Nos. 24-1522, 24-1624 , 24-1626, 24-1627,
24-1628, 24-1631, 24-1634, 24-1685, 24-2173

In the United States Court of Appeals for the Eighth Circuit

IOWA; ARKANSAS; IDAHO; MISSOURI; MONTANA; NEBRASKA; NORTH DAKOTA; SOUTH DAKOTA; UTAH; AND AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE,
Petitioners,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent
and
DISTRICT OF COLUMBIA; ARIZONA; COLORADO; CONNECTICUT; DELAWARE; HAWAII; ILLINOIS; MARYLAND; MASSACHUSETTS; MICHIGAN; MINNESOTA; NEVADA; NEW MEXICO; NEW YORK; OREGON; RHODE ISLAND; VERMONT; WASHINGTON; AND WISCONSIN,
Intervenors.

Petition for Review of an Order of the Securities and Exchange Commission

BRIEF OF ADVANCING AMERICAN FREEDOM, INC.; AMERICAN SECURITIES ASSOCIATION; JOHN LOCKE FOUNDATION; AFA ACTION; AMAC ACTION; ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS
(LIST OF *AMICI CURIAE* CONTINUED ON INSIDE COVER)

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June 24, 2024

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STATEMENT OF INTEREST OF AMICI

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all people are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that the governmental structures established by the Constitution are necessary for the preservation of the liberty of the people. When the administrative state usurps the powers of the constitutional branches and the courts fail to intervene, the rights of the people are imperiled.

The American Securities Association is a non-profit trade association whose mission is to promote trust and confidence among American investors, facilitate small business capital formation, and support fair, efficient and competitively balanced capital markets.

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

[2] Edwin J. Feulner, Jr, *Conservatives Stalk the House: The Story of the Republican Study Committee* 212 (Green Hill Publishers, Inc. 1983).

The John Locke Foundation was founded in 1990 as a nonprofit think tank in North Carolina. It employs research, journalism, and outreach to promote liberty and limited constitutional government as the cornerstones of a society in which individuals, families, and institutions can freely shape their own destinies.

Amici AFA Action; AMAC Action; American Land Rights Association; American Values; Americans for Limited Government; Center for a Free Economy; Center for Freedom and Prosperity; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Climate Science Coalition of America; Club for Growth; T. Michael Davis, Esq., Scandia-Germania-Davis, PLLC; Eagle Forum; Charlie Gerow; Allen J. Hebert, Chairman, American-Chinese Fellowship of Houston; Idaho Freedom Foundation; Institute for Policy Innovation; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House and Chairman, Missouri Center-Right Coalition; Leadership Institute; Donald L. Luskin, Chief Investment Officer, TrendMacro; Men and Women for a Representative Democracy in America, Inc.; Orthodox Jewish Chamber of Commerce; Rio Grande Foundation; Pamela S. Roberts, Immediate Past President, Kentucky Federation of Republican Women; Roughrider Policy Center; John Shadegg, Member of Congress, 1995-2010; Cameron Sholty, Executive Director, Heartland Impact; Carla J. Sonntag, President and CEO, New Mexico Business Coalition; Southeastern Legal Foundation; State Financial Officers Foundation

James Taylor, President, The Heartland Institute; Tea Party Patriots Action, Inc.; The Conservative Caucus; Bob Vander Plaats, President/CEO, The FAMiLY LEADER; Women for Democracy in America, Inc.; and Young America's Foundation believe that the liberty of the people depends on the government's operation within the limitations established by the Constitution.

INTRODUCTION

The administrative state turns one of the fundamental principles of our republic, the rule of law, on its head. The rule of law requires that a ruler "be subject to the law in exercising his power and may not govern by will alone." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment). The Securities and Exchange Commission's (SEC) climate disclosure rule circumvents the structural constraints on federal power designed to ensure the rule of law and imposes on the people the will of a self-interested minority.

