NOTE

Hostility Against the Administrative State: What the New "Major Questions Doctrine" Means for SEC Climate Reform

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 J.D. Candidate, University of California, Davis School of Law, 2024. I would like to thank Professor John P. Hunt and Elizabeth Reinhardt for their invaluable feedback and support throughout the writing process. I am grateful to the amazing editors, members, and staff of the *UC Davis Law Review* (especially Caroline Hull and Will Deyo) for their help preparing this Note for publication. Thanks also to my sisters, friends, family, and partner for their love and support. To my parents Ed and Maribeth, thank you for giving me the strength and courage to chase my dreams.

INTRODUCTION

On March 6, 2024, the Securities and Exchange Commission ("SEC") adopted a rule titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" in response to growing investor demand.[1] The rule added climate-related risks and greenhouse gas ("GHG") emissions metrics to the SEC's already comprehensive requirements.[2] Most large companies already reported Environmental, Social, and Governance ("ESG") information in some way,[3] but the rule is the first to mandate uniform climate-related disclosures for all issuers.[4] Interest in the rule has been overwhelming and immediate since its proposal in March 2022.[5] Both legal scholars and academics weighed in through more than 4,500 public comment letters.[6]

Meanwhile, the Supreme Court was repeatedly striking down rulemaking by various administrative agencies.[7] Drawing upon precedents critical of the administrative state,[8] three Court cases from

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[1] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[2] *Id.* at 21674-75; *see infra* Part I.A (discussing current mandatory disclosures over corporate behavior including codes of ethics, risk management systems, and executive pay).

[3] *See S&P 100 and ESG Reporting*, CTR. FOR AUDIT QUALITY (Apr. 29, 2021), https://www.thecaq.org/sp-100-and-esg-reporting/ [https://perma.cc/A2KC-5X9D].

[4] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21674-75; Lisa Benjamin, *The SEC and Climate Risk*, 40 UCLA J. ENV'T. L. & POL'Y 1, 20, 27-31 (2022) (recounting 2010-2021, when the SEC "effectively ignored calls for regulatory reform in [ESG and climate disclosures]").

[5] *See infra* Part I.B.

[6] *Academic Comment Letters for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, INT'L INST. OF L. & FIN., https://iilawfin.org/academic-comments-the-enhancement-and-standardization-of-climate-related-disclosures (last visited Nov. 7, 2022) [https://perma.cc/29H8-89ZC]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/news/press-release/2024-31 [https://perma.cc/XA2Y-CQRP] [hereinafter Press Release on Final Rule].

[7] *See infra* Part I.C.

[8] Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

August 2021 to June 2022[9] cemented the change. Now, the new "major questions doctrine" requires Congress to "speak clearly" in authorizing agency decisions of "vast economic and political significance."[10] This Note argues that, for its finalized climate change rule, the SEC lacks the specific authorization the doctrine requires.[11]

Part I of this Note will analyze the SEC's history regulating disclosure and how the major questions doctrine threatens to undermine the agency's authority.[12] Parts II and III contend that while the doctrine has weakened the SEC's justification for mandatory climate reporting, a failure of the means may not equally doom the ends.[13] *West Virginia v. EPA*[14] signaled that the SEC might fare better than the Environmental Protection Agency ("EPA") in a court challenge. Still, this Note argues that, despite the difficult legal battles ahead, climate disclosure is worth the fight.[15] Even with the major questions doctrine and the low probability of congressional action, the SEC can rely on a combination of audit firms' influence and market forces to enact real change.[16]

I. BACKGROUND

A. The SEC and Its Mandated Disclosures for Public Companies

Congress created the SEC by passing the Securities and Exchange Acts of 1933 and 1934.[17] The Acts "authorize[d] the Commission to promulgate rules for registrant disclosure 'as necessary or appropriate

[9] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021); Nat'l Fed'n of Indep. Bus. v. Dept. of Lab., OSHA, 595 U.S. 109 (2022); West Virginia v. EPA, 597 U.S. 697 (2022).

[10] *West Virginia*, 597 U.S. at 716.

[11] *See infra* Part II.

[12] *See infra* Part I.

[13] *See infra* Parts II, III.

[14] *West Virginia*, 597 U.S. 697.

[15] *See infra* Part II.C.

[16] *See infra* Part III.

[17] 5 U.S.C. § 551.

in the public interest or for the protection of investors.'"[18] In 1996, Congress added the promotion of efficiency, competition, and capital formation to the SEC's mandates.[19] Since its inception, the SEC has considered full and fair disclosure of financial information central to achieving its objectives.[20]

The SEC requires issuers to disclose all financially material facts, "both favorable and unfavorable."[21] Regulation S-K governs public company reporting beyond the financial statements.[22] The threshold for disclosure materiality varies by issuer and is subject to review by an independent auditor.[23] However, the current standard defines information as material if a reasonable shareholder would consider it important in deciding how to vote or whether to invest.[24] Environmental disclosures are nothing new.[25] The SEC first mandated disclosure of material costs from compliance with existing environmental law in 1971.[26]

Since then, the SEC has only expanded its mandatory disclosure regime, conceivably changing corporate behavior.[27] For example,

[18] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23921 (Apr. 22, 2016) (citing Sections 7, 10, and 19(a) of the Securities Act; Sections 3(b), 12, 13, 14, 15(d), and 23(a) of the Exchange Act).

[19] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106(b), 110 Stat. 3416, 3424; Securities Exchange Act of 1934, ch. 404, § 23(a)(2), 48 Stat. 881, 901.

[20] *See* Anne M. Khademian, *The Securities and Exchange Commission: A Small Regulatory Agency with a Gargantuan Challenge*, 62 PUB. ADMIN. REV. 515, 515 (2002).

[21] 17 C.F.R. § 229.10(b)(3)(iii) (2024).

[22] *See id.* § 229.10(a) (stating that Regulation S-K applies to non-financial portions of registration statements).

[23] Many public comments to the proposed rule have urged the SEC to mandate specific disclosure of climate metrics and targets rather than continuing to permit companies to flexibly decide which climate-related information to disclose. *See* Benjamin, *supra* note 4, at 44-45 ("[The] principle-based approach is triggered by what an issuer considers to be material.").

[24] Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

[25] *See* Disclosures Pertaining to Matters Involving the Environment and Civil Rights, 36 Fed. Reg. 13989, 13989 (July 29, 1971).

[26] *Id.*

[27] *See* U.S. SEC. & EXCH. COMM'N, REPORT ON REVIEW OF DISCLOSURE REGULATIONS IN REGULATION S-K 57 (2013), https://www.sec.gov/files/reg-sk-disclosure-requirements-review.pdf [https://perma.cc/D52Y-E8RC] [hereinafter SEC REGULATION S-K REPORT].

governance disclosures now compel companies to adopt a code of ethics, adhere to director independence standards, and implement risk oversight and risk management systems.[28] A company's disclosures of such information must be reviewed by an independent auditor, which reinforces actual compliance.[29] Most recently, the SEC stirred controversy when it adopted rules requiring registrants to disclose their executive pay compared to the registrant's overall financial performance.[30] But, unlike the new climate change disclosures, Congress requested most of these requirements through legislation including the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act") and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[31]

[28] *Id.* at 22, 67, 74-75.

[29] Per the SEC, any internal control report "must include: . . . a statement that the registered public accounting firm that audited the company's financial statements . . . issued an attestation report on management's assessment of the company's internal control over financial reporting," and "a company is required to file the registered public accounting firm's attestation report as part of the annual report." Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36636, 36636 (June 18, 2003) (to be codified at 17 C.F.R. pts. 210, 228, 229, 240, 249, 270, 274).

[30] Pay Versus Performance, 87 Fed. Reg. 55134, 55134 (Sept. 8, 2022) (to be codified at 17 C.F.R. pts. 229, 232, 240); Wonjae Chang, Michael Dambra, Bryce Schonberger & Inho Suk, *Does Sensationalism Affect Executive Compensation? Evidence from Pay Ratio Disclosure Reform*, 61 J. ACCT. RSCH. 187, 188 (2022).

[31] The Sarbanes-Oxley Act promulgated standards for disclosures of public companies' code of ethics and risk oversight functions (i.e., internal controls). Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 404(b), 406, 116 Stat. 745, 789-90. The Dodd-Frank Act requires disclosures of executive pay to financial performance. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(a), 124 Stat. 1376, 1903-04 (2010). While director independence standards were enacted by the SEC directly under the Securities Exchange Act of 1934, they did not generate the same controversy as the climate-change disclosures. 17 C.F.R. § 240.10A-3(b)(2) (2024); *see also* Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 18788, 18791 (Apr. 16, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249, 274) (noting "general overall support" for the SEC's approach, with the only critiques about the rule's limited scope and particular roles of the enacting parties).

