THE CLIMATE RULE CONUNDRUM: SEC'S CLIMATE RULE FACES THE MAJOR QUESTIONS DOCTRINE

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I. INTRODUCTION

The Securities and Exchange Commission ("SEC" or "Commission") has promulgated a final rule which it calls "The Enhancement and Standardization of Climate-Related Disclosures Rule" ("Climate Rule").[2] The Climate Rule was released after an extensive two-year comment period where the SEC received over 4,500 unique comment letters and over 18,000 form letters to the proposed Climate Rule.[3] The Climate Rule's overall purpose is to standardize the materially significant climate-related disclosures made by public companies in their SEC filings.[4] Since the publication of the Final Climate Rule, the SEC has ordered a stay of the Climate

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[2] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11275, Exchange Act Release No. 34-99678, 89 Fed. Reg. 24668 (Mar. 28, 2024).
[3] *The Enhancement and Standardization of Climate-Related Disclosures: Final Rules Fact Sheet*, U.S. SECURITIES AND EXCHANGE COMM'N (Mar. 6, 2024), https://www.sec.gov/files/33-11275-fact-sheet.pdf; Securities Act Release No. 33-11275, *supra* note 2.
[4] Securities Act Release No. 33-11275, *supra* note 2.

Rule, issued on April 4, 2024.[5] The stay was issued as a result of a variety of challenges to the Climate Rule, which were filed in courts around the nation.[6] In issuing the stay, the SEC maintains that the Commission has the authority to promulgate the new Climate Rule and that it is consistent with the applicable law under which it was promulgated.[7] If the Climate Rule was allowed to go into effect, the SEC claims it would provide investors with detailed comparable information about climate-related risks faced by publicly traded companies.[8] Those companies affected by the rule would face major challenges and costs in trying to comply with the Climate Rule.[9]

Following the Great Depression, lawmakers sought to protect the U.S. economy, the capital markets, and investors.[10] As a result, the SEC was created through the adoption of the Securities Exchange Act of 1934.[11] In crafting the act, Congress specifically designed mandatory disclosure policies which forced public "companies to disclose information that investors would find pertinent to making investment decisions."[12] It fell on the SEC to decide what was to be included in the required disclosures and to enforce them.[13] As the technologies and the environment that surrounds capital markets continues to evolve, the SEC's mission requires it to

[5] In the matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 118280, Exchange Act Release No. 99908, (April 4, 2024).
[6] *Id*.
[7] *Id*.
[8] Securities Act Release No. 33-11275, *supra* note 2.
[9] Complaint, at 19, Liberty Energy, Inc. v. SEC, No. 3:24-cv-739, WL No. 24-60109 (5th Cir. March 28, 2024) (alleging that it would have to spend $4.1 billion for the market to comply, making it unduly difficult to make sense of the definitions in the rule).
[10] *Mission*, U.S. SECURITIES AND EXCHANGE COMM'N, https://www.sec.gov/about/mission (last visited Dec 2, 2024).
[11] *The Laws that Govern the Securities Industry*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry (last visited April 15, 2025)
[12] *Securities Exchange Act of 1934*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/securities_exchange_a ct_of_1934 (last visited Dec 2, 2024).
[13] Alexander Thornton & Tyler Gellasch, *The SEC Has Broad Authority to Require Climate and Other ESG Disclosures*, CAP 20 (Jun. 10, 2021), https://www.americanprogress.org/article/sec-broad-authority-require-climate-esg-disclosures/.

continually monitor the market conditions and adapt rules and regulations to effectively fulfill its duty to investors.[14]

The disclosure requirements mandated by the Securities Exchange Act of 1934 span a wide range of topics.[15] The topics are designed to help inform investment decisions, which include but are not limited to, "the company's officers and directors, the company's line of business, audited financial statements, and the management discussion and analysis sections."[16] At the time of the creation of the SEC and accompanying disclosure rules, the focus of Congress was to prevent the securities fraud that resulted in the Great Depression.[17] However, since then, the SEC has broadened the scope of its disclosure rules.

The second part of this article will briefly describe the history of the SEC and the authority that the Commission has to make rules regarding disclosures. The third part will then focus on the Climate Rule promulgated by the SEC. The fourth part will discuss the arguments raised by plaintiffs that have challenged the Climate Rule. Finally, this article will discuss the strengths and weaknesses of the argument that the Climate Rule violates the Major Questions Doctrine.

