UNCONSTITUTIONAL PUBLIC COMPANY DISCLOSURE?: HOW THE CODIFIED "MAJOR QUESTIONS DOCTRINE" CAN HALT THE SEC ON CLIMATE DISCLOSURE REQUIREMENTS

Abstract: On June 30, 2022, in *West Virginia v. Environmental Protection Agency*, the United States Supreme Court ruled that the regulation of existing power plants in Section 7411(d) of the Clean Air Act fell under the major questions doctrine, and within that, Congress did not grant the EPA authority to regulate emissions from existing plants based on generation shifting mechanisms, which would have invalidated the Clean Power Plan. This paper argues that the major questions doctrine codified in *West Virginia* would make *The Enhancement and Standardization of Climate-Related Disclosures for Investors* promulgated by the Securities & Exchange Commission unconstitutional, and thus bringing into light the future of similarly situated regulations into question as this doctrine would be used going forward in the Court's jurisprudence.

INTRODUCTION

The 40th President of the United States, Ronald Reagan, famously stated in his farewell address, "We the People' tell the government what to do; it doesn't tell us. 'We the People' are the driver; the government is the car. And we decide where it should go, and by what route, and how fast."[1] Indeed, the status of the "Administrative State"

[1] Ronald Reagan, *Farwell Address to the Nation,* https://www.reaganlibrary.gov/archives

has long been one of the most intricate and contentious areas, both within the realm of American adminstrative law and the broader landscape of American jurisprudence. In *West Virginia v. Environmental Protection Agency*, The North American Coal Corporation challenged a particular provision of the Clean Power Plan from the EPA that rendered ultra vires under the Clean Air Act (CAA).[2] This seemingly inconsequential case would serve as a stepping stone of the shifting jurisprudence of administrative law that can render the future of the administrative state in wary grounds because of the stricter standards in place by the U.S. Supreme Court through the now codified major questions doctrine.

The objective of this paper is to provide a comprehensive overview of the major questions doctrine for which its application to the recent proposed rule by the U.S. Securities and Exchange Commission (SEC), *The Enhancement and Standardization of Climate-Related*

[2] *West Virginia v. Environmental Protection Agency,* No. 20-1530, slip op. at 1 (2022). *See* the Supreme Court's Ruling.

(Clean Air Act 42 U.S.C. §7401 et seq. (1970). The CAA is a federal legislation governing air emissions from both stationary and mobile sources. The law grants the EPA statutory authority to oversee and control the release of hazardous air pollutants.)

*Disclosures for Investors (*the "proposal") renders it unconstitutional.[3] The proposal has promulgated an extensive debate amongst stockholder activist investors, law firms, and even everyday stockholders. The SEC has received over 4,000 substantive comment letters and more than 10,000 form letters which include a variety of perspectives to the extent in which the SEC has the authority to mandate climate-related disclosure for public companies.[4]

The argument to be made in this paper is not about whether climate change affects the U.S. economy or to deny climate change is a byproduct of companies expenditures, it is about the limitation to which the SEC has the authority to promulgate such disclosures onto companies without clear congressional approval. Where at the same time, these types of disclosures can be mandated by stockholders of a publicly traded company.

This paper is particularly important for public companies, and even private companies thinking about going public within the U.S.

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[3] *The Enhancement and Standardization of Climate-Related Disclosures for Investors* 87 Fed. Reg. 21334 (proposed April 11, 2022), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf

[4] *See* Comment Letter of Professors Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams on Behalf of Thirty Securities Law Scholars (June 6, 2022), http://ssrn.com/id=4129614.

securities exchanges, to understand the implications of current mandatory and potentially future mandatory disclosures on their financial statements, proxy statements, and other SEC mandated filings.

It may be viewed that the additional disclosures are creating an incentive for public companies to go private, or for private companies to not make that leap in rendering an initial public offering (IPO). Public companies are already subject to more regulation and most large public companies report climate information. Investors in public companies such as private equity fund investors are already and increasingly demanding climate-related information and commitments from the funds or their advisors. Retail stockholders through their statutory right to vote in annual meetings voice their concerns of climate related disclosure by submitting stockholder proposals.

This paper also serves to inform individuals of whom perhaps do not know anything at all about disclosure requirements for public companies for which their 401(k) or Roth IRA accounts are invested into. This paper will also posit and answer the question of, to what

extent does the cost of a disclosure requirement take away the prospects of an additional dollar be given to the hands of stockholders?