B. The Push for New Climate Change Disclosures

The SEC first released guidance explicitly related to climate change in 2010.[32] The guidance was just that — it clarified options to disclose climate-related information without creating legal obligations for companies.[33] Failed attempts at mandatory disclosure reform continued for ten years until the 2022 proposal.[34] From 2016 to 2019, the SEC sought public input into disclosure requirements and received various petitions from academics and investors alike, and pressure mounted.[35] Still, the SEC failed to respond to the petitions, much less include climate change in its finalized rules.[36] Skepticism around the importance of climate disclosures continued, with consecutive SEC commissioners publicly justifying the agency's inaction on ESG.[37] On the other hand, investors remained interested in the subject, as illustrated by their comments on proposed rules.[38] It was not until 2020 that SEC Commissioner Allison Heron Lee publicly criticized the lack of updated guidance and disregard of "overwhelming" requests from investors.[39]

On March 21, 2022, the SEC released "The Enhancement and Standardization of Climate-Related Disclosures for Investors,"[40] which proposed to amend the SEC's current rules under the Securities Act of

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[32] *See* Benjamin, *supra* note 4, at 19-24 (summarizing the SEC's climate change mandate history).

[33] *Id.* at 21.

[34] *See id.* at 20-27 ("The SEC has a patchy record regulating ESG and climate disclosures.").

[35] *Id.* at 27-28.

[36] *Id.* at 28.

[37] *Id.* at 30-31.

[38] Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure and ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 73 (2020) (analyzing over 300 comments received by the agency in response to a 2016 Concept Release).

[39] Statement from Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, "Modernizing" Regulation S-K: Ignoring the Elephant in the Room (Jan. 30, 2020), https://www.sec.gov/news/public-statement/lee-mda-2020-01-30 [https://perma.cc/4YPR-F69U].

[40] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

1933 and the Securities Exchange Act of 1934 in several ways. First, the new rule would require registrants to provide information in their registration statements and annual reports about climate-related risks that are "reasonably likely to have a material impact on [their] business, results of operations or financial condition."[41] Second, the proposal created a new attestation requirement for certain companies to disclose their GHG emissions metrics.[42] Finally, the proposal added a requirement to report certain climate-related financial statement metrics (i.e., disaggregated climate-related impacts on existing financial statement line items).[43] Registrants also had the option to report climate-related opportunities in the proposed rule.[44]

The response to the proposed rule was mixed but extensive.[45] Critiques came quickly, with numerous legal scholars expressing concern over what they perceived as the seemingly political nature of the action and the SEC's overstep.[46] Almost anticipating the backlash, scholars in favor of the rule released their own input, defending the SEC's "broad" authority.[47] Citing "significant interest from a wide breadth of investors, issuers, market participants, and other stakeholders," the SEC extended the comment period an additional

[41] *Id.* at 21334.

[42] *Id.* at 21334-35.

[43] *Id.* at 21335.

[44] *Id.* at 21334.

[45] As of November 2022, the public has submitted 5,876 comments to the SEC. *Comments on Climate Change Disclosures*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/comments/climate-disclosure/cll12.htm (last visited Nov. 7, 2022) [https://perma.cc/SWB9-C7AU].

[46] Lawrence A. Cunningham, Comment Letter to Proposal on Climate-Related Disclosures for Investors (Apr. 25, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf [https://perma.cc/Y4VY-6GRV] (highlighting the difference between "Investor Demand" and "Investor Protection," and asserting climate disclosure regulation is under the jurisdiction of the EPA). Cunningham's letter included twenty-two signatories, all in academia. *Id.* at 17-19.

[47] *See* Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, Comment Letter to Proposal on Climate-Related Disclosures for Investors (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf [https://perma.cc/J3HP-X8ET]. Fisch's letter included thirty signatories, all from academia. *Id.* at 16-18.

month.[48] As of March 2024, the SEC had received over 24,000 comments, including more than 4,500 unique letters, responding to the proposed rule.[49] The legal and legislative communities alike remain outspoken about the issue in anticipation of the SEC's finalized rule announcement, all but ensuring that court challenges lay ahead.[50]

*C. The Major Questions Doctrine Post-*West Virginia v. EPA

Concurrently, from August 2021 to June 2022, the Supreme Court handed down decisions fundamentally challenging administrative agency rulemaking.[51] In its early days, the major questions doctrine seemed to be only one tool the Court used to analyze whether an agency possessed statutory authority for an action.[52] In fact, since 1984, courts have *deferred* to the agency's rulemaking as long as the agency's interpretation was reasonable.[53] But, in 2021, the "new" major questions doctrine introduced significant new restraints on administrative agencies.[54]

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[48] Press Release, U.S. Sec. & Exch. Comm'n, SEC Extends Comment Period for Proposed Rules on Climate-Related Disclosures (May 9, 2022), https://www.sec.gov/news/press-release/2022-82 [https://perma.cc/PG5C-LZZS].

[49] Press Release on Final Rule, *supra* note 6.

[50] *See* Bill Flook, *House Republicans, Emboldened by EPA Ruling, Press SEC Chair to Justify Agenda*, THOMSON REUTERS: TAX & ACCT. (Sep. 30, 2022), https://tax.thomsonreuters.com/news/house-republicans-emboldened-by-epa-ruling-press-sec-chair-to-justify-agenda/ [https://perma.cc/7XJ2-87XC] [hereinafter *House Republicans*] (reporting on the top Republicans on three House committees rebuking the SEC Chair for the agency's agenda).

[51] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 759-60 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 112-13 (2022); West Virginia v. EPA, 597 U.S. 697, 706, 734-35 (2022).

[52] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1035-36 (2023) (evaluating *Brown & Williamson*, *UARG*, and *King v. Burwell*, which are all typically considered "major questions" cases). Professors Deacon & Litman posit that in these three cases, the major questions doctrine was used as "one factor to consider within the *Chevron* framework or a reason to consider the case without using *Chevron* but also without putting a thumb on the scale either way." *Id.*

[53] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837-38, 840 (1984) (holding that "if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

[54] Deacon & Litman, *supra* note 52, at 1009-10.

The shift began when the Court decided two cases about an unprecedented emergency, the COVID-19 pandemic.[55] First, the Court used the doctrine as an additional basis for holding that the Public Health Service Act did not authorize the Centers for Disease Control ("CDC") to enact a moratorium on evictions.[56] Later, the Court deemed the Occupational Safety and Health Administration ("OSHA") to have overreached its authority when it issued a temporary emergency standard requiring employees to either (1) be vaccinated or (2) take a weekly COVID-19 test and wear a mask at work.[57] The Court majority proclaimed, "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[58] The OSHA case notably dedicated more analysis to the doctrine than the CDC decision, striking down the rule at issue for its lack of explicit congressional authorization and historical precedence.[59]

On June 30, 2022, the Court further tested the administrative state in *West Virginia v. EPA*.[60] Here, in contrast to the previous two major questions doctrine cases, the agency rule dealt with the long-term problem of climate change, rather than the supposedly temporary COVID-19 pandemic.[61] The Supreme Court's extension of the doctrine to this kind of rule suggests that aggressive challenges against administrative agencies are here to stay.

Specifically, the Court invalidated the EPA's Clean Power Plan, which consisted of rules for new and existing power plants.[62] In its opinion (notably, the first of which the major questions doctrine was explicitly

[55] *See id.* at 1023-49 (unpacking and analyzing the three most recent cases in which the Court has used the major questions doctrine which are about the CDC's eviction moratorium, OSHA's workplace COVID-19 response mandate, and the EPA's emission regulation under the Clean Air Act).

[56] *Ala. Ass'n of Realtors*, 594 U.S. at 763-66; Deacon & Litman, *supra* note 52, at 1024-25.

[57] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 112-13 (2022).

[58] *Id.* at 117 (quoting *Ala. Ass'n of Realtors*, 594 U.S. at 764).

[59] Deacon & Litman, *supra* note 52, at 1027-29 (noting that "for the first time in the doctrine's history, the Court framed its entire analysis of the statutory question around the major questions doctrine").

[60] West Virginia v. EPA, 597 U.S. 697 (2022).

[61] *Compare id.*, *with Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 114, *and Ala. Ass'n of Realtors*, 594 U.S. at 760.