On March 6, 2024, the SEC issued a final rule that gives "climate issues [] special treatment and disproportionate space in Commission disclosures and managers' and directors' brain space."[3] This climate disclosure rule is not directed towards facilitating financial disclosure; it is environmental regulation designed to

[3] Hester M. Pierce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024) *available at* https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624#.

manipulate the behavior of corporations. The rule requires many publicly traded corporations to report their climate-related risks and greenhouse gas emissions as part of their financial disclosures. Petition for Review at 26-30, *Iowa v. United States Securities and Exchange Commission*, No. 24-1522 (8th Cir. 2024). Some of these disclosures are limited to information that is "material" but, in effect, requires an elastic understanding of materiality.[4]

The Constitution establishes a system of separated government powers, vesting the legislative power in Congress, the executive power in the President, and the judicial power in the Supreme Court and those lower federal courts Congress chooses to establish. This "separation of powers is designed to 'secure[] the freedom of the individual.'" *Collins v. Yellen*, 141 S. Ct. 1761, 1796 (2020) (Gorsuch, J., concurring in part) (second alteration in original) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)). As the Declaration of Independence explains, "Governments are instituted among Men," "to secure" the God-given rights of "all men," including the rights to "Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2. "[T]he founders recognized the darker side of human nature and attempted in the Constitution to forge a balance between liberty,

[4] "This rule replaces our current principles-based regime with dozens of pages of prescriptive climate-related regulations. While the Commission has decorated the final rule with materiality ribbons, the rule embraces materiality in name only. The resulting flood of climate-related disclosures will overwhelm investors, not inform them." Pierce, *supra* note 3.

for which they had fought a revolution, and order, which would protect the rights of all, not just the most powerful."[5] The Constitution, "like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State." *Obergefell v. Hodges*, 576 U.S. 644, 736 (2015) (Thomas, J., dissenting).

"Few things could be more perilous to liberty than some 'fourth branch' that does not answer even to [the President,] the one executive official who *is* accountable to the body politic." *Collins*, 141 S. Ct. at 1797 (Gorsuch, J., dissenting) (emphasis in original) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)). The SEC is such an agency.[6]

"The modern administrative state was founded on premises that supplant the separation of powers. These premises—that agencies staffed with 'experts' will face 'modern' problems better than elected officials and that administration is more

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[5] Lee Edwards, *The Conservative Revolution* 322 (Free Press 1999).

[6] According to then-SEC Commissioner Edward Fleischman, "the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might." Edward H. Fleischman, Commissioner, SEC, Address to the Women in Housing and Finance, *The Fourth Branch at Work*, (November 29, 1990) https://www.sec.gov/news/speech/1990/112990fleischman.pdf. Can the administrative state be blamed for constantly seeking to expand its power at the expense of the constitutional branches? As the thief John Falstaff remarks, "Why, Hal, 'tis my vocation, Hal. 'Tis no sin for a man to labor in his vocation." William Shakespeare, *Henry IV Part 1*, act I, sc. 2, l. 110-11 at 19 (Simon & Schuster 2020).

'efficient' than legislating—still undergird agency operations today."[7] The SEC continues that legacy with its climate disclosure rule, abandoning its statutorily mandated role of facilitating non-fraudulent financial disclosure. Instead, the agency is officiously, and oafishly, inserting itself into the area of environmental regulation, threatening not only the constitutional branches and their respective powers but the liberties for which they exist.

ARGUMENT

I. The Rule of Law is Essential to the Government's Performance of its Fundamental Purpose: Securing the Rights of the People.

The rights of the people preexist government and come from man's Creator. The Declaration of Independence para. 2. As Justice Thomas has explained, "[w]hen the Framers proclaimed in the Declaration of Independence that 'all men are created equal' and 'endowed by their Creator with certain unalienable Rights,' they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built."[8] *Obergefell*, 576 U.S. at 735 (Thomas, J., dissenting) (quoting The

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[7] David McIntosh, William J. Haun, *The Separation of Powers in an Administrative State* in LIBERTY'S NEMESIS 239, 240 (Dean Reuter and John Yoo, eds., 2016).