II. BACKGROUND

The SEC's authority to create disclosure requirements stems from the mission of the Commission.[18] A cornerstone of the SEC's mission is to protect the investing public.[19] One method of doing this is by requiring the accurate disclosure of information that is either desired or important to investors, specifically, as it relates to risks, creating fairness, transparency and confidence in the capital markets.[20] As such, the Commission has broad authority to promulgate rules to carry out this

[14] Securities Act Release No. 33-11275, *supra* note 2.
[15] Investor.gov, *supra* note 11.
[16] *Id*.
[17] Russell B. Stevenson Jr.*, SEC and the New Disclosure*, 62 CORNELL L. J. 50, 51, 1976 (discussing the importance of the initial creation of disclosure requirements).
[18] Thornton & Gellasch, *supra* note 13.
[19] Securities Act Release No. 33-11275, *supra* note 2.
[20] *Id*.

mission.[21] Furthermore, the 1933 Securities Act and the Securities and Exchange Act of 1934 have provisions which generally state that the SEC may require the disclosure of information that the Commission deems to be "necessary or appropriate in the public interest for the protection of investors."[22] In particular, as far back as the 1970s, courts have recognized that information about public companies' environmental impact may or may not be material to investors in making their investment decisions. [23]

In 1973, the SEC issued guidance, which described how disclosure forms issued by publicly traded companies should disclose the material effects that compliance with state and federal laws would have on the companies' capital expenditure, earnings, and competitive positions of the company.[24] This change is one of the first where the SEC's proposed rules formally attempted to expand the definition of "necessary" and "appropriate" beyond a previously narrow economically focused definition.[25] Following this action by the SEC, there was extensive litigation and public hearings.[26] In 1976, the Commission changed its prior position and withdrew the proposed changes to the rules.[27] What followed was a limited mandate for the disclosure of "material environmentally-related capital expenditures" which would have had to be disclosed in any event under the previous rules as material expenditures.[28]

[21] *Id*. at 21683.
[22] Stevenson Jr., *supra* note 17, at 58.
[23] *Id.*, at 53, 59 (discussing the language of the opinion in the case of *NRDC v. SEC* where the court stated that it is "not prepared to say that [ethical investors] are not rational investors and the information they seek is not material information within the meaning of securities laws").
[24] *Id.* at 54.
[25] *Id.* at 58 (describing the narrow definition of "necessary and appropriate" as being limited to economically relevant information that is significant enough to be considered material).
[26] *Id.* at 57.
[27] *Id*.
[28] *Id*.

In 2010, the SEC released guidance, rather than a rule,[29] on climate-related information as it was to appear in disclosures.[30] The guidance stated that it served as a reminder to publicly traded companies of their obligations under securities laws and regulations to consider the climate and its consequences when they prepared documents filed with the SEC.[31] Additionally, in the very same guidance document, the Commission stated that it would monitor the change in disclosures by publicly traded companies to determine whether "further guidance or rule making relating to climate change disclosure is necessary or appropriate in the public interest or for the protection of investors."[32] Since the 2010 guidance, the SEC has monitored a growing recognition that the risks related to climate change are affecting public companies and their finances which ultimately has an impact on investors. [33]

Twelve years later, in 2022, the SEC proposed a rule ("proposed Climate Rule"), which would have required publicly traded companies to disclose enhanced climate-related information in their registration statements and annual reports.[34] The proposed Climate Rule included information about climate-related financial risks and climate-related financial metrics in a company's financial statements.[35] In the proposed Climate Rule, the Commission stated a wide variety of stakeholders wanted this information and, in proposing the Climate Rule, the Commission stated that it had the authority to require disclosure of climate-related risks.[36] In its support of the proposed Climate Rule, the SEC cited a number of factors.[37]First, severe weather

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[29] Commission Guidance Regarding Disclosure Related to Climate Change, 17 C.F.R. § 211, 231, 241 (2010).
[30] *General Policy Statements: Legal Overview*, CONGRESSIONAL RESEARCH SERVICE, https://crsreports.congress.gov/product/pdf/R/R44468 (last updated Apr. 14, 2016), (explaining that "set regulatory policy" and are exempt from APA rule making protocols, however, legislative rules are the actual laws promulgated by agencies which follow the APA rule making procedures).
[31] Commission Guidance, *supra* note 29.
[32] *Id*. at 28.
[33] Securities Act Release No. 33-11275, *supra* note 2.
[34] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11042, Exchange Act Release No. 34-94478, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022).
[35] *Id*.
[36] *Id*.
[37] *Id*.

events damaged assets, disrupted operations and increased costs.[38] Second, evolving regulations and changes in consumer preference called for disclosure.[39] For example, the proposed Rule cited to a number of articles that expressed the evolution and rise of the electric car market, how Wall Street has made bets on carbon removal and how Blackrock was managing the NetZero transition.[40] The proposed Climate Rule attempted to standardize reporting on climate risks, by requiring the specific facts and circumstances of the disclosing company and how the company addressed or planned to address such risks.[41] The SEC stated that the Rule expanded on the regulations from the 1970s and the guidance issued on climate-related disclosures in 2010.[42] The publication of the proposed Climate Rule stated that business related climate impacts had become increasingly well-documented and the data showed that these risks had grown to pose a greater threat to individual businesses and the overall economy.[43]