[62] *West Virginia*, 597 U.S. at 711-12, 734-35.

named), the Court reaffirmed that whether an agency action was "economic[ally] or political[y] significan[t]" is one factor in deciding whether the major questions doctrine applies.[63] The Court emphasized "the 'history and the breadth of the authority that [the agency] has asserted'" as an equally important consideration.[64] In particular, the Court gave two reasons for invalidating the EPA rule.[65] First, the provision did not authorize the agency to issue the rule because it was "ancillary"[66] (i.e., "designed to function as a gap filler and had rarely been used in the preceding decades").[67] Second, the Court looked at the EPA's past rules and found the agency had regulated sources only by reducing the sources' pollution, never by requiring sources to convert to other methods of energy production.[68] Thus, the Court concluded Congress's apparent failure to enact the reform itself meant the agency's action was unauthorized.[69]

II. IN THE SEC V. THE MAJOR QUESTIONS DOCTRINE, ONLY THE SUPREME COURT PREVAILS

A. Climate-Related Disclosures Invoke the Major Questions Doctrine

Generally, the SEC has broad authority over disclosure.[70] The Securities Act and the Exchange Act "authorize the Commission to promulgate rules for registrant disclosure 'as necessary or appropriate in the public interest or for the protection of investors.'"[71] ESG

[63] *Id.* at 700 ("Precedent teaches . . . the 'economic and political significance' of [an agency's asserted authority] provide 'a reason to hesitate . . . .'" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000))).

[64] *Id.* (alteration in original).

[65] *See id.* at 725-32.

[66] *Id.* at 724. (quoting Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[67] *Id.*

[68] *Id.* at 725-26.

[69] *Id.* at 731, 734-35 ("Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program.").

[70] *See* Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23921 (Apr. 22, 2016) (citing Sections 7, 10, and 19(a) of the Securities Act; Sections 3(b), 12, 13, 14, 15(d), and 23(a) of the Exchange Act).

[71] *Id.*

information is increasingly recognized as financially material and is of particular concern to highly diversified investors at the portfolio level.[72] Those concerned include the largest institutional investors, such as BlackRock, State Street, Vanguard, and Fidelity.[73] Even if climate risks are not material to all investors, the SEC has a track record of similar rules[74] and exclusive expertise over disclosure requirements. Further, the G20[75] describes the climate threat as "a non-diversifiable risk that affects nearly all sectors."[76]

Until recently, courts have typically deferred to administrative agencies' authority through *Chevron*.[77] In their analysis of the major questions doctrine's evolution, Daniel Deacon and Leah Litman point out that the doctrine originally operated "within the familiar *Chevron* framework."[78] As they summarize, the *Chevron* framework has two steps.[79] First, a court should ask "whether Congress has directly spoken to the precise question at issue."[80] Second, if the statute is ambiguous, courts proceed to defer to the agency's interpretation of the statute "[as] long as the agency's interpretation is a 'permissible' or reasonable

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[72] Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 286 [hereinafter *Modernizing ESG Disclosure*].

[73] *Id.* at 287.

[74] *See supra* Part I.A.

[75] The G20, or the "Group of Twenty," is the intergovernmental organization consisting of representatives from the world's major developed and emerging countries. *About the G20*, G20, https://www.g20.org/en/about-the-g20 (last visited Feb. 8, 2024) [https://perma.cc/KJ7Y-3EVA].

[76] TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES (TCFD), RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 34 (2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf [https://perma.cc/L7TZ-3CM7] [hereinafter TCFD 2017 Report].

[77] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); *see infra* notes 82–86 and accompanying text; *see also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263-64, 293-95, (2022) (discussing how recent Supreme Court cases "unhitched the major questions exception from *Chevron*, which has been silently ousted from its position as the starting point for evaluating whether an agency can exert regulatory authority" and analyzing these cases' influence on lower courts, as illustrated by four recent district court decisions).

[78] Deacon & Litman, *supra* note 52, at 1012.

[79] *Id.* at 1019.

[80] *Id.* (quoting *Chevron, U.S.A.*, 467 U.S. at 842).

one."[81] However, this deferential framework has since fallen "out of favor with the Court's Republican-appointed Justices."[82]

Thus, with the Court less focused on *Chevron* in light of *West Virginia*,[83] the new disclosure requirements are vulnerable. First, today's courts will likely see the rule as subject to the major questions doctrine.[84] Lower courts have already begun to use the doctrine to strike down administrative actions of "political significance."[85] For example, in staying the OSHA rule on vaccines, the Fifth Circuit determined that the agency's standard "purports to definitively resolve one of today's most hotly debated political issues."[86] Although arguably not as politicized as vaccine mandates or transitioning to renewable energy, the finalized climate disclosure rule will be imposed on all public companies.[87] With industry groups such as the American Petroleum Institute ("API") claiming that the new reporting requirements are costly and burdensome,[88] a court may consider the rule economically significant.

[81] *Id.* (quoting *Chevron, U.S.A.*, 467 U.S. at 843).

[82] *Id.*

[83] West Virginia v. EPA, 597 U.S. 697 (2022).

[84] *See id.* at 716 (affirming that the major questions doctrine requires any decision "of vast economic and political significance" to have specific congressional authorization).

[85] *See, e.g.*, BST Holdings, LLC v. OSHA, 17 F.4th 604, 617 (5th Cir. 2021) (concluding that "the major questions doctrine confirms that the [vaccine] Mandate exceeds the bounds of OSHA's statutory authority").

[86] Deacon & Litman, *supra* note 52, at 1052 (quoting *BST Holdings*, 17 F.4th at 617).

[87] The finalized rule includes phase-in periods for registrants based upon status, with compliance required as early as fiscal year 2025 for large, accelerated filers. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21828-29 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[88] Frank J. Macchiarola, Am. Petroleum Inst., Comment Letter in Response to Request for Public Input Regarding Climate Change Disclosures 3 (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8907327-244228.pdf [https://perma.cc/HN9S-Y6HQ] (considering the cost of compliance, smaller issuers' lack of resources, and the uncertainty of forward projections as potentially burdensome). The API is the largest U.S. trade association for the oil and gas industry. *See id.* at 1 ("API represents all segments of the US oil and natural gas industry and its member companies conduct business in nearly every country worldwide.").

Combined with the reactions from like-minded legal scholars,[89] it seems likely the SEC's rule would trigger a major questions analysis.

Second, Congress probably has not authorized the rule as clearly as required by the doctrine, as evidenced by the fate of the Clean Power Plan in *West Virginia*.[90] While the Court is willing to entertain "regulatory assertions [with] a colorable textual basis,"[91] it also "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[92] In *West Virginia* particularly, the Court emphasized the view that Congress disapproved of any proposal it debated but ultimately failed to enact.[93] Justice Gorsuch recalled in *NFIB v. OSHA* that the "agency sought to mandate COVID-19 vaccines nationwide for most workers at a time when Congress and state legislatures were engaged in robust debates over vaccine mandates."[94] As with the vaccine mandate, "Congress has debated [climate change] frequently" and declined "to adopt legislation similar to the Clean Power Plan."[95] On the other hand, legislators are not auditors, and a court may consider the advantageous nature of the SEC's expertise over disclosures as the reason Congress did not enact the rule itself.[96]

Still, even if legislation proposing climate change disclosures is not proposed and so never rejected, the Court indicates that not only should Congress speak clearly but also explicitly.[97] As Professors Deacon and Litman have observed, the most recent major questions doctrine cases show that "even a broadly worded, *otherwise unambiguous* statute is not enough."[98] Especially in *West Virginia*, the Court never engaged in a

[89] *See, e.g.*, Cunningham, *supra* note 46, at 15 ("The Proposal, if implemented, would require extensive and costly disclosure . . . .").

[90] *See* West Virginia v. EPA, 597 U.S. 697, 731, 735 (2022) ("Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program.").

[91] *Id.* at 722.

[92] *Id.* at 723 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[93] *See id.* at 743 (Gorsuch, J., concurring).

[94] *Id.*

[95] *See id.* at 745.

[96] *See infra* note 175 and accompanying text.

[97] *See* Deacon & Litman, *supra* note 52, at 1037-38.

[98] *Id.* at 1037.

traditional statutory analysis.[99] Rather than consulting dictionaries or relying on linguistic canons, the Court glanced at the statute in question for explicit congressional authorization.[100] But the Court's expectations are high: it conceded that the EPA's generation shifting requirements were a "system," which was authorized in the statute, yet it seemed to be looking for a clear reference to generation shifting itself.[101] Likewise, without explicit reference to "climate change," the Securities and Exchange Acts are unlikely to provide the justification the Court is looking for.[102]

B. Applying the Lessons from West Virginia to the SEC's Action

Assuming that a court decides the SEC's rule enters major questions territory, there may be other takeaways in *West Virginia* that the Commission could use to its advantage.[103] Along with "economic and political significance," the Court considered the "history and the breadth of the authority that [the agency] has asserted."[104] While largely reduced to their facts, the five precedents that the Court drew upon still reveal an interesting pattern with implications for the new climate change disclosures.[105] Based on this pattern, the SEC fares better than other agencies in some respects. First, the SEC is not facing an unprecedented emergency like the COVID-19 pandemic at the heart of *Alabama Association of Realtors v. Department of Health and Human Services*[106] or *NFIB v. OSHA*.[107] Second, the SEC does not assert its authority solely through a mandate to protect the "public interest" like the Attorney General in *Gonzales v. Oregon*.[108]

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[99] *See id.*

[100] *Id.* at 1037-38.

