THE MAJOR QUESTION WITH THE SEC'S CLIMATE-RELATED RISK DISCLOSURE RULE

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Abstract

This note explores the potential application of the major questions doctrine to the Securities and Exchange Commission's (SEC) Final Rule No. S7-10-22: The Enhancement and Standardization of Climate-Related Disclosures for Investors (Final Rule). This Final Rule increases disclosures of material information related to climate-related risks. Many commentators have suggested that the Final Rule is likely to be challenged, and one of the grounds for such a challenge may be the major questions doctrine. The purpose of this note is to analyze the arguments in favor of and against the invalidation of the Final Rule under the major questions doctrine. Ultimately, I conclude that the arguments against the invalidation of the Final Rule under the major questions doctrine are the strongest. Most recently, in West Virginia v. EPA, the Supreme Court held that the major questions doctrine applied because regulating emissions was of great economic and political significance. However, while the major questions doctrine likely applies, the SEC likely has clear congressional authority to require climate-related risk disclosures under Section 7 of the Securities Act and Section 12 of the Exchange Act, and there is historical evidence of congressional intent to permit the SEC to regulate such disclosures.

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I. Introduction

Environmental, social, and governance (ESG) factors are increasingly gaining momentum, but investors have struggled to find consistent, comparable, and reliable information about the climate-related risks associated with companies.[1] While third-party climate reporting frameworks attempt to fill this reporting gap, companies often disclose some but not all information due to the voluntary nature of the frameworks.[2] Even if companies voluntarily report their emissions, differences in the exact information they disclose are likely to make comparison of emissions across companies difficult.[3] As a result, on April 11, 2022, the Securities and Exchange Commission (SEC) proposed a new rule called The Enhancement and Standardization of Climate-Related Disclosures for Investors (Proposed Rule) to increase disclosures of material information related to climate-related risks. On March 6, 2024, the SEC issued the Final Rule with the goal to address these discrepancies to strengthen investor protection, improve market

[1] Release No. 33-11042, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, and 249) [hereinafter Release No. 33-11042] (presenting the various climate-related risks that corporations would be required to disclose under the proposed SEC rules, including greenhouse gas emissions).

[2] *Id.* at 21425 ("Multiple third-party reporting frameworks and data providers have emerged over the years; however, these resources lack mechanisms to ensure compliance and can contribute to reporting fragmentation. Due to deficiencies in current climate-reporting practices, investor demand for comparable and reliable information does not appear to have been met").

[3] *Id.* (discussing how the lack of centralized emissions disclosures prevents investors from being able to make meaningful comparisons across companies).

efficiency, and facilitate capital formation.[4] The SEC's statutory role in protecting investors is to determine the disclosure of information that would be in the public interest and would protect investors.[5] More specifically, Section 2(b) of the Securities Act of 1933 (Securities Act) and Section 3(f) of the Securities Exchange Act of 1934 (Exchange Act) require the SEC to consider "whether an action is necessary or appropriate in the public interest" when it creates rules, and "whether the action will promote efficiency, competition, and capital formation."[6]

Additionally, Section 23(a)(2) of the Exchange Act requires the SEC to consider the "impact that the rules would have on competition," and prohibits the SEC from adopting any rule that would "impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act."[7] While many believe that climate-related disclosures are important to investors' decision making,[8] opinions on climate-related disclosures have varied on how to execute this vision. Meanwhile, opponents include one of the SEC's own Commissioners, Congressmembers, state governors and attorneys general, industry groups, lawyers, and academics.[9]

When Justices Neil Gorsuch and Brett Kavanaugh were appointed to the Supreme Court, the Justices reignited the major questions doctrine, standing as two major proponents.[10] The major questions doctrine prevents courts from deferring to an agency's otherwise reasonable

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[4] *Id.* at 21413.

[5] Release No. 33-11042, *supra* note 1, at 21335.

[6] Securities Act, 15 U.S.C. § 77b(b). Exchange Act, 17 U.S.C. § 78c(f).

[7] Exchange Act, 17 U.S.C. 78w(a)(2).

[8] *See* Release No. 33-11042, *supra* note 1, at 21350. *See also infra* note 111.

[9] *See, e.g.*, Hester Peirce, *We Are Not the Securities and Environment Commission - At Least Not Yet* (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 (claiming the U.S.'s existing disclosure requirements already capture material risks relating to climate change). Lawrence A. Cunningham et al., Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132133-302619.pdf. Sean J., Griffith, Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 1, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130040-296591.pdf (arguing First Amendment rights prohibit the SEC from compelling these types of disclosures).

[10] Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1181 (2021).

interpretation of an ambiguous statute because of the extraordinary policy implications.[11] The major questions doctrine is often considered an exception to the *Chevron* doctrine.[12] Thus, this note explains the *Chevron* doctrine because in order to understand the exception to a rule, we must first understand the general rule.

Many commentators have suggested that the Final Rule is likely to be challenged, and one of the grounds for such a challenge may be the major questions doctrine.[13] Given the likelihood of such a challenge, this note explores the potential for application of the major questions doctrine to the Final Rule as a whole. It then considers whether the arguments for invalidation of the Final Rule are stronger than those against. Ultimately, it concludes that the arguments against invalidation under the major questions doctrine are stronger than those in favor of invalidation.

The remainder of this note is structured as follows. Part I addresses the development of the major questions doctrine, from *Chevron* to the most recent case, *West Virginia v. EPA.* Part II describes the content of the Proposed and Final Rules and the commentary following the proposal of the rule. Part III outlines the arguments for and against the application of the major questions doctrine, and if the doctrine applies, the arguments for and against a successful challenge.

II. The Development of the Major Questions Doctrine

The major questions doctrine dates to the Supreme Court's 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[14] *Chevron* became the baseline rule for the Court's approach to reviewing an agency's interpretation of a statute, and the opinion laid the groundwork for the development of the major questions doctrine over time.[15] Most recently, the major questions doctrine was solidified in *West Virginia v. EPA*, but it substantially revised the *Chevron* doctrine many ways.[16] Because the development of the major questions doctrine occurred slowly case-by-case, I describe the development in caselaw in the following section. It is important to understand this

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[11] *Id.* at 1182.
[12] *Id.* at 1192.
[13] *See generally* Nielson, *supra* note 10 (outlining the major questions doctrine and how it can be used to challenge new rules).
[14] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[15] *Id.* at 837-38.
[16] 142 S.Ct. 2587, 2608-09 (2022).

groundwork because the major questions doctrine is still being shaped to this day. Additionally, in order to understand an exception to a rule, it is important to understand the general rule. Historically, so long as an agency makes a reasonable interpretation of an otherwise ambiguous statute, the court will defer to the agency's interpretation.[17] However, over time, the Supreme Court has narrowed this deferential approach.[18] The caselaw shows how the Supreme Court has slowly developed the major question doctrine as a formal exception to the *Chevron* doctrine, beginning with dissenting opinions and culminating in.

A. General Agency Authority

Generally, federal agencies are required to use "reasoned decisionmaking."[19] Not only are an agency's ultimate actions under legal scrutiny, but also "the process by which it reaches that result must be logical and rational." [20] Under the Administrative Procedure Act (APA)[21], an agency has authority if its actions rely "on a consideration of the relevant factors."[22]

In *Chevron*, the Supreme Court addressed statutory ambiguities in the APA by allowing an agency to issue a "major rule" only if the agency "has clear congressional authorization to do so."[23] The Court de-

[17] Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 376 (1998) (suggesting that the reviewing court exercise "substantial deference to an agency's interpretation of its own regulations" (quoting Thomas Jefferson Univ. Shalala, 512 U.S. 504, 512)).