Following the publication of the proposed Climate Rule, the SEC reviewed 4,500 unique comment letters and 18,000 form letters, displaying an enormous amount of public engagement, which the Commission recognized as a benefit when the crafting the final Climate Rule.[44] When the Commission published the final Climate Rule on the March 6, 2024, it stated that the Final Rule seeks to balance opposition to the Rule set forth in the comment letters, investor's need for information and the financial burden imposed on reporting companies.[45] The release of the final Climate Rule, created by the SEC, states that it is clear from the responses to the proposed Climate Rule that investors seek to understand and evaluate how public companies assess, measure and respond to climate risks. [46] In summary, the final Climate Rule requires public companies to disclose information about climate-related risks and

[38] *Id*.
[39] *Id*.
[40] *Id.*
[41] *Id.*
[42] *Id*.
[43] *Id*.
[44] Securities Act Release No. 33-11275, *supra* note 2.
[45] *Id.*
[46] *Id.*

impacts that have been identified internally.[47] The identified risks must have a material effect on the company's strategies or activities.[48] Furthermore, the company must also report on processes to mitigate impacts of identified climate risks, any transition plans the company has in place, oversight by the board of directors as it relates to climate risk and climate-related targets or goals that may have an effect on the business of the company.[49] The Climate Rule claims that many companies already collect and distribute the above information and, as such, it should not pose too substantial of a burden on the affected companies. [50]

The Climate Rule was, almost immediately, met with petitions seeking review in courts throughout the nation.[51] Following these challenges, the Commission determined that it would use its discretion in staying the Climate Rule pending judicial review.[52] The Commission noted that despite the decision to stay the Climate Rule, it is of utmost conviction that the Rule will survive the various challenges or petitions for review.[53] Opponents of the Climate Rule, on the other hand, assert a variety of arguments against the Rule; the three main arguments asserted are: that the Climate Rule violates the Major Questions Doctrine, that the Rule is arbitrary and capricious, and that the Rule violates the First Amendment.[54]

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

In the preamble, the Climate Rule cites Section 7(a)(1) of the Securities Act of 1933, where Congress authorizes the Commission to require a public registration statement that includes a wide variety of financial information—meaning any

[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act of 1933, Order Issuing Stay Release No. 11280, Securities and Exchange Act of 1934 Release No. 99908 (Apr. 4, 2024).
[52] *Id*.
[53] *Id*.
[54] Opening Brief for Petitioner at 11, Liberty Energy, Inc. v. SEC, No. 24-1624 (8th Cir. June 21, 2024).

information the Commission may deem necessary or appropriate for the public interest or protection of investors.[55] Additionally, the Commission cites Section 12(b) and (g) of the Exchange Act, which allows the Commission to require companies that meet certain criteria to disclose any information the Commission deems necessary and appropriate.[56] In citing the above sections, the Commission asserts in the Climate Rule that Congress not only authorizes such a rule to be promulgated but also allows the Commission to update and build on its framework of disclosure information for the protection of investors.[57]

The SEC states that the Climate Rule is rooted in the understanding that natural disasters or severe weather events and impacts can have serious effects on the finances, operations, and overall position of public companies.[58] It was also constructed with the intention of creating standardized disclosure requirements for public companies within the U.S.[59] The Commission's stated goal of the Climate Rule is to provide investors with consistent, comparable, and reliable information to aid in making well-informed investment decisions.[60] The SEC noted that "the Commission has amended its disclosure requirements many times over the last 90 years based on the determination that the required information would be important to investment and voting decisions."[61] Additionally, as described above, the Commission has required disclosures about matters which relate to the environment for the last 50 years.[62] This new Climate Rule was presented as a continuation of the Commission's efforts to respond to investors needs for standardized information.[63] Specifically in this case the SEC claims that, the Rule furthers the Commission's efforts in

[55] Securities Act Release No. 33-11275, *supra* note 2.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Final Rules Fact Sheet, *supra* note 3.
[62] *Id.*
[63] *Id.*

recognizing the financial impacts of climate-related risk and how companies are managing those risks. [64]

In the discussion of the Climate Rule's purpose and overview, the Commission noted that the framework of the disclosures aims to make compliance with the Rule easy for public companies. The proposed Climate Rule was modeled after the Task Force on Climate-related Financial Disclosure ("TCFD") framework, which provided four themes that companies would need to report on, including governance, strategy, risk and management and metrics targets.[65] This conscious decision was made by the Commission as many of the affected companies at the time were familiar with the TCFD framework and were voluntarily making such disclosures with the TCFD.[66]