[101] *See id.*

[102] *See id.*

[103] *See infra* notes 143–152 and accompany text (arguing that the new rule may not be economically significant).

[104] West Virginia v. EPA, 597 U.S. 697, 721 (2022) (alteration in original) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[105] *See* Deacon & Litman, *supra* note 52, at 1034-49.

[106] 141 S. Ct. 2485 (2021).

[107] 595 U.S. 109 (2022).

[108] 546 U.S. 243 (2006).

However, the SEC enters dangerous territory when compared to the agencies in *Utility Air Regulatory Group v. EPA*[109] and *FDA v. Brown & Williamson Tobacco Corp.*[110] In both cases, the Court held against the agencies for expanding their authorities past the plain language of their authorizing statutes.[111] Inherent in the Court's rulings was a rejection of broad authority used to justify specific rules.[112] Considering these two cases, an emphasis on the "history and breadth" of the SEC's actions works like a double-edged sword in the SEC's justification of the new disclosure requirements.[113]

1. History

The "history" prong of the Court's test in *West Virginia* suggests a temporal analysis that the SEC may never successfully surmount.[114] Three possible definitions of history have emerged from the Court's recent analysis in *West Virginia*.[115] First, there is "legislative history," a statutory interpretation tool that looks at "congressional floor debates, committee reports, hearing testimony, and presidential messages" to derive Congress's true meaning.[116]

The Court's analysis of *Brown & Williamson* in *West Virginia* is especially relevant to "legislative history."[117] In *Brown & Williamson*, the FDA offered no support from the legislative history of the Food, Drug, and Cosmetic Act ("FDCA") relating to authority over tobacco

[109] Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

[110] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[111] *Util. Air Regul. Grp.*, 573 U.S. at 332; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125-26.

[112] *Util. Air Regul. Grp.*, 573 U.S. at 320-21 (holding that the EPA could not construe the term "air pollutant" in a specific provision of the Clean Air Act to cover greenhouse gases); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 142-43 (holding that the FDA could not use its authority over "drugs" and "devices" to regulate tobacco products).

[113] *See supra* notes 109–112 and accompanying text.

[114] *See* West Virginia v. EPA, 597 U.S. 697, 721-32 (2022) (discussing major questions doctrine precedents).

[115] *See id.*

[116] Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845 (1992).

[117] *See West Virginia*, 597 U.S. at 721.

specifically.[118] The agency did, however, show that the legislative record indicated that Congress included broad authorizing language in the statute deliberately, so as to encompass "*all* substances and preparations, other than food, and *all* devices intended to affect the structure or any function of the body" — a class that includes tobacco.[119]

The Court rejected the FDA's claim of jurisdiction anyway, and in *West Virginia*, the majority interpreted the decision to mean that "'Congress could not have intended to delegate' such a sweeping and consequential authority."[120] In this line of reasoning, the Court appears to conflate *lack* of legislative history with adverse statutory support and rejects any possibility of a broad grant of authority, despite evidence otherwise.[121] Here, as in *West Virginia*, the SEC does not attempt to justify its disclosures through legislative history and is thus vulnerable to the same critique.[122]

Still, even if the SEC now tries to invoke legislative history, such a move might be futile when considering the *Brown & Williamson* Court's conclusions from its legislative history analysis.[123] There, the Court

[118] "[T]here is no evidence in the text of the FDCA or its legislative history that Congress in 1938 even considered the applicability of the Act to tobacco products." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146-47 (2000).

[119] *Id.* at 165 (Breyer, J., dissenting) (quoting 1 FDA, LEGISLATIVE HISTORY OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND ITS AMENDMENTS 107 (1979)).

[120] *West Virginia*, 597 U.S. at 721 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (majority opinion)).

[121] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 165 (Breyer, J., dissenting) (describing the congressional record showing that "broad language was included *deliberately*, so that jurisdiction could be had over '*all* substances and preparations, other than food, and *all* devices intended to affect the structure or function of the body'" (quoting 1 FDA, LEGISLATIVE HISTORY OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND ITS AMENDMENTS 107 (1979)).

[122] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21683-87 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) ("[T]he major-questions objection is misplaced because the Commission is not claiming to 'discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority.' Nor is it seeking to determine national environmental policy or dictate corporate policy, as commenters suggest. Rather, it is adopting the final rules based on its long standing authority to require disclosures that provide investors with information that is important to their investment and voting decisions . . . .").

[123] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 147 (majority opinion).

dismissed Congress's original intent as "not determinative," instead saying it was "relevant to understanding the basis for the FDA's representations to Congress and the background against which Congress enacted subsequent tobacco-specific legislation."[124] Thus, in *West Virginia*, the Court seemed to fold the legislative history tool into the second possible interpretation of "history": subsequent legislative history.[125]

The Court continues to draw on *Brown & Williamson* to posit that all programs that "Congress had conspicuously and repeatedly declined to enact itself" are unauthorized.[126] Further, the Court applied the *Brown & Williamson* precedent to strike down the EPA program that, "long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times."[127] Still, that the SEC's climate change disclosures have never been proposed legislatively is unlikely to save the new rule. Unlike in *Brown & Williamson*, the administrative rule at issue in *Utility Air* was not struck down for adverse subsequent legislative history.[128] Instead, as the *West Virginia* Court recalled, the rule erred by expanding its authority "over millions of small sources . . . that had never before been subject to such requirements."[129] *Utility Air* opens a third definition of history, presumptively the history of the agency undertaking similar rules.[130]

Thus, against the backdrop of the Court's differing interpretations of "history," the SEC has one last argument. The SEC could consider comparing the climate change disclosures to its rules purporting to

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[124] *Id.*

[125] *See West Virginia*, 597 U.S. at 724-26 ("And as Justice Frankfurter has noted, 'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'".)

[126] *Id.* at 124. (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159-60).

[127] *West Virginia*, 597 U.S. at 731 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 144).

[128] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 310 (2014).

[129] *West Virginia*, 597 U.S. at 722 (citing *Util. Air Regul. Grp.*, 573 U.S. at 310, 324).

[130] *See Util. Air Regul. Grp.*, 573 U.S. at 310.

mold corporate behavior through nonfinancial disclosures.[131] However, unlike the SEC's new rule, such programs are specifically authorized by Congress.[132] Further, those disclosure rules have yet to be challenged and successfully defended in court. Instead, perhaps the best precedent is a 2010 mandate for issuers to disclose their reliance on conflict minerals.[133] The D.C. Court of Appeals accused the rule of having social (rather than investor) protection aims and ultimately struck it down for separate First Amendment reasons.[134] Still, the case never directly assessed the "majorness" of the conflict minerals rule. Without legislative or administrative history on its side, the SEC's prospects are hopeful at best.[135]

2. Breadth

Although the SEC may have stronger arguments under the "breadth" prong of *West Virginia* than that of "history," some facets of the "breadth" analysis will likely be insurmountable.[136] The Supreme Court purports to gauge the breadth of a program by examining its "economic and political significance."[137] For example, in *West Virginia*, the EPA claimed its program lacked breadth because it "limit[ed] the magnitude of generation shift . . . to a level that will not be 'exorbitantly costly' or 'threaten the reliability of the grid.'"[138] However, the Court rejected EPA's argument, saying it "does not so much *limit* the breadth of the Government's claimed authority as *reveal* it."[139] Similarly, the SEC dedicated a significant portion of its rule proposal and justification to

[131] *See supra* Part I.A (discussing current mandatory disclosures over corporate behavior including codes of ethics, risk management systems, and executive pay).

[132] *See supra* Part I.A.

[133] *See* Benjamin, *supra* note 4, at 24-27.

[134] *Id.* (summarizing Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014)).

[135] *See* West Virginia v. EPA, 597 U.S. 697, 723-24 (2022) (holding that when an agency claims "[e]xtraordinary grants of regulatory authority," the agency must be able to show "clear congressional authorization for the power it claims").

[136] *See id.* at 721.

[137] *Id.* at 729-30 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[138] *Id.* at 729.

[139] *Id.*

quelling fears about unmanageable costs.[140] The agency highlighted that registrants might already be "gathering the information required to be disclosed under the proposed rules," and thus, additional costs could be minimal.[141] This idea of reduced impact and redundancy could help the SEC win the "breadth" prong where the EPA failed.[142]

In considering the "economic" significance of the rule, the SEC has several strong arguments. Interestingly enough, comments made by opponents of the new disclosures introduce a helpful idea.[143] The API once argued that climate risks are nonfinancial (i.e., nonmaterial) and cannot be uniformly measured.[144] In fact, the organization is not alone in suggesting that ESG may only, at best, indirectly affect the company's bottom line.[145] Two recent studies aggregating investor data corroborate this phenomenon.[146] One study compared U.S. companies' labor and environmental compliance record in 147 ESG fund portfolios with that of 2,428 non-ESG portfolios.[147] The researchers found the ESG fund companies had a worse compliance record than their non-ESG counterparts.[148]

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[140] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21439-45 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[141] *Id.* at 21439.

