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NOTES

AN ELEPHANT TOO BIG TO HIDE: WHY SEC ENVIRONMENTAL DISCLOSURES WILL NOT SURVIVE A LEGAL CHALLENGE

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INTRODUCTION**

Environmental, Social, and Governance ("ESG") is a phrase that continues to divide political lines, especially when the phrase is pushed by billion-dollar

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** Shortly before publication of this Note, the Securities and Exchange Commission adopted the final rule for The Enhancement and Standardization of Climate-Related Disclosures for Investors. Although this Note focuses on the proposed rule, the application of the major questions doctrine and the implications of its use in a legal challenge nevertheless remains for the final rule. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 36654, 36702 (adopted Mar. 6, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, and 249).

investment companies like BlackRock.[1] Despite the political disagreement on whether ESG deserves a place on Wall Street, investors are gaining more and more access to investment products based on ESG principles.[2] The influx in ESG investment offerings may align with evolving investor standards. For example, two studies claim institutional and retail investors both find ESG factors to be influential in their investment-making process.[3] Other reports also argue that climate-related screening is more prevalent due to the growing awareness that physical and transitional risks often lead to financial risks.[4]

To invest with an ESG focus, investors must have sufficient data to screen investments for corporate policies relating to an ESG aspect.[5] But where do funds or investors get the information to screen these investments? Nowadays, this information can often be found on websites of various companies.[6] In fact, approximately ninety percent of S&P 500 companies published a sustainability report online in 2021.[7] However, these reports are often not meaningfully comparable, so funds typically rely on other sources like third-party ESG data providers.[8] Unlike filings made to the Securities and Exchange Commission (the "Commission"), third-party data are not easily accessible or affordable for retail investors.[9] One survey found institutional investor respondents on average spent

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1. *See* Andrew Ross Sorkin, *DealBook*, N.Y. TIMES (Sept. 22, 2022), https://messaging-custom-newsletters.nytimes.com [https://perma.cc/Y25T-4Y59].

2. The Investopedia Team, *What is Environmental, Social, and Governance (ESG) Investing?*, INVESTOPEDIA (Sept. 27, 2022), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp [https://perma.cc/Z7CN-CJKZ].

3. *See* Robert G. Eccles et al., *How to Integrate ESG into Investment Decision-Making: Results of a Global Survey of Institutional Investors*, 29 J. APPLIED CORP. FIN. 125 (2017); Leena Dagade et al., Cerulli Assocs., Global Retail Investors and ESG: Responsible Investing Converges with Accelerated Environmental and Social Imperatives (2021), https://info.cerulli.com/rs/960-BBE-213/images/2021_ESG_White_Paper.pdf [https://perma.cc/K53R-SMSZ].

4. *See* FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK (2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf [https://perma.cc/3R9J-J7QD].

5. The Investopedia Team, *supra* note 2.

6. *See* *Environmental, Social, and Governance*, FORD MOTOR CO., https://shareholder.ford.com/investors/esg/default.aspx [https://perma.cc/3MXG-6JWW] (last visited Feb. 19, 2024); *Environmental, Social & Governance Reporting*, WALMART, https://corporate.walmart.com/esgreport/ [https://perma.cc/3PG9-LT3C] (last visited Feb. 19, 2024).

7. Martina Cheung, *Seven ESG Trends to Watch in 2021*, S&P GLOBAL (Feb. 28, 2021), https://www.spglobal.com/en/research-insights/featured/special-editorial/seven-esg-trends-to-watch-in-2021 [https://perma.cc/C69C-H32D].

8. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654, 36702 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, and 279).

9. *See* MARK LEE ET AL, THE SUSTAINABILITY INST. BY ERM, COSTS AND BENEFITS OF CLIMATE-RELATED DISCLOSURE ACTIVITIES BY CORPORATE ISSUERS AND INSTITUTIONAL INVESTORS (2022), https://www.sustainability.com/globalassets/sustainability.com/thinking/

"$1,372,000 annually to collect, analyze, and report climate data to inform their investment decisions."[10]

With support from the Biden Administration, the Commission proposed two rules to address the growing demand for ESG investments and the lack of comparable ESG data.[11] In April, the SEC proposed the first rule—"The Enhancement and Standardization of Climate-Related Disclosures for Investors"—requiring climate-related disclosures on annual reports for registered companies.[12] As a result, companies like Walmart, Ford, and Apple would be required to disclose environmental information in their annual filings.[13] Two months later, the Commission proposed a companion rule titled "Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices."[14] This companion rule requires ESG disclosures by investment funds—think of BlackRock or Vanguard—that use ESG screening methods in one of three ways.[15]

While the Commission claims these rules will protect investors by arming them with decision-useful and comparable data, not everyone is convinced. Whether it be accusations that the ESG movement is "[a] collusive effort to restrict the supply of coal, oil, and gas"[16] or forecasts of capitalism falling by the wayside,[17] the Commission's proposed rules have plenty of critics. Even one of the agency's Commissioners described these disclosures as unworkable and needless.[18] In light of these criticisms and the U.S. Supreme Court's recent *West*

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pdfs/2022/costs-and-benefits-of-climate-related-disclosure-activities-by-corporate-issuers-and-institutional-investors-17-may-22.pdf [https://perma.cc/L9BZ-WV5H].

10. *Id.*

11. *See* Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 20, 2021) (directing federal agencies to take action to address climate-related financial risks); Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. at 36654; 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).

12. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21334.

13. *See id.*

14. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. at 36654.

15. *Id.* at 36659.

16. Letter from Tom Cotton et al., United States Senator, to Kenneth J. Markowitz, Partner at Akin Gump Stauss Hauer & Feld (Nov. 3, 2022), https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf [https://perma.cc/SUH8-UUDB] [hereinafter Letter from Senator Cotton].

17. Patrick Morrisey et al., W. Va. Att'y Gen., Comment Letter on the Proposed Rule titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" 2 (June 15, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf [https://perma.cc/G2CU-4ZJA] [hereinafter Morrisey Letter One].

18. *See* Hester M. Peirce, Commissioner, U.S. Sec. & Exchange Comm'n, Statement on

Virginia v. EPA decision, these rules will certainly be challenged in court.[19] While coming on the heels of increased investor demand for ESG investment products,[20] the Commission will inevitably be tasked with persuading courts that the agency possesses clear authority from Congress to promulgate and enforce this disclosure regime.

This Note argues the Commission's climate-related disclosure regime is unlikely to survive an inevitable challenge in court due to the major questions doctrine recently invoked in the *West Virginia v. EPA* decision.[21] While ultimately focusing on the environmental factor throughout this Note, Part I will briefly describe ESG investments and the current state of the environmental investment landscape. Part II illustrates how the major questions doctrine has evolved from a *Chevron* exception into a two-step substantive canon with anti-administrative effects. Part III analyzes whether the Commission's rule for registrants would trigger the first step of the major questions doctrine. Finding that the Commission's rule is "extraordinary," Part IV goes through step two of the major questions doctrine and determines whether the rule is authorized by a clear statement. Then in Part V, this Note summarizes why the Commission will lose with its first rule. Part VI provides a follow-up analysis of the Commission's companion rule and its likelihood of being invalidated. Part VII then briefly highlights the implications of the findings in this Note. And finally, this Note provides a short conclusion.