The content of the Climate Rule requires reporting on an expansive set of climate-related issues.[67] The new disclosures can be separated into disclosures that appear as footnotes to the financial statements and disclosures that are made outside of the financial statements.[68] Disclosures in the financial statements display the financial impact of climate risks and strategies companies employ to achieve climate-related goals. Financial statement disclosures also include the effects of severe weather events or other natural conditions, which must be noted regardless of if they are caused by climate change.[69] It is also noteworthy that the Rules do not define what constitutes a severe weather event but rather provides a non-exhaustive list of what *may* be deemed a severe weather event.[70] As a result of the non-exhaustive list,

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[64] *Id*.
[65] *Id.* (noting how the TCFD is an industry-led task force charged with promoting better-informed investment, credit, and insurance underwriting decisions, the disclosure framework it established is designed to elicit information that provides a clearer understanding of climate-related risks to companies, helping investors make better decisions).
[66] *Id*.
[67] Securities Act Release No. 33-11275, *supra* note 2.
[68] Deloitte, *Executive Summary of the SEC's Landmark Climate Disclosure Rule*, HEADS UP, Vol. 31 Issue 4 (Mar. 15, 2024) (last updated Apr. 8, 2024), https://dart.deloitte.com/USDART/home/publications/deloitte/heads-up/2024/sec-climate-disclosure-rule-ghg-emissions-esg-financial-reporting.
[69] Deloitte, *supra* note 68, at 2.
[70] *Id*. at 3 (emphasis added).

companies have to create an accounting policy to determine what qualifies as such an event.[71]

Additionally, disclosures regarding Carbon Offsets and Renewable Energy Credits or Certificates ("RECs") must be included as footnotes to the financial statements of companies affected by the Rule.[72] Companies are required to provide disclosures as to RECs when the company uses RECs as a material component of achieving the company's disclosed climate targets or goals.[73]

Separately, there are additional disclosure requirements that are made outside of the financial statements.[74] The non-financial statement disclosures are said to provide greater insight for investors as to how the board and management oversee how the company approaches climate-related risks.[75] These disclosures are related to governance, strategies, transition plans, and climate risk management in addition to many others.[76] As an example, a company must disclose information about how the board manages climate-related risks through committees, processes, and any formal programs.[77] Many of these disclosures are situation dependent and can vary widely depending on the nature of the risk, whether it is considered a material risk and if the company has strategies, controls, or board committees monitoring those risks.[78] Domestic and foreign registrants, except asset-backed issuers, are required to provide the disclosures prescribed by the Climate Rule.[79]

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[71] *Id*.
[72] Deloitte, *supra* note 68, at 6. See final rule (a carbon Offset is defined in the rule as representing an emissions reduction, removal or avoidance of greenhouse gasses ("GHG") in a manner calculated and traced for the purpose of offsetting an entities GHS emission.) See final rule defining a REC (Renewable energy credit or certificate or REC means a credit or certificate representing each megawatt-hour (1 MWh or 1,000 kilowatt-hours) of renewable electricity generated and delivered to a power grid).
[73] *Id*.
[74] Deloitte, *supra* note 68, at 1.
[75] *Id*. at 9.
[76] Deloitte, *supra* note 68, at 9-12.
[77] *Id*. at 9-10.
[78] Deloitte, *supra* note 68, at 10.
[79] Deloitte, *supra* note 68, at 20.

Finally, the Climate Rule adds a different disclosure metric that is required in Scope 1 and Scope 2 GHG emissions disclosure.[80] As stated, "Scope 1 emissions are direct GHG emissions that are owned or controlled by a registrant" and "Scope 2 emissions are indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat or cooling that is consumed by operations owned or controlled by a registrant."[81] Simply put, Scope 1 GHG emissions are caused directly from activities of a company and Scope 2 emissions are caused by the activities from products and services used by a company.[82] Many larger filing companies have to disclose this information, and such information must be broken down into the different types of gasses.[83] There are, however, a number of companies exempt from the Scope 1 and 2 GHG emissions disclosure requirements.[84] It was recommended by the Commission's Small Business Capital Formation that the emerging growth companies ("EGRs") and smaller reporting companies ("SRCs") should be exempted from the Final Rules in certain respects due to the financial burden that compliance would have on these companies.[85]

IV. CHALLENGES TO THE RULE

As soon as the Rule was promulgated, it was challenged multiples times.[86] The Fifth Circuit issued an administrative stay of the Final Climate Rule as a result of a petition filed by Liberty Energy Inc. and Nomad Proppant Services LLC ("Liberty").[87] Liberty is an oil field services firm that offers completion services and technology to onshore and natural gas exploration and production companies and Nomad Proppant Services LLC is a service based frac sand company.[88] In its complaint, Liberty stated

