and a better understanding of these risks.[19] In response to investor demand, many companies already voluntarily report climate risk and emissions data.[20] As the SEC has made clear, it is not regulating climate change or greenhouse gas emissions, but is discharging its duty to provide investors with information about material risks, and to harmonize for investors the climate risk and emissions data that many companies already make public.

Transparency about climate risks is not only material to individual investors;[21] it can also help limit climate-related systemic financial threats. Transparency about companies that face significant climate-related risks

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[19] *Disclose What Matters: Bridging the Gap Between Investor Needs and Company Disclosures on Sustainability*, CERES (Aug. 15, 2018), https://www.ceres.org/resources/reports/disclose-what-matters-bridging-gap-between-investor-needs-and-company-disclosures; David Gelles, *How a Climate Rule Got Watered Down*, THE NEW YORK TIMES (Mar. 5, 2024), https://www.nytimes.com/2024/03/05/climate/how-a-climate-rule-got-watered-down.html.

[20] Linda-Eling Lee, *US firms fall further behind global peers on climate disclosure,* MSCI SUSTAINABILITY INSTITUTE (Feb. 14, 2024), https://www.msci-institute.com/insights/us-firms-fall-further-behind-global-peers-on-climate-disclosure/ (Showing that forty-five percent of listed U.S. companies report Scope 1 and 2 emissions.).

[21] Celso Brunetti et al., *Climate Change and Financial Stability,* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Mar. 19, 2021), https://www.federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.html.

reduces the danger that large classes of stranded assets accumulate over time. Transparency about systemic economic risks allows markets to act to reduce the likelihood of economic disasters. To claim that the SEC can't regulate in this space is to claim that the agency can look at motes but not at beams.

II. CLIMATE CHANGE POSES SYSTEMIC FINANCIAL AND ECONOMIC RISKS

In evaluating this real-world SEC rule, one must start by evaluating climate risk in the real world. Over the last few decades, climate change has accelerated, and the risks that it poses to the economy and the financial sector (and by extension to companies) have grown accordingly. Peer-reviewed academic papers, economic studies, presentations by central banks, testimony before the Senate Budget Committee,[22] and even a recent cover article from *The Economist*[23] all warn that climate change poses systemic risks to our economy and to our financial sector.[24] These "systemic risks

[22] Letter from Chairman Sheldon Whitehouse to Republican Budget Committee Members, U.S. SENATE COMMITTEE ON THE BUDGET, (Mar. 25, 2024), https://www.budget.senate.gov/imo/media/doc/letter_to_republican_budget_committee_members_regarding_climate-related_risks_to_the_economy.pdf.
[23] THE ECONOMIST, supra note 15.
[24] *See, e.g.,* Tom Kompas et al., *The Effects of Climate Change on GDP by Country and the Global Economic Gains from Complying with the Paris*

have the potential to destabilize capital markets and lead to serious negative consequences for financial institutions and the broader economy."[25] Reports estimate climate-related losses in the trillions of dollars.[26] A huge body of work from economists, central bankers, financial experts, insurance and mortgage industry leaders warns of the economic dangers of climate risk.[27]

Climate Accord, EARTH'S FUTURE (July 13, 2018), https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2018EF000922; Patrick Bolton et. al., *The Green Swan: Central banking and financial stability in the age of climate change,* BANK FOR INTERNATIONAL SETTLEMENTS, , (Jan. 2020), https://www.bis.org/publ/othp31.pdf; *Global Turning Point Report*, DELOITTE (July 2022), https://www.deloitte.com/an/en/issues/climate/global-turning-point.html; *A call for action: Climate change as a source of financial risk*, NETWORK FOR GREENING THE FINANCIAL SYSTEM (Apr. 2019), https://www.ngfs.net/sites/default/files/medias/documents/ngfs_first_comprehensive_report_-_17042019_0.pdf.

[25] *Addressing Climate as a Systemic Risk: A call to action for U.S. financial regulators*, CERES, at vi (June 2020), https://www.ceres.org/resources/reports/addressing-climate-systemic-risk.