[18] *West Virginia*, 142 S.Ct. at 2609 ("We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies.").

[19] *Allentown Mack Sales & Service, Inc.*, 522 U.S. at 374 (internal quotation marks omitted).

[20] *Id.*

[21] The Administrative Procedure Act governs the proceedings of administrative agencies and related judicial review. Additionally, the Congressional Review Act (CRA) allows Congress to overturn rules issued by federal agencies. 5 U.S.C. § 801(a)(1)(A).

[22] Motor Vehicle Mfrs. Assn. of U.S., Inc. *v.* State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (internal quotation marks omitted) (holding that the recission of automobile crash protection requirements was arbitrary and capricious). *See also* Michigan v. EPA, 576 U.S. 743, 750 (2015).

[23] *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (2017) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

fined a "major rule" as "one of great economic and political significance."[24] The Court's approach to questions of agency authority has become known as the *Chevron* doctrine.[25] A Congressional grant of authority can be implicit or explicit.[26] Further, when a challenge to such authority "centers on the wisdom of the agency's policy," the challenge must fail.[27]

The *Chevron* doctrine involves a two-step approach. First, a reviewing court asks, "whether Congress has directly spoken to the precise question at issue."[28] If Congress's intent is clear, the agency must give effect to it. However, if the statutory provision in question is "silent or ambiguous with respect to the specific issue," then the Court must assess whether the agency's interpretation "is based on a permissible construction of the statute."[29] An agency must reach its interpretation using a "logical and rational" process.[30] Ultimately, it is the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[31]

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[24] *See id.*

[25] *Chevron, U.S.A., Inc.* at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

[26] *Id.*

[27] *Id.* at 866.

[28] *Id.* at 842. *See also* Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 171 (2016) ("[W]e begin with the language of the statute. If the . . . language is unambiguous and the statutory scheme is coherent and consistent . . . the inquiry ceases." (internal quotation marks and citation omitted)).

[29] New York Stock Exch. LLC v. Sec. & Exch. Comm'n, 962 F.3d 541, 553 (D.C. Cir. 2020) (citing *Chevron, U.S.A., Inc.*, 467 U.S. at 843) (striking down SEC Rule 610T as it was used "merely to secure information that *might* indicate to the SEC whether there is a problem worthy of regulation").

[30] Michigan v. EPA, 576 U.S. 743, 750 (2015) (citing Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (internal quotation marks omitted)).

[31] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

B. From *Chevron* to *West Virginia*

The Court eventually established an exception to the deferential *Chevron* two-step, which has become known as the "major questions doctrine."[32] The cases discussed in this section show how the Supreme Court has slowly developed the major questions doctrine into a formal exception to *Chevron*. The cases begin with an exception for "extraordinary cases" where the Court must review Congress's intent, looking for an explicit prohibition against regulation. Eventually, the Court shifted to the idea that the Court must *always* find an explicit congressional intent to confer power to an agency to regulate such activity.[33]

Two early cases seeded the major questions doctrine. First, in *Utility Air Regulatory Group v. EPA*, the Court rejected the EPA's legal authority to require permits for sources based solely on their emission of greenhouse gases.[34] This case cabined the previously deferential *Chevron* standard, stating that "agencies must operate 'within the bounds of reasonable interpretation.'"[35] Second, when the FDA tried to regulate the advertising of tobacco products to children and adolescents in *FDA v. Brown & Williamson Tobacco Corporation*, the Court found that Congress had clearly precluded the FDA from regulating tobacco products.[36] *Brown & Williamson* explained that *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[37] However, the Court cautioned, "in extraordinary cases, however, there may be

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[32] *See generally*, West Virginia v. EPA, 142 S.Ct. 2587, 2587 (2022).

[33] The nature of the inquiry shifts from optional to mandatory, whereby the general rule was a negative covenant. Congress cannot have explicitly prohibited an agency from regulating a certain activity such as tobacco. Today, it is a positive covenant, where Congress must have explicitly permitted an agency to regulate an activity. The rationale is that agencies have powers that may be too broad, and the Court prefers to limit these "extraordinary case" to elected individuals in Congress or the states, not those who are appointed.

[34] *Util. Air Regul. Grp.*, 573 U.S. at 321.

[35] *Id.* (quoting City of Arlington v. FCC, 569 U.S. 290, 291 (2013)).

[36] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

[37] *Id.* at 159 (concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion").

reason to hesitate before concluding that Congress has intended such an implicit delegation."[38]

In *Massachusetts v. EPA*, the Court distinguished *Brown & Williamson* in the context of regulating carbon dioxide tailpipe emissions.[39] The EPA refused to regulate carbon dioxide emissions, and the Court determined that it failed to provide a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."[40] The EPA's decision was thus "'arbitrary, capricious, . . . or otherwise not in accordance with law.'"[41] Some scholars have argued that this case is where "the major questions exception died."[42] However, both *Brown & Williamson* and *Massachusetts* appear to deviate from the *Chevron* doctrine and instead focus on the economic and political significance of the agency action.[43]

While the previous Supreme Court cases did not explicitly refer to the "major questions doctrine" as we know it today, the contours of the major questions doctrine were already being developed in the D.C. Circuit around the same time.[44] In 2012, now-Justice Kavanaugh and his former colleague on the D.C. Circuit, Judge Brown, reinforced the concept as the "major rules" doctrine in their dissents in *Coalition for Responsible Regulation, Inc. v. EPA*.[45] Judge Brown claimed that had their court applied the major questions doctrine, it would not, and should not, have extended *Massachusetts*.[46] Again, Justice Kavanaugh and Judge Brown dissented in *United States Telecom Association v. Federal Communications Commission*.[47] Judge Brown dissented in general

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[38] *Id.*

[39] Massachusetts v. EPA, 549 U.S. 497, 531(2007) (determining that the "EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles.").

[40] *Id.* at 534.

[41] *Id.*

[42] Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference As A Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 603 (2008).

[43] *Id.* at 606.

[44] *See generally*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (D.C. Cir. 2017). Coal. for Responsible Regul., Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *1 (D.C. Cir. Dec. 20, 2012).

[45] *Coal. for Responsible Regul., Inc.*, 2012 WL 6621785, at *1.

[46] *Id.* at *12 (Brown, J., dissenting).

[47] *U.S. Telecom Ass'n*, 855 F.3d at 383 (holding in concurrence that the Court did not need to draw the contours of the major questions doctrine because the FCC had clear congressional authorization to issue the rule).

agreement with Justice Kavanaugh, but called the doctrine the "major questions" doctrine rather than the "major rules" doctrine.[48]

In *Michigan v. EPA*, the Environmental Protection Agency (EPA) adopted the Clean Power Plan, which was a series of regulatory programs to control air pollution from factories, cars, and airplanes, and other sources.[49] The Court held that the EPA lacked the authority to regulate such pollution because the statute expressly required the EPA to consider cost, and the agency did not.[50]

The most recent cases addressing the major questions doctrine are *Alabama Association of Realtors v. Department of Health & Human Services*[51], *NFIB v. OSHA*[52], and *Biden v. Missouri.*[53] Over the course of these decisions, the major questions doctrine gradually moved into the foreground of the Supreme Court's reasoning. In *Alabama Association of Realtors*, the major questions doctrine was not the basis for rejection of an agency power, but the principle lingered in the background.[54] The doctrine was then frontloaded in *NFIB v. OSHA*, where the majority opinion applied the principle that there must be clear congressional authorization.[55] Moreover, the major questions doctrine was explicitly mentioned in the concurrence, finally putting a label to this legal approach.[56]

In *Alabama Association of Realtors*, the Centers for Disease Control and Prevention (CDC) imposed a nationwide moratorium on evictions for those in high-COVID-19 transmission counties who