[8] Nor were the ideas espoused in the Declaration new. According to Blackstone, absolute rights are those "which are such as appertain and belong to particular men, merely as individuals or single persons." 1 W. Blackstone, *Commentaries on the Laws of England* 119 (1765). The Declaration comes even closer to the ideas of

Declaration of Independence, para. 2 (U.S. 1776)). The centrality of this idea is reflected by the nation's adoption of the Ninth Amendment which guarantees that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. In other words, the people were to retain their *preexisting* rights, both enumerated and unenumerated, under the new government.

In the absence of government, the rights of the weak are subject to the will of the strong, whose respect for rights cannot be depended upon. Governments are established to solve that problem. The Declaration of Independence, which imbues meaning into the later documents of our Republic, expresses this fundamental philosophy of American government: "Governments are instituted among Men," to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness."[9]

Yet governments themselves are a threat to the rights they were established to protect. The Founders' view of government "was rooted in a general skepticism regarding the fallibility of human nature." *See INS v. Chadha*, 462 U.S. 919, 949

Locke, who wrote, "no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business" are "made to last during his, not one another's pleasure." John Locke, *Second Treatise on Government*, § 6, 9-10 (Prometheus Books 1986) (1690).

[9] The Declaration of Independence para. 2 (U.S. 1776).

(1983); The Federalist No. 10, at 43 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) ("The latent causes of faction are thus sown in the nature of man."). As Madison famously explained:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[10]

John Adams explained how a government may be "oblige[d] [] to control itself"[11] in the Massachusetts Constitution. Under the state constitution, the executive, judicial, and legislative organs of the state government may not exercise the powers of one another so that, "it may be a government of laws and not of men." Mass. Const. pt. 1, art. XXX. Proper government does not impose the will of one man, nor of the few or the many. Under proper government, the *law* must rule.[12] That is the only means of ensuring the rights of the people. Citing this provision of the Massachusetts Constitution, the Supreme Court in *Yick Wo v. Hopkins*, wrote that the idea of a person's rights held "at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." 118

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[10] The Federalist No. 51, at 269 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).
[11] *Id*.
[12] *See* Aristotle, *Politics*, Book III, 1287a (Benjamin Jowett, trans. 1885) (350 BC) ("[H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast.").

U.S. 356, 370 (1886). As Friedrich Hayek suggested, administrative law in practice often involves "'administrative powers over persons and property', not consisting of universal rules of just conduct but aiming at particular foreseeable results, and therefore necessarily involving discrimination and discretion."[13]

The Constitution is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It is also "the law that governs those who govern [the people]," and "is put in writing so that it can be enforced against the servants of the people."[14] If America is to be a nation ruled by law and not by the whims of its elected or unelected officials, the Constitution must rule.

II. The Constitution's Structures Ensure the Rule of Law; The SEC's Climate Disclosure Rule Violates Those Limitations.

To ensure that the law, not the will of those in power, rules, the Constitution imposes limitations on the federal government. First, and most importantly, the legislative, executive, and judicial powers of the federal government are divided among three coequal branches, and each has exclusive authority to exercise its own power. Second, "[t]he powers delegated by the proposed [C]onstitution to the federal

[13] Friedrich A. Hayek, *Law Legislation and Liberty Vol. I: Rules and Order* 138 (The University of Chicago Press 1973).
[14] Randy E. Barnett, *Our Republican Constitution* 23 (1st ed. 2016).

government, are few and defined."[15] The SEC's climate disclosure rule circumvents these essential limitations on government power and its abuse.

A. The SEC's promulgation of its climate disclosure rule depends on the agency's usurpation of the legislative power vested solely in Congress in Article I of the Constitution.

Article I of the Constitution vests, "[a]ll legislative Powers *herein granted* . . . in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). Congress is thus the exclusive federal legislative authority. The SEC's climate regulation usurps that power.

i. If the commissioners of the SEC are protected from removal by the President, the agency's promulgation of the climate disclosure rule illegitimately vests the legislative power in an unaccountable independent agency.

