

No. 23-5409

United States Court of Appeals for the Sixth Circuit

U.S. Chamber of Commerce, et al.,
Plaintiffs-Appellants,

v.

Securities and Exchange Commission, et al.,
Defendants-Appellees.

On appeal from the United States District Court,
Middle District of Tennessee
Judge Aleta A. Trauger
No. 3:22-cv-00561

**Brief of the State of Utah and 25 Other States as
Amici Curiae in Support of Plaintiffs-Appellants**

Melissa A. Holyoak
Utah Solicitor General
Christopher A. Bates
Deputy Solicitor General
Office of the Utah Attorney General
350 N. State Street, Suite 230
Salt Lake City, UT 84114
(801) 538-9600
melissaholyoak@agutah.gov
chrisbates@agutah.gov

Counsel for Amici Curiae

Additional counsel listed with signature block

Table of Contents

Table of Authorities	ii
Identity and Interest of <i>Amici Curiae</i>	1
Introduction and Summary of Argument.....	3
Argument	7
I. PVABs wield significant influence over corporate decision- making through vote recommendations and robo-voting.....	7
II. The two dominant PVABs have committed to using their power to advance political goals.	11
III. The 2020 Rule’s notice-and-awareness provisions placed important safeguards on PVABs’ ability to promote political agendas.	17
IV. In rescinding the 2020 Rule’s notice-and-awareness provisions, the Commission failed to consider the importance of constraining PVABs’ ability to promote political objectives and placed unjustified faith in PVABs’ voluntary practices.	22
Conclusion.....	32
Additional Counsel	33
Certificate of Compliance	35
Certificate of Service	35

Table of Authorities

Cases

Am. Wild Horse Pres. Campaign v. Perdue,
873 F.3d 914 (D.C. Cir. 2017) 23

Michigan v. EPA,
576 U.S. 743 (2015) 23

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 23, 26, 30

Rules

Federal Rule of Appellate Procedure 29(a)(2) 1

Regulations

17 C.F.R. § 240.14a-1(j) 4

Exemptions From the Proxy Rules for Proxy Voting Advice,
85 Fed. Reg. 55,082 (Sept. 3, 2020) 7

Proxy Voting Advice,
86 Fed. Reg. 67,383 (Nov. 26, 2021) 24

Proxy Voting Advice,
87 Fed. Reg. 43,168 (July 19, 2022) 8, 9

Supplement to Comm’n Guidance Regarding Proxy Voting Resps. of Inv. Advisers,
85 Fed. Reg. 55,155 (Sept. 3, 2020) 7, 8

Other Authorities

Comment of Ani Huang, Ctr. on Exec. Comp., File No. S7-17-21,
Proxy Voting Advice (Dec. 23, 2021),
<https://www.sec.gov/comments/s7-17-21/s71721-20110717-264594.pdf> 29

Comment of Benjamin Zycher, Am. Enter. Inst., File No. S7-17-21,
Proxy Voting Advice (Dec. 27, 2021),
<https://www.sec.gov/comments/s7-17-21/s71721-20110748-264612.pdf> 24

Comment of Chris Netram, Nat’l Ass’n of Mfrs., File No. S7-17-21, *Proxy Voting Advice* (Dec. 24, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110752-264616.pdf>..... 29

Comment of John A. Zecca, Nasdaq, Inc., File No. S7-17-21, *Proxy Voting Advice* (Dec. 27, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110818-264663.pdf>..... 29

Comment of Paul Rose & Christopher J. Walker, Ohio State Univ. Moritz Coll. of Law, SEC File No. S7-17-21, *Proxy Voting Advice* (Dec. 22, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110226-264490.pdf>..... 7, 8

Comment of Tom Quaadman, U.S. Chamber of Commerce (Dec. 23, 2021), File No. S7-17-21, *Proxy Voting Advice*, <https://www.sec.gov/comments/s7-17-21/s71721-20110258-264516.pdf>..... 25

Emily Faithfull *et al.*, *ISS ESG, Tackling Financed Emissions: Introducing Science-Based Targets for Financial Institutions* (2020), <https://web.archive.org/web/20230117175148/https://www.issgovernance.com/file/publications/ISS-ESG-T> 12

Gibson Dunn, *Shareholder Proposal Developments During the 2022 Proxy Season* (July 11, 2020), <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season>..... 21

Glass Lewis, *2022 Policy Guidelines for ESG Initiatives* at 28 (2022), <https://www.glasslewis.com/wp-content/uploads/2021/11/ESG-Initiatives-Voting-Guidelines-GL-2022.pdf>..... 13

Glass Lewis, *2022 Policy Guidelines for the United States* at 40-41 (2022), <https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf> 14

ISS, *United States Proxy Voting Guidelines Benchmark Policy Recommendations* at 17 (Dec. 13, 2022), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf>..... 12, 14

John G. Matsuaka & Chong Shu, *Does Proxy Advice Allow Funds to Cast Informed Votes?* (June 15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866041..... 25