[26] *38 trillion dollars in damages each year: World economy already committed to income reduction of 19% due to climate change*, POTSDAM INSTITUTE FOR CLIMATE IMPACT RESEARCH (April 17, 2024); DELOITTE *supra* note 23;

[27] *See, e.g.,* Mark Carney, *Breaking the tragedy of the horizon – climate change and financial stability,* Address at Lloyd's of London, (Sept. 29, 2015); Paul Fisher, *Confronting the challenges of tomorrow' world*, Address at the Economist's Insurance Summit 2015, London, (Mar. 3, 2015); NETWORK FOR GREENING THE FINANCIAL SYSTEM *supra* note 23; Christopher McGlade & Paul Elkins, *The geographical distribution of fossil fuels unused when limiting global warming to 2 °C*, 517 NATURE 187-190 (Jan. 8, 2015); J. F. Mercure et al., *Macroeconomic impact of stranded fossil fuel assets*, 8 NATURE CLIMATE CHANGE 588 - 593 (2018) https://www.nature.com/articles/s41558-018-0182-1; Stefano Battiston et.

al., *A climate stress-test of the financial system*, 7 NATURE CLIMATE CHANGE 283-288 (Mar. 27, 2017) https://www.nature.com/articles/nclimate3255; Expert Report of Joseph E. Stiglitz, Ph.D., *Juliana v. US*, Civ. 6:15-cv-01517-AA (9th Cir. 2018); *Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate*, UNION OF CONCERNED SCIENTISTS (June 2018); *Press Release, As the seas have been rising, home values have been sinking*, FIRST STREET FOUNDATION (July 25, 2018) (https://firststreet.org/press/as-the-seas-have-been-rising-home-values-have-been-sinking); *Press Release*, *Sea Level Rise Sinks Alabama Home Values by More Than $157 Million*, FIRST STREET FOUNDATION (Dec. 3, 2018) (https://firststreet.org/press/sea-level-rise-sinks-mississippi-home-values-by-more-than-263-million); *Press Release*, *Sea Level Rise Sinks Mississippi Values by More Than $263 Million*, FIRST STREET FOUNDATION (Dec. 3, 2018) (https://firststreet.org/press/sea-level-rise-sinks-mississippi-home-values-by-more-than-263-million); *Press Release*, *Rising Seas Swallow $403 Million in New England Home Values*, FIRST STREET FOUNDATION (Jan. 22, 2019) (https://assets.firststreet.org/uploads/2019/03/Rising-Seas-Swallow-403-Million-in-New-England-Home-Values.pdf); *Press Release*, *As the seas have been rising, Tri-State home values have been sinking*, FIRST STREET FOUNDATION (Aug. 23, 2018) (https://firststreet.org/press/as-the-seas-have-been-rising-tri-state-home-values-have-been-sinking); Amine Ouazad & Matthew E. Kahn, *Mortgage Finance in the Face of Rising Climate Risk*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Sept. 30, 2019), https://www.nber.org/system/files/working_papers/w26322/revisions/w26322.rev0.pdf; *Global: Scenario analysis for assessing climate-related risks*, *Global Insights* BLACKROCK (Apr. 2019), https://www.blackrock.com/us/individual/insights/blackrock-investment-institute/physical-climate-risks; *Life's a Beach*, FREDDIE MAC (Apr. 26, 2016), https://www.freddiemac.com/research/insight/20160426-lifes-a-beach; *2017 Most Dangerous Emerging Risks, Coastal Mortgage Value Collapse*, RISK & INSURANCE (Apr. 7, 2017), https://riskandinsurance.com/coastal-mortgage-value-collapse/; Bolton *supra* note 24; DELOITTE *supra* note 24; Jonathan Woetzel et al., *Climate risk and response, Physical hazards and socioeconomic impacts*, MCKINSEY GLOBAL INSTITUTE (Jan. 2020), https://www.mckinsey.com/~/media/mckinsey/business%20functions/sustainability/our%20insights/climate%20risk%20and%20response%20physical%20hazards%20and%20socioeconomic%20impacts/mgi-climate-risk-and-