[142] *See West Virginia*, 597 U.S. at 728-29.

[143] *See* Macchiarola, *supra* note 88.

[144] *Id.* at 5 (asserting that material facts generally relate to "discernable economic or financial impact on a company's earnings or operations"). The API further argued climate-related issues were a "type of nonfinancial reporting" and debatably material. *Id.* The organization concluded, "The materiality of any particular climate-related statement remains very much a case-by-case inquiry, focused on the statements a particular issuer provided in the context of the 'total-mix' of information available to reasonable investors about that issuer." *Id.*

[145] Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing [https://perma.cc/256D-SW2S].

[146] Aneesh Raghunandan & Shiva Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?*, 27 REV. ACCT. STUD. 822, 824 (2022); Rajna Gibson Brandon, Simon Glossner, Philipp Krueger, Pedro Matos & Tom Steffen, *Do Responsible Investors Invest Responsibly?* 5 (Eur. Corp. Governance Inst., Working Paper No. 712/2022, 2022).

[147] Raghunandan & Rajgopal, *supra* note 146, at 824.

[148] *Id.*

Further, another study suggests an opportunistic motive for ESG that distorts financial returns.[149] Looking at the portfolios of U.S. investors who signed the United Nations' Principles of Responsible Investment, the researchers found their portfolios had worse ESG scores and, in fact, even had "commercial motives (i.e., to attract higher flows and possibly to make up for lost business due to lower past performance)."[150] Finally, lower courts have recognized that a violation of an SEC reporting requirement does not automatically constitute a material omission for Rule 10b-5.[151] These findings undermine the "economic" significance of the SEC's rule and suggest the major questions doctrine post-*West Virginia* may not doom it after all.[152]

Ultimately, even the SEC's best defenses will likely fail because of the political climate. Apart from the SEC's weak "history" defenses,[153] the agency would still need to clear the second "breadth" hurdle: political significance.[154] In *West Virginia*, Justices Gorsuch and Alito, both part of the Court's conservative wing, added one "non-exclusive" factor with profound implications: whether the agency claims the power to resolve a matter of great political significance.[155] The most recent major

[149] Brandon et al., *supra* note 146, at 5.

[150] *Id.*

[151] *See, e.g.*, Oran v. Stafford, 226 F.3d 275, 287-88 (3d Cir. 2000) (holding that failure to disclose the results of a health study could not form a basis for liability); *In re* Galena Biopharma, Inc. Sec. Litig., 336 F. Supp. 3d 378, 393-94 (D.N.J. 2018) (holding that failure to disclose certain trends, uncertainties, and facts was not securities fraud).

[152] *See supra* Part II.A.

[153] *See supra* Part II.B.1.

[154] The first analytical step in Justice Gorsuch and Alito's *West Virginia* concurrence is to examine whether "an agency claims the power to resolve a matter of great 'political significance.'" West Virginia v. EPA, 597 U.S. 697, 743 (2022) (Gorsuch, J., concurring) (citing Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 117 (2022)).

[155] Justice Gorsuch's concurrence emphasizes the importance of "political significance" not only by discussing it first, but also by providing several detailed examples of when the factor is present, including when "Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action." *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000)). Justice Gorsuch continued, "[t]hat too may be a sign that an agency is attempting to 'work [a]round' the legislative process to resolve for itself a question of great political significance." *Id.* (Gorsuch, J., concurring) (quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring)). The aforementioned quote's citation to Justice's Gorsuch's own concurrence in *NFIB v. OSHA* itself also

questions doctrine cases demonstrate the Court is progressively becoming more skeptical of administrative rulemaking. Thus, given the politically charged nature of climate change,[156] the Court is likely to see the SEC as attempting to work around the legislature to achieve its goals.

One other perhaps less explored interpretation of "breadth" from *West Virginia* also threatens the SEC's rule.[157] The new major questions doctrine includes "entertain[ing] hypotheticals about what [an] agency *might* do if its current regulation were authorized by statute."[158] In *West Virginia*, the Court imagined the EPA "go[ing] further . . . [and] forcing coal plants to . . . cease making power altogether."[159] Applying this thought experiment to the new climate change disclosures yields an equally detrimental result. Future courts may consider, for example, whether the SEC could mandate registrants calculate and disclose their political contributions.[160] This result only further suggests that when the ways a rule can become "major" are limitless, agencies like the SEC do not stand a chance.

C. The Urgent Need for Change

Climate change threatens the general welfare.[161] It is widely recognized that continued emission of greenhouse gases will cause further warming of the planet.[162] This warming will lead to damaging

suggests his steadfast commitment to building upon "political significance" doctrine that may influence future decisions (as concurrences and dissents sometimes have).

[156] *See* Flook, *House Republicans*, *supra* note 50.

[157] *See* Deacon & Litman, *supra* note 52, at 1072-73.

[158] *Id.*

[159] *West Virginia*, 597 U.S. at 728 (majority opinion).

[160] Hotly debated, political spending is another disclosure that investors have pushed the SEC to regulate in recent years. Bill Flook, *After Years of Congressional Block, SEC Political Spending Rules Finally in Sight*, THOMSON REUTERS: TAX & ACCT. (Aug. 18, 2021), https://tax.thomsonreuters.com/news/after-years-of-congressional-block-sec-political-spending-rules-finally-in-sight/ [https://perma.cc/AR8U-WRNJ].

[161] *See* TCFD 2017 REPORT, *supra* note 76, at ii.

[162] Although the exact timing and severity of physical effects may be difficult to estimate, the implications of climate change are not long-term. *Id.* In other words, decisions made today can stem "the disastrous effects of climate change within this century." *Id.* In December 2015, nearly 200 countries committed to changing the course

economic and social consequences.[163] In the aggregate, the registrants reporting to the SEC have an important opportunity to change the course because the transition to a lower carbon economy requires significant and, in some cases, disruptive changes across economic sectors and industries in the near term.[164] Nearly the entire world is on notice, and the G20 finance ministers and central bank governors have expressed concern over how the financial sector can take account of climate-related issues.[165] Further, the United States has fallen behind its allies on the issue of climate-related disclosures.[166] Thus, the SEC should do whatever it can in the interest of society.

To be sure, there is some evidence that climate change disclosure does not always alter corporate behavior.[167] Concerns over "greenwashing" — overstating an institution's commitment to sustainable investing — are not without merit.[168] But, as ESG disclosure expert Virginia Harper Ho has pointed out, "the SEC's goal isn't to change behavior" through direct mandate.[169] Instead, the SEC can work with the federal government to "integrat[e][] sustainability considerations into financial systems" with the goal of "more effectively allocat[ing] capital toward sustainable uses and away from environmentally harmful, unsustainable ones" and "advanc[ing] sustainable development."[170] Professor George S. Georgiev, an expert on the SEC regulatory regime, also suggested that "even 10% of ESG information is useful [because] it still impacts market choices."[171] It is not hard to imagine that even the

by reducing greenhouse gas emissions and accelerating the transition to a lower-carbon economy. *Id.*

[163] *Id.*

[164] *Id.* at iii.

[165] *Id.*

[166] Benjamin, *supra* note 4, at 9.

[167] *See supra* Part II.B.2.

[168] Brandon et al., *supra* note 146, at 4.

[169] Virginia Harper Ho, Professor of L., Remarks at the UC Davis Law Review Symposium: The "E" in ESG, Panel 1, at 19:37 (Oct. 21, 2022) [hereinafter Harper Ho at The "E" in ESG Panel].

[170] Harper Ho, *Modernizing ESG Disclosure*, *supra* note 72, at 350.

[171] George S. Georgiev, Professor of Bus. L., Remarks at the UC Davis Law Review Symposium: The "E" in ESG, Panel 1, at 36:37 (Oct. 21, 2022).

mere release of the SEC's proposed rule has convinced at least some companies to rethink their operations.[172]

Finally, the low likelihood of congressional action suggests another policy reason why the major questions doctrine is impractical: the efficiency of administrative agencies. As scholars have argued, when Congress has delegated in broad terms, it likely does so because it expects an agency to adapt to changing circumstances.[173] The agencies' flexibility allows them to "implement innovative new policies in the face of uncertainty and use data about the resulting feedback to formulate more effective policies in the future."[174] Administrative agencies have the advantage of sizeable professional staff with specialized regulatory training and experience.[175] Unfortunately, the only actor that can limit the impact of the Court's decisions is Congress, an entity paralyzed by gridlock.[176]

III. A PATH FORWARD

In the near future, the SEC may consider taking proactive steps in anticipation of the legal challenges ahead.[177] First, the major questions doctrine reminds agencies like the SEC and the EPA that they have a scope of authority limited to what the law gives them.[178] Accordingly, Congress's failure to act is the most significant limit on agencies' ability

[172] *See infra* Part III.