Justin Danhof, *Is environmental, social and corporate governance (ESG) illegal?: The case of Travelers Insurance*, Wash. Times (Oct. 24, 2022), <https://www.washingtontimes.com/news/2022/oct/24/is-environmental-social-and-corporate-governance-e> 15

Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673 (2005) 10

Letter from 21 State Attorneys General to Asset Managers (Mar. 30, 2023), <https://attorneygeneral.utah.gov/wp-content/uploads/2023/03/2023-03-30-Asset-Manager-letter-PRESS-FINAL.pdf> 2

Letter from 21 State Attorneys General to Inst’l S’holder Servs., Inc. & Glass, Lewis & Co. (Jan. 17, 2023), <https://attorneygeneral.utah.gov/wp-content/uploads/2023/01/2023-01-17-Utah-Texas-Letter-to-Glass-Lewis-ISS.pdf>..... 2

Principles for Responsible Inv., PRI Strategic Plan 2021-24, (Apr. 2021), <https://www.unpri.org/download?ac=13269> 16

Principles for Responsible Inv., Signatory Directory (accessed June 27, 2023), <https://www.unpri.org/signatories/signatory-resources/signatory-directory> 15

Principles for Responsible Inv., What are the Principles for Responsible Investment? (accessed June 27, 2023), <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>..... 16

SEC, No Action Letters (accessed June 27, 2023), <https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters> 21

Sonali Paul, *Glass Lewis recommends vote against Woodside Petroleum’s climate plan*, Reuters (May 9, 2022), <https://www.reuters.com/business/energy/glass-lewis-recommends-vote-against-woodside-petroleums-climate-plan-2022-05-09> 13

TCFD, *Task Force Members* (last visited June 27, 2023),
<https://www.fsb-tcfd.org/members> 13

Timothy M. Doyle, *The Realities of Robo-Voting*, Harv. L. Sch.
Forum Corp. Governance (Nov. 29, 2018),
<https://corpgov.law.harvard.edu/2018/11/29/the-realities-of-robo-voting> 10

Travelers Cos., Inc., *2022 Proxy Statement* at 79 (Apr. 8, 2022),
https://s26.q4cdn.com/410417801/files/doc_financials/annual/2021/2022-Proxy-Statement-04-14-2022.pdf 15, 20

Identity and Interest of *Amici Curiae*

Amici Curiae, the States of Utah, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming are authorized to file this brief under Federal Rule of Appellate Procedure 29(a)(2).

Amici States have a strong interest in promoting fair, honest, and informed markets for their residents and for companies doing business in their States. *Amici* States also have a strong interest in ensuring their residents receive timely, accurate, and truthful information regarding their investments. In addition, many *Amici* States have retirement funds or other investment vehicles that are clients of proxy voting advice businesses (“PVABs”) and rely on PVAB vote recommendations when voting shares.

For these reasons, *Amici* States have been at the forefront of (i) ensuring that asset managers, institutional investors, and other fiduciaries are transparent about the uses to which they are putting client money; and (ii) bringing to light efforts by PVABs and other large

financial entities to pressure companies to prioritize environmental, social, and governance (“ESG”) objectives over maximizing economic value. *See, e.g.*, Letter from 21 State Attorneys General to Inst’l S’holder Servs., Inc. & Glass, Lewis & Co. (Jan. 17, 2023), <https://attorneygeneral.utah.gov/wp-content/uploads/2023/01/2023-01-17-Utah-Texas-Letter-to-Glass-Lewis-ISS.pdf>; Letter from 21 State Attorneys General to Asset Managers (Mar. 30, 2023), <https://attorneygeneral.utah.gov/wp-content/uploads/2023/03/2023-03-30-Asset-Manager-letter-Press-FINAL.pdf>.

Amici States submit this brief in support of Appellants because the Commission’s rescission of the 2020 Proxy Voting Advice Rule’s notice-and-awareness provisions will empower large PVABs to continue promoting political objectives like ESG without providing companies and clients adequate notice about politically oriented vote recommendations or the ability to become fully informed about such recommendations before votes are cast. This case is about far more than ensuring the technical accuracy of proxy voting reports. It’s about who gets to decide what priorities companies pursue and whether investors are entitled to

adequate notice and information when their vote shares are used to promote political objectives with which they may not agree.

Introduction and Summary of Argument

PVABs wield tremendous power in today's corporate economy. They issue vote recommendations for tens of thousands of shareholder meetings each year and directly vote trillions of shares for their clients. Because PVABs' vote recommendations carry such significant influence, ensuring their recommendations are based on accurate information and that investors are adequately informed about their recommendations is critical.

In 2020, the Commission issued a well-reasoned rule ("2020 Rule") that sought to do just that. Responding to concerns that PVABs' vote recommendations often contain or rely on faulty or incomplete information and that existing pathways for companies to respond to and make PVABs' clients aware of those problems were insufficient, the 2020 Rule created two new requirements for PVABs. First, they had to provide their recommendations to companies (registrants that are the subject of

the voting advice¹) at the same time they send them to clients. Second, they had to alert their clients in a timely manner when a company provided a written response. Taken together, these “notice-and-awareness provisions” enhanced the transparency of PVABs’ vote recommendations and ensured PVABs’ clients would have more accurate, complete information when making vote decisions.