[80] Deloitte, *supra* note 68, at 7.
[81] Securities Act Release No. 33-11275, *supra* note 2.
[82] *National Grid, Exergy Explained,* NATIONAL GRID, https://www.nationalgrid.com/stories/energy-explained/what-are-scope-1-2-3-carbon-emissions (last updated July 1, 2024).
[83] Deloitte, *supra* note 68, at 7.
[84] Id. at 20.
[85] Securities Act Release No. 33-11275, *supra* note 2.
[86] Exchange Act Release No. 99908, *supra* note 51.
[87] *Id*.
[88] Complaint, *supra* note 9, at 3.

that the new disclosure requirements are "wildly speculative" and require that companies convert qualitative data, transition risks and severe weather events, into accurate financial accounting for investors.[89] Later in the complaint Liberty listed three main arguments: 1) that the Rule violates the Major Questions Doctrine; 2) that the Rule is arbitrary and capricious; and 3) that the Rule violates the First Amendment to the U.S. Constitution.[90]

State Attorney Generals from a number of states joined the challenge, including Arkansas, Idaho, Iowa, Missouri, Montana, Nebraska, North Dakota, South Dakota, and Utah.[91] The states were later joined by Virginia, Alabama, Alaska, Georgia, Indiana, New Hampshire, Oklahoma, South Caroline, West Virginia, and Wyoming.[92] As a result, the Commission filed a Notice of Multidistrict Petitions for Review with the Judicial Panel on Multidistrict litigation, and the panel later issued an order consolidating the petitions in the U.S. Court of Appeals for the Eighth Circuit.[93] While judicial review is pending, the Commission stayed the Final Climate Rule to resolve any disputes before reevaluating effective dates and making a plan to roll it out following the conclusion of the litigation. [94]

a. The Major Questions Doctrine

On June 21, 2024, Liberty filed its opening brief in the case before the Eighth Circuit.[95] Liberty's position was that the Rule failed the Major Questions Doctrine because the SEC did not have clear authority from Congress to regulate environmental matters.[96] In explaining its Major Questions Doctrine argument, Liberty stated that the SEC relied on an old statute to assert its highly consequential power to regulate environmental issues.[97] Liberty then added to its Major Questions

[89] *Id*. at 1.
[90] *Id*. at 5, 15, 17.
[91] State of Iowa, et al v. SEC, No. 24-1522 (8th Cir. Mar. 12, 2024).
[92] *Id*.
[93] *Id*.
[94] Exchange Act Release No. 99908, *supra* note 51.
[95] Opening Brief, *supra* note 54, at 1.
[96] *Id*. at 11.
[97] *Id*. at 13.

Doctrine point that if Congress wanted the SEC to regulate such matters Congress would have made as much clear. [98] The Major Questions Doctrine is a rule established by the United States Supreme Court that requires executive agencies to have clear and express authorization to act when promulgating rules on matters of national significance.[99] In other words, agencies may not rely, in such matters, on broad or general authority.[100]Liberty further stated that the Major Questions Doctrine may render the Rule invalid because the Final Climate Rule is an extraordinary exercise of regulatory power over an economically and politically significant policy issue.[101] In response, the SEC filed a brief on August 6, 2024, in which it maintained the same position as stated in the Rule: Congress granted the Commission the power to request not only the enumerated information but also such information that the Commission determines to be "necessary and appropriate".[102]

Liberty acknowledged the argument that Congress has in the past given the Commission the express authority to require disclosures for information deemed non-traditional like executive pay, conflicts, minerals, and extraction of oil and natural gas. [103] However, Liberty argued that Congress has not done anything similar for climate disclosures, but rather, for example, has provided the Environmental Protection Agency with clear and detailed disclosure powers in the area of GHG.[104] The SEC's position on this, much like the other issue, is that the information required is described in the statutory language as necessary and appropriate.[105] That is, the SEC has the authority to promulgate rules that are necessary and appropriate to protect investors and as such this Rule is in line with the statutory authority;

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[98] *Id*.
[99] *Major Questions Doctrine Congressional Research Service Congressional Research Service*, THE MAJOR QUESTIONS DOCTRINE, (last updated Nov. 14, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12077.
[100] *Id*.
[101] *Id*. at 13.
[102] Reply Brief for Respondent at 2, Liberty Energy, Inc. v. SEC, No. 24-1624 (8th Cir. Aug. 6, 2024) (citing U.S.C. 77g9a) (1), 78(b)(1)).
[103] Opening Brief, *supra* note 54, at 27.
[104] *Id*.
[105] Reply Brief, *supra* note 101, at 27.