Last year, the United States experienced a record 28 weather and climate disasters costing $1 billion or more.[28] Climate-related extreme weather events, such as hurricanes, wildfires, floods, heat waves and droughts pose obvious physical threats to property, infrastructure and supply chains. They pose obvious economic risks too. In warnings to the U.S. Senate Committee on the Budget, experts identified climate risks to insurance markets, mortgage markets, and property markets.[29] Wildfires, sea level rise, extreme precipitation, and tropical cyclones – all made more frequent and/or more severe by climate change – are making coastal, wildfire-adjacent, and other exposed communities far riskier places. "These concerns are not merely

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response-full-report-vf.pdf; Martinich, J. et al., *Reducing Risks Through Emissions Mitigation*, Impacts, Risks and Adaptation in the United States: Fourth National Climate Assessment, Volume II, Global Change Research Program, Washington, DC, USA, pp. 1346–1386. https://nca2018.globalchange.gov/downloads/NCA4_Ch29_Mitigation_Full.pdf.

[28] Gelles *supra* note 19.

[29] *See, e.g.,* Rising Seas, Rising Costs: Climate Change and the Economic Risks to Coastal Communities: Hearing Before the U.S. Senate Budget Committee, 118th Cong. (Mar. 1, 2023); A Burning Issue: The Economic Costs of Wildfires: Hearing Before the U.S. Senate Budget Committee, 118th Cong. (Mar. 8, 2023); Risky Business: How Climate Change is Changing Insurance Markets, 118th Cong. (Mar. 22, 2023); Riskier Business: How Climate is Already Challenging Insurance Markets: Hearing Before the U.S. Senate Budget Committee, 118th Cong. (June 5, 2024).

theoretical."[30] And, for just one example, they make property insurance in such areas more expensive and less accessible.

Florida, for instance, is already feeling the effects of climate risk on its insurance market. Florida has the highest premiums in the nation; its high-risk areas have premiums five times higher than the national average.[31] Despite efforts from the state to mitigate losses (e.g., updated building codes), insurance premiums continue to increase.[32] Florida's experience "stands as a warning of what the future may hold [for] other states."[33]

Insurance, mortgage, and property markets interact. Added insurance expense is an added cost of ownership that depresses property values. Here "a broken insurance market is not the problem" but a "symptom of a larger problem—too much risk for the market to bear."[34] As insurance becomes unaffordable and unavailable, mortgage markets are compromised, as they

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[30] *Risky Business supra* note 29, at 1 (Testimony of Benjamin J. Keys, Ph.D.) https://www.budget.senate.gov/imo/media/doc/Dr.%20Benjamin%20J.%20Keys%20-%20Testimony%20-%20Senate%20Budget%20Committee.pdf.

[31] *Riskier Business supra* note 29, at 1 (Testimony of Rade Musulin) https://www.budget.senate.gov/imo/media/doc/mrrademusulinsenatebudgetcommitteetestimony.pdf.

[32] *Id.* at 2.

[33] *Id.* at 2.

[34] *Risky Business supra* note 29, at 2 (Testimony of Nancy Watkins) https://www.budget.senate.gov/imo/media/doc/Ms.%20Nancy%20Watkins%20-%20Testimony%20-%20Senate%20Budget%20Committee.pdf.

require insurance. Without mortgages, property prices fall, as the pool of potential buyers shrinks (Fannie Mae and Freddie Mac require properties whose mortgages they back to carry insurance). In sum, insurance market collapse leads to mortgage market collapse leads to property values collapse.

We saw in the 2008 Financial Crisis how trouble in mortgage markets coupled with declining property values inflicted widespread economic contagion with severe consequences throughout the country. The former chief economist for Freddie Mac warned that the climate-driven risk cascade could destroy more real estate value than did the 2008 Financial Crisis.[35] Financial experts in Senate Budget Committee hearings explicitly compared the current trajectory to the 2008 Financial Crisis. The president of the insurance giant Aon testified that "just as the US economy was overexposed to mortgage risk in 2008, the economy today is overexposed to climate risk."[36] Dr. Ishita Sen warned that property insurance failures harm property values, as promptly compensated insurance claimants are less likely to walk away and default on mortgages. Sound property insurance also reduces risk to banks and Government Sponsored Enterprises (GSEs) like Fannie Mae

[35] *Rising Seas, Rising Costs supra* note 29, at 1 (Testimony of Dr. Sean Becketti) https://www.budget.senate.gov/download/testimony-Becketti.