I. SUSTAINABILITY AND ITS ROLE IN THE FINANCIAL WORLD

ESG investing is a set of standards that has recently been incorporated into Wall Street as a method of screening investments based on corporate policies relating to each ESG aspect.[22] For example, the environmental aspect may consider "corporate policies addressing climate change," the social aspect may

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Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (May 25, 2022), https://www.sec.gov/news/statement/peirce-statement-esg-052522 [https://perma.cc/W8MW-U725].

19. *See* Alice C. Hill, *What Does the Supreme Court's Decision in West Virginia v. EPA Mean for U.S. Action on Climate?*, COUNCIL ON FOREIGN RELS. (Jul. 19, 2022, 12:19 PM), https://www.cfr.org/blog/what-does-supreme-courts-decision-west-virginia-v-epa-mean-us-action-climate [https://perma.cc/3WLD-2S4P]; Patrick Morrisey, W. Va. Att'y Gen., Comment Letter on the Proposed Rule titled "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices" 8-9 (Aug. 16, 2022), https://ago.wv.gov/Documents/2022.08.16%20ESG%20Funds%20Comment.pdf [https://perma.cc/8PYT-3UZQ] [hereinafter Morrisey Letter Two].

20. *See* Dagade et al., *supra* note 3, at 3, 5 (finding 83% of U.S. retail investors preferred investing in environmentally responsible companies and finding in 2020 that 70% of U.S. asset manager anticipated a high demand for ESG investing from Generation Z clients and 84% anticipated a high demand for ESG investing from millennial clients).

21. West Virgnia v. EPA, 597 U.S. 697 (2022).

22. The Investopedia Team, *supra* note 2.

examine how a corporation “manages relationships with employees, suppliers, customers, and the communities where it operates,” and the governance aspect may consider “a company’s leadership, executive pay, . . . [or] shareholder rights.”[23] This Note will specifically focus on the environmental aspect as it applies to both the rule for registrants (i.e., stock issuing companies) and the rule for investment companies (i.e., companies that buy shares of registrants and offer them in investment products). Indeed, the other factors are implicated in both rules, but environmental corporate policies and investing strategies are at the forefront of this topic.

While critics claim environmental strategies are non-financial or “ill-advised ESG schemes,”[24] the growth in environmental investment products suggests they may be more than just a play on retail investor emotions. One report—analyzing the results of more than two-thousand studies—observed most studies had found positive correlations between environmental and financial performance of assets.[25] Seemingly in agreeance with this report, banks and investment firms find ESG portfolios are often accompanied with better risk-adjusted returns, better branding, and more client favorability.[26] These findings are further corroborated by substantial growth in the sustainable investments market. In 2018, U.S. assets managed under sustainable investment strategies grew from $12 trillion to $17.1 trillion in 2020.[27] With U.S. total assets under management equaling $51.4 trillion in 2020, this estimated growth means roughly one-third of all U.S. assets are managed using some level of sustainable investment screening.[28] Ill-advised schemes or not, today investors are afforded the opportunity to invest in an increasing number of environmentally-focused products that label themselves as “‘green,’ ‘sustainable,’ ‘low carbon,’ and so on.”[29]

With institutional investors increasingly focusing on ESG, it should be no surprise that registrants have begun to voluntarily publish ESG reports and data online. In 2020, ninety-two percent of S&P 500 companies published a sustainability report, and seventy percent of Russell 1000 Index companies

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23. *Id.*

24. Letter from Senator Cotton, *supra* note 16.

25. *See* Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210 (2015).

26. *See* BARBARA NOVICK ET AL., BLACKROCK, TOWARDS A COMMON LANGUAGE FOR SUSTAINABLE INVESTING (2020), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-towards-a-common-language-for-sustainable-investing-january-2020.pdf [https://perma.cc/5DC8-8E5Q]; BANK OF AM., ANNUAL REPORT 2020 (2021), https://about.bankofamerica.com/annualmeeting/static/media/BAC_2020_AnnualReport.9130a6d8.pdf [https://perma.cc/5EXA-L4WU].

27. US SIF FOUND., REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 2020, (2020), https://www.ussif.org/currentandpast [https://perma.cc/Q6BG-DRPH].

28. *Id.*

29. Gary Gensler, U.S. Sec. & Exch. Comm’n, Statement on ESG Disclosures Proposal (May 25, 2022), https://www.sec.gov/news/statement/gensler-statement-esg-disclosures-proposal-052522 [https://perma.cc/RH6F-AR46].

published sustainability reports.[30] However, fifty percent of registrants that disclose sustainability information in their regulatory filings only provide boilerplate or generic information.[31] This lack of decision useful information may be problematic for the eighty-three percent of retail investors that prefer to invest in environmentally responsible companies.[32] Unlike the investment companies who can afford to spend millions of dollars to obtain third-party ESG data from registrants, this lack of consistent, useful data leaves retail investors with only two options: (1) invest in products from the investment companies or (2) risk investing in a company that only says it is environmentally responsible.

As will be seen in later portions of this Note, much of this information serves as an underlying basis for the Commission's new environmental disclosure regime. But first, this Note will detour into the evolution of a judicial tool that will likely invalidate the Commission's proposed rules at some point in the near future.

II. The Evolution of the Major Questions Doctrine

A. Major Questions as an Exception

When a legal challenge to an agency's regulation seems imminent, it is hard to imagine anything more beneficial for the agency than *Chevron* deference. If enough evidence is shown to pass *Chevron*'s two-part test, federal judges will defer to an agency's expertise when the agency has reasonably interpreted its authority granted by Congress.[33] Eventually, *Chevron* would become a breeding ground for the first iteration of what would later become known as the major questions doctrine.[34]

A decade after the *Chevron* decision, the Court would use what scholars eventually began to refer to as the major questions exception to *Chevron* deference.[35] In *MCI Telecommunications Corp. v. AT&T Co.*, the Court invalidated a Federal Communications Commission ("FCC") regulation that eliminated the Communications Act of 1934's requirement that common carriers file tariffs with the FCC.[36] The validity of the regulation turned on the meaning of the phrase "modify any requirement."[37] Unfortunately for the FCC, the Court did not get past the first step of the *Chevron* test. Holding "modify" means a

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30. *92% of the S&P 500 and 70% of the Russell 1000 Published Sustainability Reports in 2020, G&A Research Shows*, Governance & Accountability Inst. (2020), https://www.ga-institute.com/index.php?id=9127 [https://perma.cc/HK49-WUGM].

31. 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).

32. *See* Dagade et al., *supra* note 3.

33. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 865 (1984).

34. *See* Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613, 1669 (2019).

35. *Id.*

36. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 220 (1994).