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[48] *Id.*
[49] Michigan v. EPA, 576 U.S. 743, 747 (2015).
[50] *Id.* at 749 ("Read naturally in the present context, the phrase "appropriate and necessary" requires at least some attention to cost.").
[51] Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S.Ct. 2485 (2021) (per curiam). *See also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).
[52] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S.Ct. 661 (2022) (per curiam). *See also* Sohoni, *supra* note 51, at 262.
[53] Biden v. Missouri, 142 S.Ct. 647 (2022) (per curiam).
[54] *Alabama Ass'n of Realtors*, 141 S.Ct at 2486 (finding that when Congress did not specifically authorize CDC to impose a nationwide moratorium, CDC exceeded its authority).
[55] *Nat'l Fed'n of Indep Bus.*, 142 S.Ct at 665.
[56] *Id.* at 667.

demonstrated financial need.[57] The Court held that the CDC exceeded its authority, reasoning that regulations under the Public Health Service Act have generally been limited to quarantining and prohibiting the import or sale of animals known to transmit disease.[58] It determined that Section 361(a) of the Public Health Service Act did not give the CDC broad authority to take any measures necessary to control the spread of COVID-19, because the Public Health Service Act did not grant authority in "exceedingly clear language."[59] Here, the court relied primarily on a textual and historical approach, with the major questions doctrine playing a secondary role.[60]

However, in subsequent cases, the Court flipped this ordering, frontloading its analysis with the major questions doctrine before analyzing any statutory text.[61] In *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, the Secretary of Labor, acting under the authority of the Occupational Safety and Health Act (OSHA), enacted a vaccine mandate for a majority of the workforce, subject to an exception for workers who wore a mask and received a weekly COVID-19 test at their own expense.[62] The Court held that under OSHA, the Secretary lacked authority to enact the mandate because the Act "empowers the Secretary to set *workplace* safety standards, not broad public health measures."[63]

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[57] *Alabama Ass'n of Realtors*, 141 S.Ct. at 2486 ("We expect Congress to speak clearly" if it intends to grant to an executive agency decisions "of vast economic and political significance . . . . We sometimes call this the major questions doctrine.").

[58] *Id.* (illustrating the CDC exceeded authority because the kinds of measures that could be necessary are inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles).

[59] *Id.* at 2489.

[60] Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, CATO SUP. CT. REV., 2021-2022, at 37, 54. ("[T]he Court could not see textual or historical support for the CDC's claimed authority, and the major questions doctrine merely confirmed this conclusion. Major questions was icing on the Court's interpretive cake.").

[61] *Id.* ("[H]ere a concern for 'major questions, and a skepticism of the government's authority, was baked into the interpretive cake from the beginning.'").

[62] *Nat'l Fed'n of Indep. Bus.*, 142 S.Ct. at 668 (Gorsuch, J., concurring) ("[T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine.").

[63] *Id.* at 665 (applying a textualist approach).

In *Biden v. Missouri*, the Secretary of Health and Human Services, acting under the authority of the Centers for Medicare & Medicaid Services (CMS), issued a rule requiring facilities to ensure that their staff are vaccinated against COVID-19 in order to participate in Medicare and Medicaid.[64] Observing that the purpose of CMS is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety, the Court held that the Secretary had authority to mandate staff vaccinations.[65] While this may seem contradictory to the outcome in *NFIB,* the Court determined that CMS had a more expansive grant of authority than the Occupational Safety and Health Administration, and that the latter agency, but not the former, had exceeded its statutory authority.[66]

C. *West Virginia* v. *EPA*

In *West Virginia*, the Supreme Court explicitly invoked "the major questions doctrine"[67] as representing the idea that that Congress must clearly intend to grant the powers agencies assert.[68] Chief Justice Roberts, writing for the majority, frontloaded his analysis with the major questions doctrine, holding that the doctrine underlies "both separation of powers principles and a practical understanding of legislative intent . . . ."[69] The major questions doctrine is generally used to prevent

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[64] Biden v. Missouri, 142 S.Ct. 647, 651 ("First, we agree with the Government that the Secretary's rule falls within the authorities that Congress has conferred upon him . . . . First, the interim rule is not arbitrary and capricious . . . . Other statutory objections to the rule fare no better.").

[65] *Id.* (finding evidence in the statutory record that Congress had given the agency a general public health regulatory power).

[66] *Nat'l Fed'n of Indep. Bus.*, 142 S.Ct. at 661.

[67] But the Supreme Court has previously referred to this principle as the "major rules doctrine" or "*Chevron* doctrine." U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (D.C. Cir. 2017) (upholding the FCC's 2015 Open Internet Order, known as the net neutrality rule); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837 (1984) (upholding the EPA's regulation allowing states to treat all pollution-emitting devices within same industrial grouping as though the EPA was encased within single "bubble" under the Clean Air Act Amendments).

[68] West Virginia v. EPA, 142 S.Ct. 2587, 2609 (2022) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

[69] *Id.* (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

unintentional or unlikely delegations of legislative power.[70] This is evident in the Court's decision in *West Virginia*, which held that the major questions doctrine requires Congress to write legislation clearly when authorizing an agency to make "decisions of vast economic and political significance," given the "history and the breadth of the authority that [the agency] has asserted."[71] The Court also reaffirmed *Utility Air Regulatory Group v. EPA*, making clear that the courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[72]

West Virginia concerned the EPA's adoption of the Affordable Clean Energy Rule (ACE), which was promulgated under the Clean Air Act (CAA) to implement a shift towards cleaner sources of energy generation.[73] ACE broadened the EPA's authority, concluding that the "'best system of emission reduction' for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources."[74] The EPA claimed that the authority for the CAA derived from the statutory phrase "system of emission reduction" under Section 111, and that a system of emission reduction includes a shift in pollutions to cleaner sources.[75]

However, the Court found that Section 111 was a gap filler, not a clear authorization of authority, as evidenced by the history of pollution regulatory programs.[76] The Court also observed that the EPA admitted that regulatory areas that include electricity transmission, distribution, and storage were not within its technical or political expertise.[77] Further, the EPA essentially created a cap-and-trade scheme that Congress had already considered and rejected many times.[78] Justice Elena Kagan dissented, joined by Justices Stephen Breyer and Sonia

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[70] SCOTT M. SEAMAN & JASON R. SCHULZE, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 19:7 (LegalWorks 11th ed., 2023).
[71] *West Virginia*, 142 S.Ct. at 2609.
[72] *Id.* at 2605 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324 (internal quotation marks omitted)).
[73] *Id.* at 2594.
[74] *Id.* at 2599.
[75] *Id.* at 2601 ("Under Section 111(d), once EPA "has set new source standards addressing emissions of a particular pollutant under . . . section 111(b)," it must then address emissions of that same pollutant by existing sources.")
[76] *Id.*
[77] *Id.* at 2612.
[78] *Id.* at 2614.