therefore, it is in no way a violation of the Major Questions Doctrine.[106] The SEC maintained in the Final Climate Rule Release and in their brief that the desired climate-related information is required for the protection of investors and the public interest as is authorized by the statutes which grant the SEC this power. [107]

b. Arbitrary and Capricious

Liberty's second argument was that the Rule is arbitrary and capricious.[108] A court may set aside an Agency rule in the event it finds the rule to be arbitrary and capricious.[109] For a rule to be considered arbitrary and capricious the court must find that the rule is willfully unreasonable as it does not take into account the facts and circumstances under which the Rule is made.[110] Liberty asserted five reasons as to why it believes that the Rule is arbitrary and capricious; the first is that "the SEC has failed to explain its change in position" from not having the authority to impose climate disclosures to now claiming that same authority.[111] Second, the SEC relied on what Liberty called "at best mixed and new evidence" and failed to recognize the impacts that the Rule will have on efficiency, competition and capital formation as is required by the Exchange Act.[112] Third, it asserted that "the Rule imposes an extraordinary cost with no real benefits."[113] Liberty questioned the evidence that the Commission used to support the Rule, and the evidence used to show that the investors are desperate for the required disclosure information.[114] Fourth, it asserted that the Final Rule dramatically changed from the Proposed Rule.[115] Finally, it asserted that the Rule is riddled with inconsistencies which Liberty explains are

[106] *Id*. at 36.
[107] *Id*. at 27.
[108] Opening Brief, *supra* note 54, at 39.
[109] *Capricious*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/capricious (Last visited Dec. 2, 2024).
[110] *Id*.
[111] Opening Brief, *supra* note 54, at 39.
[112] *Id*. at 41.
[113] *Id*. at 44.
[114] *Id*.
[115] *Id*. at 46.

present in third party data collection requirements, auditing assurances and costs of complying with the rule.[116]

In its response brief the SEC argued that it did consider the effects the Final Climate Rule would have on efficiency, competition and capital formation.[117] The Commission claimed that the Rule put investors in a position with superior information to more efficiently allocate capital and make investment decisions.[118] Additionally, the SEC stated that the Rule puts companies on a more even playing field which, in turn, results in greater competition and efficiency.[119] Finally, the Commission estimated the costs of compliance that firms may face in adhering to the Rule, however, its position was that the Commission is not required to base every action upon empirical data.[120] However, the Commission may, in its opinion, conduct a general analysis based in informed conjecture.[121]

c. The First Amendment

Liberty's third argument was that the SEC cannot force public companies to make public disclosures and discussion on topics that may be considered controversial political issues.[122] It further stated the law required the company to describe actual and potential material impacts of climate-related risks which is speech that the company would prefer not to engage in.[123] Liberty cited to a number of cases that suggest any laws that compel speech are subject to strict scrutiny.[124]

In opposition, the SEC reasoned that the United States Supreme Court has long held that laws requiring the disclosure of factual and uncontroversial information are permissible as long as the law is reasonably related to a government interest that is

[116] *Id*. at 49.
[117] Reply Brief, *supra* note 101, at 81.
[118] *Id*. at 82.
[119] *Id*. at 81.
[120] *Id*. at 83.
[121] *Id*.
[122] Opening Brief, *supra* note 54, at 51.
[123] *Id*. at 52.
[124] *Id*. at 51-52; Clyde Reed, et al., Petitioners v. Town of Gilbert, Arizona, et al., 576 U.S. 155 (2015) (explaining that strict scrutiny "requires the government to prove that they restriction furthers a compelling interest and is narrowly tailored to achieve that interest").

not unjustified or unduly burdensome.[125] The SEC argued that disclosures are to inform investors about the product or services offered by regulated parties and the terms under which securities in such parties will be available.[126] As a result, the SEC took the position that information as it relates to securities is subject only to limited scrutiny.[127]

V. MAJOR QUESTIONS DOCTRINE ANALYSIS

The Major Questions Doctrine has emerged in recent years as one way in which the Supreme Court has curbed the ability of administrative agencies from expanding their power into areas of political and economic significance without express permission from Congress.[128] The Major Questions Doctrine requires an agency that "seeks to decide an issue of major national significance, its actions must be supported by clear congressional authorization.[129] The Major Questions Doctrine, as the Supreme Court is currently applying it, consists of a two-step analysis: 1) whether the agency is attempting to solve a Major Question; and 2) whether Congress clearly authorized the agency's action.[130]

Ultimately, Liberty's argument in this case was that the Climate Rule was: 1) of vast economic and political significance, meaning Congress would not have intended the SEC to exercise this power without clear authority; 2) the SEC finds the authority to promulgate the Rule in an old statute that does not give them clear authority to create rules on the subject of climate change; and 3) that the Rule is beyond the SEC's

[125] Reply Brief, *supra* note 101, at 110.
[126] *Id*. at 98.
[127] *Id*. at 99 (citing SEC v. Wall St. Publ'g Inst., Inc., 851 F. 2d 365, 373 (D.C. Cir 1988) (stating that "regulation of the exchange of information regarding securities is subject only to limited First Amendment scrutiny," as the court goes on to describe that the government's power to regulate in this space is as broad as the general rubric as commercial speech, further noting that the court must determine whether the asserted government interest)).
[128] Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84:2 OHIO STATE L.J. 194 (2023).
[129] *Major Questions Doctrine*, *supra* note 99.
[130] Capozzi III, *supra* note 127, at 224.