37. *Id.* at 225.

moderate change, the Court bolstered its refusal of deference by highlighting the FCC's "radical or fundamental change" to the existing regulatory tariff scheme "[t]hat may be a good idea, but . . . not the idea Congress enacted into law in 1934."[38] Including the radical aspect of the issue as part of the Court's analysis, this decision marked the first use of a "carve-out" from *Chevron* deference that may exist when an ambiguity creates an issue of sufficient importance.[39]

In 2000, only six years after *MCI*, the Court used language that would form the foundation of both the first and second iteration of the major question doctrine. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court revisited the carve-out in addressing whether the Food and Drug Administration ("FDA") possessed the power to regulate tobacco advertising under the Food, Drug, and Cosmetic Act.[40] Offering an analysis of more than twenty-five pages of legislative history and context, the Court stopped at step one of the *Chevron* test and held Congress "ha[d] directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."[41]

While the Court could have concluded *Brown & Williamson* at that step, Justice O'Connor continued on by highlighting that the opinion "[was] shaped, at least in some measure, by the nature of the question presented."[42] More specifically, the Court noted that in "*extraordinary cases* . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation" of power.[43] And here, the Court found this was "hardly an ordinary case."[44] Then what made this case extraordinary? Well, the Court pointed specifically to tobacco's "unique place in American history and society" and its "unique political history", as well as the broad authority the FDA asserted.[45] Concluding with words that would be entrenched into future major questions cases, the Court stated it was "confident that Congress could not have intended to delegate a decision of such *economic and political significance* to an agency in so cryptic a fashion."[46]

Over the next eighteen years, the Court would continue to develop this *Chevron* carve-out—often meaning Justice O'Connor's *Brown & Williamson* language would be heard again. In 2006, the Court invalidated an Attorney General's regulation of drugs available for physician-assisted suicide, in part, because the Attorney General claimed "extraordinary authority" on an issue of "earnest and profound debate."[47] Eight years later in *Utility Air Regulatory Group v. EPA*, the Court found an EPA proposed regulation under the Clean Air Act was

38. *Id.* at 229, 232.
39. Sunstein, *supra* note 34, at 1669.
40. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).
41. *Id.* at 133.
42. *Id.* at 159.
43. *Id.* (emphasis added).
44. *Id.* at 159.
45. *Id.*
46. *Id.* at 160 (emphasis added).
47. Gonzales v. Oregon, 546 U.S. 243, 262, 267 (2006).

unreasonable and expanded on *Brown*'s language by stating the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[48] In *King v. Burwell*, the Court—just one year after *Utility Air*—refused to give *Chevron* deference to the Internal Revenue Service's ("IRS") interpretation of the Affordable Care Act when it proposed federal tax credit regulations.[49] Concluding it to be the Court's "task to determine the correct reading of [the Act]," the Court relied on three aspects of the Affordable Care Act and the IRS regulation: (1) tax credits are a "key reform" of the Affordable Care Act, (2) the regulation has "deep 'economic and political significance,'" and (3) the IRS lacked expertise in health care policy.[50]

Between 1994 and 2015, the Court implemented the *Chevron* carve-out differently in cases. In *MCI*, the Court highlighted the radical aspect of the FCC's regulation as just one of a few reasons for concluding the Communications Act of 1934 was unambiguous.[51] Fast-forward twenty-one years, the Court had established an entirely new version of the major questions exception where the Court may retain statutory interpretation when the question at issue "(1) is central or interstitial to the statutory scheme, (2) is economically and politically significant, and (3) implicates the agency's core expertise."[52] While the Court's implementation of this *Chevron* carve-out certainly varied, the language invoked in each case would set up the Court's second and more powerful iteration of the major questions doctrine.

B. The Current Major Questions Doctrine

In addition to a nationwide lockdown and stifled American economy, the COVID-19 pandemic established something else: a more potent version of the major questions doctrine. In two pandemic-related cases, the Court—refusing to analyze an administrative emergency action through *Chevron*—applied a new major questions doctrine and invalidated the agencies' regulations.[53]

In *Alabama Association of Realtors v. Department of Health and Human Services*, the Court evaluated the Centers for Disease Control and Prevention's ("CDC") authority under the Public Health Service Act to impose a nationwide eviction moratorium.[54] The moratorium's "vast 'economic and political significance'" and the "breathtaking amount of authority" asserted by the CDC triggered the Court's use of the major questions doctrine.[55] Establishing the case

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48. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

49. King v. Burwell, 576 U.S. 473, 496-98 (2015).

50. *Id.* at 485-86 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

51. MCI Telecomms. Corp. v. AT&T Co., 114 S. Ct. 2223, 2229-32 (1994).

52. Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 51, 59 (2015).

53. Nathan Richardson, Antideference: COVID, Climate, and the Rise of the Major Questions Canon, 108 VA. L. REV. ONLINE 174, 185 (2022).

54. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2485-87 (2021).

55. *Id.* at 2489.

as a major questions issue, the Court described the relevant statute as "a wafer-thin reed on which to rest such sweeping power" where the CDC could enforce any regulation deemed necessary to prevent the spread of disease.[56]

A few months later in a vaccine-related case, the Court reinforced the major questions doctrine's application. In *National Federation of Independent Business v. Department of Labor*, the Court considered OSHA's authority to impose an emergency standard on employers requiring their employees either be vaccinated against COVID or be masked and tested regularly.[57] Like in *Alabama Association of Realtors*, the Court in the *NFIB* decision opted to apply the new two-step major questions test over the *Chevron* test.[58] First, the Court evaluated whether the regulation was significant.[59] Highlighting the regulation's "significant encroachment into the lives—and health" of eighty-four million Americans, the Court held the regulation to be significant.[60] Turning to the second step, the Court looked at whether the statute "plainly authorize[d]" OSHA's regulation.[61] Here, the Court found no plain congressional authorization as the statute granted OSHA the power to "set workplace safety standards, not broad public health measures" which falls outside the agency's "sphere of expertise."[62] Having found no explicit congressional authorization in light of a significant issue, the Court invalidated OSHA's pandemic-related regulation.[63] In effect, these two pandemic-related cases signified a somewhat clear transition from the first iteration of the major questions doctrine—previously invoked alongside other statutory clues—to a new substantive two-prong version that sidesteps typical *Chevron* analyses.

In *West Virginia v. EPA* the following summer, Chief Justice Roberts gave significant weight and timely recognition to the major questions doctrine in six words: "[T]his is a major questions case."[64] The Clean Air Act authorizes the EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[65] In *West Virginia*, the Court considered whether the Clean Air Act authorized the EPA to promulgate the Clean Power Plan which set standards of performance that would require some coal-fired plants to shift to natural gas-fired plants, use alternative sources of energy, or purchase emission allowances.[66] Prior to embarking on this newly-named body of law, the Court highlighted the rationale for judicial interpretation of such a statute:

56. *Id.*
57. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 112-13 (2022).
58. *Id.* at 117-18.
59. *Id.* at 117.
60. *Id.*
61. *Id.*
62. *Id.* at 117-18.
63. *Id.* at 120-21.
64. West Virginia v. EPA, 597 U.S. 697, 724-25 (2022).
65. 42 U.S.C. § 7411(b)(1)(A).
66. *West Virginia*, 597 U.S. at 712.