Sotomayor.[79] Justice Kagan disagreed with the interpretation of the statutory language of Section 111.[80] The dissent interpreted the CAA to authorize the EPA to "regulate stationary sources of any substance that 'causes, or contributes significantly to, air pollution' and that 'may reasonably be anticipated to endanger public health or welfare.'"[81]

Nonetheless, this case further limited the major questions doctrine to "'extraordinary cases' in which the 'history and 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."[82] However, the dissent still criticized the use of the major questions doctrine, reasoning that the decisions the majority cited simply applied an "ordinary method" of "normal statutory interpretation."[83] Justice Gorsuch, in a concurring opinion, described the doctrine as a way for the courts to make sure that the government does "not inadvertently cross constitutional lines."[84] Though both liberal and conservative justices had relied upon the principles underlying the major questions doctrine in the past[85], *West Virginia* was the first majority opinion to expressly apply this doctrine.[86]

The majority opinion in *West Virginia* expressed a key commonality among the line of cases invoking the major questions doctrine: each has involved a determination that the agency asserted a "highly consequential power beyond what Congress could reasonably be understood to have granted."[87] Accordingly, *West Virginia* reinforces the reasoning in the line of cases deviating from the *Chevron* doctrine.[88] Scholars have noted that its reasoning also bears a resemblance to the

[79] *Id.* at 2626 (Kagan, J., dissenting).
[80] *Id.* at 2627 (Kagan, J., dissenting).
[81] *Id.*
[82] *Id.* at 2595 (alteration in original) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).
[83] *Id.* at 2609 (alteration in original).
[84] *Id.* at 2620 (Gorsuch, J., concurring) (quoting A. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 175 (2010)).
[85] SEAMAN & SCHULZE, *supra* note 70.
[86] Adler, *supra* note 60, at 37.
[87] *West Virginia*, 142 S.Ct. at 2609.
[88] *See* A. Michael Froomkin et al., *Safety As Privacy*, 64 ARIZ. L. REV. 921, 934 (2022).

non-delegation doctrine[89], another doctrine grounded in the constitutional principle of separation of powers, which requires Congress to provide an "intelligible principle" to guide regulations when it authorizes an agency to regulate in a particular area.[90] The Supreme Court has not struck down a statute for violating the non-delegation doctrine since the New Deal Era.[91]

As many scholars have observed, *West Virginia* left unanswered questions for lower courts.[92] Accordingly there is no precise definition of what constitutes a "major question."[93] Nevertheless, it is possible to synthesize a rough two-part test for major questions doctrine cases. The reviewing court must ask: (1) whether the case triggers the major questions doctrine, and, if so, (2) whether the agency can point to "clear congressional authorization" to regulate in the manner it has. Because the major questions doctrine is still in its infancy, future litigation

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[89] *Id.* (suggesting that the major questions doctrine "has morphed into a new form of the nondelegation doctrine, one aimed at any delegation of regulatory duties that the Court is prepared to deem insufficiently specific.").

[90] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S.Ct. 661, 668-69 (2022) (Gorsuch, J., concurring) ("[T]he major questions doctrine is closely related to . . . the nondelegation doctrine . . . . Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."). *See also* J.W. Hampton v. United States, 276 U.S. 394 (1928).

[91] *See* Mistretta v. United States, 488 U.S. 361, 373 (1989) (explaining "Congress had failed to articulate any policy or standard" to confine discretion); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (holding Congress is not permitted to abdicate or to transfer the essential legislative functions with to others); Panama Refining Co. v. Ryan, 293 U.S. 388 (1939) (limiting Congressional action from abdicating or transferring their vested powers, after what the court called "excessive statutory delegation of legislative power to the President").

[92] Adler, *supra* note 60, at 38 ("By skimping on statutory analysis and front-loading consideration of whether a case presents a major question, Chief Justice Roberts's opinion failed to provide much guidance for lower courts.").

[93] Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 479 (2021) ("It therefore remains unclear how an important or significant question is identified. . . ."). However, this author also believes that the Court leaves "majorness" intentionally unclear so that the Court can determine this themselves.

of the SEC's Final Rule could serve as a vehicle for the Supreme Court clarify its bounds.[94]

III. The SEC's Proposed and Final Rules

A. The Proposed and Final Rules

On April 11, 2022, the SEC proposed Rule No. S7-10-22, The Enhancement and Standardization of Climate-Related Disclosures for Investors.[95] The Proposed Rule added a new subpart to Regulation S-K, which requires a registrant's disclosure of: (1) all direct greenhouse gas (GHG) emissions (Scope 1 emissions), (2) all indirect emissions from purchased electricity or other forms of energy (Scope 2 emissions), and (3) all upstream and downstream activities in its value chain if material or if the company has set a GHG emissions target or goal that includes Scope 3 emissions (Scope 3 emissions).[96] These three scopes describe certain levels of climate-related risks that a company may face, with Scope 1 emissions being the most direct, and Scope 3 emissions being the least direct. A company would be required to disclose all climate-related risks that are "reasonably likely to have material impacts on its business or consolidated financial statements," and the SEC believes that the GHG scopes of emissions will help investors assess such risks.[97]

On March 6, 2024, the SEC issued its Final Rule, which most notably excluded the originally proposed Scope 3 emissions, among other revisions. Ultimately, this Final Rule increases the number of required disclosures because public companies would be required to disclose their climate-related risks in their annual reports and registration statements filed with the SEC. The Final Rule is historic because this is the first time that the SEC has specifically mandated a disclosure rule related to climate risks. However, as proponents for the rule have argued, the SEC has previously issued interpretive releases and guidance for companies to disclose climate-related risks, given the materiality of those risks to investors.

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[94] Jacqueline M. Vallette and Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2022), https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/.

[95] Release No. 33-11042, *supra* note 1, at 21334.

[96] *Id.* at 21344.

[97] *Id.* at 21345.

The SEC states that the Final Rule is "in the public interest and would protect investors."[98] Other considerations include "efficiency, competition, and capital formation."[99] The SEC argues that this is material information to investors, given that "many investors—including shareholders, investment advisers, and investment management companies—currently seek information about climate-related risks from companies to inform their investment decision-making."[100] Investors are seeking this information because climate-related risks have current financial consequences[101], such as governance and risk management practices[102], valuation models, and credit research and assessments.[103] Climate change creates financial effects that may materially impact companies.[104] Specifically, there are physical risks such as wildfires,

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[98] *Id.* at 21335. *See also* Sec. & Exch. Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/rules/2022/03/enhancement-and-standardization-climate-related-disclosures-investors#33-11275.

[99] *Id.*

[100] *Id.* at 21335.

[101] *Id. See* Financial Stability Oversight Council ("FSOC"), Report on Climate-Related Financial Risk 2021 (Oct. 2021) ("2021 FSOC Report"), available at https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf (detailing the myriad ways that climate-related risks pose financial threats both at the firm level and financial system level). *See also* Managing Climate Risk in the U.S. Financial System, Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (2020), available at https://www.cftc.gov/sites/default/files/2020-09/9-920%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf ("CFTC Advisory Subcommittee Report") (stating that climate-related risks pose a major risk to the stability of the U.S. financial system and to its ability to sustain the American economy).

[102] Release No. 33-11042, *supra* note 1, at 21336. *See, e.g.*, Letters from Amalgamated Bank (June 14, 2021); Norges Bank Investment Management (June 13, 2021).

[103] Release No. 33-11042, *supra* note 1, at 21336. *See, e.g.*, Letter from Principles for Responsible Investment (PRI) (Consultation Response) (June 11, 2021).

[104] Release No. 33-11042, *supra* note 1, at 21337. *See* Antony J. Blinken, Secretary of State, The United States Officially Rejoins the Paris Agreement, Press Statement, (Feb. 19, 2021). 191 countries plus the European Union have now signed the Paris Climate Agreement. The central aim of the Paris Climate

hurricanes, tornadoes, floods, and heatwaves, and these risks can have an immediate and direct impact on businesses and assets.[105] In the long term, there are chronic risks such as increasing global temperature, drought, and rising sea levels.[106] For instance, a company in the real estate sector could lose revenues from the rental or sale of coastal property or incur higher costs or a diminished ability to obtain property insurance.[107]

In response to concerns that the Proposed Rule required too much detail or was costly or burdensome, the SEC revised the definition of climate-related risk to mirror the most commonly used standard in the U.S., the TCFD framework.[108] The SEC's Final Rule made the climate-related risk disclosure requirements "less prescriptive" and specified the time frames that a company "should describe whether any such material risks are reasonably likely to manifest."[109] While these revisions are not substantive, they will help companies comply and ensure continuity with information already disclosed.