But less than two years later, before the 2020 Rule had even gone into effect, a new Commission majority reversed course and rescinded the notice-and-awareness provisions (“2022 Rule”). As Appellants outline in their brief, the new majority’s rescission was legally defective for multiple reasons. *Amici* States highlight two of those reasons while also providing additional context to explain why this case is so significant.

As an initial matter, it’s important for the Court to understand the impact of this case. PVABs are extremely powerful actors. Their decisions make the difference in tens of thousands of shareholder meetings each year; they directly vote trillions of shares on behalf of their clients.

¹ A registrant is a company that files documents with the Commission. In the context of proxy solicitations, “registrant” means “the issuer of the securities” for which “proxies are to be solicited.” 17 C.F.R. § 240.14a-1(j).

PVABs are among the most influential decision-makers in modern corporate America.

At the same time, PVABs have increasingly been using their power to promote political goals related to climate change, social issues, and other topics. These goals have come to be known by the shorthand “ESG,” which stands for “environmental, social, and governance.” The two largest PVABs have even signed on to a set of public principles whose stated purpose is to promote acceptance of ESG and incorporate ESG into investment analysis and corporate decision-making.

The 2020 Rule’s notice-and-awareness provisions placed constraints on PVABs’ ability to promote ESG and other political agendas. By requiring PVABs to notify companies about vote recommendations at the same time as clients and alert clients to any written responses companies submit, the provisions increased the likelihood investors would be made aware of contrary views, particularly regarding politically motivated or controversial vote recommendations that would not maximize shareholder value. In this way, the notice-and-awareness provisions placed an important check on PVABs’ ability to promote ESG and other political goals *sub silentio*.

Yet in rescinding the notice-and-awareness provisions, the new Commission majority entirely failed to consider this aspect of the problem or grapple with comments that explained how rescinding the provisions would empower PVABs to promote political goals. That's the first reason *Amici* States highlight why the rescission was arbitrary and capricious.

The second reason has to do with the Commission's reliance on PVABs' "voluntary practices." The new Commission majority based its decision, in part, on the view that PVABs have "voluntary practices" that already enable companies, in some circumstances, to submit feedback on PVABs' vote recommendations. But the evidence before the agency showed that these practices are ineffective substitutes for mandatory notice-and-awareness procedures, and in fact revealed that one large PVAB had recently *cut back* on its voluntary practices. The evidence before the agency contradicted the new Commission majority's reliance on these practices to justify its decision. Placing faith in "voluntary" PVAB practices was also highly questionable in any event given PVABs' demonstrated willingness to use their vast power to promote political aims.

Argument

I. PVABs wield significant influence over corporate decision-making through vote recommendations and robo-voting.

PVABs are among the most influential actors in today's corporate environment. This is so for at least two reasons. First, PVABs provide vote recommendations on tens of thousands of shareholder meeting proposals and director elections each year for thousands of clients that collectively manage trillions of dollars in assets. *See Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082, 55,083, 55,126-27 (Sept. 3, 2020) ("2020 Rule").

Second, and perhaps even more telling, PVABs directly execute votes for trillions of shares pursuant to client agreements that authorize PVABs to automatically submit clients' votes. *See id.* at 55,083, 55,126; *Supplement to Comm'n Guidance Regarding Proxy Voting Resps. of Inv. Advisers*, 85 Fed. Reg. 55,155, 55,155 (Sept. 3, 2020) ("2020 Supplemental Guidance"). This practice is known as "automated voting" or "robo-voting." 2020 Supplemental Guidance at 55,155; Comment of Paul Rose & Christopher J. Walker, Ohio State Univ. Moritz Coll. of Law, Att. 2 at 5, SEC File No. S7-17-21, *Proxy Voting Advice* (Dec. 22, 2021) ("Rose &

Walker Comment”), <https://www.sec.gov/comments/s7-17-21/s71721-20110226-264490.pdf>.

Under a similar practice, PVABs may also pre-populate clients’ voting forms with the PVABs’ recommendations, leading to those clients voting in near lockstep with the PVABs’ recommendations. 2020 Supplemental Guidance at 55,155; *see also* Rose & Walker Comment, Att. 2 at 5, 9. One study, for example, found that 175 asset managers with over \$5 trillion in assets under management voted with one large PVAB’s recommendations more than 95 percent of the time. Rose & Walker Comment, Att. 2 at 9.