> [O]ur precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[67]

Holding the matter at hand was significant, the Court rejected the EPA's attempt to downplay its "unprecedented power over American industry"[68] which stemmed from generational powershifting that the Court found "highly unlikely that Congress would leave to [the EPA]."[69] Emphasizing that Congress rarely makes "[e]xtraordinary grants of regulatory authority" through "modest words," "vague terms," or "subtle devices,"[70] the Court stated the agency "must point to 'clear congressional authorization' for the power it claims."[71] Without such explicit congressional authorization, the agency will fail step two of the major questions doctrine.[72] Finding no explicit language in the "long-extant statute," the Court held the EPA's regulation must be invalidated under this doctrine.[73]

Over the course of twenty-eight years, the Court has established an anti-deference tool that has significantly grown from its original *Chevron* carve-out to a powerful, standalone substantive doctrine. The new major questions doctrine is best summarized by a two-part analysis. First, the Court indicates that the doctrine will apply when an agency has claimed a power of great economic or political significance.[74] Conditional on the claimed power's significance, the second part of the analysis addresses "what qualifies as a clear congressional statement authorizing an agency's action."[75] In answering this question, courts should examine (1) the statutory provision relied on by the agency in relation to its place in the overall statutory scheme, (2) the age and focus of the statute with respect to the problem being addressed, (3) past statutory interpretations by the agency itself, and (4) skepticism stemming from agency action and congressionally stated missions and expertise.[76]

Moving away from the old version of the major questions doctrine, *West Virginia v. EPA* leaves agencies—that exercise transformational power—with the burden of showing explicit congressional authorization.[77] Unlike the carve-out

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67. *Id.* at 721 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

68. *Id.* at 728 (quoting Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 645 (1980)).

69. *Id.* at 729 (quoting MCI Telecomms. Corp. v. AT&T Co,, 512 U.S. 218, 231 (1994).

70. *Id.* at 723 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

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

72. *Id.* at 743-44 (Gorsuch, J., concurring).

73. *Id.* at 724-35 (majority opinion).

74. *Id.* at 742-45, (Gorsuch, J., concurring).

75. *Id.* at 746.

76. *Id.* at 745-49.

77. *See id.* at 697 (majority opinion).

that allowed Courts to refuse deference to an agency in the event of a major question, an ambiguous statute now means the agency outright loses.[78] With environmental regulations recently being at the forefront of the administrative state, agencies should consider whether they can meet the requirements of this new judicial roadblock. Enter the Commission's new environmental disclosure regime and its confrontation with the major questions doctrine.

III. THE COMMISSION'S EXTRAORDINARY ISSUE

A. Overview of the Issuer Rule

In April of 2022, the Commission proposed a rule—"The Enhancement and Standardization of Climate-Related Disclosures for Investors"—requiring climate-related disclosures on annual reports for registered companies ("registrants").[79] Shifting away from the current voluntary environmental disclosure framework, this rule (commonly referred to as the "Issuer Rule") requires registrants to disclose climate-related risks that are reasonably likely to materially impact the business or its financial statements.[80] More specifically, the Issuer Rule requires all registrants to disclose direct greenhouse gas emissions ("Scope 1 emissions") and indirect greenhouse gas emissions from purchased energy like electricity ("Scope 2 emissions").[81] Finally, the Issuer Rule may require disclosure of Scope 3 emissions—indirect emissions from upstream and downstream activities in the registrant's value chain—if Scope 3 emissions are material or if the registrant has set greenhouse gas emission targets or goals.[82]

Consider the classic example of a widget manufacturer. Under the Issuer Rule, a widget manufacturing registrant is required to disclose emissions from machines used to the make the widgets (Scope 1) as well as the emissions equivalent of electricity used to keep the machines and widget facility operating (Scope 2). And, if the widget manufacturer markets itself as sustainable, the manufacturer must also disclose other value chain emissions. An example is emissions related to the extraction and processing of raw materials used to make widgets (Scope 3).

As companies begin to calculate these emissions for annual reports, many will keep an eye on the post-*West Virginia v. EPA* court system and whether the Commission is authorized to promulgate an expansive environmental disclosure

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78. Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 493 (2021).

79. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21337 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229. 232, 239, and 249) (however, the rule provides an exemption for smaller reporting companies—companies with a public float under $250 million, or less than $100 million in annual revenue and a public float under $700 million).

80. *Id*. at 21345.

81. *Id*. at 21344.

82. *Id.*

regime. More simply stated, companies will wait to see if the Issuer Rule will survive the major questions doctrine.

B. Clearly Extraordinary

The Supreme Court has stated the major questions doctrine applies when an agency claims a power to solve an issue of "great 'political significance'" or to "end an 'earnest and profound debate across the country.'"[83] With the Issuer Rule, the Commission easily meets both thresholds.

For starters, environmental regulation is an earnest and profound debate in America. Attorney General of West Virginia, Patrick Morrisey, sent a letter—joined by twenty-three other state attorneys general—shortly after the Commission proposed the Issuer Rule.[84] Reminding the Commission that only lawmakers decide "major policy questions like these," Morrisey argued the Issuer Rule "pushes naked policy preferences far afield of the Commission's market-focused domain."[85] Even without the strong views of office holders, courts will not struggle to spot the significance of the Commission's environmental regulation. After promulgating the Issuer Rule, letters and comments from companies have asked the Commission to "dramatically scale back its climate mandates", especially the inclusion of Scope 3 emission requirements.[86] Even BlackRock, one of the most vocal proponents of environmental investing, urged the Commission to leave out these disclosures on financial statements.[87] The sheer volume of comments alone—leading the Commission to miss a self-imposed deadline for finalizing the rule—further suggests to courts the problem is far from a trivial debate.[88] In fact, a final rule has still not been finalized by the Commission at the time this Note was published.

Pretending for a moment the Issuer Rule does not attempt to solve a politically significant issue, a court may still find the rule "seeks to regulate 'a significant portion of the American economy.'"[89] The Commission itself puts this on full display by stating the Issuer Rule will cost individual registrants *at least* a half a million dollars per year.[90] Multiplying half a million dollars in costs by

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83. West Virginia v. EPA, 597 U.S. 697, 743 (2022) (Gorsuch, J., concurring) (first quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 117 (2022); then quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

84. Morrisey Letter One, *supra* note 17.

85. *Id.*

86. Andrew Ramonas & Amanda Iacone, *SEC Climate Rules Pushed Back Amid Bureaucratic, Legal Woes*, BLOOMBERG L. (Oct. 19, 2022, 5:00 AM), https://news.bloomberglaw.com/securities-law/sec-climate-rules-pushed-back-amid-bureaucratic-legal-woes [https://perma.cc/NE3J-4YYP].