[36] *Risky Business supra* note 29, at 2 (Testimony of Eric Anderson) https://www.budget.senate.gov/imo/media/doc/Mr.%20Eric%20Andersen%20-%20Testimony%20-%20Senate%20Budget%20Committee.pdf.

and Freddie Mac, protecting taxpayers.[37] But like 2008, there is evidence that some rating agencies are inflating ratings to get low-quality insurers past GSE requirements.[38] Of course, climate-related extreme weather increases fragile insurers' risk of becoming insolvent, and that in turn increases risk in the mortgage market.[39]

We learned from the 2008 Financial Crisis that when borrowers' risks are neglected and lenders issue too many risky loans, these risks can accumulate to the point where they become "systemic," and then the entire financial system and economy suffer from the collapse.[40] The CEO of an investment research and consulting firm that develops models to connect climate science and investment science warned that "the longer the markets take to price in [climate] challenges, the worse the ultimate reckoning will be."[41] As the saying goes: these disasters happen gradually, then suddenly. It looks like we are in the "gradually" phase of insurance/mortgage/property market peril.

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[37] *Riskier Business supra* note 29, 2 (Testimony of Dr. Ishita Sen) https://www.budget.senate.gov/download/dr-ishita-sen_-senate-budget-committee---testimony.

[38] *Id.* at 3.

[39] *Id.* at 3.

[40] *Id.* at 4.

[41] *A Burning Issue supra* note 29, 1 (Testimony of David Burt) https://www.budget.senate.gov/download/mr-david-burt_-testimony---senate-budget-committee.

Along a separate vector of risk, climate hazards threaten the municipal bond market. Municipal bonds finance infrastructure in local communities.[42] More than seventy percent of the country's infrastructure is financed with local government bonds,[43] including essential public services like water treatment facilities, roads, bridges and power plants.[44] Municipal bonds have historical default rates less than one percent.[45] Unfortunately, climate risks threaten their stability. A climate-related disaster can create default risks from the physical damage of the disaster; increasingly unavailable or unaffordable property insurance may undermine a local community's tax base;[46] or persistent sea level rise may gnaw away at

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[42] *What are municipal bonds and how are they used?,* TAX POLICY CENTER, https://www.taxpolicycenter.org/briefing-book/what-are-municipal-bonds-and-how-are-they-used (last visited Aug. 8, 2024).
[43] *U.S. Infrastructure is Backed by Municipal Bonds: Three Things to Know,* MUNICIPAL SECURITIES RULEMAKING BOARD, https://www.msrb.org/sites/default/files/MSRB-Infrastructure-Explainer.pdf (last visited Aug. 8, 2024).
[44] *Id.*
[45] Thomas V. Kennedy, *A rare municipal bond opportunity: Equity-like yields*, J.P. MORGAN, https://privatebank.jpmorgan.com/nam/en/insights/markets-and-investing/ideas-and-insights/a-rare-municipal-bond-opportunity-equity-like-yields#id1 (last visited Aug. 8, 2024).
[46] *Investors Underappreciate Climate-Related Risks in their Portfolios,* BLACKROCK, (Apr. 4, 2019), https://www.blackrock.com/corporate/newsroom/press-releases/article/corporate-one/press-releases/investors-underappreciate-climate-related-risks-in-their-portfolios.

valuable coastal properties, ultimately removing them from tax rolls. These risks make municipal bonds a less safe option for investors, including corporate investors reliant on their historic safety.