area of expertise and that there is an agency in a better position to create rules on the topic.[131]

In arguing the political significance of climate change, Liberty discussed how Biden Administration pushed climate change policy initiatives in Congress that would require climate-related disclosures, which ultimately failed.[132] This failure is what, in Liberty's view, prompted the SEC to create the Climate Rule.[133] Second, Liberty argued that the mere cost of compliance with the Climate Rule would have significant impacts which would be passed onto participants in the marketplace. [134]

Next, Liberty argued that the Securities Act was passed in 1933 and, for many years, the SEC has agreed that it may not require blanket climate disclosures.[135] In support of this, Liberty provided a quote from the SEC which states that, as late as 2016, the Commission took the position that "disclosure relating to environmental and other matters of social concern should not be required of all registrant unless appropriate to further a specific congressional mandate."[136] Liberty reasoned that this is proof that the disclosures should not be required unless they would be appropriate in response to clear authority from Congress to regulate on such matters of social importance. [137]

Third, Liberty argued that the Climate Rule ventures beyond the Commission's expertise.[138] Liberty stated that the EPA is the agency that has the most expertise over climate and emissions related issues.[139] It argued that Congress has already delegated the task of collecting emissions reports to the EPA, which includes the mandatory disclosure of some climate-related information for select regulated entities.[140] Thus, Liberty concluded that the climate-related disclosures are beyond

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[131] Opening Brief, *supra* note 54, at 15-39.
[132] *Id*. at 16.
[133] *Id*. at 17-18.
[134] *Id*. at 18.
[135] *Id*. at 20.
[136] Opening Brief, *supra* note 54, at 20.
[137] *Id*. at 26-27.
[138] *Id*. at 25.
[139] *Id*.
[140] *Id*.

the SEC's sphere of expertise and should be left to the EPA, who is best positioned to create such rules.[141]

The SEC's argument against the Major Questions Doctrine was less robust. The SEC argued that the Climate Rule was created to inform investors of the business, operations and financial performance of a company.[142] This information would help investors understand the value and risks that would result from investing in the company.[143] The SEC stated that the Rule did not serve the purpose of influencing companies' behavior but rather to advance securities laws.[144] The SEC argued next that the Commission has, in the past, required disclosure of information that is not required to be material under all facts and circumstances. [145] Therefore, there is no distinct requirement that the required disclosure information be material, but rather, the Commission can make a reasoned determination whether the information is important to analyzing the investment risk and necessary and appropriate to protect the public interest.[146]

The outcome will most likely hinge on the way the court considers the impact on the economy or marketplace, the nature of Climate Change having become a political issue, and the lack of clear and specific authorization from Congress for the Commission to promulgate this Rule.[147] A handful of recent decisions by the Court provide guidance as to how the Major Questions Doctrine might limit government agency power, by requiring explicit direction from congress before agencies may tackle questions of economic and political significance.[148]

The first of the recent cases addressing the Major Questions Doctrine was *Alabama Association of Realtors v. HHS*.[149] In this case, the Centers for Disease Control and Prevention (CDC) sought to impose a nationwide eviction moratorium

[141] *Id*. at 26.
[142] Reply Brief, *supra* note 101, at 1.
[143] *Id*.
[144] *Id*. at 19.
[145] *Id*. at 34-35.
[146] *Id*. at 52-53.
[147] Capozzi III, *supra* note 127, at 229.
[148] *Id*. at 225.
[149] *Id*. at 216.

and relied on a statute that gave it the authority "to make and enforce such regulations as … are necessary to prevent the introduction and transmission, or spread of curable diseases," in addition to "provide for such inspection, fumigation, disinfection, sanitation, pest examination, destruction of animals … and other measures, as [its] judgement may be necessary." [150] The Court stated that the nationwide eviction moratorium would cost an estimated $50 Billion and effect between six and seven million tenants and, as such, would require Congress to clearly authorize the CDC to take such measures that are of such "economic and political significance."[151]

The Major Questions Doctrine was at issue again in *National Federation of Independent Business v. OSHA*, where the Occupational Safety and Health Administration ("OSHA") tried to mandate COVID-19 vaccines or testing mandates on workplaces.[152] Here, OSHA relied on a statute which express the authority OSHA to impose "emergency" rules where "employees are exposed to substances or agents determine to be toxic or physically harmful' … and … the emergency standard is necessary to protect employees from such danger."[153] The Court did not agree with OSHA's reading of the statute and relied on the clear statement rule as they did above.[154] Secondly, the Court read the statute to mean that OSHA could only take precautions to address dangers in the workplace and held that COVID-19 was no more of a risk at the workplace than in other settings. [155]