Additionally, the Final Rule does not require disclosure of Scope 3 emissions, which means that a company need not reference negative climate-related impacts on a registrant's value chain from the definition of climate-related risks.[110] This addresses many concerns that a company may not be able to assess the material risks in its value chain without commissioning a third party to seek out this information for

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Agreement is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century to well below 2º Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5º degrees Celsius. *See* Paris Agreement (Paris, Dec. 12, 2015) (entered into force Nov. 4, 2016). Moreover, at the UN Climate Change Conference (COP 26), the United States committed to become net zero by 2050, China by 2060, and India by 2070. Further, over 100 countries formed a coalition to reduce methane emissions by 30 percent by 2030. *See* Environment+Energy Leader, COP26 Net Zero Commitments will Speed Energy Transition, Increase Pressure on Industries, According to Moody's Report (Nov. 17, 2021)

[105] Release No. 33-11042, *supra* note 1, at 21349.

[106] *Id.*

[107] *Id.* at 21350.

[108] Sec. & Exch. Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/rules/2022/03/enhancement-and-standardization-climate-related-disclosures-investors#33-11275.

[109] *Id.*

[110] *Id.*

them.[111] The Final Rule also adds a materiality requirement to the disclosure of Scopes 1 and 2 emissions; such emissions are only required to be disclosed if they are material, and only large companies must disclose them, not small reporting companies or emerging growth companies.[112] There are many other revisions to the Proposed Rule that pull back required disclosures to address commenter concerns and add materiality requirements, which are not specifically addressed for the purposes of this note.[113]

B. Public Response to the Proposed Rule

The Proposed Rule sparked significant criticism, even from climate risk disclosure proponents. For instance, the Chamber of Commerce agreed "that material climate risks and impacts should be disclosed to investors, and that the Commission's 2010 climate change interpretive guidance has been instrumental in improving the quantity and quality of disclosures on this topic," while admitting that "[t]he Proposed Rules are too much, too soon and too inflexible."[114] On the proponent side, several State Attorneys General submitted a comment in support of the Proposed Rule, with the goal of protecting state residents who invest their retirement savings, college funds, and life savings, while also benefiting states as investors that control the pensions.[115] BlackRock also reiterated the SEC's reasoning behind climate-

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[111] *Id.*

[112] *Id.*

[113] Sec. & Exch. Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/rules/2022/03/enhancement-and-standardization-climate-related-disclosures-investors#33-11275 (removing ZIP code requirement for physical risks, eliminating specific requirement to disclose flooding risks, redefining time horizon to be short and long term without a medium term, not requiring scenario analysis, and modifications to the board and management oversight of climate-related risks).

[114] Chamber of Com. of the U.S., Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf.

[115] Attorneys General of California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, Comment Letter on Proposed Rule of The

risk disclosure, emphasizing the importance of high-quality information.[116] Its main reservation was that certain elements of the Proposed Rule exceed or differ from the Task Force on Climate-Related Financial Disclosures (TCFD), which is the most commonly used disclosure standard in the U.S.[117] Jill Fisch and twenty-nine other law professors argued that the Proposed Rule was within the SEC's rulemaking authority.[118]

There has also been significant political commentary. For instance, Senator Patrick Toomey (R-PA), the ranking member of the Senate Banking Committee, described the Proposed Rule as reaching "far beyond the SEC's mission," and becoming "a thinly-veiled effort to have unelected financial regulators set climate and energy policy for America."[119] On the other hand, Democrats have articulated the view that the rules are not expansive enough. For example, Senator Sheldon Whitehouse (D-RI) argued that the SEC should have included disclosure requirements for climate-related lobbying and influencing activities because these are "the single most material disclosures a company could make to achieve climate safety."[120]

Enhancement and Standardization of Climate-Related Disclosures for Investors, at 1, (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131887-302340.pdf (highlighting the physical and economic costs of climate change).

[116] BlackRock, Inc., Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors, at 2, (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132288-302820.pdf.

[117] *Id.* at 4 (stating that BlackRock concerns that such difference from TCFD will decrease the effectiveness of SEC's goal in providing climate related information to investors).

[118] Jill E. Fisch et al., Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors, at 1, (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf.

[119] Sylvan Lane, *SEC Proposes Long-Awaited Rules on Companies' Emissions, Climate Risk*, HILL: FINANCE (Mar. 21, 2022), https://thehill.com/policy/finance/599041-sec-proposes-climate-risk-emission-disclosure-rules/.

[120] Jacob H. Hupart et al., *A Brief Summary of the SEC's Proposed Climate-Related Rules*, MINTZ: INSIGHTS CENTER, https://www.mintz.com/insights-center/viewpoints/2451/2022-03-30-brief-summary-secs-proposed-climate-related-rules.

IV. Application of the Major Questions Doctrine to the SEC's Final Rule

The Supreme Court will likely scrutinize the rule as a whole, and thus, the following analysis will evaluate the arguments for and against the invalidation of the rule as a whole.[121] The major questions doctrine likely applies on its face, meaning the Court will likely analyze the doctrine in future litigation of the Final Rule. Furthermore, opponents of the Final Rule will probably rely on all related arguments to invalidate the rule, thereby compelling the Court to address the major questions doctrine even if it does not apply on its face.[122] I argue that there is a significant likelihood for the major questions doctrine to apply to the Final Rule. However, in the second part of the two-part test, I argue there is clear congressional authority under Section 7 of the Securities Act, and Section 12 of the Exchange Act, and there is historical evidence of congressional intent to permit the SEC to regulate such disclosures. Thus, I conclude that the arguments against the invalidation of the Final Rule under the major questions doctrine are stronger than those in favor of invalidation.

A. Why the Major Questions Doctrine Likely Applies

The major questions doctrine will likely be invoked in any future litigation over the Final Rule because, as in *West Virginia* and *NFIB*

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[121] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation.").

[122] Many commentators believe that this doctrine will impact the outcome of future litigation over the Rule. *See* Scott Mascianica, Jessica Magee, & Danny Athenour, *The Major Questions Doctrine Raises Major Questions for the SEC's Proposed Climate Rule*, TEXAS LAWBOOK (July 21, 2022), https://texaslawbook.net/the-major-questions-doctrine-raises-major-questions-for-the-secs-proposed-climate-rule/ ("This article applies insights from the Supreme Court's decision in West Virginia to the SEC's proposed rule and offers a path forward both for would-be challengers who want to do away with the rule altogether and an SEC that is focused on enacting a rule that can stand the test of time."); Christina Thomas, Andrew Olmem, & Katelyn Merick, *Supreme Court Decision Casts Doubt on SEC's Climate Proposal and Other Regulatory Initiatives*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 12, 2022), https://corpgov.law.harvard.edu/2022/07/12/supreme-court-decision-casts-doubt-on-secs-climate-proposal-and-other-regulatory-initiatives/.

v. OSHA, the Court may once again frontload its analysis with a discussion of the major questions doctrine.[123] The first part of the major questions doctrine is whether the agency's actions are of extraordinary or political significance.[124] Opponents of the rule argue that because climate change is politically contested, and because there are significantly more disclosures that would be required of public companies, the Final Rule has extraordinary political and economic implications.[125] Opponents have also argued that the SEC is attempting to assert "unprecedented power over American industry," given the fact that this is the first time the SEC has explicitly mandated a climate-related disclosure for all companies registered with the SEC.[126] Additionally, because Congress has not clearly authorized the SEC to regulate climate-related disclosures, opponents have argued that the SEC needs explicit, new Congressional authorization in order to validly promulgate such a rule.[127] Because we do not have a precise definition for what constitutes a "major question," the outcome of the Supreme Court's decision is not entirely clear. However, given the recent line of cases and the most recent *West Virginia* decision regarding pollution, climate-related issues that impact many companies are likely major questions.[128]

B. Why the Major Questions Doctrine May Not Apply

Proponents of the Final Rule will likely argue that this rule does not have extraordinary political or economic implications, because climate change is not scientifically contested, and thus, carbon emissions

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[123] Adler, *supra* note 60, at 54 ("Despite the availability of textual arguments that would have precluded the expansive construction of EPA authority that underlay the CPP, the chief justice opted to deploy the major questions concern at the front end of his analysis.").