The Constitution vests the President with "the 'executive Power'—all of it" and requires that he "take Care that the Laws be faithfully executed." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203 (2020) (quoting U.S. Const. art. II, § 1, cl. 1); U.S. Const. art. II, § 3. Further, "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.'" *Id*. at 204 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010)). The Court has "recognized only two exceptions to the President's

[15] The Federalist No. 45, at 241 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

unrestricted removal power," *Id*. (emphasis added), only one of which is relevant here.

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court "held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause." *Seila Law LLC*, 591 U.S. at 204 (emphasis omitted). Whether SEC Commissioners have removal protections is an open question.[16] The SEC's organic statute lacks removal protections. *See* 15 U.S.C. § 78d. However, the Supreme Court has assumed, and the Fifth Circuit has found, that the Commissioners do have protection.

The Supreme Court noted in *Free Enterprise Fund v. Public Company Accounting Oversight Board* that "[t]he parties [had] agree[d] that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'" 561 U.S. 477, 487 (2010) (quoting *Humphrey's Executor*, 295 U.S. at 620). Similarly, the Fifth Circuit based its decision in *Jarkesy v. SEC* in part on the assumption that the "SEC Commissioners and MSPB members can only be removed by the President for cause; so, SEC [administrative law judges] are insulated from

[16] Whether the Commissioners have removal protection is not outcome determinative, but it does affect the reasoning that leads to that conclusion.

the President by at least two layers of for-cause protection from removal, which is unconstitutional under *Free Enterprise Fund*." 34 F.4th 446, 464 (5th Cir. 2022).

Assuming the legitimacy of the *Humphrey's Executor* limitation on the President's removal power,[17] it is only permissible if the powers of the agency are limited in scope and type. Whether the *Humphrey's Executor* exception applies "depends on the characteristics of the agency before the Court." *Seila Law LLC*, 591 U.S. at 215. There are some elements of the *Humphrey's Executor* test the SEC clearly meets. It is a multi-member commission headed by experts with staggered terms and with no more than three of the five being members of the same political party. *See id.* at 216.

However, removal protections under *Humphrey's Executor* also depend on the agency in question exercising "no part of the executive power." *Id*. at 215 (internal quotation marks omitted) (quoting *Humphrey's Executor*, 295 U.S. at 628). *Humphrey's Executor* agencies are "'administrative bod[ies]' that perform[] 'specified duties as a legislative or judicial aid.'" *Id*. (quoting *Humphrey's Executor*, 295 U.S. at 628). The Court has characterized these "quasi-legislative or quasi-judicial powers" as consisting of "'making reports' to Congress and 'as an agency

[17] Justice Thomas, joined by Justice Gorsuch has persuasively argued that the Court should overturn *Humphrey's Executor* because it "poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Seila Law LLC*, 591 U.S. at 239 (Thomas, J., concurring).

of the judiciary' in making recommendations to courts as a master in chancery.'" *Id*. at 215-16 (quoting *Humphrey's Executor*, 295 U.S. at 628) (internal quotation marks omitted in first quotation).

The SEC's climate disclosure rule is an exercise both of legislative and executive power and thus would exceed the powers available to the SEC if its commissioners have removal protections. In issuing its climate disclosure rule, the SEC went far beyond providing reports to Congress or acting as an agent of the judiciary. Because this regulation represents a much more significant exercise of power than *Humphrey's Executor* allows to independent agencies, if the SEC is such an agency, then the climate disclosure rule is an unconstitutional usurpation of legislative power.

ii. If the SEC's commissioners are not protected from presidential removal, the SEC's climate disclosure rule is an instance of usurpation by the Executive Branch of the legislative power.