There are three major categories of climate risk. One is the immediate physical damage and economic shock of climate catastrophes; the second is the impact of that future risk carried into current insurance, mortgage, property and bond markets; and there is a third: transition risk as the world economy moves away from dangerous carbon fuels. The risk of "stranded" carbon assets is a looming financial threat in the energy and financial sectors,[47] a threat dangerous enough to become "systemic," with economic damage cascading beyond those sectors.[48]

Investors need to understand the financial implications of such "stranded" assets: on public companies that own them; on banks and other financial sector companies that financed the assets; and, since stranded fossil fuel assets pose possibly a "systemic" risk to the economy,[49] on *all*

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[47] Gregor Semieniuk, et al., *Stranded fossil-fuel assets translate to major losses for investors in advanced economies,* 12 NATURE CLIMATE CHANGE 532-538 (2022).

[48] Hugh Miller & Simon Dikau, *Preventing a 'climate Minsky moment': environmental financial risks and prudential exposure limits,* GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT, 9,19 (Mar. 2022), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/03/Preventing-a-climate-Minsky-moment.pdf.

[49] Mercure *supra* note 27.

companies potentially exposed to this “carbon bubble” risk. Petitioners fault the SEC for overreacting, but these are real risks, of real relevance to investors. If anything, more complete disclosures along these lines should have been required.

Here is where the “scope three” problem comes in. The SEC rule requires better disclosure of “stranded asset” risks from companies that potentially face them, but not comprehensive disclosure of the “stranded asset” risk associated with scope three emissions. For many companies — auto companies, oil, gas and coal producers, refiners, commercial airliner manufacturers, to name but a few — the bulk of their emissions responsibility is downstream “scope three” emissions. These downstream “scope three” emissions are the most likely to be affected by global efforts to find a pathway to global climate safety.

The “free to pollute” business model of the fossil fuel industry is an obvious target for climate safety strategies: it’s an economically improper and unsound subsidy (in the hundreds of billions of dollars annually in the U.S. alone[50]); it creates massive negative externalities in pollution cost and

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[50] Simon Black, et al., *IMF Fossil Fuel Subsidies Data: 2023 Update*, INTERNATIONAL MONETARY FUND, (Aug. 24, 2023), https://www.imf.org/en/Publications/WP/Issues/2023/08/22/IMF-Fossil-Fuel-Subsidies-Data-2023-Update-537281.

impairs innovation in emissions reduction; and it's often propped up by political power and influence, not by merit. The archetypal "stranded asset" is an asset that is not economically viable without these massive subsidies, and these massive subsidies are rarely if ever economically legitimate. Without accurate, uniform disclosure of scope three emissions, it will be substantially more difficult for investors to fully appreciate the transition and "stranded asset" risks facing public companies.

In sum, understanding the material risks facing a public company requires investors to know how exposed those companies are to climate risks — physical, economic, and transition; individual, industry-wide, and "systemic" — and how the companies plan to manage these risks.[51] Many public companies implement their own climate risk disclosures[52] — but mandatory disclosures are needed to help issuers and investors understand the financial consequences of investment options. Uniform, mandatory climate risk disclosures will help reduce financial instability, reduce the economic risk of stranded assets, and reduce the systemic risks that can

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[51] Mercure *supra* note 27.

[52] Randi Mali, *Meet the Companies that are Leading the Way on Scope 3 Emissions,* CERES (Nov. 8, 2022), https://www.ceres.org/resources/news/meet-the-companies-that-are-leading-the-way-on-scope-3-emissions.

"destabilize capital markets and lead to serious negative consequences for financial institutions and the broader economy."

The "systemic risks" are multiple: insurance failure, coastal property values collapse, wildfire-adjacent property value collapse, and assets stranded as the "carbon bubble" bursts. Each poses challenges to companies across industrial sectors, and more than one of them could occur — indeed they all could, and all at once. Petitioners claim that the agency has overshot its authority; the opposite is true. They seek to cast a mouse as a monster, and they are wrong. If anything, the instant rulemaking failed to explicitly require companies to disclose their risk exposure to climate related systemic collapses.

III. PETITIONERS' PATTERN OF CLIMATE OBSTRUCTION

Petitioners do not come to this argument with clean hands. They are deeply enmeshed in a fossil fuel-funded network operating (often covertly) to deny the genuine danger (and risks) of climate change, to obstruct legislative efforts to reduce the danger of fossil fuel emissions, and to abuse the administrative and adjudicative processes to create delay.