[124] *Id.*

[125] Andrew N. Vollmer, Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors (May 9, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20128334-291089.pdf.

[126] West Virginia v. EPA, 142 S.Ct. 2587, 2612 (2022) (quoting Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) (plurality opinion)).

[127] Luis Aguilar et al., Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors, at 8 (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131670-302060.pdf.

[128] *West Virginia*, 142 S.Ct. at 2610 (finding that "[u]nder our precedents, this is a major questions case.").

do not have extraordinary political implications.[129] There are also nominal costs compared to the benefits for companies, investors, and the market as a whole.[130] Proponents of the Final Rule may also argue that this rule will not affect the entire American economy, because many companies are already voluntarily disclosing this information.[131] Furthermore, the SEC has not endeavored to completely ban an industry, as with the tobacco industry ban involved in *Brown & Williamson*.[132] Proponents of the rule have also argued that this is not an "unprecedented" assertion of authority. Here, there is no question as to "'whether

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[129] *Id.* at 2626 (Kagan, J., dissenting) (quoting Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021)) ("Climate change's causes and dangers are no longer subject to serious doubt. Modern science is 'unequivocal that human influence'—in particular, the emission of greenhouse gases like carbon dioxide—'has warmed the atmosphere, ocean and land.'").

[130] *See generally*, Release No. 33-11042, *supra* note 1, at 21412-52 (reviewing economic analysis).

[131] Release No. 33-11042, *supra* note 1, at 21396 ("many registrants already voluntarily seek assurance over their GHG emissions disclosure"). *See, e.g.*, Etsy, Inc. FY 2021 Form 10–K, available at https://s22.q4cdn.com/941741262/files/doc_financials/2021/q4/ETSY-12.31.2021-10K.pdf (external third-party attestation report available at https://s22.q4cdn.com/941741262/files/doc_financials/2021/q4/PwC/Limited-Assurance-Report-Assertion-Etsy-FY21_2.24.22_final-signed_final.pdf) (highlighting Etsy's Form 10-K which includes environmental impact and climate advocacy); Johnson Controls International plc 2021 Sustainability Report, available at https://www.johnsoncontrols.com/2021sustainability (external third-party verification report available at https://www.johnsoncont rols.com/-/media/jci/corporate-sustainability/reporting-and-policies/gri/2020/ghg-jci-fy-2020-verification-statement.pdf); Norfolk Southern Corporation 2021 GHG Emissions Report, available at http://www. nscorp.com/content/dam/nscorp/get-to-know-ns/about-ns/environment/2020-GHG-Emissions-Report.pdf; Koninklijke Philips NV (Royal Philips) Annual Report 2021, at 269, available at https://www.results.philips.com/publications/ar21/downloads/pdf/en/PhilipsFullAnnualReport2021-English.pdf; Starbucks Coffee Company FY 2020 GHG emissions inventory assurance report, at 3, available at https://stories.starbucks.com/uploads/2021/04/StaFY20/Third-Party-Independent-Verification-and-Assurance-Reports.pdf (disclosing Starbucks' "planet goals" and progress towards meeting those goals); Vornado Realty Trust FY 2020 ESG report, available at https://books.vno.c om/books/idpn/#p=1.

[132] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160-61 (2000).

such [a] power was actually conferred[133]'" because the SEC has historically mandated disclosures on a wide variety of topics, without an authoritative challenge. Notably, no one in 2010 argued that the SEC lacked authority to mandate climate-related disclosure. In fact, no one argued that climate change was novel, or even scientifically untrue.

The SEC has historically issued guidance on climate-related disclosures since the 1970s.[134] In 1970, the SEC issued an interpretive release stating that registrants should consider disclosing in their SEC filings the financial impact of compliance with environmental laws.[135] In 2010, the SEC published guidance (2010 Guidance) for registrants on how the SEC's existing disclosure rules may require disclosure of the impacts of climate change on a registrant's business or financial condition. [136] Since 2010, climate-related risks have become well-documented, and thus, investors have increasingly demanded more detailed information about the effects of climate change on a company's business.[137] Investors have also sought out more information about how a company has addressed climate-related risks when operating and developing business strategy and financial plans.[138]

If the Final Rule is not considered a "major question," then the Supreme Court will defer to the SEC, and the Final Rule will likely be upheld as valid.[139] As previously stated, in "extraordinary" cases, such

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[133] *West Virginia*, 142 S.Ct. at 2610 (quoting FTC v. Bunte Bros., Inc., 312 U.S. 349, 352 (1941)).

[134] Release No. 33-11042, *supra* note 1, at 21337. *See also* Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release Nos. 33-5386, 34-10116, 38 Fed. Reg. 12100 (May 9, 1973) (citing NEPA, 42 U.S.C. §§ 4321 et seq.); Aguilar et al., *supra* note 128, at 2.

[135] *Id.* at 21337-38. *See* Release No. 33-5170 (July 19, 1971) [36 FR 13989]. The Commission codified this interpretive position in its disclosure forms two years later. *See* Release 33-5386 (Apr. 20, 1973) [38 FR 12100] ("1972 Amendments").

[136] Release No. 33-11042, *supra* note 1, at 21337. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 339106 (Feb. 2, 2010) [75 FR 6290] (Feb. 8, 2010)]; Aguilar et al., *supra* note 128, at 4.

[137] Release No. 33-11042, *supra* note 1, at 21338.

[138] *Id.* at 21337.

[139] Froomkin et al., *supra* note 88, at 934 ("The Court's new majority appears to have no intention of giving Chevron deference to large exercises of regulatory power that the majority is willing to interpret as lacking the clearest statutory authorization, including those based on an agency's reinterpretations of its statutory authority.").

as those deemed to be "major questions," ambiguity in the statute prevents the court from deferring to the agency's interpretation.[140] Under *Chevron's* first step, a reviewing court must evaluate "whether Congress has directly spoken to the precise question at issue."[141] Under *Chevron's* second step, an agency's interpretation must be a "reasonable resolution of an ambiguity in a statute that the agency administers,"[142] and "a reasoned explanation for why it chose that interpretation."[143] Despite the arguments against application of the major questions doctrine, the remainder of this note's analysis of the Final Rule assumes that the Supreme Court would apply the doctrine in any future litigation.

C. Why the SEC May Not Have Clear Congressional Authorization

Opponents of the Final Rule have argued that Congress has not directly spoken to the precise question at issue, reasoning that the statutory text does not expressly state that the SEC can require climate-related disclosures. In particular, they point to the SEC's acknowledgment in 1975 that it could not order disclosures on climate change without "a specific congressional mandate."[144] However, these opponents have

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[140] West Virginia v. EPA, 142 S.Ct. 2587, 2609 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

[141] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, at 842-43 (1984) ("[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). *See id.* at 842–43. If the statute is wholly ambiguous, then the court will defer to any "permissible construction of the statute" adopted by the agency. *See also* Cigar Ass'n of Am. v. FDA, 5 F.4th 68, 77 (D.C. Cir. 2021) (quoting *Chevron, U.S.A., Inc*., 467 U.S. at 843).