If the President is empowered to remove the Commissioners of the SEC, the SEC is an agent of the Executive Branch. "The 'executive Power' –all of it," is vested in the President. *Seila Law LLC*, 591 U.S. at 203. "All legislative Powers" granted by the Constitution, on the other hand, are "vested in a Congress of the United States." U.S. Const. art. II. The grant of these powers, as well as that of the judicial power in Article III, "are exclusive." *Ass'n of Am. R.R.s*, 575 U.S. at 67 (Thomas, J., concurring in the judgment) (citing *Whitman v. Am. Trucking Ass'ns,*

Inc., 531 U.S. 457, 472 (2001); *Free Enter. Fund*, 561 U.S. at 496-97; *Stern v. Marshall*, 564 U.S. 462, 481-84 (2011)). "Only the vested recipient of [a particular government] power can" exercise that power. *Ass'n of Am. R.R.s*, 575 U.S. at 68 (Thomas, J., concurring in the judgment). Thus, the executive cannot exercise the legislative power.

This limitation on the executive's ability to exercise the legislative power "has ancient roots in the concept of the 'rule of law,' which has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone." *Id*. at 70. This idea further developed throughout English history. In 1539, Parliament passed the Act of Proclamations giving the king's proclamations the force of parliamentary law with some exceptions and limitations. *Id*. at 71 (citing Philip Hamburger, *Is Administrative Law Unlawful?* 35-37 (2014)). Writing about this law after its repeal less than a decade after its enactment, David Hume described the investment of the king's proclamations with such authority as "a total subversion of the English Constitution." *Id*. (internal quotation marks omitted).

The Constitution was designed to avoid that problem by vesting Congress with the sole legislative power. As Professor Philip Hamburger has shown, throughout much of the first century of American government, executive and legislative power coexisted without the President engaging in legislative activity. For

example, the President "could make regulations and interpretations that merely directed executive officers and nonsubjects and could make determinations that merely discerned facts or the duties of subjects. Although these executive acts came close to legislation, they generally did not bind members of the public, and they therefore were not legislative."[18] Unlike the presidencies of our first century under the Constitution, the SEC's climate disclosure rule shares the characteristics of legislation—it is binding on the private companies to which it applies and is generally applicable to the large class of companies that meet certain requirements.

Further, the climate disclosure rule does not clear even the low hurdle that is the Court's current approach to assessing executive exercise of legislative power: the intelligible principle test. This nearly "boundless" test "does not adequately reinforce the Constitution's allocation of legislative power." *Ass'n of Am. R.R.s*, 575 U.S. at 77 (Thomas, J., concurring in the judgment). Nonetheless, it is not a blank check. Here, the SEC is claiming authority not to facilitate financial disclosure but to engage in environmental regulation with no congressional authorization. That Congress has delegated power to regulate the environment to the Environmental Protection Agency (EPA), rather than the SEC, makes the SEC's claim to that authority more tenuous still. As the Court has explained, in the two instances in

[18] Philip Hamburger, *Is Administrative Law Unlawful?* 110 (2014). *See* Hamburger, 81-110.

which it has "found a delegation excessive," it was "because 'Congress had failed to articulate *any* policy or standard.'" *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (quoting *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 474-75 (2001)). Because Congress has not empowered the SEC to engage in environmental regulation, the SEC cannot have an intelligible principle for doing so. Thus, because the agency is engaging in regulatory legislation absent congressional authorization, it is usurping the legislative power vested by the Constitution only in Congress.

B. The SEC's climate disclosure rule is not a necessary and proper law for the exercise of Congress's commerce power.

Congress has only those powers vested in it by the Constitution. U.S. Const. art. I, § 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States.") (emphasis added); U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *Ass'n of Am. R.R.s*, 575 U.S. at 67 (Thomas, J., concurring in the judgment). Thus, even if Congress could grant some legislative authority to the executive branch, Congress can only grant that which it itself has.

The climate disclosure rule does not lie within Congress's authority to regulate commerce "among the several States." U.S. Const. art. I, § 8, cl. 3. The Court has

interpreted the Commerce Clause as giving Congress the authority to regulate "activities that substantially affect interstate commerce." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). This power, the Court has said, "can be expansive." *Id*. That is an understatement.