87. *Id.*

88. *Id.*

89. West Virginia v. EPA, 597 U.S. 697, 744 (2022) (Gorsuch, J., concurring) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

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

the approximately 5,248 exchange-listed public companies, a court would find that the Issuer Rule will "require 'billions of dollars in spending'" by public companies and their shareholders.[91] Bearing in mind both the political climate surrounding environmental regulations and its aggregate costs, it is hard to imagine post-*West Virginia* courts struggling to find the Commission at least attempted to solve an economically or politically significant issue.

IV. THE ISSUER RULE AND THE CLEAR STATEMENT TEST

With the first step of the major questions doctrine seemingly met, the Commission would then need to "point to 'clear congressional authorization'" to require environmental disclosures through the Issuer Rule.[92] Citing the Securities Act of 1933 and Exchange Act of 1934, the Commission indicates it possesses the authority to promulgate disclosure requirements that are "necessary or appropriate in the public interest or for the protection of investors."[93] The Commission also acknowledges that in order for a regulation to be necessary or appropriate, the regulation must and does "promote efficiency, competition, and capital formation."[94] While the Commission clearly relies on these acts of Congress to validate its environmental disclosures for registrants, a court would only uphold this regulation upon finding these are "clear statement[s]" of authorization.[95]

A. Broad or Specific Language

At the outset of the search for a clear statement, courts will struggle to see how the broad language of the Securities Act and Exchange Act authorize the Commission to require environmental disclosures in registrant's financial reports. Extraordinary grants of agency power "are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[96] Yet, the Commission claims to have authority to require environmental disclosures "for the protection of investors" and due to "necessary . . . public interest" with nothing more than conclusory statements.[97] Similar to the CDC's failed attempt to institute a nationwide eviction moratorium under its authority to regulate as "necessary to prevent the . . . spread of communicable diseases," the Commission's authority

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91. *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (quoting King v. Burwell, 576 U.S. 473, 485 (2015)); *About the SEC*, U.S. SEC. & EXCH. COMM'N (Apr. 6, 2023), https://www.sec.gov/strategic-plan/about [https://perma.cc/5BZV-XXQE].

92. *West Virginia*, 597 U.S. at 732 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

93. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21335 (citing 15 U.S.C. §§ 77g, 78l, 78m, 78o).

94. *Id.* at 21335 (citing 15 U.S.C. §§ 77b(b), 78c(f)).

95. *West Virginia*, 597 U.S. at 736 (Gorsuch, J., concurring).

96. *Id.* at 2609 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

97. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21335 (citing 15 U.S.C. §§ 77g, 78l, 78m, 78o).

would rely on a seemingly similar grant of power rooted in necessity.[98] This statutory language alone would be a "wafer-thin reed" the Commission chooses to rest environmental disclosures on.[99]

Courts have even more reason to hesitate in concluding the Issuer Rule is authorized by this broad statutory language when Congress has already unsuccessfully attempted to provide a more direct statement for environmental disclosures.[100] Courts presume "Congress intends to make major policy decisions itself, not leave those decisions to agencies."[101] Following that presumption, courts will likely be more skeptical of the Commission's attempt to solve a major issue after Congress had already failed to solve the same issue through legislation.

B. Age and Focus of the Underlying Authority

Courts will also look at the age and focus of the Securities Act and Exchange Act.[102] Again, the Commission will not find much support for the Issuer Rule in the analysis of this factor. Established by Congress ninety years ago, the Securities Act and Exchange Act were created "in response to the excesses and ruins of the Roaring Twenties and the Great Depression."[103] Based on a philosophy of disclosure, the Securities Act ensured investors would receive accurate and meaningful information of securities and the firms that issued them.[104] The Exchange Act, on the other hand, ensured "accurate and meaningful information" about securities in secondary markets.[105] Together, these acts are meant to protect investors by requiring timely disclosures of a firm's financial statements and material risks.[106]

It is easy to spot the difference in age and focus between the problem Congress attempted to address nearly a century ago and the problem the Commission is attempting to address now. Recently, the Supreme Court found the age and focus of a statutory provision relied on by OSHA—adopted forty years prior to the COVID-19 pandemic with a specific focus on workplace conditions rather than society at large—influenced the Court in finding a clear statement was lacking when OSHA attempted to impose a nationwide vaccine

98. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2487 (2021).

99. *Id.* at 2489.

100. *See, e.g.*, S. 1217, 117th Cong. (2021) ("Climate Risk Disclosure Act of 2021"); H.R. 2570, 117th Cong. (2021) ("Climate Risk Disclosure Act of 2021"); H.R. 1187, 117th Cong. (2021) ("Corporate Governance Improvement and Investor Protection Act").

101. West Virginia v. EPA, 597 U.S. 697, 723 (quoting United States Telecom Ass'n. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

102. *Id.* at 747 (Gorsuch, J., concurring).

103. Tom C. W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE U. L. REV. 325, 329 (2011).

104. *Id.*

105. *Id*.

106. *Id.* at 329-30.

mandate.[107] Far more different in age and focus are the statutes relied on by the Commission in the Issuer Rule. Here, the Commission relies on an authority from nearly a century ago that created the financial regulatory agency we know today.[108] Yet, problematically, the Commission invokes these old authorities as justification for a broad agency power allowing the Commission to regulate financial markets through an environmental lens.[109]

C. A Glimmer of Hope in Materiality

While the Supreme Court has acknowledged old statutes can be written in ways that allow new, unanticipated situations to be addressed, "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."[110] Therefore, the Commission would need to prove Congress created the Securities Act with the intention of allowing the Commission to require disclosures of material facts that were considered trivial a short time ago. With the Supreme Court having stated "the notion of materiality assumes heightened significance" in the Commission's disclosure context, the Commission has an opportunity to prove Congress intended for the statute to address America's ever-evolving economy.[111] But this opportunity is conditional on the Commission's ability to convince a court that environmental disclosures (i.e., Scope 1, 2, and 3 emissions) are in fact material to investors. The Commission has several tools to suggest environmental information meets the materiality threshold: statistics on institutional and retail investor interest, positive correlations between environmental investing and financial performance, and increases in environmental corporate policies and investing strategies.[112] The Commission can also point to global leaders like the European Securities and Markets Authority which requires environmental disclosures under the assumption that corporate environmental policies and risks are material for investors' portfolios.[113]

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107. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 122-23 (2022) (Gorsuch, J., concurring).

108. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (citing 15 U.S.C. §§ 77b(b), 78c(f), 77g, 78l, 78m, 78o).

109. *Id*.

110. West Virginia v. EPA, 597 U.S. 697, 747 (2022) (Gorsuch, J., concurring).

111. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976).

112. *See* U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO THE HONORABLE MARK WARNER U.S. SENATE, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM (2020), https://www.gao.gov/assets/gao-20-530.pdf [https://perma.cc/ 5JXV-AT2Q]; Dagade et al., *supra* note 3; Friede et al., *supra* note 25, at 211-12 (finding the vast majority of more than 2,000 studies found positive correlations between environmental strategies and financial performance of assets).

