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

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF IOWA, *et al.*,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT AND DENIAL OF THE PETITIONS FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Administrative Materials

INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer advocacy organization with members in all 50 states, appears on behalf of its members before Congress, administrative agencies, and the courts. Public Citizen has long advocated for regulatory requirements that companies disclose to consumers and investors information that they need to protect their interests as participants in the marketplaces for goods, services, and investments, and Public Citizen submitted comments in the rulemaking at issue. More generally, much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation either challenging or defending agency action. Significant questions of administrative law, such as the scope of the newly articulated "major questions doctrine," are thus central concerns of Public Citizen, and Public Citizen has often filed briefs in cases raising such issues. *See*, *e.g.*, *West Virginia v. EPA*, 597 U.S. 697 (2022).

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[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

This case implicates Public Citizen's interests in two significant respects. First, in the short time since the Supreme Court's decision in *West Virginia v. EPA*, invocation of the major questions doctrine has become a standard feature of challenges to regulatory action, notwithstanding the Supreme Court's insistence that that doctrine applies only in "extraordinary cases" and does not affect "the appropriate analysis" of questions of regulatory authority "[i]n the ordinary case." *Id.* at 721. Petitioners' argument that the major questions doctrine applies to a Securities and Exchange Commission (SEC) regulation requiring issuers of publicly traded securities to disclose material risks that climate change poses to their financial prospects is a case in point. Requiring disclosure of information material to investors falls within the core of the authority delegated to the SEC by Congress, and arguments that the SEC has exercised that delegated authority improperly by arbitrarily or unlawfully designating particular information as material do not suggest the kind of "'radical or fundamental change' to a statutory scheme" that implicates the major questions doctrine. *Id.* at 723. Public Citizen believes that a brief addressing these points will be helpful to the Court as it determines the bounds of the major questions doctrine.

Second, in recent years, business entities have increasingly invoked First Amendment principles applicable to fully protected speech in attempts to thwart reasonable regulatory measures, such as the disclosure requirements at issue in this case. Although the Supreme Court has vigorously applied the First Amendment to shield the fully protected speech of corporations as well as individuals, the Court has continued to adhere to its recognition in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), that the First Amendment concerns posed by commercial disclosure requirements are limited and that such requirements are permissible if they are reasonably related to a government interest and are not unduly burdensome. *Id.* at 651. As a result, requirements that corporations disclose information material to investors have never been subject to First Amendment condemnation. Petitioners' First Amendment challenge in this case would significantly impair investor protections without advancing significant First Amendment values. Again, Public Citizen respectfully submits that its discussion of these First Amendment issues may be of assistance to this Court in its consideration of this case.

SUMMARY OF ARGUMENT

I. Not all challenges to important regulations implicate the major questions doctrine. Indeed, not many do. The doctrine is reserved for extraordinary cases, as the Supreme Court has specified. It applies when an agency purports to exercise authority to regulate highly significant matters, and when historical context and other factors indicate it is unreasonable to think Congress would have intended to place those matters within the agency's purview. Such transformative expansions of agency authority, the doctrine provides, require clear congressional authorization, not a merely plausible basis in statutory text.

Petitioners' challenges to the SEC's climate-risk disclosure regulations do not present such an extraordinary case. In the rulemaking at issue, the SEC asserted authority to regulate disclosure by publicly traded companies for the protection of investors. The rule requires disclosure only of information determined to be material to investors, and the SEC has repeatedly emphasized that traditional notions of materiality govern whether information must be disclosed. The assertion of authority to require publicly traded companies to disclose information material to investors does not reflect the kind of transformational

expansion of agency authority or radical change to the statutory scheme that would call the major questions doctrine into play. Rather, as Petitioners repeatedly acknowledge, the agency has authority to require disclosure of information material to reasonable investors, and material information about climate risks is already subject to disclosure requirements. Because the agency based its rule on its undisputed authority to regulate disclosures material to investors, the Court need not consider whether the major questions doctrine would bar the SEC from asserting authority to require disclosure for other reasons. The question whether the SEC lawfully could have done something that it did not do is not before the Court.