Significant evidence demonstrates that, under the original meaning of the Commerce Clause, Congress is empowered to "regulate the buying and selling of goods and services trafficked across state lines." *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (citing *United States v. Lopez*, 514 U.S. 549, 586-89 (1995) (Thomas, J., concurring)).[19] That evidence demonstrates that "[c]ommerce, or trade, stood in contrast to productive activities like manufacturing and agriculture." *Id*. For example, "[i]n none of the sixty-three appearances of the term 'commerce' in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange."[20] The purpose of the federal government under the Constitution, after all, was to create national unity, not national uniformity.

Thus, because the climate disclosure rule does not regulate the interstate trade of goods, the question is whether the rule is necessary and proper to Congress's exercise of its Commerce Clause power. Along with its enumerated powers,

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[19] *See also*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 859 (2003).

[20] Barnett*, The Original Meaning of the Commerce Clause*, *supra* note 19 at 116.

Congress also has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. The Court has applied this constitutional provision by asking "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010). However, the Court's early interpretation of the clause conformed more closely to its limiting language.

In his *McCulloch* opinion, Chief Justice Marshall explained his understanding of the clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). While the Court has characterized *McCulloch* as creating "a means-end rationality test," *Sabri v. United States*, 541 U.S. 600, 611 (2004) (Thomas, J., concurring) (quoting *Sabri*, 541 U.S. at 605 (majority opinion)), "'appropriate' and 'plainly adapted' are hardly synonymous with 'means-end rationality.'" *Id*. at 612 (alteration removed).

As Justice Thomas has explained, *McCulloch* created a two-part test for compliance with the Necessary and Proper Clause. The SEC's climate disclosure rule fails that test. "First, the law must be directed toward a 'legitimate' end,

which *McCulloch* defines as one 'within the scope of the [C]onstitution'—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution." *Comstock*, 560 U.S. at 160 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). After all, as Hamilton explained, the Necessary and Proper Clause simply restates what was already implicit in the powers enumerated in the Constitution; it does not create new powers.[21]

Thus, the question is, are the ends toward which the climate disclosure rule is directed within the scope of the powers the Constitution grants Congress? The answer to that question depends on the answer to yet another question: did the SEC promulgate this rule to "'carry[] into Execution' one or more of the Federal Government's enumerated powers"? *Id*. (quoting U.S. Const. art. I, § 8, cl. 18). it appears that the SEC's objective here is not to foster material financial disclosure, which at least arguably could have been for the purpose of carrying into execution Congress's Commerce Clause power, but environmental regulation many steps removed from the trade of goods across state lines. If the rule exists to ensure that investors and potential investors have information relevant to their assessment of the income stream of a company, how are a company's greenhouse gas emissions, and those of its energy suppliers, relevant to that assessment? What is it about a

[21] The Federalist No. 33, at 158 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

company's greenhouse gas emissions that bears on its income stream? The SEC's apparent end, to engage in environmental regulation, is not within the scope of the Constitution.

Second, even if the ends pursued by the SEC in this case are within the scope of the Constitution, the means employed by the SEC are neither necessary nor proper.

> [T]here must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve . . . The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

Comstock, 560 U.S. at 160-61 (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421).

To show plain adaptation, "it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power." *Sabri*, 541 U.S. at 613 (Thomas, J., concurring) (citing *Writings of James Madison* at 448 (G. Hunt ed. 1908)). There is no direct, clear relation between the regulation of the interstate trade of goods and a requirement that companies report environmental impacts like greenhouse gas emissions that have little or no obvious impact on the company's financial returns.

Finally, the government's means are not proper because they are "'[in]consistent' with [the Constitution;'] 'letter and spirit.'" *Comstock*, 560 U.S. at 160-61 (Thomas, J., dissenting) (first alteration in original) (quoting *McCulloch*, 17 U.S. at 421). The SEC's climate disclosure rule expands the power of the federal legislative authority and vests it in an unelected, unaccountable, and unconstitutional "fourth branch" administrative agency. Further, it attempts to manipulate the market to accomplish the agenda of ideological and commercial factions, contrary to the fundamental purpose of the governmental structure the Constitution establishes. The climate disclosure rule is inconsistent with the "letter and spirit of the Constitution." *McCulloch*, 17 U.S. at 421. For that reason, it should be struck down.