113. Adrien Covo, *Exploring ESMA vs SEC Climate Disclosures*, KSAPA (May 12, 2022),

While all the above arguments are relevant to the issue of materiality, challengers of the Issuer Rule have a much more persuasive weapon: Congress's failed attempt to define environmental factors as material. Through the ESG Disclosure Simplification Act of 2021, Congress attempted to label ESG metrics as "de facto material for the purposes of disclosures" under the Securities Act.[114] This legislative attempt suggests Congress itself does not yet see environmental, social, and governance metrics as inherently material. Unfortunately for the Commission, if environmental information is not material, then it hardly seems "necessary" for reasonable investors to know under the Securities Act. Moreover, challengers have the added bonus of a conservative bench.[115] Should the major questions doctrine be invoked by the Supreme Court in determining the validity of the Issuer Rule, the Commission's chances of successfully winning this issue of materiality likely declines.

D. Lack of Environmental Expertise

The final clue suggesting the Commission lacks clear authorization is the discontinuity between the Issuer Rule and the Commission's historic area of expertise. Nearly a decade after Congress created the Commission to regulate the financial market in the wake of "excesses and ruins" of the 1920s and '30s, the Commission has stuck relatively close to the area of expertise suggested by its own name.[116] Only in rare instances and with direct authorization from Congress has the Commission been authorized to go beyond its area of expertise covered in the Securities Act.[117] For example, in the Dodd-Frank Act, Congress mandated the Commission require registrants to disclosure "use of 'conflict minerals' originating in specified countries," "payments made by resource extraction issuers to foreign governments," and "information about health and safety violations at mining-related facilities."[118] If the Commission required direct legislation permitting it to regulate the above policy issues, it seems unlikely that the Commission would not require similar legislation to authorize its Issuer

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https://ksapa.org/exploring-esma-vs-sec-climate-disclosures/ [https://perma.cc/T6U3-9AY8].

114. H.R. 1187, 117th Cong. (2021) ("ESG Disclosure Simplification Act of 2021, Congress").

115. *See* Laura Bronner & Elena Mejia, *The Supreme Court's Conservative Supermajority is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/ [https://perma.cc/GL6C-JZ57] (highlighting the Supreme Court's conservative bench and the power it wields).

116. Lin, *supra* note 103, at 329.

117. ANDREW N. VOLLMER, MERCATUS CTR., GEORGE MASON UNIV., DOES THE SEC HAVE LEGAL AUTHORITY TO ADOPT CLIMATE-CHANGE DISCLOSURE RULES? 9 (2021), https://www.mercatus.org/system/files/vollmer-policybrief-doesthesechavelegalauthoritytoadoptcorporatedisclosurerulesonclimatechange-v1.pdf [https://perma.cc/Q2A5-KV8X].

118. Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23969-70 (proposed April 22, 2016) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, and 249).

Rule's environmental regulations too.[119]

Moreover, the Commission's attempt to dip its toes into the field of environmental regulation is similar to other stretches of expertise the Supreme Court invalidated in the past. In *Alabama Association of Realtors*, the Court invalidated the CDC's attempt to regulate housing in part because of the CDC's expertise as a public health agency.[120] And in *NFIB*, the Court could not find that a workplace safety agency's vaccine requirement fell within "[its] sphere of expertise."[121] Here, the Commission is faced with the difficult task of showing it has the relevant expertise to require and evaluate disclosures of registrants' Scope 1, 2, and 3 greenhouse gas emissions. Without "comparative expertise in making certain policy judgments," the Court has stated "'Congress presumably would not' task [an agency] with doing so."[122] Considering the trends in these cases and the current political leaning of the Supreme Court, it is unlikely that the Commission will find much luck in arguing environmental regulations are within its field of expertise.

V. WHY THE ISSUER RULE FAILS IN A LEGAL CHALLENGE

West Virginia solidified the Supreme Court's use of a powerful roadblock to significant agency regulations, and the Commission's Issuer Rule will likely fall victim to this anti-administrative state doctrine. First, the Issuer Rule is clearly a politically significant act by the Commission. The sheer volume of comments on the Issuer Rule, anti-ESG investing bills, and public discourse all support this finding.[123] Even Justice Alito has said "[c]limate change has staked a place at the very center of this Nation's public discourse."[124] But in the off chance the Commission's environmental disclosures are found politically *insignificant*, the major questions doctrine will still be invoked in response to the Issuer Rule's significant economic effects. With an estimated regulatory cost of a half million dollars per registrant, the Issuer Rule may "require 'billions of dollars in spending'" by public companies.[125] Having found the Issuer Rule will likely pass the first step of the major questions doctrine, the validity of the Commission's

119. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21337 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

120. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2485-87 (2021).

121. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 118 (2022).

122. West Virginia v. EPA, 597 U.S. 697, 729 (2022) (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019)).

123. *See* Ramonas & Iacone, *supra* note 86; Adam Bluestein, *These States are Trying to Ban ESG Investing*, FAST CO. (Oct. 26, 2022), https://www.fastcompany.com/90797130/states-ban-esg-investing-utah-texas [https://perma.cc/KDR3-MHB7].

124. Nat'l Rev., Inc. v. Mann, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari).

125. *See West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (quoting King v. Burwell, 576 U.S. 473, 485 (2015)); *About the SEC*, *supra* note 91.

environmental disclosures likely hinges on one issue: whether Congress has given a clear statement of authorization.

Determining whether an agency has received a clear statement of authority involves analyzing statutory construction, legislative intent, and the agency's mission and expertise.[126] Immediately, the Commission runs into trouble by relying on the Securities Act and Exchange Act—two statutes created nearly a century ago to provide stability and transparency to a turbulent American marketplace.[127] Also disadvantageous is the discontinuity between the Commission's traditional "sphere of expertise" as Wall Street's regulator and the expertise required to regulate companies through an environmental lens.[128] If the question of this rule's validity were to make it up to the Supreme Court, it is hard to imagine a conservative majority of Justices would find that the Securities and Exchange Commission's expertise includes environmental regulations. Especially when the Commission goes outside of its sphere to address what the Court has considered a "controversial subject[.]"[129]

At face value, the analysis of statutory construction and legislative intent behind the Securities Act favors the challengers of the Issuer Rule. Relying on these old statutes, the Commission would have courts equate its ability to require disclosures as "necessary or appropriate in the public interest or for the protection of investors" as a clear congressional authorization to now require environmental disclosures.[130] Without offering any substantive evidence, the Commission supports this claim through its "concern that existing disclosures of climate-related risks do not adequately protect investors," and the Issuer Rule can "improve consistency, comparability, and reliability[.]"[131] Recent precedents invoking the major questions doctrine suggests the Commission's reliance on this broad statutory language alone would be a losing argument.[132] In *Alabama Association of Realtors*, the Court highlighted it was "hard to see what measures this interpretation would place outside the CDC's reach" when the agency offered no statutory limit identified besides measures deemed "necessary."[133] Having already been cautioned against sweeping disclosures that "simply . . . bury the shareholders in an avalanche of trivial information," the Commission must avoid

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126. *West Virginia*, 597 U.S. at 745-49 (Gorsuch, J., concurring).

