State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

State of Arizona
Office of the Attorney General

Mark Brnovich
Attorney General

July 13, 2022

Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Submitted Electronically via SEC Internet Comment Form

Re: Supplemental Comments on Proposed Rule Amendments titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" by the Attorneys General of the States of West Virginia, Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming (SEC File No. S7-10-22)

Dear Secretary Countryman:

The Attorneys General of the States of West Virginia, Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming submit these additional comments on the Securities and Exchange Commission's proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors."[1] We submit these supplemental comments given an important post-deadline development—a U.S. Supreme Court decision that confirms that the SEC should not finalize the Proposed Rule.

In *West Virginia v. Environmental Protection Agency*,[2] the Court confirmed that Congress—not a federal administrative agency—has the power to decide major issues of the day. There, the Court rejected a "broader conception of EPA's authority" that the EPA thought empowered it to effect sweeping changes in the nation's power grid through an ambiguous provision of the Clean Air Act.[3] Although EPA's "regulatory assertion[] had a colorable textual basis," the agency needed to identify something more than a "merely plausible textual basis" for

[1] 87 Fed. Reg. 21,334 (Apr. 11, 2022) ("Proposed Rule").

[2] No. 20-1530, 2022 WL 2347278 (U.S. June 30, 2022).

[3] *Id.* at *5.

it to accomplish "radical or fundamental change to a statutory scheme."[4] The Court insisted that EPA "must point to clear congressional authorization for the power it claims."[5]

Many things that should look familiar to the Commission established that EPA's actions presented the sort of "extraordinary" case that requires more specific language: The agency had never before interpreted the statute that way, its understanding revised the nature of the statutory scheme itself, the action fell outside the realm of the agency's ordinary expertise, the regulated issue was one so important that one would expect Congress to address it directly, and Congress had considered and rejected similar regulatory actions.[6] At the same time, a "vague statutory grant" with some broad wording was not a clear enough statement from Congress to allow EPA to address these issues.[7] Among other things, the nebulous wording in the statute at issue contrasted with more specific language that Congress had enacted in other provisions.[8]

West Virginia v. EPA thus confirms that "the major questions doctrine" operates as a "distinct" constraint on agency power.[9]

We explained in our earlier comment letter why the Commission's Proposed Rule offends that doctrine,[10] and *West Virginia v. EPA* confirms we were right. Just as the EPA did, the Commission purports to "discover in a long-extant statute an unheralded power."[11] Based on vague text,[12] the SEC claims the right to reorder how publicly registered companies can operate. Businesses would be compelled to subordinate the shareholders' interests to those of the regulators and their powerful backers. And after adopting a paternalistic reading of its mandate, the Commission concludes that it can constrain how public companies function simply because influential institutional investors think it best to squeeze out disfavored, carbon-based energy sources. If this sort of regulatory overreach does not constitute a sweeping policy judgment on a major question,[13] then we struggle to see what would.

Indeed, *all* the factors present in *West Virginia* are present here. SEC has never applied its authority to require disclosures in this way. It has rarely, if ever, required disclosures focused on

[4] *Id.* at *12, *13 (cleaned up).

[5] *Id.* (cleaned up).

[6] *Id.* at *13-16.

[7] *Id.* at *17-18.

[8] *Id.*

[9] *Id.* at *13.

[10] *See* Letter from Patrick Morrisey, West Virginia Attorney General, to Vanessa Countryman, Secretary, SEC 17-20 (June 15, 2022), https://bit.ly/3R8Z8YL.

[11] *West Virginia*, 2022 WL 2347278, at *13.

[12] Morrisey, *supra* note 10, at 7-12.

[13] *See West Virginia*, 2022 WL 2347278, at *15 (explaining that EPA's view of its authority empowered it to "demand [compliance] based on a very different kind of policy judgment: that it would be 'best' if coal made up a much smaller share of national electricity generation").

non-material, non-financial matters like those found in the Proposed Rule.[14] Environmental regulation is outside the Commission's area of expertise; if anything, the Commission is even *less* equipped to regulate in areas concerning climate change than EPA. This issue—climate change—is also the same issue deemed vitally important in *West Virginia.* And Congress has considered and rejected similar disclosures on many prior occasions.[15] Yet the Commission can point to no congressional authorization other than statutes concerning investor "protection" or the "public interest."[16] This language contrasts with the more specific language that Congress used to authorize EPA to enact limited climate disclosures.[17] The Commission's squishy language does not license the Commission to reorder the market in the way that the Proposed Rule would.

Several years ago, many of us warned EPA that it was headed down an unlawful path. The Supreme Court has now agreed. If the Commission insists on taking the same inappropriate course, we will be ready to act once again. We urge you to save everyone years of strife by abandoning the Proposed Rule.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Mark Brnovich
Arizona Attorney General

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General

Leslie Rutledge
Arkansas Attorney General

Ashley Moody
Florida Attorney General

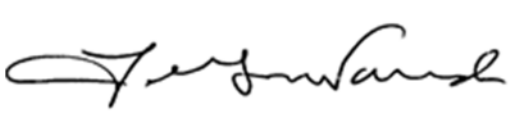
[14] *See*, *e.g.*, *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979) ("[T]hese laws, in the Commission's view, were designed generally to require disclosure of financial information in the narrow sense only.").

[15] *See*, *e.g.*, S. 1217, 117th Cong. ("Climate Risk Disclosure Act of 2021"); H.R. 2570, 117th Cong. ("Climate Risk Disclosure Act of 2021"); H.R. 1187, 117th Cong. (2021) ("Corporate Governance Improvement and Investor Protection Act").

[16] *See* 87 Fed. Reg. at 21,335 n.3 (citing Section 7 of the Securities Act of 1933, 15 U.S.C. § 77g, and Sections 12, 13, and 15 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 78m, and 78o).

[17] *See* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2124-28.

Christopher M. Carr
Georgia Attorney General



Lawrence Wasden
Idaho Attorney General

Todd Rokita
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

Daniel Cameron
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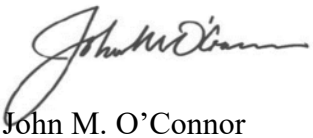
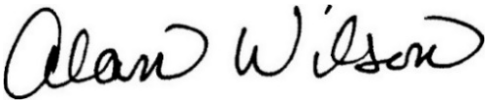


John M. O'Connor
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Mark. A Vargo
South Dakota Attorney General

Sean D. Reyes
Utah Attorney General

Jason S. Miyares
Virginia Attorney General

Bridget Hill
Wyoming Attorney General