III. The SEC Represents One of the Chief Dangers to the Rule of Law: Factional Control of Government Power.

In his 1971 article *The Theory of Economic Regulation*, Nobel laureate in economics George Stigler argued that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[22] The regulatory reform spurred in part by this "landmark work" resulted in "efficiency improvements equivalent to a 7-9 percent increase in GDP, with consumers receiving most of the benefits."[23] Regulatory capture "does not always predict when regulations will be

[22] George J. Stigler, *The Theory of Economic Regulation*, 2 The Bell J. of Econ. & Mgmt. Sci., 3, 3 (1971).
[23] Susan E. Dudley, *Let's Not Forget George Stigler's Lessons about Regulatory*

issued," but "[o]nce regulation is inevitable, industry works to ensure that it is implemented in a way that best serves its interests."[24]

Regulatory capture confers upon those already established in the market a "moat": a protection from competition. As investor Warren Buffett has explained, "A truly great business must have an enduring 'moat' that protects excellent returns on invested capital."[25] Regulatory capture is a moat-builder, harmful to existing market players and hampering market entry of new competitors whose success depends on economic liberty. There are two factional interests that benefit from such capture: the first are the large corporations that are better prepared to absorb the costs of compliance than their smaller competitors who will suffer disproportionate harm; the second are those with an ideological axe to grind in climate regulation either because they see humans as a problem in general,[26] or because they believe that it is

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Capture, Promarket (May 20, 2021) https://www.promarket.org/2021/05/20/george-stiglers-lesson-regulatory-capture-rent-seeking/.

[24] *Id*.

[25] *What is an Economic Moat? Why Warren Buffett Says It Matters for Investors*, Yahoo! Finance (March 31, 2024) https://tinyurl.com/yc3nzr7z.

[26] "The causal chain of the [environmental] deterioration is easily followed to its source. Too many cars, too many factories, too much detergent, too much pesticide, multiplying contrails, inadequate sewage treatment plants, too little water, too much carbon dioxide—all can be traced easily to *too many people*." Paul R. Ehrlich, *The Population Bomb* 66-67 (1968) (emphasis in original).

in the public's interest to have government-led climate regulation. Everyday Americans, however, are the ones who suffer the consequences.

The ever-present threat posed by government is that some interested party may seize the power of that government and use it to its own ends, to the detriment of the rights of those not in power. As Madison explained, one major danger to republican government is that such "governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[27] Madison goes on to explain in the following paragraph that a faction need not be a majority to exercise illegitimate control.[28]

The Founders had experienced the consequences of factional control in the form of debtor relief laws in the states.[29] Debtors represented the majority party in

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[27] The Federalist No. 10, at 42 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

[28] *Id*. at 43 ("By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.").

[29] Nor has the idea of punishing some people for the unpaid debts of others gone out of style, as demonstrated by recent efforts to shoulder the taxpayers with the burden of unpaid student loan debt. *See* Brief for *Amici Curiae* Americans for Prosperity and Advancing American Freedom, *Biden v. Nebraska*, 600 U.S. 447 (2023) (No. 22-506).

the states and were passing laws to their own benefit and to the detriment of creditors, hence the Contracts Clause of the Constitution. *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018).

Madison explains that the problem of factional control can either be remedied by controlling its causes or mitigating its effects. To control its causes would require either the destruction of liberty or the universal agreement of all.[30] Because the former would be worse than the disease, and because the second is impracticable, the solution to factionalism must come in the mitigation of its effects.[31] The whole system of checks and balances was designed to accomplish that goal.