Part I of this paper examines a brief background of the inception and application of the major questions doctrine coupled with a detailed explanation of the doctrine at play applicable to the facts in *West Virginia*.[5] Part II discusses an important federal securities laws, The Securities Act of 1933 ("Securities Act") and The Securities Exchange Act of 1934 ("Exchange Act") along with its goal in capital markets.[6] Part III discusses the SEC proposed climate disclosure requirement as it was released in 2022. Part IV contends that based on the applicable elements of the major questions doctrine stemming from *Virginia,* the SEC proposed rule is effectively unconstitutional. Lastly, Part V drives on the importance how capital markets can effectively promote the SEC's climate goals through statutory corporate law, rather than through back door regulation making.[7]

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[5] *West Virginia*, slip op. at 11.

[6] Securities Act of 1933, 15 U.S.C. § 77a, *et seq*; Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, et seq

[7] **8** Del. C. § 100, et. seq

I. THE LEGAL BACKGROUND OF THE MAJOR QUESTIONS DOCTRINE

Under the major questions doctrine, the Supreme Court has rejected administrative agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue.[8]

The inception of the major questions doctrine can be generally traced back to the U.S. Supreme Court's 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*[9] The Court stated, "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[10] There, the Court ruled that the FDA did not have the power to regulate tobacco under the Food Drug and Cosmetic Act because Congress did not grant explicit authority to do so.[11]

[8] See the Congressional Research Service's report of the Major Questions Doctrine (April 6, 2022): https://crsreports.congress.gov/product/pdf/IF/IF12077.

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

[10] *Id.* at 133.

[11] The U.S. Federal Food, Drug and Cosmetic Act 21 U.S.C. ch. 9 § 301 et seq; Id at 123.

The facts of *West Virginia* stem from The Federal Clean Air Act (CAA), initially enacted in 1970 and subsequently amended, served as the legal framework through which the Environmental Protection Agency (EPA) safeguards and enhances the air quality across the nation.[12]

Pursuant to § 7411(d) of the CAA, Congress granted the EPA authority to identify the "best system of emission reduction" from power generating plants or other large stationary sources. [13] In simpler terms, § 7411(d) is the regulatory scheme through which greenhouse gases are incorporated into the oversight of existing power plants.[14] The Supreme Court's focus in its decision primarily centered on Section 7411(d). [15]

In 2015, the EPA proposed the Clean Power Plan (CPP) which addressed ways in which to reduce carbon dioxide emissions from existing coal and natural gas fired power plants. The EPA relied on § 7411(d) for its authority to promulgate this plan.[16] The approach for

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[12] *Id.*
[13] 42 U. S. C. §7411(d)
[14] *Id.*
[15] *Id.*
[16] *West Virginia*, slip op. at 1.

the goal of the CPP in which the EPA called “building blocks” was first, reducing carbon emissions at existing power plants by improving the heat rate of existing coal-fired plants for more thermal efficiency, increasing electricity generation from natural gas plants, and moving away from coal-fired power plants; and increasing renewable electricity generation.[17]

The last two blocks were called “generation shifting” and these were the two blocks the Court called into question.[18] The Court determined that the EPA does not possess the authority, pursuant to the CAA, to enforce the “generation shifting” approach and deemed it a "major question" with significant economic and political implications.[19] Notably, the Court established that an administrative agency cannot make decisions on such "major questions" unless explicitly granted the authority by Congress.[20] As § 7411(d) lacked a clear statement providing such authority to the EPA, the court ruled

[17] *Id.* at p. 8.
[18] *Id.* at p. 2.
[19] *Id.* at p. 25.
[20] *Id.* at p. 28.

that the EPA's efforts to regulate carbon dioxide emissions exceeded its jurisdiction.[21]

The EPA relied on the “best system of emission reduction” under the CAA to show that it indeed had the power to establish the “generation shifting” approach.[22] However, the Court noted, “The word “system” shorn of all contexts, however, is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required”.[23] The EPA pointed to other parts of the CAA that mentioned “system” and other similar words to show an expansive interpretation of the word to show it can impose sector-wide mechanisms for reducing pollution.[24] The Court did not buy that argument and opted for a narrow interpretation noting, that just because the word “system” can be used to reduce emissions did not mean the same kind of “system” used in § 7411(d).[25]

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[21] *Id.* at p. 3.
[22] *Supra* note 17.
[23] *Id.* at p. 6.
[24] *Id.* at p. 29.
[25] *Supra* at note 6.