II. Petitioners' claim that the regulations compel fully protected speech in violation of the First Amendment is also baseless. The compelled speech doctrine has never been held to prohibit requirements that issuers of publicly traded securities make public reports of information material to investors. Notably, Petitioners themselves do not assert that longstanding requirements of such disclosures under the federal securities laws are unconstitutional or subject to strict scrutiny. Rather, they argue that the SEC is wrong to regard climate-risk

information as material and that requiring them to speak about *non-material* matters would raise a First Amendment issue. But here the SEC defends its rule on the ground that it requires companies to disclose information that is material to investors. This case, therefore, does not require the Court to face the hypothetical question whether the First Amendment would permit the government to require disclosure of information not material to a legitimate government interest. The only First Amendment question presented here is whether the First Amendment forbids a requirement that corporations disclose information material to investors—which it decidedly does not.

ARGUMENT

I. This case does not implicate the major questions doctrine.

Petitioners in this case assert that in determining the lawfulness of the SEC's climate-risk disclosure regulations, this Court must apply the major questions doctrine as articulated in the Supreme Court's recent decisions in *West Virginia*, 597 U.S. 697, and *Biden v. Nebraska*, 600 U.S. 477 (2023). That claim reflects a fundamental misunderstanding of the major questions doctrine, which applies only in "extraordinary cases," *West Virginia*, 597 U.S. at 723, when agencies assert powers that

Congress cannot reasonably be thought to have given them, *see id.* at 724. Here, the SEC asserted power that even Petitioners concede it possesses: authority to require publicly traded corporations to disclose information material to investors. Petitioners may challenge the SEC's exercise of that authority as arbitrary and capricious or contrary to law, *see* 5 U.S.C. § 706(2), but the foundational issue of whether the agency possesses the authority it claims does not implicate the major questions doctrine.

A. For most agency actions, such as the SEC regulations at issue, the APA provides the rule of decision for challenges to final agency action: A court shall "hold unlawful and set aside agency action" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or taken "without observance of procedure required by law." 5 U.S.C. § 706(2). In considering whether an agency's actions are arbitrary and capricious, courts must respect the reasonable choices made by the agency. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In addressing legal questions concerning the scope of an agency's statutory authority and the

conformity of its actions with statutory requirements, courts apply ordinary principles of statutory construction requiring that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 597 U.S. at 721 (citation omitted).

"In the ordinary case," the fact that a legal question arises in the context of a challenge to the existence or scope of an agency's authority "has no great effect on the appropriate analysis." *Id.* A court addresses statutory questions concerning agency authority as it does others, seeking the best reading of the statute in light of its text and context, *see id.*; *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024), and deferring to exercises of agency discretion "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency." *Loper Bright*, 144 S. Ct. at 2263.

"Like a dictionary, or expressio unius, or the extraterritoriality canon, the major questions doctrine is a tool of statutory interpretation." *Save Jobs USA v. Dep't of Homeland Sec.*, __ F.4th __, 2024 WL 3627942, at *3 (D.C. Cir. Aug. 2, 2024). "[T]he function of the major questions doctrine is simple—to help courts figure out what a statute means." *Id.*

Announced by the Supreme Court as an exception to the since-overruled doctrine of *Chevron* deference, *see Loper Bright*, 144 S. Ct. at 2269, the major questions doctrine comes into play only in "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." *West Virginia*, 597 U.S. at 721 (citation omitted). Such extraordinary cases have been defined by circumstances in which "'common sense as to the manner in which Congress [would have been] likely to delegate' such power to the agency at issue … made it very unlikely that Congress had actually done so." *Id.* at 722–23 (brackets in original; citation omitted). Those circumstances include agency actions that purport to "discover in a long-extant statute an unheralded power" to effect a "transformative expansion" of regulatory authority, *id.* at 724 (citation omitted); actions that rest on the premise that "[e]xtraordinary grants of regulatory authority" have been conferred by "modest," "vague," or "subtle" statutory language, *id.* at 723 (citation omitted); and actions asserting that "oblique or elliptical language" has "empower[ed] an

agency to make a 'radical or fundamental change' to a statutory scheme," *id*. (citation omitted).