[173] *See, e.g.*, Deacon & Litman, *supra* note 52, at 1080-81 (arguing in favor of delegation). In particular, the Supreme Court has even noted that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* at 1080 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

[174] *Id.*

[175] *Id.* at 1079.

[176] *See* West Virginia v. EPA, 597 U.S. 697, 732 (2022) ("[O]ur precedent counsels skepticism toward [administrative agencies' claims] . . . the Government must — under the major questions doctrine — point to 'clear congressional authorization' to regulate . . . .") (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); Joseph Ax & Jason Lange, *Moderates Fleeing U.S. House, Setting Stage for More Washington Gridlock*, REUTERS (Sep. 14, 2022, 2:13 PM PDT), https://www.reuters.com/world/us/moderates-fleeing-us-house-setting-stage-more-washington-gridlock-2022-09-14/ [https://perma.cc/SGF8-QSMM].

[177] *See supra* Part II.

[178] *See supra* Part II.

to tackle new and diverse issues.[179] There may only be one solution in the long run: a clear and specific legislative grant of authority to require climate change disclosures, including GHG emissions.[180] Not only would congressional action discourage legal challenges but also withstand changes in executive administration.[181] However, swift congressional action is probably unlikely in the current political climate.[182] Consider the American Clean Energy and Security Act of 2009 ("ACES"),[183] also known as the Waxman-Markey Bill. The bill expressly delegated new authority to the EPA to regulate a national carbon market.[184] Democrats lost their filibuster-proof majority in the Senate and ACES never became law.[185] Although the exact reason for the bill's demise is debatable, many blame partisanship.[186]

Congress has not passed any major climate legislation since ACES' demise.[187] Even the recent Inflation Reduction Act ("IRA"),[188] touted by the Biden administration as the "largest investment in clean energy and climate action ever,"[189] required significant compromise and faced strong opposition. The bill was Democrats' second attempt at passage, after a single centrist Senate Democrat refused to support its

[179] *See supra* Part II.C.

[180] *See supra* Part II.

[181] The Clean Power Plan was repealed soon after the election of President Donald Trump. Lisa Friedman & Brad Plumer, *E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/climate/clean-power-plan.html [https://perma.cc/U4UU-6D7G].

[182] *See supra* Part II.C.

[183] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

[184] Nathan Richardson, *The Rise and Fall of Clean Air Act Climate Policy*, 10 MICH. J. ENV'T & ADMIN. L. 69, 95 (2020).

[185] *Id.* at 96.

[186] *See id.*

[187] *See id.* at 152-53.

[188] Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. (2022).

[189] Press Release, The White House, Fact Sheet: One Year In, President Biden's Inflation Reduction Act is Driving Historic Climate Action and Investing in America to Create Good Paying Jobs and Reduce Costs (Aug. 16, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/16/fact-sheet-one-year-in-president-bidens-inflation-reduction-act-is-driving-historic-climate-action-and-investing-in-america-to-create-good-paying-jobs-and-reduce-costs/ [https://perma.cc/NQC8-DMVA].

predecessor.[190] By no means climate-exclusive, the IRA also addressed taxes and deficit reduction, both key compromise issues.[191] (Presumably a name not focusing on climate also made the IRA more palatable to centrists, unlike "American Clean Energy and Security.") The IRA also addressed the Supreme Court's concerns in *West Virginia v. EPA* by explicitly giving the agency the authority to regulate greenhouse gases and to use its power to push the adoption of wind, solar, and other renewable sources.[192] However, this measure faced strong objection from Senate Republicans until the last minute, when the Senate approved the IRA by a vote of fifty-one to fifty, along party lines, with the Democratic Vice President casting the tiebreaking vote.[193] As majorities tighten and gridlock perpetuates, hope for congressional action has continued to wane since the IRA's passage.[194]

If the courts are all but sure to strike down the SEC's rule[195] and congressional response seems unlikely, what other options does the agency have? For one, while the rule's proposal garnered no shortage of controversy, it allowed the SEC to pause and consider the consequences before taking action.[196] In early October 2022, the SEC again reopened

[190] Emily Cochrane, Jim Tankersley & Lisa Friedman. *Manchin, in Reversal, Agrees to Quick Action on Climate and Tax Plan*, N.Y. TIMES (July 31, 2022), https://www.nytimes.com/2022/07/27/us/politics/manchin-climate-tax-bill.html [https://perma.cc/EQ5L-5AYJ]; Lisa Friedman & Coral Davenport, *Manchin Rejects Landmark Legislation, Putting Biden's Climate Goals at Risk*, N.Y. TIMES (Dec. 19, 2021), https://www.nytimes.com/2021/12/19/climate/manchin-climate-build-back-better-bill.html [https://perma.cc/MQ89-NY99].

[191] *See* Cochrane et al., *supra* note 190.

[192] Lisa Friedman, *Democrats Designed the Climate Law to Be a Game Changer. Here's How.*, N.Y. TIMES (Aug. 22, 2022), https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html [https://perma.cc/PR93-ZKBU].

[193] *Id.*

[194] *See* Ax & Lange, *supra* note 176.

[195] *See supra* Part II.B.

[196] *See* Andrew Ramonas & Amanda Iacone, *SEC Climate Rules Pushed Back Amid Bureaucratic, Legal Woes*, BLOOMBERG L. (Oct. 19, 2022, 2:00 AM PDT), https://news.bloomberglaw.com/securities-law/sec-climate-rules-pushed-back-amid-bureaucratic-legal-woes [https://perma.cc/RED5-EJ6H] (describing the SEC's struggles amid "investor demands for more transparency, tech glitches and a tough Republican legal threat").

the comment period for the rule.[197] While the press release attributed the delay to a "technological error,"[198] the extension caused the SEC to miss its self-imposed October deadline to finalize the climate rules.[199]

The delay to finalize presumably helped the SEC strategize *how* to discourage legal challenges. First, the final rule contains six explicit references to Congress' grant of authority (whereas the proposed rule contained none).[200] However, each assertion generally relates to broad statutory authority, which as discussed is probably not enough under the new major questions doctrine.[201] Second, the final rule responds to the strongest critiques and has narrowed disclosure requirements.[202] For example, the SEC dropped Scope 3 GHG emission disclosure, which the U.S. Chamber of Commerce ("The Chamber") threatened a lawsuit over.[203] Even so, the SEC kept many key (and still controversial) provisions, including Scope 1 and Scope 2 GHG and severe weather event disclosures.[204] Contentious debate is likely to continue — even the SEC's vote to finalize was three to two, with the two Republican Commissioners criticizing the SEC's failure to justify the rule's necessity.[205] The Chamber has left the door open for legal action,

[197] Press Release, U.S. Sec. & Exch. Comm'n, SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments (Oct. 7, 2022), https://www.sec.gov/news/press-release/2022-186 [https://perma.cc/AW2C-BEQU].

[198] *Id.*

[199] *See Climate Change Disclosures*, OFF. OF MGMT. & BUDGET, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM87 (last visited Nov. 8, 2022) [https://perma.cc/QLQ9-8R5J].

[200] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21673, 21683 & n.181, 21685 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249); The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[201] *See supra* notes 97–102 and accompanying text.

[202] Soyoung Ho, *SEC Scales Back Requirements in Final Climate Disclosure Rule*, THOMSON REUTERS: TAX & ACCT. (Mar. 7, 2024), https://tax.thomsonreuters.com/news/sec-scales-back-requirements-in-final-climate-disclosure-rule/ [https://perma.cc/J5JP-ES3K].

[203] *Id.*

[204] *See id.*

[205] *See id.*

suggesting the SEC may try to limit but will never fully prevent lawsuits.[206]

Meanwhile, even before the rule takes effect in 2025,[207] the relationship between public company audit firms and their clients may facilitate the increase in ESG reporting the SEC desires.[208] The largest accounting firms, nicknamed the "Big Four" for their size and dominance in the audit industry, provide extensive public information to guide companies through the new climate change disclosures.[209] For example, one of Ernst & Young's many ESG disclosure articles told readers in its 2022 summary, "Although the rules are not final, companies should start identifying potential implementation challenges and opportunities."[210] Described as a "related topic[]," is a link to the

[206] *See id.*

[207] The final rule requires some disclosures for the largest companies as early as fiscal year 2025, with GHG emissions disclosure not required until 2026. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21828-29 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

Notably, that reports are not filed until after the fiscal year ends means that investors may not see many companies' full climate disclosures until 2026 or 2027. *See id.* "For example, a [large company] with a January 1 fiscal-year start and a December 31 fiscal-year end date will not be required to comply with the climate disclosure rules (other than those pertaining to GHG emissions and those related to Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2), if applicable) until its Form 10–K for fiscal year ended December 31, 2025, due in March 2026." *Id.*

[208] *See infra* notes 209–217 and accompanying text.