The major questions doctrine applies to issues in which a regulation poses "political and economic significance".[26] Chief Justice Roberts and Justice Neil Gorsuch explain of such significances imposed by the CPP.[27] Justice Roberts noted that capping carbon dioxide emissions at a level in such a way to force energy makers to stop using coal for electricity would be according to Robert, a sensible "solution to the crisis of the day."[28] Roberts furthered concluded at the end of his opinion that it was not plausible that Congress gave the EPA the authority to adopt that approach and ended with, "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body".[29]

Justice Gorsuch further explicated the economic significance of the CPP stating that industry analysts have estimated the CPP would cause consumers' electricity costs to rise by over $200 billion.[30]

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[26] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160, 120 S.Ct. 1291, 146 L.Ed.2d 121. This case explained that there are "extraordinary 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.

[27] *Supra* note 2.

[28] Id. at 31.

[29] Id. at 31.

[30] *See West Virginia*, slip op. at 12 (Gorsuch, J. concurring)

II. THE GOALS OF THE SECURITIES ACT AND THE EXCHANGE ACT

The Securities Act of 1933 ("The Securities Act"), is primarily overseeing the distribution of securities.[31] The Securities Act requires the registration of offerings and distributions of securities that end up in the hands of stockholders, regardless of whether the distribution to the public is accomplished through a primary or secondary offering such as an IPO.[32] The registration of securities from Congress's point of view, was that investors are adequately protected if all relevant aspects of the securities being marketed are fully disclosed. The rationale behind full disclosure is to offer investors ample opportunity to assess the worth of an investment and make independent decisions.[33]

The significance of the Securities Act traces back to the days of President Franklin Delano Roosevelt in which he wanted the Securities Act to be a protection against shady brokers and other securities professionals by making them provide what Roosevelt called, "complete and truthful disclosures".[34] This framework to shape the capital markets

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[31] *Supra* note 6.
[32] *Id.*
[33] 1 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 1:17 (2023)
[34] Chairman Gary Gensler's video on the 90th birthday of the Securities Acts of 1933, https://www.sec.gov/news/sec-videos/securities-act-1933.

as we know of today not only has brought more transparency between the shareholder and companies, but it has brought a peace of mind amongst all of us that what we are investing, is truly predicated upon our decision to invest, not from asymmetric information.

The Securities Exchange Act of 1934 ("The Exchange Act") is a federal law that regulates the secondary trading of securities such as stocks and bonds.[35] An easy way to differentiate between the Securities Act and the Exchange Act is that the former regulates securities *prior* to coming into the public marketplace while the latter regulates securities *after* the securities are registered and are being traded in the public marketplace. More importantly, the Exchange Act also established the SEC, the agency responsible for enforcement of U.S. federal securities law.[36] The Exchange Act grants extensive authority to the SEC, conferring control over every part of the securities industry. Additionally, the SEC has oversight various securities exchanges like the New York Stock Exchange (NYSE) and the Nasdaq Stock Market.[37]

[35] 1 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 1:18 (2023)
[36] *Id.*
[37] https://www.sec.gov/about/about-securities-laws#secexact1934

The registration of a company's securities under the Exchange Act involves comprehensive disclosure of the company's operational activities, financial status, and leadership, along with adherence to various periodic reporting obligations.[38] In order to safeguard investors, Congress mandated disclosures by companies to reveal information essential for investors to make well-informed investment decisions. Pursuant to Section 13(a) of the Exchange Act, public companies are obligated to fulfill periodic disclosure requirements through the submission of annual reports such as a 10-K for annual, and 10-Q for semi-annual.[39] These reports include information about the company's officers and directors, the company's line of business, audited financial statements, and corporate governance related topics. [40]

III. THE ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES FOR INVESTORS

In March 2021, to determine how and whether the SEC should further regulate the disclosure of climate related disclosure onto public

[38] *Id.*
[39] 15 U.S.C. §§ 78m
[40] https://www.sec.gov/oiea/investor-alerts-and-bulletins/how-read-10-k10-q

companies and private foreign issuers, the SEC's former Chair, Allison Herren Lee, requested public input regarding the need for climate change disclosure requirements.[41] The SEC received roughly 600 responses which generated opinions from supporters of a climate related disclosure to skeptics regarding such disclosures. [42]

Consequently, on April 11, 2022, the SEC proposed rules for climate change disclosure requirements for both U.S. public companies and foreign private issuers.[43] The SEC disclosed a Proposing Release that outlined the full proposal and the specific mandates the SEC is seeking to impose on companies.