The PVAB market is also extraordinarily concentrated, with just two firms controlling more than 90 percent of the market. *See* 2020 Rule at 55,127 n.517 (noting comment stating that two firms control “roughly 97% of the market share”). The first of these firms, Institutional Shareholder Services (“ISS”), issues vote recommendations for approximately 48,000 shareholder meetings each year and directly executes more than 12.8 million ballots annually for clients holding 5.4 trillion shares. *Proxy Voting Advice*, 87 Fed. Reg. 43,168, 43,183 (July 19, 2022) (“2022 Rule”). The second firm, Glass Lewis, issues vote

recommendations for over 30,000 shareholder meetings each year and provides services to clients that collectively manage more than \$40 trillion in assets. *Id.*

The role these two PVABs play in issuing vote recommendations and directly voting trillions of shares, combined with their extraordinarily high market share, gives them vast influence over corporate decision-making. As one SEC Commissioner has noted, “given the widespread reliance on proxy advisors, automatic voting can have an outsized effect on vote outcomes at public companies,” making proxy voting advice “market moving.” Statement of SEC Comm’r Hester M. Peirce, *U-Turn: Comments on Proxy Voting Advice* (July 13, 2022) (“Peirce 2022 Dissent”) (internal quotation marks omitted), <https://www.sec.gov/news/statement/peirce-statement-proxy-voting-advice-071322>; *see also* 2020 Rule at 55,106 n.304 (noting comment describing “the immediate and near irrevocable impact” proxy advisor reports have on voting results (internal quotation marks omitted)).

Another expert has characterized ISS and Glass Lewis as “quasi-regulator[s]” whose outsized influence causes boards to “feel compelled to make decisions in line with” ISS and Glass Lewis policies “due to their

impact on voting.” Timothy M. Doyle, *The Realities of Robo-Voting*, Harv. L. Sch. Forum Corp. Governance (Nov. 29, 2018), <https://corpgov.law.harvard.edu/2018/11/29/the-realities-of-robo-voting>. Former Delaware Chief Justice Leo Strine similarly has described the practice of “powerful CEOs com[ing] on bended knee” to ISS “to persuade the managers of ISS of the merits of their views.” Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 688 (2005). As Strine explains, CEOs do this because “institutional investors will simply follow ISS’s advice rather than do any thinking of their own.” *Id.*

The extraordinary power that PVABs—and in particular ISS and Glass Lewis—wield in today’s corporate marketplace makes the Commission’s rulemakings in this area incredibly consequential. Ensuring that PVABs are transparent, honest, and accurate is essential to properly functioning markets and to ensuring investors are fully informed about how their hard-earned money is being used. As the Commission recognized in promulgating the 2020 Rule, PVABs have the ability to “affect[] the interests of *all* shareholders” of companies for which they issue vote recommendations and “the proxy system in

general.” 2020 Rule at 55,086 (emphasis added). Their actions can be—and frequently are—“market moving.” Peirce 2022 Dissent.

II. The two dominant PVABs have committed to using their power to advance political goals.

PVABs have statutory and contractual obligations to make voting recommendations in the best financial interests of their investor clients. Yet the two largest PVABs—ISS and Glass Lewis, which together control more than 90 percent of the market—have committed in recent years to prioritize objectives other than maximizing economic value. In particular, they are dedicated to achieving certain environmental, social, and governance goals that, depending on the circumstances, may run counter to companies’ economic interests or at the least conflict with the desires of investors who would rather maximize returns on investment than fund political agendas.

For example, ISS and Glass Lewis have both pledged to recommend votes on company directors and shareholder meeting proposals based on how the company is implementing various climate-related goals. ISS has announced that it will “generally vote against” relevant directors of companies that are “significant greenhouse gas (GHG) emitters” if ISS decides the company is not taking sufficient steps to “mitigate risks

related to climate change,” including setting “[a]ppropriate GHG emissions reduction targets.” ISS, *United States Proxy Voting Guidelines Benchmark Policy Recommendations* at 17 (Dec. 13, 2022) (“ISS Proxy Voting Guidelines”), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf>. ISS has further stated that it believes financial institutions “must play a central and catalytic role in the global transition to a low-carbon economy” because “[s]ignatories to the 2015 Paris Agreement are largely failing to deliver *on their emissions reduction commitments*.” Emily Faithfull et al., *ISS ESG, Tackling Financed Emissions: Introducing Science-Based Targets for Financial Institutions* at 3 (2020) (emphasis added), <https://web.archive.org/web/20230117175148/https://www.issgovernance.com/file/publications/ISS-ESG-Tackling-Financed-Emissions.pdf>.²

Glass Lewis, in turn, has stated it will base vote recommendations in part on the quality of the company’s “climate plans,” which Glass Lewis says should explain how the company is seeking to achieve “net zero emissions goals” and “should be aligned with the recommendations of the” Task Force on Climate-Related Financial Disclosures (“TCFD”),

² This document appears to have been removed from ISS’s website.

Glass Lewis, *2022 Policy Guidelines for ESG Initiatives* at 28 (2022), <https://www.glasslewis.com/wp-content/uploads/2021/11/ESG-Initiatives-Voting-Guidelines-GL-2022.pdf>, an international body led by former New York City Mayor Michael Bloomberg, TCFD, *Task Force Members* (last visited June 27, 2023), <https://www.fsb-tcf.org/members>. In one recent example, Glass Lewis recommended that shareholders vote against a major petroleum company's proposed climate plan because Glass Lewis believed the plan would not do enough to reduce customers' emissions. Sonali Paul, *Glass Lewis recommends vote against Woodside Petroleum's climate plan*, Reuters (May 9, 2022), <https://www.reuters.com/business/energy/glass-lewis-recommends-vote-against-woodside-petroleums-climate-plan-2022-05-09>. Put differently, Glass Lewis recommended voting against the plan because it wouldn't do enough to get customers to stop buying the company's *own* product.