In such "extraordinary cases," where "agencies assert[] highly consequential power beyond what Congress could reasonably be understood to have granted," the major questions doctrine provides that the agency's interpretation of ambiguous statutory text receives no special deference. *Id*. at 723, 724. Instead, "something more than a merely plausible textual [statutory] basis for the agency action is necessary." *Id*. at 723.[2] The Supreme Court described the "something more" as "clear congressional authorization," *id*., but not the "unequivocal declaration" needed in situations in which a substantive clear-statement rule applies, *Nebraska*, 600 U.S. at 511 (Barrett, J., concurring).

As Justice Barrett has explained, none of the decisions that the Supreme Court has characterized as embodying the major questions doctrine has departed from what the Court's majority has concluded is

[2] After *Loper Bright*, which holds that the agency's action must fall within its authority under the "best reading" of the statute, 144 S. Ct. at 2266, the continuing role of the major questions doctrine is not entirely clear.

"the best interpretation of the text." *Id.* Instead, the Court has treated the circumstances that mark a case as "extraordinary" enough to trigger the doctrine as contextual indications that the best reading of the statutory text is that the agency lacks the transformative authority claimed, even if there is some ambiguity in the statute. *See id.* at 511–16. When the best reading of the statute, in context, is that the agency *has* the authority claimed, the major questions doctrine provides no "permission" for courts "to choose an inferior-but-tenable alternative that curbs the agency's authority" simply because Congress has not satisfied a heightened-specificity standard in delegating authority. *Id.* at 516. Although the majority opinion in *Biden v. Nebraska*, which Justice Barrett joined, did not expressly endorse her view, it cited her concurring opinion favorably. *See id.* at 504.

B. This case falls well outside the scope of extraordinary cases to which the doctrine applies. The regulations at issue display none of the key "indicators" that the Supreme Court's decisions have used to identify agency action subject to the major questions doctrine. *Id.* at 504; *id.* at 521 (Barrett, J., concurring). Here, the agency has not asserted "unheralded" authority over matters it has long disclaimed power to

regulate. *Id.* at 519. *Material* risks to a publicly traded corporation's business and financial prospects, whether related to climate change, other environmental issues, or other matters, have long been viewed by the SEC as potentially subject to disclosure requirements. *See* SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290 (2010). Nor does the SEC rule reflect a "mismatch" between a broad invocation of power and narrow statutes asserted to confer that power. *See Nebraska*, 600 U.S. at 517 (Barrett, J. concurring). The power the SEC asserts to require disclosures of material matters fits well with its statutory authorization to require publicly traded companies to disclose information in the interest of investor protection. Moreover, the agency has not sought to meddle in environmental regulation, assert substantive regulatory authority to restructure broad swaths of the economy, or regulate "outside its wheelhouse." *Id.* at 518. The agency has focused its regulations precisely on its area of authority and expertise—disclosure of material information for the protection of investors—and *rejected* suggestions that it require disclosure of emissions based on its reading of environmental statutes or regulations administered by other government entities rather than on the materiality standard that is

"fundamental to U.S. securities laws and the Commission's securities regulation." 89 Fed. Reg. 21668, 21733 (2024).

In these circumstances, the major questions doctrine has no application. Indeed, invoking it here would bring about exactly the kind of "'radical or fundamental change' to a statutory scheme" that the doctrine is intended to prevent. *West Virginia*, 597 U.S. at 723. Specifically, it would transform the securities laws' general authorization of regulations that require disclosure of material information for the protection of investors into a law with a gaping loophole prohibiting the agency from requiring disclosure regarding a specific subject of enormous potential importance to investors, without any indication in the relevant statutes that Congress intended such an exclusion. That misuse of the major questions doctrine would result in precisely what Justice Barrett has warned against: adoption of an "inferior" reading of a statute that "curbs the agency's authority" to do the job that the best reading of the statute assigns it. *Nebraska*, 600 U.S. at 516 (Barrett, J., concurring).