[209] *See, e.g.*, *The SEC Unveils Environmental Disclosure Requirements*, DELOITTE (Mar. 29, 2022), https://www2.deloitte.com/us/en/pages/audit/articles/sec-climate-disclosure-guidance.html [https://perma.cc/4G64-AVCV] (illustrating the "key components" of the SEC's proposed rule and "how companies can assess their approach"); *SEC Climate Disclosures and Your Company*, PRICEWATERHOUSECOOPERS (Mar. 2023), https://www.pwc.com/us/en/services/esg/library/sec-climate-disclosures.html [https://perma.cc/4Q4H-K78E] (instructing companies on how they can "prepare today" for the SEC's new rules); Julie Santoro, *Understanding the SEC's Climate Proposal*, KPMG (Mar. 2022), https://frv.kpmg.us/reference-library/2022/talkbook-sec-climate-disclosures.html [https://perma.cc/7XK8-E7LE] ("Our talk book . . . answers our Top – questions about the SEC's rulemaking proposal — what the proposal would require and how it may impact companies.").

[210] *See* Eloise Wagner, *How to Approach the SEC's Proposal on Climate-Related Disclosures*, ERNST & YOUNG (July 1, 2022), https://www.ey.com/en_us/esg-reporting/climate-related-disclosures [https://perma.cc/7X6Z-U8AV].

firm's "financial accounting advisory services."[211] This marketing device suggests the new climate change disclosures have created an *opportunity* for accounting firms.[212]

The largest accounting firms earn revenue from audit engagements (i.e., third-party assurance) *and* consulting, subject to independence requirements.[213] Recent research suggests that consulting may be more lucrative than audit for these firms.[214] Over the past decade, Big Four revenue from consulting businesses has "more than doubled globally, up a combined 136% . . . while audit fees grew just 19%." Only thirteen percent of S&P 100[215] companies received assurance from a public company auditing firm over some of their ESG information in April 2021, one month after the SEC released the proposed rule.[216] Thus, considering accounting firms benefit from increased audit scope and, even more so, further consulting opportunities, it is no surprise that ESG disclosures have been so heavily discussed with clients.[217]

Further, the nature of the audit industry allows big players to solidify ESG reporting methodology through conferences and knowledge sharing, thus developing best practices.[218] The 2021 and 2022 annual conferences hosted by the American Institute of Certified Public Accountants, the organization that sets U.S. auditing standards,

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[211] *Id.*

[212] *See id.*

[213] Amanda Iacone, *SEC Questions Auditor Independence as Firms' Advisory Work Booms*, BLOOMBERG TAX (Nov. 3, 2021, 1:45 AM PDT), https://news.bloombergtax.com/financial-accounting/sec-questions-auditor-independence-as-firms-advisory-work-booms [https://perma.cc/TX94-HSGZ].

[214] *Id.*

[215] The S&P 100 Index is a stock market index of U.S. stocks maintained by Standard & Poor's. S&P DOW JONES INDICES, S&P 100 FACTSHEET (last updated Dec. 30, 2022), https://www.spglobal.com/spdji/en/idsenhancedfactsheet/file.pdf?calcFrequency=M&force_download=true&hostIdentifier=48190c8c-42c4-46af-8d1a-0cd5db894797&indexId=2431 [https://perma.cc/9AGL-4YF3].

[216] *S&P 100 and ESG Reporting*, *supra* note 3.

[217] *See supra* note 208 and accompanying text.

[218] *See, e.g.*, *AICPA & CIMA Conference on Current SEC and PCAOB Developments*, AM. INST. OF CERTIFIED PUB. ACCTS., https://www.aicpa.org/cpe-learning/conference/aicpa-conference-on-current-sec-and-pcaob-developments (last visited Nov. 9, 2022) [https://perma.cc/4XD7-7VSP] (guiding attendees through the latest accounting and reporting issues affecting SEC registrants and their auditors).

incorporated climate and ESG disclosures at the top of their agendas.[219] The 2022 conference featured speakers from each of the Big Four firms, some with "ESG" specifically in their titles.[220] As some scholars have suggested, the lack of uniform (i.e., standardized) disclosure requirements in the market creates confusion among the myriad of investors interested in the level of climate change risks posed to the businesses they invest in.[221] Thus, even in its "proposed" state, the SEC's rule created a framework companies could prepare to adhere to, perhaps improving compliance rates later.[222]

Lastly, market forces may organically assist the SEC in increasing the number of companies disclosing climate-related information.[223] Notably, the United States is out of step with its leading counterparts abroad, particularly the European Union ("EU"), which has already mandated climate disclosures.[224] But the United States' trailing is not detrimental, and the country can tackle climate-related regulations in its own way.[225] Unlike the EU, "The U.S.' voluntary disclosure regime rarely mandates companies to disclose" future events that are "unfolding, yet uncertain," and "rel[ies] instead on market-based

[219] *See Agenda — AICPA & CIMA Conference on Current SEC and PCAOB Developments*, AM. INST. OF CERTIFIED PUB. ACCTS., https://agenda.aicpastore.com/sec22/sessions (last visited Nov. 9, 2022) [https://perma.cc/QY8R-QREU] (including a session titled "SEC2205. Climate & Other ESG Disclosure — Preparer Perspectives" in the first day's agenda); *Highlights of the 2021 AICPA & CIMA Conference on Current SEC and PCAOB Developments*, DELOITTE (Dec. 12, 2021), https://dart.deloitte.com/USDART/home/publications/deloitte/heads-up/2021/aicpa-cima-conference [https://perma.cc/6ANM-TDW5] (discussing "ESG Reporting" as the first topic directly below the executive summary).

[220] *Speakers — AICPA & CIMA Conference on Current SEC and PCAOB Developments*, AM. INST. OF CERTIFIED PUB. ACCTS., https://agenda.aicpastore.com/sec22/speakers (last visited Nov. 9, 2022) [https://perma.cc/5M52-UT3M].

[221] *See* Benjamin, *supra* note 4, at 37-40.

[222] *See id.* at 15. Further, independent auditors provide reasonable assurance in the financial statements that even voluntary ESG disclosures are complete and accurate. *See supra* note 29 and accompanying text.

[223] *See* Andrew W. Winden, *Jumpstarting Sustainability Disclosures*, 75 BUS. LAW. 1215, 1255-56 (2021).

[224] Benjamin, *supra* note 4, at 10-11.

[225] *See* Ido Baum & Dov Solomon, *More JoMo Less FoMo: The Case for Voluntary Disclosure of Uncertain Information in Securities Regulation*, 14 VA. L. & BUS. REV. 171, 180 (2020).

incentives to generate disclosure."[226] In the United States, institutional investors perform the "Wall Street walk" when they disagree with how a company is managed.[227] In other words, they prefer to sell their shares ("exit") rather than vote at a shareholder meeting ("use their voice").[228] Accordingly, firms still have a strong incentive to disclose climate-related information even in a voluntary system.[229] Investors can note which companies provide more information than others or which companies are more transparent with negative information.[230] In fact, the number of U.S. companies voluntarily reporting climate-related information has been steadily increasing.[231] Studies show that "[f]rom 2011 to 2019, the percentage of S&P 500 companies publishing voluntary reports on sustainability matters increased from 20 percent to 90 percent."[232] Additionally, studies show that U.S. companies tend to follow industry leaders in their voluntary disclosures even with "little or no SEC guidance."[233] Further, there is "overwhelming" support for climate-related disclosure regulation in general among investors, including large institutional investor groups and managers.[234] Thus,

[226] *Id.*

[227] *Id.* at 207-08.

[228] *Id.*

[229] *See id.* at 215.

[230] *Id.*

[231] *See* Winden, *supra* note 223, at 1232.

[232] *Id.* at 1231.

[233] *Id.* at 1255.