Yet today, most of American law is created outside the system of those checks and balances by a vast and effectively unaccountable bureaucracy. Both corporate interests and ideological interests can exercise factional control over these agencies. The regulatory activity of these agencies, and the impacts of those activities, in turn, are often hidden from the people. For example, in this case, Americans will find that their grocery bills have increased as a result of the massive compliance costs that associated with these regulations. However, they would likely have no idea (and it would be virtually impossible to compute) the degree to which the grocery price

[30] Madison, *supra* note 27 at 43.
[31] *Id*.

increase was due to the regulatory activity of the SEC—activity that is effectively and totally beyond accountability to the people.

The SEC's climate disclosure rule is an act of environmental regulation, not an effort to facilitate material financial disclosure. As such, it represents the capture of the SEC and three of its five commissioners by a minority political agenda. When asked by Pew research in May of this year how much of a problem climate change is, only 36% said it was a "very big problem," compared with 62% who said the same about inflation and 60% who said the same about affordability of health care.[32] Out of sixteen topics in this survey, climate change ranked eleventh in terms of what percent thought it was a very big problem.[33] Thus, while climate policy is highly contentious, it is only a top priority for a minority of Americans. In a *Newsweek* poll, only 21% selected the environment as one of their top three issues, while 60% said that the economy was among the three most important issues to them.[34] The next most agreed upon issue, healthcare, was ranked as a top issue by only 33% of respondents, meaning that the economy was the only issue a majority of voters in

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[32] *Top Problems facing the U.S.*, Public's Positive Economic Ratings Slip; Inflation Still Widely Viewed As Major Problem, Pew Research (May 23, 2024) https://www.pewresearch.org/politics/2024/05/23/top-problems-facing-the-u-s/.

[33] *Id*.

[34] Darragh Roche, *Election 2024 Poll: How Voters Feel About Key Issues*, *Newsweek* (July 19, 2023, 5:00 AM) https://www.newsweek.com/election-2024-poll-how-voters-feel-about-key-issues-1813658.

that poll agreed was a priority.[35] Further, these polls suggest, but fail to fully capture, another essential element of the question of voter priorities. Whatever their ostensible benefits, environmental regulations have costs. Most obviously, they lead to higher prices and fewer options for consumers.[36] When it comes to policy decisions, there are no solutions, only tradeoffs.[37]

The question, then, in assessing factional control, is not merely how many people think an issue is important but whether the people, through their representatives, would make the tradeoff required by a particular policy. Those who prioritize climate over any other issue are often those who can most afford to do so. The climate rule is the product of a "luxury belief"[38] held by certain financially secure individuals or corporations that, whether for sincere or cynical reasons, believe pursuing or appearing to pursue climate policy is worth whatever harm it may cause to those less able to bear the burden of those policies and those who, in this case, had no meaningful voice in that creation.

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[35] *Id*.

[36] For example, California has taken it upon itself to prohibit the sale of gas-powered cars after 2035. Andrew Krok, *California's 2035 Mandate and What it Could Mean for You*, CNET (August 25, 2022, 1:23pm) https://www.cnet.com/roadshow/news/california-carb-advanced-clean-cars-regulations/.

[37] Thomas Sowell, *A Conflict of Visions* 17-18 (2007).

[38] Luxury beliefs are "ideas and opinions that confer status on the upper class at little cost, while often inflicting costs on the lower class." Rob Henderson, *Troubled* at xx (2024).

Of course, it is not this Court's job to decide policy issues. However, it is this Court's role to protect the structures created by the Constitution. Here, the violation of those structures is clear, and the consequences are the very type of danger the structures in question were designed to mitigate. The SEC's violation of constitutional structure is not a victimless crime. Its victims will pay the price in virtually every financial transaction as the cost of compliance is inevitably passed on to savers and investors. For the sake of the Constitution and the liberties it exists to protect, this Court should rule for Petitioners and strike down the SEC's climate disclosure rule.

CONCLUSION

For the forgoing reasons, this Court should rule for Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I electronically filed the foregoing Appellants' Brief with the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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