ISS and Glass Lewis have also pledged to recommend votes on company directors based on how well the company is meeting race and gender quotas. ISS, for example, has stated it will recommend votes on board nominating committee members, as well as "other directors on a case-by-case basis," based on the number of "racially or ethnically

diverse” board members and number of women board members. ISS Proxy Voting Guidelines, *supra*, at 12. ISS has also announced that it will support, on case-by-case basis, “racial equity” audits, taking into account the company’s recent “track record” of “racial justice measures” and whether the company has recently “issued a public statement related to its racial justice efforts.” *Id.* at 69. Glass Lewis likewise has stated it will recommend votes on board nominating committee members based on the racial and gender makeup of the board. Glass Lewis, 2022 Policy Guidelines for the United States at 40-41 (2022), <https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf>.

ISS and Glass Lewis’s efforts to promote race and gender quotas have even led them to support proposals that would cause companies to violate state law. For example, in 2022, ISS and Glass Lewis both supported a shareholder proposal that would have required Travelers Insurance to collect and consider race data as part of a “racial justice audit” when writing insurance policies. Travelers Cos., Inc., 2022 Proxy Statement at 79 (Apr. 8, 2022) (“Travelers 2022 Proxy Statement”), https://s26.q4cdn.com/410417801/files/doc_financials/annual/2021/2022-

Proxy-Statement-04-14-2022.pdf; see Justin Danhof, *Is environmental, social and corporate governance (ESG) illegal?: The case of Travelers Insurance*, Wash. Times (Oct. 24, 2022), <https://www.washingtontimes.com/news/2022/oct/24/is-environmental-social-and-corporate-governance-e>. As Travelers' board of directors explained, the proposal was "incompatible with state laws prohibiting the consideration of race in underwriting and/or pricing decisions." *Travelers 2022 Proxy Statement* at 79. The proposal nevertheless received 47 percent of the vote at the shareholder meeting, in large part because ISS and Glass Lewis both recommended voting in favor of the proposal. See Danhof, *supra*.

In addition to the above examples, ISS and Glass Lewis are both signatories to the United Nations "Principles for Responsible Investment" ("PRI"), a set of guidelines designed to promote ESG objectives in corporate analysis and decision-making. Principles for Responsible Inv., Signatory Directory (accessed June 27, 2023), <https://www.unpri.org/signatories/signatory-resources/signatory-directory>. Among other things, signatories pledge to "incorporate ESG issues into investment analysis and decision-making processes" and

“promote acceptance and implementation” of ESG principles. Principles for Responsible Inv., What are the Principles for Responsible Investment? (accessed June 27, 2023), <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>.

The most recent PRI strategic plan applauds signatories for “elevat[ing] social issues up the investor agenda” and says signatories will give particular focus going forward to “diversity, equity, and inclusion.” Principles for Responsible Inv., PRI Strategic Plan 2021-24, at 10-11 (Apr. 2021), <https://www.unpri.org/download?ac=13269>. The plan also says signatories will continue to prioritize “climate change mitigation,” which the plan calls “the most urgent existential challenge facing society.” *Id.* at 11.

In sum, ISS and Glass Lewis, which together control over 90 percent of the PVAB market, have committed to an activist ESG agenda. And they are using their vast influence to promote that agenda in boardrooms, shareholder meetings, and marketplaces across the country.

III. The 2020 Rule’s notice-and-awareness provisions placed important safeguards on PVABs’ ability to promote political agendas.

Given the commitments of large PVABs like ISS and Glass Lewis to make vote recommendations based on politically oriented objectives, ensuring investors receive timely, complete information about PVABs’ recommendations has never been more critical. And the 2020 Rule’s notice-and-awareness provisions created the means to ensure that happens.

The Commission adopted the 2020 Rule in response to concerns that investors weren’t receiving enough information about PVABs’ vote recommendations or the opportunity to consider countervailing views before votes were cast. As the Commission explained, “because a significant percentage of proxy votes are typically cast shortly after a proxy voting advice business delivers its advice, . . . many voting decisions are made before registrants have a meaningful opportunity to engage with that advice.” 2020 Rule at 55,118. Thus, votes may be cast before registrants are able “to address any material factual errors or omissions” in the PVABs’ advice or “offer views with respect to the proxy voting advice business’s methodologies or conclusions.” *Id.* The

Commission further explained that “without a mechanism by which [PVAB] clients can reasonably be expected to become aware of any response” by registrants in a timely manner, “votes may be cast on less complete information.” *Id.* at 55,108.