Finally, the holding in *West Virginia v. EPA* helps develop the current understanding of the Major Questions Doctrine. The cases arose from the EPA's promulgation of the Clean Power Act ("CPP").[156] The CPP required coal and natural gas power plants to adhere to emissions reduction rules or subsidize clean energy

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[150] *Id.*
[151] Capozzi III, *supra* note 127, at 216-17; *see also* Ala. Ass'n of Realtors, et al. v. Dept. of Health and Human Services, et al., 594, U.S. 759, 764 (2021).
[152] *Id.* at 217; *see also* Nat. Federation of Independent Business, et al. v. Applicants v. OSHA, et al. 595 U.S. 112 (2022).
[153] Capozzi III, *supra* note 127, at 217; *see also* 595 U.S. at 113.
[154] Capozzi III, *supra* note 127, at 217; *see also* 595 U.S. at 114.
[155] Capozzi III, supra note 127, at 217; see also 595 U.S. at 119.
[156] Capozzi III, *supra* note 127, at 217; West Virginia v. E.P.A., 597 U.S. 697 (2022).

generation plants as a counterbalance to their emissions output.[157] The EPA relied on a statute which allowed it "to determine the "best system of emission reduction" for power plants."[158] The Court held that the Major Questions Doctrine had been applied in "all corners of the administrative state" and that an agency needs to argue beyond authority to implement a major policy the agency must point to clear authority from congress to implement a major policy.[159]

Applying the Major Questions Doctrine guidance gleaned from the aforementioned cases to the Final Climate Rule, it is likely that the Court will find that the Rule will not pass the Major Questions Doctrine's two step inquiry. The SEC aims to create a major economic and politically significant rule that will impact all publicly traded companies and collaterally companies that interact with publicly traded companies. To do this, the SEC relied on a statute that allocates the Commission the authority to act where "necessary and appropriate to protect investors."[160] Based on the three cases discussed above, the likely outcome is that the Court will assess the impact and scale of the Final Climate Rule which will be enough to trigger the Major Questions Doctrine. While the precise definition of what constitutes a major question remains unclear, as the Court has yet to develop a clear test, the charged political and public debate[161] over the topic of climate change may speak for itself.[162] Secondly, the Court will analyze the Securities Act of 1933 and the Exchange Act of 1934, which grants the Commission the power to enact such legislation.[163] In its analysis, the Court will likely find that the statute lacks the clear and direct authorization from Congress to enact a Rule that would grab such broad

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[157] *Id.*
[158] *Id*. at 218-19.
[159] Capozzi III, *supra* note 127, at 219.
[160] Reply Brief, *supra* note 101, at 1.
[161] *Id.* at 104-05 (arguing that the required disclosures are uncontroversial and that they do not require the company to opine on the scientific basis of climate change); *see* Opening Brief, *supra* note 54, at 20 (arguing that "the Biden Administration itself claimed that climate issues-including disclosures- are among the most politically significant of our time"); see Capozzi III, *supra* note 127, at 192 (pointing out that climate change has been an issue of political significance for two decades and during that time congress has debated legislation empowering the EPA to take on the challenges presented by it).
[162] Capozzi III, *supra* note 127, at 226.
[163] Securities Act Release No. 33-11275, *supra* note 2.

power for the Commission.[164] The likely result is that the Court holds the Final Climate Rule goes beyond the Commission's authority and may not require publicly traded companies to make climate-related disclosures under the Rule.

The question then presented is how the agency should move forward in its attempt to provide investors with the information that they seek to make the best and most informed investment decisions. It is worth noting that the Commission's 2010 guidance document to publicly traded companies previously required information related to climate risks which may be sufficient.[165] An alternative approach by the SEC could be to be to limit the disclosure to narrow financial impacts from severe weather events that have already taken place and strategies or expenditure that the company has engaged in relating to severe weather events, which are more precisely measurable. It may also be that it is more appropriate for an environmental agency to create rules in the sphere of climate change rather than the SEC.

Based on the Court's prior decisions regarding the Major Questions Doctrine and the likely outcome regarding the final Climate Rule, government agencies as a whole will be limited going forward without any clear authorization from Congress. The Court has made it clear that in order for agencies to engage in broader rule making on matters of national significance, there has to be action from Congress providing explicit authorization for the agency to act. The Major Questions Doctrine, while not clear in defining what constitutes a Major Question, is clear in that it requires Congress to work together to identify where agency rules impact issues of economic and social importance and provide clear and pointed authorization that empowers agencies to address the issues that face society. Looking forward, executive agencies must create rules within their mandates to allow for constructive engagement and active rulemaking—especially in spheres that are determined to be of economic and social importance.

[164] Capozzi III, *supra* note 127, at 193.
[165] Commission Guidance, *supra* note 29.