Instead, this case is in the same class as *Biden v. Missouri*, 595 U.S. 87 (2022), in which the Supreme Court, in the face of a dissent that sought to invoke the major questions doctrine, *see id.* at 104 (Thomas, J.,

dissenting), held that the Secretary of Health and Human Services acted within his statutory authority in ordering that health care facilities participating in Medicare and Medicaid require members of their staffs to be vaccinated against COVID-19 unless exempt for medical or religious reasons, *see id.* at 95–96 (majority). The Court concluded that this order fell easily within the governing statute's broad authorization for the Secretary to impose conditions on facilities participating in the programs to protect the health and safety of patients. *See id.* at 94. The Court observed that even the challengers acknowledged that this language authorized measures to protect patients' health by controlling infections, *id.* at 94–95, and held that the Secretary's use of means that "go[] further than what the Secretary has done in the past" reflected only the use of authority to address a problem of different "scale and scope" than those previously addressed. *Id.* at 95. The significant consequences of the Secretary's order did not alter the fact that, under the statute, "addressing infection problems in Medicare and Medicaid facilities is what he does," not a transformative change in the nature of his authority requiring more explicit congressional authorization. *Id.*

Biden v. Missouri illustrates that, outside the rare circumstances where an agency asserts authority to exercise extraordinary or transformative powers that cannot reasonably be understood to have been conferred by Congress, agency action that falls within the scope of broad statutory language authorizing it is lawful—even if the subject matter is highly consequential and the specific action taken is not explicitly identified in the statute. As was true of the agency action at issue in that case, the SEC here has not sought to exercise some new power not reasonably within Congress's contemplation. Rather, it has mandated disclosure by publicly traded corporations of information it regards as material to investors—which is, to paraphrase *Biden v. Missouri*, exactly "what [the SEC] does." *Id.*; *see SEC v. Wall St. Pub. Inst., Inc.*, 851 F.2d 365, 374 n.9 (D.C. Cir. 1988) ("Requiring disclosure of a material fact in order to prevent investor misunderstanding is the very essence of federal securities regulation.").

C. Importantly, Petitioners do not contest that other SEC regulations requiring disclosure of material information by securities issuers are authorized by the SEC's governing statutes, and that climate-risk information can be subject to disclosure when it is in fact material.

Indeed, Petitioners maintain that existing regulatory requirements *already* compel disclosure of climate-risk information if it meets traditional materiality standards, and argue that the SEC therefore had no reason to impose further requirements. *See* Chamber of Commerce Br. 16; Iowa Br. 44–45; Liberty Energy Br. 32; National Legal & Policy Center Br. 4; Texas Alliance Br. 47. The latter argument merely calls into question the reasonableness of the agency's determination that further requirements are needed "to improve the consistency, comparability, and reliability of climate-related disclosures for investors." 89 Fed. Reg. at 21679. That APA question aside, however, Petitioners' argument gives away the store with respect to their major questions doctrine arguments: If the disclosure of material climate-change risks is *already required*, the SEC's issuance of regulations requiring that disclosure plainly cannot represent a transformational expansion of the scope of the SEC's claimed regulatory authority.

To be sure, Petitioners protest that the agency has gone beyond requiring disclosure of material information and has abandoned the traditional concept of materiality in creating its regulatory framework for disclosure of climate-change risks. But even if adjusting the