Petitioner U.S. Chamber of Commerce ("the Chamber")[53] has for decades been obstructing climate action in Congress and before executive agencies, and advocating for policies sought by its fossil fuel donors and members, to the point where it has been labeled one of America's worst climate obstructers.[54] Despite occasional masquerade,[55] the Chamber has worked relentlessly to block meaningful climate legislation[56] and to oppose regulations that would benefit human health and the environment.[57] It supports climate-denying political candidates. And in courtrooms, "both as

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[53] *Chamber of Com. of the U.S. v SEC, No. 24-1628*, (8th Cir. June 14, 2023).

[54] *See Industry Groups and their Carbon Footprints*, INFLUENCEMAP (Sep. 2019), https://influencemap.org/report/Trade-Groups-and-their-Carbon-Footprints-f48157cf8df3526078541070f067f6e6.

[55] *Task Force on Climate Action*, U.S. CHAMBER OF COMMERCE https://www.uschamber.com/program/policy/environmental-affairs-and-sustainability/task-force-on-climate-actions (last visited Aug. 7, 2024).

[56] Karl Evers-Hillstrom, *Arizona chambers run ads targeting Sinema, Kelly over reconciliation bill*, THE HILL (Aug. 2, 2023), https://thehill.com/lobbying/3584204-us-arizona-chambers-run-ads-targeting-sinema-kelly-overreconciliation-bill/.

[57] *See, e.g.,* John Bowman, *U.S. Chamber of Commerce Opposes Climate Action that Corporate America Claims to Back*, NATURAL RESOURCES DEFENSE COUNCIL (Sep. 29, 2021), https://www.nrdc.org/bio/john-bowman/us-chambercommerce-opposes-climate-action-corporate-america-claims-back; *The U.S. Chamber of Commerce and Climate Policy,* INFLUENCEMAP (Mar. 2022), https://influencemap.org/report/The-US-Chamber-of-Commerce-and-itsCorporate-Members-on-Climate-17631.

a litigant and an amicus, the Chamber maintains a long history of opposing climate rules and laws."[58]

Petitioner Domestic Energy Producers Alliance (DEPA) has a similar history of climate-hostile litigation.[59] DEPA is a lobbying group founded by the chairman of Continental Resources ("Continental"), one of the country's largest oil and gas producers.[60] Since DEPA's inception, Continental has deployed DEPA to serve its corporate interests, for example in a lobbying push for a $140 million extension to the Keystone XL pipeline.[61]

Petitioner National Center for Public Policy Research (NCPPR) was originally founded to "change opinions through vocal national campaigns

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[58] *See, e.g.,* Kristoffer Tigue, *The US Chamber of Commerce Has Helped Downplay the Climate Threat, a New Report Concludes*, INSIDE CLIMATE NEWS (June 29, 2021), https://insideclimatenews.org/news/29062021/uschamber-of-commerce-downplay-climate-threat-new-report-concludes/; *Who's Fighting the Clean Power Plan and EPA Action on Climate Change*, UNION OF CONCERNED SCIENTISTS (Apr. 13, 2016), https://www.ucsusa.org/resources/whos-fighting-clean-power-plan#toc-us-chamber-of-commerce.

[59] *Press Releases*, DOMESTIC ENERGY PRODUCERS ALLIANCE, https://depausa.org/news/news-2. / (last visited Aug. 7, 2024).

[60] *Executive Committee*, DOMESTIC ENERGY PRODUCERS ALLIANCE, https://depausa.org/executive-committee/ (last visited Aug. 7, 2024).