[234] Subodh Mishra, *SEC Climate Disclosure Comments Reveal Diversity of Views*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 31, 2022), https://corpgov.law.harvard.edu/2022/08/31/sec-climate-disclosure-comments-reveal-diversity-of-views/ [https://perma.cc/YS2J-TZ9H] (analyzing climate disclosure comments from investors to the SEC). While "most investors" fully support less controversial requirements in the proposed rule (i.e., Scope 1 and 2 GHG disclosures), investment manager Fidelity called Scope 3 disclosures unnecessary. *Id.* Still, there was "strong support" for a core aspect of the rule (alignment with the TCFD) among investor groups including BlackRock and Vanguard. *Id.*; Paul Bodnar, Kathryn Fulton & Elizabeth Kent, BlackRock, Inc., Comment Letter to Proposal on Climate-Related Disclosures for Investors (June 17, 2022), https://www.blackrock.com/corporate/literature/publication/sec-enhancement-and-standardization-of-climate-related-disclosures-for-investors-061722.pdf [https://perma.cc/8MB6-TDS3]; John Galloway, Vanguard Grp., Inc., Comment Letter to Proposal on Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132302-302834.pdf [https://perma.cc/WWA2-726T].

even with the delay to mandate disclosures and looming legal threats, market norms may assist the SEC in increasing disclosure rates.[235]

Ultimately, although there is no silver bullet, the SEC is not devoid of options in light of the new major questions doctrine.[236] With the combined strength of possible congressional action,[237] audit firms' influence, and the market itself, the SEC can still achieve its goals. Although the rule's diluted final form has disappointed some,[238] scaling back might be necessary to the rule's viability. In fact, Professor Harper Ho has suggested that a more "flexible" approach to the rules may be the best way for the SEC to survive legal challenges.[239] This approach includes "recommended" but not mandatory disclosures, like those of a company's post-carbon transition plan in the final rule.[240] Professor Ho also points out that the new disclosures may be challenged for violating the First Amendment, suggesting that no matter what the SEC decides to do, it will always have opponents ready to challenge it in court.[241] Thus, the SEC should stand firm.

CONCLUSION

The Supreme Court's recent decisions announcing the "major questions doctrine" threaten the administrative state, especially the

[235] *See* Mishra, *supra* note 234.

[236] *See supra* notes 207–235 and accompanying text.

[237] *See supra* notes 192–193 and accompanying text (discussing the 2022 IRA which ultimately gave the EPA authority to regulate greenhouse gases and encourage renewable energy post-*West Virginia v. EPA*, despite Republican pushback).

[238] Immediately after the SEC's rule finalization, sustainable investors and environmental groups including Ceres, the Clean Air Task Force, the Sierra Club, and Public Citizen criticized the final rule as falling short of what's needed. Zahra Hirji & Lily Meier, *Green Groups Decry the SEC's Climate Disclosure Rule as Too Weak*, BLOOMBERG L. (Mar. 7, 2024, 8:00 AM PST), https://news.bloomberglaw.com/environment-and-energy/green-groups-decry-secs-climate-disclosure-rule-as-too-weak [https://perma.cc/FME3-NWUZ].

[239] Harper Ho at The "E" in ESG Panel, *supra* note 169, at 17:05.

[240] *Id.*; The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21703-05 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249). Investors can put pressure on companies even with "recommended" disclosures, further supporting the viability of this approach. *See supra* note 229–230 and accompanying text.

[241] *See* Harper Ho at The "E" in ESG Panel, *supra* note 169, at 17:05.

SEC's recently finalized climate-related disclosures.[242] First, the Court's outright rejection of the sufficiency of broad delegations of authority and the SEC's lack of specific congressional approval place its rule squarely in the scope of the Court's new analysis.[243] Further, the Court's harsh stance in *West Virginia* suggests the SEC has few legal arguments in its favor, despite evidence that climate change severely threatens humanity.[244] However, even vulnerable to attack, the SEC should refuse to back down.[245] Despite pushback that continues to delay progress, the SEC can rely on the nature of the audit system and market forces to achieve its goals.[246]

APPENDIX A

On June 30, 2023, the Supreme Court again applied the "major questions doctrine" in *Biden v. Nebraska*.[247] The Court rejected the Secretary of Education's program to reduce or cancel the loan balances of 43 million borrowers under the Higher Education Relief Opportunities for Students Act ("HEROES Act").[248] The majority opinion leaned heavily on *West Virginia v. EPA*, invoking it nine times.[249]

The opinion further cemented *West Virginia*'s longevity by leaning on many familiar arguments about history and breadth. First, the Court cited purportedly "negative" subsequent legislative history by pointing to the "[m]ore than 80 student loan forgiveness bills and other student loan legislation" considered by Congress "during its 116th session alone."[250] In other words, an agency "'conveniently enabled [] to enact a program' that Congress has chosen not to enact itself" indicated an overstep by the Executive Branch.[251] Second, the Court called the

[242] *See supra* Part I.

[243] *See supra* Part II.A.

[244] *See supra* Part II.C.

[245] *See supra* Part II.

[246] *See supra* Part II.

[247] Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[248] *See id.* at 2372-75. Notably, the majority opinion also stated the case was not distinguishable from *West Virginia*. *Id.* at 2374.

[249] *Id.* at 2355-74.

[250] *Id.* at 2373.

[251] *Id.*

"economic and political significance" of the loan forgiveness plan "staggering by any measure."[252] In this vein, the Court also dabbled with the thought experiment of what an agency could theoretically do in the future if a court were to conclude that the agency's existing policy was authorized by statute.[253] Accepting the government's reading of the HEROES Act would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind,"[254] therefore giving the Secretary of Education "virtually unlimited power to rewrite the Education Act."[255]

But even as the Court recommitted to the new major questions doctrine and the SEC faced setbacks to its other disclosure rules,[256] the ESG movement pushed on. On October 7, 2023, California Governor Gavin Newsom signed into law two landmark climate disclosure bills that would affect over 10,000 U.S. companies in the near term.[257] These bills enacted many requirements similar to that of the SEC's rule, including GHG emissions reporting in compliance with the GHG Protocol and climate-related financial risk reporting in line with the Task Force on Climate-Related Financial Disclosures' recommendations.[258] Considering the SEC received comment letters to

[252] *Id.*

[253] *See supra* notes 155–160 and accompanying text.

[254] *Biden*, 143 S. Ct. at 2373 (quoting West Virginia v. EPA, 597 U.S. 697, 701 (2022)). "[T]he statute" refers to the Higher Education Act, not the HEROES Act.

[255] *Id.*

[256] On October 31, 2023, the Fifth Circuit Court of Appeals held that the SEC acted arbitrarily and capriciously, violating the Administrative Procedures Act in adopting final rules amending disclosure requirements related to issuers' daily share repurchase activity. David Sakowitz, Sey-Hyo Lee & Nnamdi Ezenwa, *Fifth Circuit Directs SEC to Correct Defects in Share Repurchase Disclosure Rules*, WINSTON & STRAWN, LLP (Nov. 8, 2023), https://www.winston.com/en/blogs-and-podcasts/capital-markets-and-securities-law-watch/fifth-circuit-directs-sec-to-correct-defects-in-share-repurchase-disclosure-rules [https://perma.cc/7REX-6K9A]. Still, lawyers encouraged businesses to "continue to take steps to prepare for compliance" with the proposed rule. *Id.*

[257] *See California's Not Waiting for the SEC's Climate Disclosure Rules*, PRICEWATERHOUSECOOPERS, https://viewpoint.pwc.com/dt/us/en/pwc/in_the_loop/in_the_loop_US/caliclimatedisclosurerules.html (last updated Nov. 9, 2023) [https://perma.cc/VSU7-PBR2].

[258] *Id.*

its proposed rule until the very last minute,[259] it is unsurprising that some critics used California's laws to argue that finalization of the rule should have been further delayed.[260]

These recent events further demonstrate that independent forces nudge the SEC toward its climate goals even amid highly critical comment letters and looming court challenges. Perhaps SEC Chairman Gary Gensler best reiterated this Note's core argument. Gensler stated, "If those companies were reporting to California, then [the SEC's climate change disclosures] would be in essence less costly because they'd already be producing that information."[261] Further, even when a rule's legality hangs in the balance, audit firms and lawyers alike encourage clients to "continue to take steps to prepare for compliance."[262] With these dynamics at play, the SEC is primed to advance its climate agenda even before the rules go into effect, despite recent setbacks and continued Supreme Court skepticism.

[259] *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/comments/s7-10-22/s71022.htm (last visited Apr. 18, 2024) [https://perma.cc/8BAU-R2RL] (publishing 36 comment letters submitted by various legislators and interest groups from Sept. 16, 2023 to Mar. 5, 2024 — the day before the rule's finalization).

[260] Bill Hagerty & Joe Manchin III, Comment Letter in Response to Request for Public Input Regarding Climate Change Disclosures (Nov. 9, 2023), https://www.sec.gov/comments/s7-10-22/s71022-296539-721142.pdf [https://perma.cc/46S3-R4EL] (calling the effort to finalize the March 2022 proposal "concerning" because the SEC should solicit further public feedback).

[261] Douglas Gillison, *SEC Chief Says New California Law Could 'Change Baseline' for Coming SEC Climate Rule*, REUTERS (Sep. 27, 2023, 7:49 PM PDT), https://www.reuters.com/sustainability/sec-chief-says-new-california-law-could-change-baseline-coming-sec-climate-rule-2023-09-27/ [https://perma.cc/L5R8-ZPGQ].

[262] Sakowitz et al., *supra* note 256 (providing guidance to prospective clients on the implications of the appellate court's decision on the SEC's share repurchase rule); *see supra* notes 208–217 and accompanying text.