127. *See* Lin, *supra* note 103, at 329-30.

128. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 117 (2022).

129. Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018).

130. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (citing 15 U.S.C. §§ 77g, 78l, 78m, 78o).

131. *Id.* at 21335.

132. *See* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (finding the CDC's attempt to institute a nationwide eviction moratorium under its authority to regulate as "necessary to prevent the . . . spread of disease" overly broad and limitless); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117-21.

133. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

arguing the Securities Act broadly authorizes environmental disclosures because of their necessity alone.[134]

While the above factors seemingly favor the challengers of the Issuer Rule, a small glimmer of hope exists for the Commission in a remaining battleground issue: whether environmental disclosures are considered material to investors. In fact, the Supreme Court has stated "the notion of materiality assumes heightened significance" in disclosure issues.[135] Information "is material if there is a substantial likelihood that a reasonable [investor] would consider [the information] important in deciding to how to vote" or make an investment decision.[136] Therefore, the Commission must prove reasonable investors would consider environmental disclosures, like greenhouse gas emissions, important in making an investment decision or voting as a shareholder. As previously addressed, the Commission has a variety of evidentiary tools it can deploy to persuade a court that environmental information is material (i.e., investor surveys, studies on environmental investing and financial performance, policies of global leaders, etc.).[137]

But critics of the Issuer Rule have two factors favoring their desired outcome in a legal challenge: (1) failed attempts by Congress to define ESG as material, and (2) the minds and opinions of the Supreme Court Justices.[138] The first factor suggests the obvious: Congress itself has not agreed that environmental factors are material.[139] As for the second factor, the Commission may be challenged with persuading a conservative majority bench that environmental factors are material; and therefore, environmental regulation is within the purview of the Securities and Exchange Commission.[140] Certainly, not an ideal situation for the Commission.

The major questions doctrine is a judicial weapon that is likely to be swung in the Commission's direction with unfavorable consequences for the Issuer Rule. Without hesitation, courts will find the financial regulator is attempting to solve a major problem. Unfortunately for the Commission, recent precedents suggest little to no chances of a court then finding a clear statement of authorization. Even assuming a lower court does find a clear statement for the Issuer Rule, a conservative majority Supreme Court bench may hear this case—a situation the Commission is unlikely to find success in based on precedent. Simply put, Congress does not "hide elephants in mouseholes," and environmental disclosures required by the Securities and Exchange Commission is an elephant too big for

134. TSC Indus., Inc. v. Northway Inc., 426 U.S. 438, 448 (1976).

135. *Id.* at 444.

136. *Id.* at 449.

137. *See* Eccles et al., *supra* note 3; Dagade et al., *supra* note; Fin. Stability Oversight Council, *supra* note 4.

138. *See* H.R. 1187, 117th Cong. (2021) ("ESG Disclosure Simplification Act of 2021, Congress").

139. *See id.*

140. *See* Bronner & Mejia, *supra* note 115 (highlighting the Supreme Court's conservative bench and the power it wields).

the Supreme Court to ignore.[141]

VI. SIMILAR RESULTS FOR THE COMPANION RULE

Just like the Issuer Rule, the Commission's companion rule (the "Fund Rule") will immediately find itself in the crosshairs of a legal challenge after being finalized.[142] While adhering to the general theme of environmental disclosures, the Fund Rule differs by its application to various investment companies. In the Fund Rule, the Commission requires different levels of specific environmental disclosures depending on whether an investment company is categorized as an (1) Integration Fund, (2) Focused Fund, or (3) Impact Fund.[143] Each type of fund has different requirements with Integration Funds having the lowest level of specificity and Impact Funds having the highest.[144]

Integration Funds use ESG factors in their investment strategies, but not in a significant manner.[145] Companies that fall into this category are affected the least as they only have to describe how environmental factors are incorporated into their investment process.[146] Focused Funds—funds for which environmental factors are "a significant or main consideration"—have significantly more reporting requirements.[147] Finally, Impact Funds must disclose all of the same information as Focused Funds in their annual reports but have the added requirement of "clarify[ing] the impact the fund is seeking to achieve" and "how the fund measures progress towards the stated impact."[148] As a result, Impact Funds must also disclose "the time horizon used to measure that progress" and the relationship between the fund's goal and its financial returns.[149]

In addition to the above disclosures, the Fund Rule requires emission disclosures for certain investment companies.[150] Focused Funds and Impact Funds—specifically considering environmental factors—must "disclose the aggregated [greenhouse gas] emissions of the portfolio" by two different methods: (1) carbon footprint and (2) weighted average carbon intensity.[151]

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141. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

142. *See* Morrisey Letter Two, *supra* note 19.

143. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654, 36657 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, and 279).

144. *Id.* at 36657-66.

145. *Id.* at 36657.

146. U.S. SEC. & EXCH. COMM, FACT SHEET: ESG DISCLOSURES FOR INVESTMENT ADVISERS AND INVESTMENT COMPANIES 2 (2022), https://www.sec.gov/files/ia-6034-fact-sheet.pdf [https://perma.cc/VYT8-BN9R].

147. *Id.*

148. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices*,* 87 Fed. Reg. at 36663.

149. *Id.* at 36658.

150. *Id.* at 36672.

151. *Id.*

Therefore, investment companies that explicitly disclose that they do not consider greenhouse gas emissions as a part of their ESG investing strategy, are not required to disclose greenhouse gas emissions. More importantly, investment companies are not required to disclose any environmental information if they do not fall into any of these three categories.

Just like the Issuer Rule, the Fund Rule will likely face a major questions challenge. With this rule, the Commission, again, takes part in "an earnest and profound debate" in America: climate change.[152] Pretending for a moment that a court would gloss over the political significance of the Fund Rule, the major questions doctrine would still be invoked due to the economic significance of the regulation. One financial burden the Commission highlights is possible investment strategy changes that will be necessary for some funds to operate under one category of the rule versus another.[153] Acknowledging that it cannot accurately estimate these costs, the Commission proceeds by admitting "a fund making these adjustments may incur substantial costs."[154] Other existing costs include additional time spent on annual reports, proxy voting disclosures, and greenhouse gas emissions calculations—which only has a low financial burden if registrants have already provided emissions under the Issuer Rule.[155] Notably, the Commission highlights that "any increase in compliance costs are passed on to investors as funds are pass-through vehicles."[156] With the Commission regulating over "29,000 registered entities, including investment advisers, mutual funds, exchange-traded funds, broker-dealers, and transfer agents," the Fund Rule likely surpasses the economically significant threshold which triggers the major questions doctrine.[157]

Except for one additional rationale on how the Commission is protecting investors with the Fund Rule, a court will come to similar conclusions as it did with the Issuer Rule on whether the Commission has clear authorization. However, the Commission offers one additional way the Fund Rule protects investors unlike the Issuer Rule: the Fund Rule combats risks of greenwashing.[158] The Commission defines "greenwashing" as the act of funds "exaggerate[ing] their [environmental] strategies or the extent to which their investment products or services take into account [environmental] factors in order to attract business [.]"[159] The Commission's ability to prove greenwashing is a real risk for retail investors may serve as evidence that the Fund Rule is clearly authorized by the Investment Company Act's duty to protect clause.