[61] David Sheppard et al, *Special Report: How Romney energy czar fuels business with politics*, REUTERS (Sept. 21, 2012), https://www.reuters.com/article/us-hamm-romney-profile-idUSBRE88J12L20120921/.

aimed at supporting Reagan administration initiatives"[62] and is now focused on challenging environmental regulations. In 2017, NCPPR signed a letter urging President Trump "to withdraw fully from the Paris Climate Treaty and to stop all taxpayer funding of UN global warming programs."[63]

The fossil fuel industry has recently been campaigning through public officials against ESG investing, systematically attacking any initiative to consider climate-related risks in investment decisions. Petitioner state treasurers have attacked both federal and state regulations meant to address climate-related economic risks.[64] In 2022, the state treasurer of Petitioner West Virginia, working with the state's legislature, barred banks from contracting with the state when banks reduced their investments in coal.[65] Petitioners Texas and Oklahoma passed similar laws.[66] Freedom of Information Act disclosures show the hand of the fossil fuel industry in

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[62] *About Us,* THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH (archived Nov. 12, 2015) [https://archive.is/hSm6S].

[63] Letter to Donald J. Trump from Competitive Enterprise Institute et al.,, (May 8, 2017) (https://web.archive.org/web/20170512185946/https://cei.org/sites/default/files/20170508%20CEI%20Paris%20Treaty%20with%20logos%20-%2044%20Final.pdf).

[64] David Gelles, *How Republicans Are 'Weaponizing' Public Office Against Climate Action*, THE NEW YORK TIMES (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html.

[65] *Id.*

[66] *Id.*

developing anti-ESG bills in the West Virginia and Texas legislatures.[67] (This has not gone well for Texas cities.[68]) State treasurers from some Petitioner states pulled money out of investment firms like BlackRock for being "too focused on environmental issues."[69] Other state treasurers from Petitioner states tried to hamper the nomination of federal regulators supportive of climate risk disclosure.[70]

Tellingly, these efforts can be tied back to the State Financial Officer Foundations (SFOF), a nonprofit organization pushing state treasurers to advocate for oil and gas interests and impede climate action.[71] In 2022, SFOF hired CRC Advisors, a political strategy firm chaired by Leonard Leo, of Supreme Court notoriety.[72] Consumers Research, an anti-ESG investing group funded by Leonard Leo, is SFOF's largest donor.[73] The anti-ESG operation is a fossil fuel-funded charade.

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[67] *Anti-ESG and the Fossil Fuel Sector*, (May 2023), INFLUENCEMAP https://influencemap.org/report/Anti-ESG-and-the-Fossil-Fuel-Sector-21873.
[68] *See e.g. Texas' Extremism is Bad for Texas Business*, UNLOCKING AMERICA'S FUTURE (May 2004), https://unlockingamericasfuture.org/wp-content/uploads/2024/05/Textremism-Report.pdf.
[69] Gelles *supra* note 64.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *New: State Financial Officers Foundation, With Deep Ties to Leonard Leo and Koch Industries, Launches New Anti-ESG Political Arm*,

CONCLUSION

The facts of the matter here are: (1) that climate risks caused by fossil fuel emissions are real, dangerous, and worsening; (2) that financial instruments like bonds, mortgages, and insurance policies transpose those real-world physical risks into the current economic arena, in a magnitude that makes those risks "systemic"; (3) that years of well-understood scientific predictions about those risks have now become so indisputable that ordinary fiduciary duty requires they be taken into account; (4) that faced with that new problem, the fossil fuel industry reverted to form and created an anti-ESG operation using hidden funders, front groups, and well-funded political actors; and (5) that these front groups and political actors include Petitioners in the instant case. An honest appreciation by the SEC of the grave and worsening climate economic risks would justify the agency requiring considerably stronger climate risk disclosure requirements, but the bottom line remains: requiring disclosure to investors of material climate-related risks is well within the statutory authority of the agency. It would

UNLOCKING AMERICA'S FUTURE (May 3, 2024), https://unlockingamericasfuture.org/new-state-financial-officers-foundation-with-deep-ties-to-leonard-leo-and-koch-industries-launches-new-anti-esg-political-arm/.

actually be hard to imagine a more essential disclosure or a more dangerous risk.

For these reasons and the reasons enumerated in the Respondent's brief, the Court should dismiss the Petitioners' petitions.

August 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, signature block, certificates of counsel). This brief contains 5117 words.

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Date: August 15, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2024, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

Dated this August 15, 2024.

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