The 2020 Rule’s notice-and-awareness provisions responded to these concerns in two ways. First, they required PVABs to adopt policies to ensure “[r]egistrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the” PVABs’ clients. *Id.* at 55,154. Second, they required PVABs to provide clients “with a mechanism by which they can reasonably be expected to become aware of any written statements regarding” the PVABs’ “proxy voting advice by registrants who are the subject of such advice, in a timely manner” before votes are cast. *Id.*

Taken together, the provisions required PVABs to both (1) notify subjects of vote recommendations about the recommendations at the same time the PVAB sent them to clients, and (2) ensure clients were made aware of any written response the company submitted ahead of the vote. In this way, the provisions helped ensure investors would learn

about contrary or alternative views to PVABs' vote recommendations "in time for investors to benefit from such an exchange." *Id.* at 55,118.

By ensuring investors would learn about any contrary or additional views of the registrant, the provisions placed crucial constraints on PVABs' ability to promote political agendas. If a PVAB issued a vote recommendation that pushed a political goal such as net zero emissions or a race or gender quota, the notice-and-awareness provisions ensured that the subject company would have an opportunity to respond and—even more important—that the PVABs' clients would be made *aware* of the company's response before votes were cast. If the political goal ran counter to the company's economic interests, was unrelated to maximizing the company's economic value, or was likely to conflict with the investors' own preferences or investment goals, the notice-and-awareness provisions increased the likelihood investors would be made aware of those points and be able to modify their votes accordingly. *See* 2020 Rule at 55,107 (explaining that "more complete and robust information and discussion leads to more informed investor decisionmaking, and therefore results in choices more closely aligned with investors' interests"); *id.* at 55,113 n. 373 (suggesting the 2020 Rule

could result in PVAB clients becoming “more likely to change votes” after receiving registrants’ responses).

The Travelers Insurance example described above provides a case in point. Although the proposal to conduct a “racial justice audit” that would have placed the company in violation of state laws ultimately failed, it did so by a narrow margin. *See supra* at 14-15. And a principal reason for that narrow margin was ISS and Glass Lewis’s endorsement of the proposal. *See Danhof, supra*. Under the 2020 Rule’s notice-and-awareness provisions, ISS and Glass Lewis would have been required to notify their clients of Travelers’ strong concern that the proposal was “incompatible with state laws prohibiting the consideration of race in underwriting and/or pricing decisions,” as well as the company’s “longstanding practice not to take race into account in its underwriting and pricing decisions.” Travelers 2022 Proxy Statement at 79. Investors undoubtedly would have taken note of this response. And the mere fact of the response would have notified investors there was a controversial, politically oriented proposal on the table they might want to take a closer look at rather than simply deferring to ISS and Glass Lewis’s advice.

Moreover, the checks the 2020 Rule's notice-and-awareness provisions placed on PVABs' ability to promote political agendas are all the more critical given the Commission's increasing refusal in recent years to issue no-action letters. When a company is concerned that a shareholder proposal is unlawful or would place the company in legal jeopardy, the company may request a "no-action letter" from the Commission that, if granted, provides the company a safe harbor to exclude the proposal from its proxy statement. *See* SEC, No Action Letters (accessed June 27, 2023), <https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters>.

Between 2020 and 2022, the success rate for no-action requests from the Commission plummeted from 70 percent in 2020 to only 38 percent in 2022. Gibson Dunn, Shareholder Proposal Developments During the 2022 Proxy Season (July 11, 2020), <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season>. At the same time, the number of ESG-related shareholder proposals rose dramatically, with environmental proposals increasing 51 percent between 2021 and 2022 and social proposals increasing 20 percent. *Id.* In fact, in 2022, climate-change-

related proposals were *the most popular* shareholder proposal topic, with antidiscrimination and diversity-related proposals the third most popular. *Id.*

Thus, while the number of ESG-related shareholder proposals has skyrocketed, the Commission's role as a check on unlawful or legally dubious proposals has significantly decreased. This dynamic makes the 2020 Rule's notice-and-awareness provisions even more important, as they provided a means for investors to become aware of the subject company's alternative views about politically charged proposals.

IV. In rescinding the 2020 Rule's notice-and-awareness provisions, the Commission failed to consider the importance of constraining PVABs' ability to promote political objectives and placed unjustified faith in PVABs' voluntary practices.

In its final rule rescinding the 2020 Rule's notice-and-awareness provisions, the new Commission majority said it was striking a "different" "policy balance" that avoided "burdens on PVABs" that the majority worried could impede the "timeliness and independence" of proxy voting advice. 2022 Rule at 43,170. But in reversing course, the new majority failed to consider the notice-and-awareness provisions' crucial role in constraining PVABs' ability to promote political agendas,

a subject multiple commenters raised. The new majority also placed unjustified faith in PVABs' existing "voluntary practices" regarding registrant outreach and feedback, which the majority said were "likely, at least to some extent, to advance the goals" of the notice-and-awareness provisions. *Id.* In so doing, the new Commission majority "entirely failed to consider an important aspect of the problem" and "offered an explanation for its decision that [ran] counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983). Under well-settled law, these failings rendered the majority's action arbitrary and capricious. *See id.*; *see also Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) ("[A]n agency may not 'entirely fail to consider an important aspect of the problem' when deciding whether regulation is appropriate." (quoting *State Farm*, 463 U.S. at 43)) (quotation simplified); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (arbitrary-and-capricious standard "obligates the agency to examine all relevant factors and record evidence" and "articulate a reasoned explanation for its decision").³