The proposal mandates the disclosure in SEC filings of details concerning a public company's climate-related risks that could reasonably be expected to significantly affect its business, operational outcomes, or financial status.[44] This kind of information encompasses the disclosure of company's greenhouse gas ("GHG") emissions, recognized as a popular measure to evaluate the company's

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[41] *See* Chair Allison Herren Lee, "Public Input Welcomed on Climate Change Disclosures" (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[42] *See* the Proposing Release, p. 19. (Release Nos. 33-11042; 34-94478; File No. S7-10-22).

[43] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87, Fed. Reg. 21334 (proposed on Apr 11, 2022) (hereinafter the Proposing Release).

[44] *See* the Proposing Release, p. 41.

vulnerability to climate-related risks. The proposal also stipulated the inclusion of specific climate-related financial metrics in a company's audited financial statements.[45] More specifically, the SEC is seeking five main topics of information to be included in SEC filings; climate-related risks, impact on business model, risk management/oversight, GHG emissions, and future target or goals. [46]

Statistical data coming from law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, of the 13,289 comments that were submitted to the SEC regarding the proposal, 11,008 (83%) broadly express support for the proposed climate disclosure rule, and only 2,277 (17%) are opposed to it.[47]

IV. THE PROPOSAL IS EFFECTIVELY UNCONSTITUTIONAL

Starting from the first prong of the major questions doctrine in *West Virginia,* the Supreme Court looked at whether an issue at hand

[45] *See* the Proposing Release, p. 41.

[46] *See* the Proposing Release, p. 42.

[47] Jacob H. Hupart, Megan Gates, William F. Weld, Douglas P. Baumstein, Jennifer B. Rubin, Will G. McKitterick, *What Public Comments on the SEC's Proposed Climate-Related Rules Reveal- and the Impact That may have on the Proposed Rules*, Mintz Levin, https://www.mintz.com/insights-center/viewpoints/2301/2022-07-20-what-public-comments-secs-proposed-climate-related-rules#:~:text=The%20form%20letters%20are%20worth,conveyed%20by%20the%20chart%20below.

concerns a question of such vast political and economic significance.[48] As mentioned earlier in this paper, political and economic significance is not about the miniscule effects that a proposed regulation influences, but rather, the significance would look more like a constraint or detrimental effect on the general public of the U.S. as a whole and perhaps, even abroad.

A. THE ECONOMIC SIGNIFICANCE OF THE PROPOSAL

With further detail below, the proposal will have a material impact on the U.S. economy that will call into question the SEC's statutory authority to unilaterally make such a proposal. The SEC estimated that annual direct costs to comply with the proposal would be $490,000 for smaller reporting companies and $640,000 for non-smaller reporting companies in the first year and $420,000 to $530,000 in subsequent years respectively.[49] Companies who would have to utilize earnings to pay for the compliance of the proposal, would potentially disable stockholders from seeing a return on their investment or even a dividend if that money were used elsewhere for the company.

[48] *West Virginia v. EPA, supra* at note 8.
[49] *See* the Proposing Release, p. 373.

The SEC in its proposing release did acknowledge that its estimated compliance costs are limited in scope and may not reflect accurately companies *true* compliance costs. [50] However, the factors that affected direct costs based on the information from the proposing release is compelling. The SEC noted that companies that are currently subject to the Environmental Protection Agency's (EPA) Greenhouse Gas Reporting Program would face lower compliance costs in reporting certain scopes such as GHG emissions compared to companies that are not subject to the EPA's program. [51]

The SEC also reviewed 6,644 annual reports such as the 10-K and found that 33% of those reports contained information regarding climate change and how it related to business impact.[52] This information reveals that notwithstanding the proposal, there are companies that have made the choice to disclose climate-related information as well as voluntarily subjecting themselves to other administrative agency's disclosure programs like the EPA.

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[50] *See* the Proposing Release, p. 372.

[51] *See* the Proposing Release, p. 383.

[52] *See* the Proposing Release, p. 384. (the annual reports that the SEC studied were "recent" and thus by the time the proposal was published, the annual reports may have come from FY 2021 and FY 2022 depending on when companies have to disclose their 10-K's and other filings to the SEC).