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152. Gonzales v. Oregon, 546 U.S. 243, 249 (2006).

153. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. at 36710.

154. *Id.*

155. *Id.* at 36710-15.

156. *Id.* at 36709.

157. *About the SEC*, *supra* note 91.

158. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. at 36655.

159. *Id.* at 36703.

But just like proving environmental disclosures are material, this argument may be nothing more than a glimmer of hope. While studies have found that greenwashing both negatively impacts consumers and is accompanied by higher investment fees, one report analyzing data of two-hundred eighty ESG mutual funds found that only two failed to deliver on their ESG promises during a one-year period.[160] While this may be cold comfort to the unlucky few investors that do not see environmental success in their investments, this finding suggests that a new disclosure regime is likely unnecessary to extinguish the threat of greenwashing. In fact, the Commission already polices some of these exaggerated claims as illustrated by a settled enforcement proceeding against an advisor who said one thing about ESG and did another.[161] Much like the materiality argument, the Commission's chances of persuading the courts that greenwashing is a real threat warranting an environmental disclosure regime is quite low. Therefore, the Commission's rule for investment companies will also be seen as an elephant too large to hide from a major questions challenge.

VII. EFFECTS OF THE DISCLOSURE REGIME AND LEGAL CHALLENGE

A. Companies and Law Firms

Even with a legal challenge virtually guaranteed, companies and law firms are bracing for the impacts of the environmental disclosure regime.[162] Contributing to the fourteen thousand comments received in the initial sixty-day commenting window, many companies initially responded in the hopes the Wall Street regulator would alter its final rules.[163] For example, BlackRock Inc.—a supporter of mandatory climate reporting—requested the Commission drop the environmental disclosures from financial statements, and United Parcel Service Inc., called the Commission's one-percent line item reporting threshold "overly

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160. *See* Hendy Mustiko Aji & Bayu Sutikno, *The Extended Consequence of Greenwashing: Perceived Consumer Skepticism*, 10 INT'L J. BUS. & INFO. 433, 433-68 (2015); Sadok El Ghoul & Aymen Karoui, *What's in a (Green) Name? The Consequences of Greening Fund Names on Fund Flows, Turnover, and Performance*, 39 FIN. RSCH. LETTERS 101620 (2021); *but see* Quinn Curtis et al., Do ESG Mutual Funds Deliver on Their Promises? 27-33 (European Corp. Governance Inst., Working Paper No. 586, 2021).

161. *See* Hester M. Peirce, Commissioner, U.S. Sec. & Exch. Comm'n, Statement, We are Not the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022) https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/KDB3-AYA4] [hereinafter We are Not the SEC]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), https://www.sec.gov/news/press-release/2022-86 [https://perma.cc/B6QW-A5MZ].

162. Dan Roe, *Thanks to the SEC, Law Firms See Increasing Business in ESG*, AM. L. (Aug. 9, 2022, 7:57 PM), https://www.law.com/americanlawyer/2022/08/09/thanks-to-the-sec-law-firms-see-increasing-business-in-esg/?slreturn=20230103110046 [https://perma.cc/3EQJ-VME7].

163. *Id.*

burdensome."[164] Past the act of commenting, some companies have begun to "stress-test their existing compliance, risk management and audit functions" even in light of a legal challenge.[165]

As businesses begin to evaluate their existing compliance, law firms have also begun to take on environmental disclosure work. Specifically, clients have increasingly started to look at law firms for their legal talent and their ability to bring the right consultants to the table.[166] With ESG compliance developing into its own niche practice area, large firms have already begun to invest in valuable assets like former counsel and enforcement lawyers of the Commission.[167] Until the Commission's environmental disclosure regime comes face-to-face with the judicial system, law firms will continue to invest in this new, developing area of law and clients will continue to seek out their help.

B. Effect on the Administrative State

The Supreme Court invalidating the Commission's environmental disclosure regime under the major questions doctrine—or, alternatively, approving a lower court's decision to do as much—would have lasting impacts on the administrative state. In "extraordinary cases," the Court expresses that "both separation of powers principles and a practical understanding of legislative intent" forms the basis for invoking the major questions doctrine.[168] Yet, the standard that must be met for an agency's regulation to survive is not all too clear. Take the Commission's environmental regime as an example. In the case for the Issuer Rule, the clear statement analysis leaves the Commission in a position where it must persuade a court that environmental disclosures are material. And the Fund Rule faces the same issue along with proving that greenwashing is a real risk to investors. As these analyses have shown, the danger of the major questions doctrine is that judges, specific people, with lifetime tenure, are left to decide questions about what retail investors find material and which threats are worth protecting against. In the likely event this doctrine does invalidate the Commission's environmental disclosure regime, agencies should proceed with caution in regulating anything a court might find "extraordinary."[169]

CONCLUSION

In promulgating this environmental disclosure regime, the Commission knew that it was going into a controversial area that would have its fair share of opposition.[170] With environmental corporate policies and investing strategies

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164. Ramonas & Iacone, *supra* note 86.

165. Roe, *supra* note 162.

166. *Id.*

167. *Id.*

168. West Virginia v. EPA, 597 U.S. 697, 700 (2022).

169. *Id.* at 723.

170. Michael R. Littenberg et al., *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, ROPES & GRAY (Apr. 12, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/April/

continuing to grow, one can imagine how these rules could provide real value to investors.[171] But critics come with their fair share of practical arguments as well, including: significant financial burdens for companies and skepticism of authenticity in institutional supporters.[172] The end result: a virtually certain legal challenge.[173]

Unfortunately for the Commission and environmental disclosure supporters, the major questions doctrine—developing over the course of twenty-eight years into a substantive judicial canon—will likely result in both the Issuer Rule and Fund Rule being invalidated, depending on the substance of the rules once finalized. A financial markets agency regulating through an environmental lens will quickly set any court down a clear statement analysis path. With a conservative majority on the bench, the Commission stands little to no chance of succeeding in the event this issue rises to the level of the Supreme Court. But until that moment arises, a few things remain certain. Investors will continue to use ESG investment products, law firms and their corporate clients will continue to prepare and stress-test internal procedures prior to the final rules being issued, and the administrative state will continue to cautiously navigate how it can regulate an innovating society amidst an ever-growing, unbounded major questions canon.

ten-thoughts-on-the-secs-proposed-climate-disclosure-rules [https://perma.cc/SAQ5-7D5T].

171. *See* The Investopedia Team, *supra* note 2; Fin. Stability Oversight Council, supra note 4.

172. We are Not the SEC, *supra* note 161 (claiming "many calls for enhanced climate disclosure are motivated not by an interest in financial returns . . . but by . . . concerns about the climate or, sometimes, superficial concerns expressed to garner goodwill").

173. Ramonas & Iacone, *supra* note 86 (highlighting Patrick Morrisey's intent to challenge the environmental disclosure regime in court).