[142] Michigan v. EPA, 576 U.S. 743, 751 (2015).

[143] *Cigar Ass'n of Am*., 5 F.4th at 77 (internal quotation marks omitted). If an agency successfully offers a logical and rational explanation, then the Court will give deference because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones". *Chevron, U.S.A., Inc*., 467 U.S. at 866. Agencies are in better positions than judges to follow ever-changing facts and circumstances in the context of what agencies are charged to regulate. *See Brown & Williamson Tobacco Corp*., 529 U.S. at 132.

[144] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23971 (Apr. 22, 2016) (literal citation). *See generally* Andrew N. Vollmer, Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors (May 9, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20128334-291089.pdf.

cited only one other apparent instance where the SEC has apparently questioned its authority to regulate in this area—its refusal to require climate risk disclosures when it amended certain parts of Regulation S-K in 2020.[145]

Opponents have also argued that the Supreme Court 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[; r]ather, the words take meaning from the purposes of the regulatory legislation."[146] Thus, the Supreme Court must look to the agency's purposes for adopting the relevant statutory schemes.[147] Former SEC Chairman Jay Clayton affirmed that one purpose is "to ensure that the mix of information companies provide to investors facilitates well-informed decision making."[148] However, opponents have argued that the purpose for adopting this rule is to effectuate a trend toward a lower-carbon economy.[149] While disclosures may impact investor decision-making, the opponents' arguments as to the purpose of the rule are weak.[150]

Lastly, opponents of the Final Rule have argued that companies will bear substantial costs to comply with the rule.[151] However, given

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[145] *See* Allison Herren Lee, Comm'r, Sec. & Exch. Comm'n, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26.

[146] NAACP v. FPC, 425 U.S. 662, 669 (1976). Also, Republican SEC Commissioners have argued that the SEC is exceeding their authority and have consistently challenged the SEC's potential ESG rulemaking for the past year. Overall, this line of attack aligns with the broader goals to restrict and limit regulatory and administrative rulemaking of Federal agencies.

[147] *Id.* (holding that the Supreme Court's statutory interpretation must be grounded in a reading of the legislative intent of the Proposed Rule).

[148] Fisch et al., *supra* note 119, at 1 (citing Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at Meeting of the Investor Advisory Committee (Dec. 13, 2018), https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-meeting-121318.).

[149] Andrew N. Vollmer, Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors (May 9, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20128334-291089.pdf (arguing that the purpose of the Proposal is to reduce the supply and use of fossil fuels, like oil, gas, and coal).

[150] Investors may be dissatisfied with a company's climate risk, which may initially lower their stock, but it does not equate to effectuating environmental policies. Investors can still choose to invest in these companies, and undervalued companies may be more attractive to investors.

[151] *Id.*

the modifications to the Final Rule, it would be unlikely that large companies filing with the SEC "would need to pay for third-party attestations of scope 1 and 2 emissions" because of the materiality requirement and these companies would only need to disclose information that is reasonably available.[152] Opponents have also argued that the SEC has made these proposals while also claiming it is "unable to fully and accurately quantify these costs," thereby contravening its statutory requirement to consider costs.[153] However, the SEC need only consider costs, not accurately quantify them.

D. Why the SEC Likely Has Clear Congressional Authority

Although the majority opinion in *West Virginia* abandoned a textualist approach, the Court will likely use this approach in its next opinion to avoid the same criticism. Just like in *West Virginia*'s question of "system" of emission reduction, whether nicotine was a "drug" in *Brown & Williamson*, and whether carbon dioxide was an "air pollutant" in *Massachusetts,* the Court will be faced with the question whether climate-related risks are "necessary or appropriate in the public interest or for the protection of investors" and will "promote efficiency, competition, and capital formation" based on Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act.[154]

First, the Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[155] The SEC has clearly been granted general authority to require disclosures under Section 7 of the Securities Act, and Section 12 of the Exchange Act.[156] Congress

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[152] Release No. 33-11042, *supra* note 1, at 21468–70 (requiring GHG emissions attestation report for Scope 1 and Scope 2 emissions to be prepared and signed by an independent third-party expert). *See generally*, Vollmer, *supra* note 144.
[153] Release No. 33-11042, *supra* note 1, at 21. Vollmer, *supra* note 144.
[154] Securities Act of 1933, 15 U.S.C. §§ 77g, 7(a)(1).
[155] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (internal quotation marks omitted).
[156] *See* Securities Act of 1933, 15 U.S.C. §77g, § 7(a)(1); Securities Exchange Act of 1934, 15 U.S.C. § 78l, § 12; Aguilar et al., *supra* note 128, at 9 ("[T]he framers of the Securities Act expressly recognized it, too, contemplating that the disclosure mandate they created would affect corporate behavior . . . ."); Bevis Longstreth, *ABA National Institute Corporate Social Responsibility Panel: The Role of the SEC*, 28 BUS. LAW. 215 (1973) (if "a significant number

delegates power to the SEC under the Securities Act of 1933 and Securities Exchange Act of 1934.[157] In 1996, Congress provided guidance to the SEC by defining "necessary or appropriate" as "whether the action will promote efficiency, competition, and capital formation."[158] The SEC is required to consider the impact any such rule or regulation would have on competition.[159] The SEC also cannot issue a rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[160] Proponents argue that this regulation is reasonable because the disclosures have substantial benefits to investors, and the disclosures do not impose large financial costs on companies.[161]

Further, Section 7 of the Securities Act allows the SEC to require information to be disclosed prior to a public offering "as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors."[162] The SEC argues that climate-related disclosures are "necessary or appropriate in the public interest or for the protection of investors."[163] Moreover, Section 12 of the Exchange Act requires that in order to trade on exchanges a company must disclose "such information, in such detail, as to the [company] . . . as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following: . . . the organization, financial structure, and nature of the business."[164] Nonetheless, the "meaning—or ambiguity—of certain words or phrases may only

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of investors [eventually want] data in order to measure an investment" based on environmental considerations, "the SEC [would] have the power [to], and . . . should[,] mandate disclosure in response")).

[157] *See* 15 U.S.C. §§ 77g(a)(1), 78l(b)(1); Securities Act § 2(b); Exchange Act § 23(a)(2). *See also* 15 U.S.C. § 78m(a) ("as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security").

[158] 15 U.S.C. §§ 77b(b), 78c(f). *See also id.* § 78w(a)(2). The SEC has interpreted its authority as cabined by its "core mission to promote investor protection, market efficiency and competition, and capital formation." Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23917, 23922 & n.6 & n.55 (Apr. 22, 2016).

[159] 15 U.S.C.A. § 78w(a)(2).

[160] *Id.*

[161] *See generally*, Release No. 33-11042, *supra* note 1, at 21412–52.

[162] Securities Act of 1933, 15 U.S.C. §§ 77b, 7(a)(1).

[163] Release No. 33-11042, *supra* note 1, at 21335.

[164] Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 12.

become evident when placed in context."[165] When deciding whether the language is plain, words must be read "in their context and with a view to their place in the overall statutory scheme."[166]

Accordingly, statutory history must be evaluated. When the Securities Act was passed, Congress's intent was to create an agency "designed to reach items of distribution profits, watered values, and hidden interests . . . [of] indispensable importance in appraising the soundness of a security," which contains "items indispensable to any accurate judgment upon the value of the security."[167] Finally, the Supreme Court has historically taken a permissive approach to the delegation of powers.[168] Given the historical evidence of Congress's intent, the SEC would have to fail to articulate *any* policy or standard for the Final Rule to be invalidated.