In a comment letter from the proposal's comment section submitted by Associate Professor of Economics at the University of Wisconsin, Matthew Winden, Ph.D, Winden summarized the change in compliance costs based on statistics from the proposing release, and effects of the proposal coming into fruition for all registered companies with the SEC.[53] Winden noted, "The SEC estimated companies will incur incremental direct costs of $6.37 billion for compliance with this new rule, a figure fully 165% of current SEC compliance costs of $3.85 billion – this will more than double current SEC regulatory compliance costs."[54] This staggering change in total compliance costs for all companies that would be subject to the mandate is an understatement that does not accurately reflect the true impact it would have on the U.S. economy overall as Winden noted in his comment letter.[55]

Winden relied on an equilibrium model called the Regional Economic Model ("REMI").[56] It is used in many federal agencies, states, academic institutions, and consulting firms to model the impact

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[53] *See* Matthew Winden, *Comments,* SEC.GOV (Jun. 17, 2022) https://www.sec.gov/comments/s7-10-22/s71022-20132304-302836.pdf

[54] *Id.* at p. 4.

[55] *Id.*

[56] *Id.* at page 4.

policy changes have on the U.S. economy.[57] The data used to estimate the compliance costs were gathered from the *Wall Street Journal* that described the basic characteristics of companies that are traded on the U.S. securities exchanges.[58]

The $6.37 billion direct cost calculated by the SEC regarding the proposal was used as the "production cost" in REMI.[59] The production cost estimates the impact of regulatory costs to companies.[60] Regulatory costs include taxes, energy prices, wages and salaries, or other costs of operation which have a different impact on companies because of the difference of companies' relationships with the sector, government, customers, and international capital markets.[61]

The results from HEMI show that the impact of the proposal by 2025, would approximately cost 0.1% of U.S. GDP and U.S. jobs.[62] While this may be marginal, as Winden noted, the impact would need to be compared to the size of the U.S. economy.[63] Thus, a seemingly

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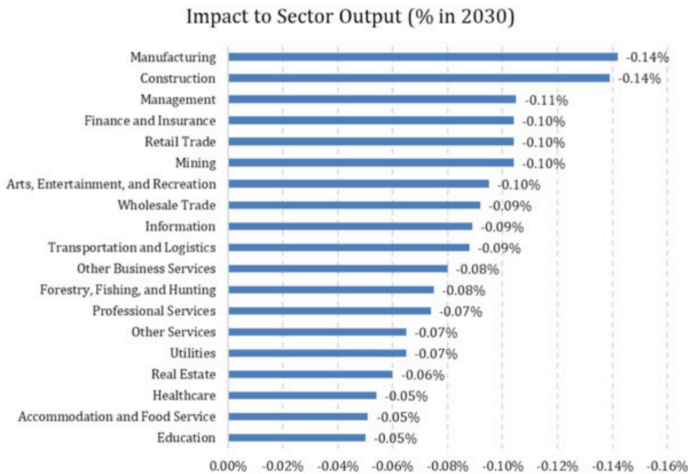
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at page 7.
[63] *Id.*

small change is economically significant given that the analysis is done to see the effect of only *one* policy change that is narrowly tailored to specific companies incorporated in the U.S. namely, publicly traded companies.

Table 1 below, attained by the results from Professor Winden's analysis, shows just how much the proposed rule would impact sectors with a high amount of publicly traded companies.[64] The negative numbers reflect a contraction in sector output stemming from -0.14% to -0.05%.



The industries that would be affected the most by the proposal are the manufacturing and construction industries. This data from Winden,

[64] *See* Table 1 (https://www.sec.gov/comments/s7-10-22/s71022-20132304-302836.pdf) at page 9.

coupled with the costs that the SEC has calculated, reflects a material impact on the United States. Winden concluded that overall, the proposed SEC rule will be contractionary for the U.S. economy.[65] It would cost the U.S. "roughly a month's worth of normal job growth" annually.[66] This detrimental effect will fall mostly in the hands of the manufacturing and construction industries, which are integral to the U.S. economy.

B. THE SEC DOES NOT HAVE STATUTORY AUTHORITY TO IMPOSE CLIMATE RELATED DISCLOSURE

Article I of the U.S. Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States."[67] In *J.W. Hampton Jr. & Co. v. United States* (1928), the Supreme Court held that when authorizing a government official or agency to regulate or implement congressional statutory law, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." [68]

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[65] *Id.* at page 9.
[66] *Id.*
[67] U.S. CONST. art. 1, § 1, cl. 1.
[68] Donald Kochan, *The SEC's Climate Change Disclosure Rules are in Double Constitutional Trouble,* Harvard Law School Forum of Corporation Governance (Dec. 15, 2023, 11:00AM),

With further detail below, there is an effectual argument that with statutory interpretation through Supreme Court precedent, and a lack of an intelligible principle, and other evidence of congressional intent, the SEC is authorized to only require disclosure of information from companies that is strictly related to financial returns and not its climate change agenda.