materiality standard could constitute a transformative expansion of authority that would bring the major questions doctrine into play—a doubtful proposition, at best—the agency here explicitly disclaimed any such alteration of the meaning of materiality. Rather, in response to comments urging it to apply the materiality standard as traditionally understood, the SEC included in the final rule multiple "materiality qualifier" provisions explicitly stating that the regulations call only for disclosure of material information. *See*, *e.g.*, 89 Fed. Reg. at 21698. And the agency stated repeatedly in the preamble to the final rule that in evaluating and disclosing climate-related risks, regulated corporations should use "traditional notions of materiality." *Id*. at 21696, 21733. The final rule thus reflects that the SEC has claimed no authority to alter the nature of the key criterion that determines whether disclosures are required under federal securities laws, and that it is applying its long-established standard to a specific type of information. Regardless of whether the agency is justified in viewing those matters as sufficiently material to require disclosure in the manner required by the rule, its action does not purport to regulate matters outside the scope of the investor-protection authority conferred on the agency by Congress. The

issuance of rules that have been properly determined to benefit investors by requiring disclosure of information that is material under traditional securities-law standards cannot be said to represent an agency effort to grab authority "beyond what Congress could reasonably be understood to have granted." *West Virginia*, 597 U.S. at 724.

In the end, Petitioners' assertion that the climate-change information subject to the rule is not material under the traditional meaning of that term is nothing more than a claim that the agency's action cannot be sustained under the APA on the basis stated by the agency—that is, that it is arbitrary and capricious or contrary to law. As the SEC's brief explains, that claim is unfounded, but even if the Court agreed with Petitioners' assertion, the major questions doctrine would still play no role here. If an agency's rule cannot stand on the agency's own rationale, it must be set aside without regard to whether the agency might have come up with a *different* set of reasons for adopting the rule. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Thus, a climate-risk disclosure rule issued by the SEC that rested on some other, more expansive basis (such as a desire to combat global warming) might provide an occasion for considering whether to apply the major questions

doctrine, but this case does not. Whether the major questions doctrine would permit or bar reading the securities laws to authorize the SEC to require *non-material* disclosures or disclosures for policy reasons other than investor protection is irrelevant to the proper outcome of this case.

II. The First Amendment does not prohibit regulations requiring corporations to disclose information material to investors.

Securities regulations requiring disclosure of material information have uniformly been upheld by federal courts because they satisfy the relaxed standard of review for commercial-speech disclosure rules announced by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 651. Thus, Petitioners' claim that the SEC's climate-risk disclosure regulations violate the First Amendment fails for the same reason as their invocation of the major questions doctrine: The regulations are aimed at disclosure of information material to investors. Although Petitioners assert that laws compelling speech are subject to strict First Amendment scrutiny, that principle applies where the government compels speech entitled to full First Amendment protection. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). It does not apply to the disclosures at issue here.

A. The Supreme Court has repeatedly recognized that disclosure requirements applicable to certain forms of speech, especially commercial speech, are not subject to strict scrutiny. *See 303 Creative LLC*, 600 U.S. at 596; *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*). These cases require rejection of Petitioners' contention that the SEC regulations here should be subject to strict scrutiny. Disclosure requirements applicable to commercial speech are upheld under the standard originally announced in *Zauderer* when they are reasonably related to a legitimate government interest advanced by requiring disclosure of factual, noncontroversial information and when they do not unduly burden protected speech. *See NIFLA*, 585 U.S. at 768 (citing *Zauderer*, 471 U.S. at 651).

Although Petitioners assert that this case does not involve commercial speech because securities-related disclosures are not *advertising*, *see* Chamber of Commerce Br. 63–64, courts have repeatedly rejected that argument. The provision of material information in connection with the sale of securities is either commercial speech or a closely related category of speech that is subject to equivalent, or perhaps even lesser, protection. *See, e.g.*, *Chamber of Commerce of U.S. v. SEC*,

85 F.4th 760, 768 (5th Cir. 2023) (holding that securities disclosure requirements regulate commercial speech and are subject to *Zauderer*'s "lesser scrutiny"); *United States v. Wenger*, 427 F.3d 840, 847 (10th Cir. 2005) (concluding that speech regarding securities by paid publicists is commercial speech); *Wall St. Pub. Inst.*, 851 F.2d at 373 (concluding that the government's power to regulate "[s]peech relating to the purchase and sale of securities … is at least as broad as with respect to the general rubric of commercial speech"). The Supreme Court itself, when extending First Amendment protection to commercial speech, emphasized that in doing so it did not "cast doubt on the permissibility" of the SEC's regulation of "the exchange of information about securities." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S.447, 456 (1978); *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