³ *Amici* States highlight these errors for the Court because, as described above, *Amici* States are concerned that without proper constraints, large PVABs like ISS and Glass Lewis will continue to use their vast, largely

Starting with the new majority’s failure to consider the importance of constraining PVABs’ ability to promote political objectives, comments on the majority’s proposal to rescind the notice-and-awareness provisions placed this issue squarely before the agency. *See Proxy Voting Advice*, 86 Fed. Reg. 67,383 (Nov. 26, 2021) (“Proposed 2022 Rule”). One commenter explained that “[b]y reducing the transparency of voting recommendations offered by proxy advisors,” rescinding the provisions “would allow for an increase in the relative weight of the personal political preferences of the proxy advisors.” Comment of Benjamin Zycher, Am. Enter. Inst., at 2, File No. S7-17-21, *Proxy Voting Advice* (Dec. 27, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110748-264612.pdf>. The commenter cited “the introduction of ‘Environmental, Social, and Governance’ (ESG) objectives” as “an obvious example.” *Id.* The commenter further warned that “the personal preferences of the proxy advisors, often oriented toward specific policy or political goals, can carry substantial weight in terms of decisions on proxy matters.” *Id.* at 5.

unchecked power to promote political objectives like ESG. Appellants provide additional grounds for vacatur in their brief.

Another commenter described a 2021 study that found “PVABs give advice that is often distorted in a way that advances the agenda of ‘socially responsible’ activist investors in a way that is not necessarily tied to what is in the best economic interests of all investors.” Comment of Tom Quaadman, U.S. Chamber of Commerce, at 13 (Dec. 23, 2021), File No. S7-17-21, *Proxy Voting Advice*, <https://www.sec.gov/comments/s7-17-21/s71721-20110258-264516.pdf> (citing John G. Matsuoka & Chong Shu, *Does Proxy Advice Allow Funds to Cast Informed Votes?* (June 15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866041).

The new Commission majority was aware of these comments and cited them in the final rule. *See* 2022 Rule at 43,174. It even briefly described the 2021 paper’s findings. *Id.* But it failed entirely to address the important points just described or grapple with PVABs’ ability to direct their vast influence toward political ends. It likewise failed to acknowledge how rescinding the notice-and-awareness provisions would *increase* PVABs’ ability to pursue political agendas like ESG through vote

recommendations.⁴ For good measure, the new Commission majority also said little about the importance of ensuring investors receive complete information about PVABs' vote recommendations or the importance of ensuring proxy solicitations are fair, honest, and informed. Both of those were key reasons the Commission adopted the 2020 Rule. *See, e.g.*, 2020 Rule at 55,082-83, 55,101-03, 55,107-08.

In all these ways, the Commission's rescission of the notice-and-awareness provisions "entirely failed to consider an important aspect of the problem" and thus was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Turning to the new majority's unjustified faith in PVABs' "voluntary practices," the Commission had already considered those practices and rejected them as insufficient when it promulgated the 2020 rule. *See* 2020 Rule at 55,108. Such practices include occasionally giving registrants the ability to review draft research analyses and reports, correcting factual inaccuracies registrants identify, and in the case of

⁴ Notably, at the same time the Commission was ignoring these important points raised by commenters, it was holding closed-door meetings with various labor, consumer, and sustainable investment groups that had long opposed the notice-and-awareness provisions. *See* Proposed 2022 Rule at 67,385 n.24.

Glass Lewis, sometimes allowing registrants to include feedback in reports sent to Glass Lewis clients. *See id.* at 55,128-29; *see also* 2022 Rule at 43,172.

In 2020, the Commission concluded those practices were insufficient to ensure clients receive timely, complete information about PVABs' vote recommendations because they "have not been universally adopted by proxy voting advice businesses and do not uniformly provide registrants (and their investors) with the same opportunities for (and benefits of) review, feedback and response." 2020 Rule at 55,108. The Commission further explained that "under current market practices," registrants "are not systematically informed of proxy voting advice in a timely manner such that they can provide investors a response to such advice, let alone a response sufficiently in advance of the relevant meeting to allow investors to consider the response prior to casting their vote." *Id.*

But in 2022, the new Commission majority flipped 180 degrees on the issue, describing PVABs' voluntary practices as a reason to *rescind* the 2020 rule's notice-and-awareness provisions. *See* 2022 Rule at 43,170 ("Our analysis is also supported by certain voluntary practices of PVABs.