The core mission of the SEC is, "requiring issuers raising capital to make full and fair disclosures to investors on a regular basis; placing heightened responsibilities on key market participants; and using SEC examination and enforcement resources to bolster those requirements and protect investors."[69]

The SEC emphasized its rulemaking authority for the proposal based on the Securities Act and the Exchange Act.[70] These two Acts authorize the SEC to promulgate rules or regulations requiring disclosure of information that it believes is "necessary or appropriate

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https://corpgov.law.harvard.edu/2023/06/19/the-secs-climate-change-disclosure-rules-are-in-double-constitutional-trouble/ (citing *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)) (Kochan provides in his blog with immense detail on the basics of the intelligible principle test and the major questions doctrine that hinges on why the SEC does not have statutory authority to promulgate the climate related disclosures onto companies.)

[69] *Strategic Plan Fiscal Years 2022-2026,* Securities and Exchange Commission, 2022, https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf

[70] *See* the Proposing Release, p. 7. (citing 15 U.S.C. §§ 77g(a)(1), 78l(b)(1))

in the public interest or for the protection of investors."[71] The SEC further noted that Congress had directed the agency to consider, in addition to the protection of investors, "whether the action will promote efficiency, competition, and capital formation."[72]

Under *National Association for the Advancement of Colored People v. Federal Power Commission*, the Supreme Court noted that it has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare rather, the words take meaning from the purposes of the regulatory legislation."[73] If this definition of 'public interest' were to be applied to the SEC's version of 'public interest', it would be argued to mean that it does not apply to climate change disclosures.

The public interest that the SEC is protecting is definitionally different from other agencies that use 'public interest' in their enabling statutes. If 'public interest' were meant to be defined as something for

[71] *Id. (citing* Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)].)

[72] *Id.*

[73] Jacqueline M. Vallette & Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges,* Harvard Law School Forum of Corporate Governance (Dec. 15, 2023 11:30am), (citing *NAACP v. FPC*, 425 U.S. 662, 669 (1976)). https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/#11

which an agency must pursue for the interest of all people, then agencies would likely deviate away from their primary purpose in overseeing the sector they are in and promulgate rules that would not be narrowly tailored to that primary purpose. For the SEC, that purpose is about data on financial returns from companies to protect investors from fraud.

After the release of the proposal, a number of Republican Senators submitted a comment letter to the SEC contending that the agency was not delegated the task of environmental regulation, nor had Congress amended the SEC's enabling statutes to promulgate climate related disclosures.[74] The Senators noted the concept of materiality as the "cornerstone" of the disclosure system established in federal securities laws, and Congress did not provide climate disclosure as something material to investors.[75] The materiality standard as defined by the Supreme Court stated that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the

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[74] *See e.g., Kevin Cramer, Comments,* SEC.GOV (April. 5, 2022) https://www.sec.gov/comments/s7-10-22/s71022-20122544-278541.pdf

[75] *Id. See also* Business and Financial Disclosure Required by Regulation S-K, 78 FR 23916, 23924 (Apr. 22, 2016).

reasonable investor as having significantly altered the 'total mix' of information available."[76]

With regards to the proposal, it can be argued that a reasonable person would want climate-related disclosure from the companies that they invest in if they think it is important for their investment decisions. Putting it another way, not all companies hinge on climate change or focus their business model on it. A reasonable investor investing in company X that focuses on institutional banking, would want material information to be disclosed to them about banking performance and other banking metrics to see if it is worth investing. On the contrary, a reasonable investor investing in company Y that focuses on mining and land consumption, would indeed, want to know about the company's climate impact.

For the SEC to make such disclosure material to *all* companies, it can most certainly amend the SEC's enabling statutes to provide the agency such authority. As of now, there is no congressional mandate

[76] *Id. See also TSC Industries, Inc. v. Northway*, 426 U.S. 438, 448-49 (1976). (In TSC Industries, the Supreme Court addressed the subject of materiality in the context of securities fraud, finding that a fact is material if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote").

on the SEC regarding the authority to drive the proposal through, thus lacking an intelligible principle.[77] Attorneys Jacqueline M. Vallette and Kathryne M. Gray of Mayer Brown, noted that the SEC itself, acknowledged that when Congress wanted to expand the subject matter of mandatory disclosures that are beyond related to financial aspects of a company, it specifically did so by statute, including disclosure topics such as executive compensation, corporate governance, and others.[78] The Greenhouse Gas Reporting Program mentioned earlier, was a congressionally mandated reporting requirement that Congress called for with specificity.[79]

Not only would a congressional mandate provide a clear picture as to whether the SEC has authority to carry out the proposal, it would also put the democratically held ideas of debate and compromise into motion. It would allow duly elected lawmakers to know what is in the best for all American interest rather than an unelected agency with unilateral authority to tell the American people what is best for them.