Under the *Zauderer* standard, SEC requirements that issuers of publicly traded securities disclose information material to investors are constitutional because such requirements are reasonably related to the legitimate interest in protecting investors, because material information is by nature both factual and noncontroversial, and because such disclosure requirements do not unduly burden protected speech. *See*, *e.g.*,

Chamber of Commerce, 85 F.4th at 769–72; *Wenger*, 427 F.3d at 850–51. The SEC rule at issue here illustrates how securities disclosures satisfy these criteria: The SEC's explanation of the importance of the information at issue to investors, *see* 89 Fed. Reg. at 21699, amply establishes that the required disclosures are reasonably related to the investor-protection interest. Regardless of whether climate change is controversial, *see* Chamber of Commerce Br. 64, a company's own knowledge of the data and other information concerning management of risks posed to its operations and financial prospects by climate change is factual and not a subject of public controversy. *See* 89 Fed. Reg. at 21670 (describing the required disclosures). And disclosure of climate risk information in a corporation's required SEC filings does not burden its ability to speak about any subject of its choosing. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2398 (2024) (defining the burden inquiry under *Zauderer* as "whether the required disclosures unduly burden expression").

B. Petitioners cite no examples of courts striking down, under the First Amendment, requirements that publicly traded corporations disclose information about their operations that would be material to

investors. Indeed, seeming to recognize themselves that precedent does not support strict scrutiny of routine SEC disclosure requirements, Petitioners do not explicitly advocate the application of strict scrutiny to all regulatory and statutory requirements that corporations disclose material information in connection with the issuance and sale of securities—a position that would strike at the very heart of the SEC's mission and the regulatory structure it has built to fulfill it. Instead, as in their arguments about the major questions doctrine, their position seems to rest on the view that the SEC regulations at issue require disclosure of *non-material* information. Thus, they rely on *National Ass'n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (*NAM*), in which the D.C. Circuit struck down a statutory requirement that corporations disclose information about their use of "conflict minerals" originating in war-torn regions of Africa. The court held that, unlike SEC disclosure requirements for the protection of investors, the statutory requirement did not involve factual information material to investors, but instead compelled corporations to provide pejorative, ideologically charged descriptions of their products. *See id.* at 522, 530. The court was skeptical that such disclosure would serve the claimed interest in reducing conflict

in Africa, *see id*. at 526, and found that the required disclosures were not factual and uncontroversial because they required a corporation that used minerals from certain sources not just to disclose facts, but to "confess blood on its hands," *id*. at 530.

Whatever the merits of the divided opinion in *NAM*, it does not support Petitioners here. Unlike in that case, the SEC regulations here do not seek to influence corporate behavior by requiring corporations to endorse non-material characterizations of the moral worth of their conduct. Unlike in that case, the SEC here has determined that the climate-risk disclosures—like other required disclosures—involve facts material to investors. *See* 89 Fed. Reg. at 21669–73. To be sure, Petitioners take issue with the SEC's conclusion that the information covered by the rules is material and would benefit investors enough to justify requiring its disclosure. But, again, if correct, that argument would require setting aside the rule under the APA and make any First Amendment claim superfluous. And the question whether a disclosure requirement resting on a rationale *not* offered by the SEC would violate the First Amendment is not properly before the Court on the petitions for review of the regulations the agency promulgated. *Cf. Chenery Corp.*, 318

U.S. at 95 (stating that an agency order can be upheld only on the grounds offered by the agency in issuing it).

CONCLUSION

For the foregoing reasons and those set forth by the SEC, this Court should deny the petitions for review of the SEC regulations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5), (6), and (7)(B) and Rule 29(a)(5), I certify that the foregoing brief is proportionately spaced, has a font size of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 4,785 words. As required by Local Rule 28A(h), the electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Scott L. Nelson
Scott L. Nelson