We believe those practices are likely, at least to some extent, to advance the goals underlying the [notice-and-awareness provisions]”). The new majority didn’t identify anything that had changed in the intervening two-year period to justify this reversal. To the contrary, in its earlier notice proposing to rescind the notice-and-awareness provisions, the majority acknowledged ISS had changed its policies in 2021 in a way that *reduced* registrants’ ability to provide feedback on vote recommendations. *See* Proposed 2022 Rule at 67,387 n.48 (citing statement on ISS website that “from January 2021,” draft proxy reports “are no longer provided to U.S. companies”). The majority further acknowledged that ISS doesn’t allow registrants to share published proxy reports with any external parties, such as law firms or consultants, and that this restriction “may inhibit a registrant’s ability to adequately respond to ISS’[s] proxy voting advice in a manner that would benefit its shareholders.” *Id.* at 67,388 n.59.

Commenters also identified numerous problems with PVABs’ “voluntary practices” that rendered them ineffective substitutes for the 2020 Rule’s notice-and-awareness provisions. One commenter, for example, reported that it had been “provided with as little as 24 hours to

provide feedback on ISS voting recommendations” and that “requests to correct factual errors” had been rejected. Comment of John A. Zecca, Nasdaq, Inc., at 5, File No. S7-17-21, *Proxy Voting Advice* (Dec. 27, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110818-264663.pdf>.

The same commenter also reported that one of its participating companies had been told by Glass Lewis that in order to participate in Glass Lewis’s feedback service, it would need to pay a \$2,000 fee. *Id.* at 4.

Other commenters reported similar problems. *See, e.g.*, Comment of Ani Huang, Ctr. on Exec. Comp., at 7, File No. S7-17-21, *Proxy Voting Advice* (Dec. 23, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110717-264594.pdf> (“Companies have requested discussions with ISS staff to highlight errors, omissions, or mischaracterizations, but the ISS research team has noticeably scaled back its willingness to engage.”); Comment of Chris Netram, Nat’l Ass’n of Mfrs., at 13, File No. S7-17-21, *Proxy Voting Advice* (Dec. 24, 2021), <https://www.sec.gov/comments/s7-17-21/s71721-20110752-264616.pdf> (noting that Glass Lewis’s “Issuer Data Report,” which Glass Lewis makes available to certain registrants, “only grants companies access to some of the data underlying Glass

Lewis’s research, not the full analysis and voting recommendations disseminated to clients”).

The new Commission majority’s about-face from the agency’s position only two years earlier that PVABs’ voluntary practices are ineffective substitutes for the 2020 Rule’s notice-and-awareness provisions “runs counter to the evidence before the agency” and thus provides further grounds for vacatur under the arbitrary-and-capricious standard. *State Farm*, 463 U.S. at 43.

The new majority’s unjustified faith in those voluntary practices is particularly unwarranted given ISS and Glass Lewis’s track record of promoting political objectives like ESG. As explained, *see supra* at 11-15, ISS and Glass Lewis have committed in recent years to prioritize political goals such as achieving net zero emissions and satisfying race and gender quotas over maximizing economic value. They have also expressly signed on to the ESG agenda through the U.N.’s Principles for Responsible Investment. *See supra* at 15-16. Those actions undercut the notion that PVABs can be trusted to act in a completely fair and objective manner when registrants raise concerns or to respond fairly and accurately to those concerns and incorporate the feedback registrants provide.

The efficacy of PVABs’ “voluntary practices” depends on PVABs’ willingness to correct errors when raised and convey registrants’ feedback to clients. But if the reason for a vote recommendation is a perceived moral or social imperative on the part of a PVAB, the PVAB will be less likely to voluntarily take action that may undermine or defeat that recommendation.

For all these reasons, as well as the additional reasons identified by Appellants, the new Commission majority’s rescission of the notice-and-awareness provisions was arbitrary and capricious.

Conclusion

The Court should reverse the district court's judgment and set aside the 2022 Rule.

Respectfully submitted,

/s/ Melissa A. Holyoak

Melissa A. Holyoak
Utah Solicitor General
Christopher A. Bates
Deputy Solicitor General
Office of the Utah Attorney General
350 N. State Street, Suite 230
Salt Lake City, UT 84114
(801) 538-9600
melissaholyoak@agutah.gov
chrisbates@agutah.gov

Counsel for Amici Curiae

Additional Counsel
Counsel for Amici States

STEVE MARSHALL
Attorney General
State of Alabama

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

RAÚL LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

JOHN M. FORMELLA
Attorney General
State of New Hampshire

DREW WRIGLEY
Attorney General
State of North Dakota

DAVE YOST
Attorney General
State of Ohio

GENTNER F. DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

JONATHAN SKRMETTI
Attorney General
State of Tennessee

JOHN SCOTT
Provisional Attorney General
State of Texas

JASON S. MIYARES
Attorney General
State of Virginia

PATRICK MORRISEY
Attorney General
State of West Virginia

BRIDGET HILL
Attorney General
State of Wyoming

Certificate of Compliance

This brief complies with the word limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,382 words, excluding items listed in Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook font.

/s/Melissa A. Holyoak

Certificate of Service

I certify that on June 27, 2023, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Melissa A. Holyoak