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[77] *Supra* note 65. *See* Climate Risk Disclosure Act of 2021, H.R. 1187, 117th Cong. § 402(8) (2021). (In June 2021, the House of Representatives passed a climate risk disclosure bill that would require companies to disclose climate-related risk exposure and risk management strategies, however the Senate did not pass the bill.)

[78] *Supra* note 65.

[79] *Supra* note 44, *Supra* note 65.

C. COUNTERARGUMENTS

The SEC furthered their argument on the constitutionality of the proposal by referring to the Financial Stability Oversight Council's report on Climate-Related Financial Risk from 2021.[80] The study indicated that climate-related risks could directly impact businesses, financial institutions, investors, and households, leading into supply chain disruptions.[81]

However, this argument can be applied to different types of circumstances that may or may not have an impact on the economy. Would this mean that companies would need to think of every single plausible impact on the economy and then disclose how they are dealing with it? This expansive use in the definitional terms of disclosure requirements would hurt companies through compliance costs, especially smaller-reporting companies as defined from the SEC.[82]

[80] *See* the Proposing Release, p. 10.

[81] *Id.*

[82] *See* https://www.sec.gov/education/smallbusiness/goingpublic/SRC. (Under the new definition, generally, a company qualifies as a "smaller reporting company" if it has public float of less than $250 million or it has less than $100 million in annual revenues and no public float or public float of less than $700 million.)

John Coates is a Professor of Law and Economics at Harvard Law School who also served as General Counsel and as Acting Director for the Division of Corporation Finance for the SEC.[83] Coates submitted a comment letter to the SEC regarding the proposal that provided principled arguments in upholding the constitutionality of the proposal.[84] Coates argues that the Securities Act and the Exchange Act are broad enough to encompass climate disclosure because of the lack of qualifiers in those statutes.[85]

For example, with respect to the Securities Act, Coates acknowledged that it included a specific limit for disclosures that are "for the protection of investors" but the statute does not provide any further qualifier to that statement and thus, it can be construed as additional disclosures that are "related" or "similar".[86]

For the Exchange Act, Coates argued that "Section 13(a)(2)'s statutory language statutory language authorizes periodic reports and

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[83] John Coates, https://hls.harvard.edu/faculty/john-c-coates/ (last visited Dec. 15, 2023).

[84] *See* John C. Coates, *Comments,* SEC.GOV, https://www.sec.gov/comments/s7-10-22/s71022-20130026-296547.pdf (Jun. 2, 2022).

[85] *Id.* at page 3.

[86] *Id.*

imposes no subject-matter restriction on those reports. It does not say, for example, "annual financial reports," but simply "annual reports."[87]

While Coates arguments are plausible, a Court would likely not follow the same line of reasoning. The expansive use of the words described in the Acts, and a Court following the legal analysis in *West Virginia,* would narrowly construe them to be specific to the goals of the SEC.[88]

For the reasons stated above, if the current Supreme Court were to take on the constitutionality of the proposal, it would most likely hold that the proposal is unconstitutional pursuant to the major questions doctrine as outlined under *West Virginia*, 6-3 with all Republican President appointed justices ruling in this manner.[89]

V. An Alternative Approach to Climate Disclosure

Stockholders of publicly traded companies are constantly trying to find ways to voice their concerns to the board of directors running the company. The second smallest state in the U.S., Delaware, is the home

[87] *Id.* at page 6. *See* also Section 13 and 15 of the 1934 Act authorize the SEC to require annual and other reports containing the same kind of information required under Section 12.

[88] Supra note 28.

[89] *Supra note 2.*

for many major U.S. publicly traded companies because of the state's corporation friendly laws. Nearly 69% of Fortune 500 companies are incorporated in Delaware and roughly 79% of all U.S. initial public offerings in fiscal year 2022 were registered in Delaware.[90] Under Section 212 of the Delaware General Corporation Law, stockholders are allowed to vote in a meeting of stockholders to vote in favor or against certain management actions which directly allows them to hold the board accountable.[91]

Rule 14a-8 of the Exchange Act allows a public company stockholder to request that a proposal be included in the company's proxy statement, and to be voted upon at a company's stockholders meeting.[92] This is commonly known as a stockholder proposal.[93]

Among stockholder proposals in 2022, climate risk disclosure was most prevalent in sectors with existing regulatory and reputational risks related to climate change, including utilities (93%), real estate

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[90] *See Delaware Division of Corporations 2022 Annual Repor*t, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf

[91] *See* 8 DE Code § 212.