V. Discussion

There is a substantial likelihood, based on the Supreme Court's recent decision in *West Virginia*, that it will consider climate-related issues major questions and accordingly apply the major questions doctrine to any challenge of the SEC's Final Rule. Nevertheless, there is a strong argument that Congress granted the SEC clear congressional authority to require climate risk disclosures as "necessary or appropriate in the public interest or for the protection of investors."[169] Neither the Securities Act, nor the Exchange Act, limit the SEC with respect to the specific kind of disclosures reached by this grant of authority—any issue that would affect an investor, including climate-related ones, is fair game, "full stop—no ifs, ands, or buts of any kind relevant here."[170] In guidance from 1996, Congress gave the SEC wide latitude in deciding what disclosures would promote efficiency, competition, and capital formation.[171] Congress had the opportunity to limit the SEC's power,

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[165] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).
[166] *Id.* (internal quotation marks omitted).
[167] Fisch et al., *supra* note 119, at 3 (citing HOUSE REPORT ON SECURITIES ACT, H.R. REP. NO. 85, 73d Cong., (1st Sess. 3 1933)).
[168] Gundy v. United States, 139 S.Ct. 2116, 2122 (2019) (permitting Congress to grant the Attorney General the authority to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration."). *See id.* (Gorsuch, J., dissenting) (raising the major questions doctrine). *See also* Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).
[169] Securities Act of 1933, 15 U.S.C. §§77g, 7(a)(1).
[170] West Virginia v. EPA, 142 S.Ct. 2587, 2626 (2022) (Kagan, J., dissenting).
[171] 15 U.S.C. §§ 77b(b), 78c(f).

but declined to do so. So long as the Final Rule does not impose a burden on competition[172], no other provision prevents the SEC from requiring climate-related disclosures.

Some commentators have argued that the SEC can only require disclosure of information that is material to the prospect of a company's financial returns. However, Former Commissioner Allison Herren Lee dispelled that argument, pointing out that the SEC's statutory authority is not qualified by "materiality."[173] The SEC has historically required periodic reports to include information that is important to investors but may or may not be material in every respect to every company making the disclosure.[174] Examples include related party transactions[175], environmental proceedings[176], share repurchases[177], and executive compensation.[178]

Commenters also argue that the Final Rule does not merely fill in gaps in the statutory scheme, but rather crafts a novel and expansive policy.[179] Congress has historically mandated environmental reporting requirements through the EPA to collect reports from emission sources and make them available to the public.[180] However, the EPA's role is not diminished by the existence of other administrative agencies.[181] In fact, there are many agencies that also have the power to issue disclosure requirements, such as the Internal Revenue Service, the Occupational

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[172] 17 U.S.C. 78w(a)(2).

[173] Allison Herren Lee, Comm'r, Sec. Exch. Comm'n, *Keynote Remarks at the 2021 ESG Disclosure Priorities Event Hosted by the American Institute of CPAs & the Chartered Institute of Management Accountants, Sustainability Accounting Standards Board, and the Center for Audit Quality: Living in a Material World: Myths and Misconceptions about "Materiality"* (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421.

[174] Herren Lee, *supra* note 172. *See also* Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1645, n. 18 (2004) ("Although the rationale for the construction of the various disclosure obligations of companies - such as their periodic filing obligations in Forms 10-Q and 10-K - is that the information is likely to be important to investors, not every piece of information required is going to be important in every instance.").

[175] Herren Lee, *supra* note 172. 17 C.F.R. § 229.404.

[176] Herren Lee, *supra* note 172. 17 C.F.R. § 229.103(c)(3).

[177] Herren Lee, *supra* note 172. Form 10Q, Item 2(e).

[178] Herren Lee, *supra* note 172. 17 C.F.R. § 229.402.

[179] *See* Chamber of Com. of the U.S., *supra* note 114, at 43.

[180] *Id.* (discussing Congress delegating to the EPA emission reports and how to track different emissions levels).

[181] Fisch et al., *supra* note 119, at 9.

Safety and Health Administration, and the Equal Employment Opportunity Commission.[182] It is well-established that federal agencies share intra-agency authority and sharing such authority does not diminish any agencies' power.[183] Additionally, the SEC is not the only securities markets regulator; the Commodity Futures Trading Commission (CFTC) shares that regulatory role.[184] In fact, "other entities that play a role in financial regulation are interagency bodies, state regulators, and international regulatory fora."[185]

Lastly, Congress cannot—and should not—explicitly define every specific use of power by an agency. This would frustrate the purpose of our national government. "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[186] Most importantly, Congress broadly delegates power because agencies are better equipped to respond appropriately, and "Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and

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[182] *Id.* (emphasizing that the disclosures are directed to different audiences and serve different regulatory goals).

[183] FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001) (citation omitted) ("Because we live in 'an age of overlapping and concurring regulatory jurisdiction.'"). *See also* Massachusetts v. EPA, 549 U.S. 497, 532 (2007) ("The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."); Thompson Med. Co. v. FTC, 791 F.2d 189, 192 (D.C. Cir. 1986) ("A court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may."); Galliano v. U.S. Postal Serv., 836 F.2d 1362, 1369-70 (D.C. Cir. 1988) (relying on First Amendment and canon of constitutional doubt in holding that Federal Election Campaign Act partially preempted postal fraud prescriptions of 39 U.S.C. § 3005); Pennsylvania v. ICC, 561 F.2d 278, 292 (D.C. Cir. 1977) ("It is well established that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect.").

[184] Marc Labonte, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2020).

[185] *Id.*

[186] Arlington v. FCC, 569 U.S. 290, 296 (2013). In *West Virginia*, Justice Kagan's dissent observed that in Section 111 of the CAA, Congress spoke in "capacious terms." It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." West Virginia v. EPA, 142 S.Ct. 2587, 2632 (2022) (citing *Massachusetts*, 549 U.S. at 532).

when they arise."[187] When Congress uses broad language, "courts generally may not "impos[e] limits on [the] agency's discretion."[188] Something our current Court has forgotten is judicial modesty.

VI. Conclusion

Within days of the SEC's publication of the Final Rule, groups have already filed at least three lawsuits against the SEC.[189] We are likely to see the major questions doctrine in future litigation, and this note accordingly explores the arguments for and against the major questions doctrine invalidating the Final Rule. In the Final Rule's current form, there is a significant likelihood that the major questions doctrine would be applied, but based on the clear congressional authority and historical evidence of congressional intent, the Final Rule will not likely be invalidated. However, even if we see a successful major questions challenge to the Final Rule, there are numerous remedies already initiated, such as the legislative policies currently in the House to address the dissemination of disinformation concerning climate change by the fossil fuel industry.[190] If the Supreme Court holds that the SEC exceeded its authority, the case would signal to Congress the need to consider whether the agency should have such authority, or whether Congress should draft clearer legislation to authorize such powers.[191] The silver lining for any upcoming litigation is that any outcome could also lead to increased state and local action on climate-related risk disclosures.

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[187] *West Virginia*, 142 S.Ct. at 2628 (Kagan, J., dissenting).
[188] *Id.* at 2632–33 (citing Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367, 2381 (2020)).
[189] Jessica Corso, *SEC's Climate Regs Face Multipronged Courtroom Attack*, Law360 Legal News (Mar. 8, 2024).
[190] Hiroko Tabuchi, *House Panel Expands Inquiry Into Climate Disinformation by Oil Giants*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/09/16/climate/exxon-oil-disinformation-house-probe.html.
[191] Adler, *supra* note 60, at 66–67.