[92] 17 CFR 240.14a–8 (hereinafter "Rule 14a–8")

[93] *Id.*

(77%), and energy (75%).[94] The lowest rates of climate risk disclosure from stockholder proposals were in the sectors of healthcare (15%), communication services (23%), and IT (24%).[95]

Georgeson, a popular proxy solicitation firm published a report covering an overview of all 562 stockholder proposals submitted in the 2022 annual meeting season for companies within the Russell 3000 Index.[96] Georgeson reported that 15 out of 60 environmentally focused stockholder proposals received majority support.[97] The report also explained that stockholder proposals advocating GHG emission reductions were the most common subject among environmental proposals that went to a vote.[98]

More specifically, the proposals more often requested targets or strategies that specifically account for Scope 3 emissions.[99] This type

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[94] *See* Steve Newman, *2023 Climate Disclosures in the Russell 3000 and S&P 500,* Harvard Law School Forum of Corporate Governance (2023) https://corpgov.law.harvard.edu/2023/12/05/2023-climate-disclosures-in-the-russell-3000-and-sp-500/

[95] *Id.*

[96] *See* Brigid Rosati (Georgeson), *A Look Back at the 2022 Proxy Season, (2022), https://corpgov.law.harvard.edu/2022/10/23/a-look-back-at-the-2022-proxy-season/*

[97] *Id.*

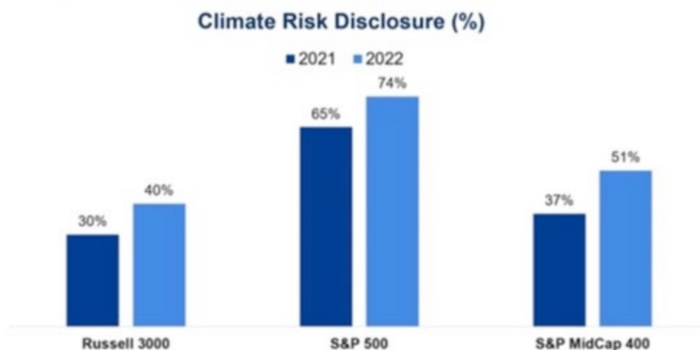
[98] *Id.*

[99] *Id.*

of emission is one of the kinds of emissions that the SEC is looking to be disclosed under their proposal.[100]

These statistics purport to show that stockholders are exercising their statutory power to voice their concerns about the environment directly to the board that oversees the company that they are invested in. The same kind of information that the SEC is wanting companies to disclose is effectively what stockholders want disclosed pursuant to these stockholder proposals.

Table 2 below illustrates an overview of the increase in climate related disclosure from 2021 to 2022.[101] It is clear that in 2021, there were companies from both the S&P 500 and Nasdaq that voluntarily



[100] *See* Proposing Release p. 208.

[101] *See* Table 2, https://corpgov.law.harvard.edu/2023/12/05/2023-climate-disclosures-in-the-russell-3000-and-sp-500/

disclosed climate related information, prior to the release of the proposal by the SEC.

The innerworkings of capital markets can efficiently and effectively promote the SEC's guidance of climate related disclosure onto companies by allowing stockholders, and the companies themselves, to decide whether to disclose that kind of information to the public. Capital markets allows regulations like the proposal to be brought to the front door of the stockholder's investment, rather than through the backdoor of regulation making by an administrative agency.

VI. Conclusion

The holding in *West Virginia* shines a light to the constitutionality of other federal regulations such as e-cigarettes, car modeling, and other FDA regulations. The case also poses a new perspective on the administrative state and how the Supreme Court's jurisprudence on the matter can potentially halt the expansive nature of administrative agencies with the use of the now codified major questions doctrine.

This paper only serves to reflect that not only can stockholders be informed about their statutory rights to voice their concerns to the boardroom, but it allows stockholders to understand the immense complexity of how a single word or phrase can be construed to mean one thing and not the other. However, interpreting words in the wrong manner can call into question on which branch has the authority to make such regulations, and that is the legislative branch.

As Justice Neil Gorsuch wrote in his concurring opinion on *West Virginia*, "It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable "ministers."[102]

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[102] *See West Virginia*, slip op. at 3 (Gorsuch, J. concurring) (quoting The Federalist No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton)).