SYMPOSIUM

A MAJOR QUESTION FOR THE SEC: ANALYZING CONSTITUTIONAL LIMITS ON REGULATORY AUTHORITY

WELCOME AND INTRODUCTORY REMARKS

Matthew Diller[i]
Fordham University School of Law

Meredith Berger[ii]
Fordham University School of Law

[i] Dean Matthew Diller is a prominent scholar of social welfare law and policy. He has lectured and written extensively on the legal dimensions of social welfare policy, including public assistance, Social Security, and disability programs and on disability law and policy. His articles have appeared in the *Yale Law Journal*, *UCLA Law Review*, *Texas Law Review*, and *Michigan Law Review*. He received an A.B. and a J.D., both magna cum laude, from Harvard University, where he was an editor of the *Harvard Law Review*. He then clerked for the Honorable Walter R. Mansfield of the U.S. Court of Appeals for the Second Circuit. He worked for the Legal Aid Society in New York, where he was a staff attorney in the civil appeals and law reform unit.

[ii] Meredith Berger served as the Symposium Editor for Volume XXIX of the *Fordham Journal of Corporate & Financial Law*. Meredith earned her bachelor's from Washington University in St. Louis and will earn her law degree from Fordham University School of Law in May 2024.

PANEL ONE: ADMINISTRATIVE LAW JUDGES AND THE SEC: A SUPREME COURT ISSUE

Samuel W. Buell[iii]
Duke University School of Law

John M. Golden[iv]
University of Texas at Austin School of Law

[iii] Sam Buell is the Bernard M. Fishman Professor of Law at Duke University. His research and teaching focus on criminal law, corporations, and the regulatory state. He is the author of dozens of articles on corporate crime and enforcement and the books Capital Offenses: Business Crime and Punishment in America's Corporate Age (W.W. Norton & Co. 2016) and Corporate Crime: An Introduction to the Law and its Enforcement (3d ed. 2023, downloadable at buelloncorporatecrime.com). Prior to his academic career, he worked as a federal prosecutor in New York, Boston, Washington, and Houston. He twice received the Attorney General's Award for Exceptional Service and was a lead prosecutor for the Department's Enron Task Force. He graduated summa cum laude from New York University School of Law and magna cum laude from Brown University.

[iv] John Golden is the Edward S. Knight Chair in Law, Entrepreneurialism and Innovation at the University of Texas at Austin School of Law, where he has taught administrative law, contracts, patent law, seminars relating to innovation and intellectual property, and a seminar on disaster and emergency law. From 2011 to 2022, he served as faculty director of the Andrew Ben White Center in Law, Science and Social Policy. Golden has a J.D. from Harvard Law School, a Ph.D. in Physics from Harvard University, and an A.B. in Physics and History from Harvard College. After law school, Golden clerked for the Honorable Michael Boudin of the United States Court of Appeals for the First Circuit and for Associate Justice Stephen Breyer of the United States Supreme Court. Golden also worked as an associate in the intellectual property department of Wilmer Cutler Pickering Hale and Dorr LLP.

PANEL TWO: SEC CLIMATE DISCLOSURE AND THE MAJOR QUESTIONS DOCTRINE

Suzanne Ashley[v]
Founder & Managing Principal, Materiality Strategies

Coy Garrison[vi]
Partner, Steptoe & Johnson LLP

[v] Suzanne Ashley began her career as an Associate at Akin Gump Strauss Hauer & Feld LLP in Washington, D.C., focusing on white collar criminal and congressional investigation defense before becoming a Senior Counsel in the Division of Enforcement at the U.S. Securities and Exchange Commission. She later was chosen to detail from the SEC to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) in the U.S. Department of the Treasury as the Deputy Chief Investigative Counsel. From March 2010 to December 2013, Ashley returned to the SEC as the Special Advisor and Senior Counsel to the SEC's Director of Enforcement, Robert Khuzami, overseeing national priority investigations as well as managing the Division's legislative & congressional work and all Enforcement-related aspects of SEC rulemaking. After leaving the SEC, Ashley founded CrowdFair, Inc., to connect social impact startups with early stage capital and advising on governance policies scalable with growth including ESG and sustainability. In 2023, she began a new venture, founding Materiality Strategies. As the principal manager of this organization, Ashley advises public companies on optimizing strategies for ESG and sustainability goals—including preparation for the SEC's proposed climate-related disclosure rule—while enhancing corporate governance. She is a Phi Beta Kappa and honors graduate of Johns Hopkins University and a graduate of the University of Pennsylvania Law School. Suzanne currently is participating in the 2023-2024 cohort of the Climate Change and Health certificate program at Yale University.

[vi] Coy Garrison is a partner at Steptoe & Johnson LLP, and a member of the firm's Blockchain & Cryptocurrency and Financial Services practices, based in Washington, DC. He advises public companies, SEC registrants, and corporate insiders on disclosure, compliance, and general corporate law matters, including the growing area of environmental, social, and governance (ESG) matters. Prior to joining Steptoe in 2022, Coy served as counsel to SEC Commissioner Hester Peirce and held a number of leadership positions in the SEC's Division of Corporation Finance during his eight-year tenure at the Commission. Coy also clerked as a Staff Attorney for the U.S. Court of Appeals for the Fourth Circuit after earning his J.D., magna cum laude, from Pepperdine University School of Law and his B.A. from University of Maryland.

Aaron Saiger[vii]
Professor of Law, Fordham University School of Law

Moderator: *Suman Naishadham*[viii]
Climate Reporter, Associated Press

[vii] Aaron Saiger is a Professor of Law at Fordham University. He has taught Administrative Law, Education Law, Executive Power in the Administrative State, Legislation and Regulation, Property, and State and Local Government. Saiger clerked for Justice Ruth Bader Ginsburg at the United States Supreme Court from 2001 to 2002 and clerking for Judge Douglas H. Ginsburg at the United States Court of Appeals for the District of Columbia Circuit from 2000 to 2001. Saiger has a Ph.D. from Princeton University's School of Public Affairs, a J.D. from Columbia University, and an A.B. from Harvard College.

[viii] Suman Naishadham is a climate reporter at the Associated Press. She has covered drought in the American West, federal regulation of the environment and climate. Prior to this role, she was a journalist in Mexico, writing for Bloomberg Industry Group, the Wall Street Journal, Reuters, and more. She is a graduate of Missouri School of Journalism and has a BA in Political Science from New York University.

KEYNOTE ADDRESS

Mary Jo White[ix]
Partner, Debevoise & Plimpton LLP

[ix] Mary Jo White served as the Chair of the United States Securities and Exchange Commission from 2013 to 2017. She was nominated by President Obama to lead the SEC and was one of the Commission's longest-serving Chairs. Under White's leadership, the Commission strengthened protections for investors and the markets through rulemakings that addressed major issues raised by the financial crisis, and created the framework for the future regulation of the asset management industry, enhancement of equity market structure and disclosure effectiveness. The Commission also instituted changes to enforcement that resulted in greater accountability and record levels of actions and monetary remedies ordered. From 1993 to 2002, White served as the U.S. Attorney for the Southern District of New York. She is the only woman to hold the position in the more than 200-year history of that office, which has the responsibility of enforcing the federal criminal and civil laws of the nation. White also served as the first Chairperson of Attorney General Janet Reno's Advisory Committee of U.S. Attorneys from all over the country. Prior to becoming the U.S. Attorney in the Southern District of New York, White served as the First Assistant U.S. Attorney and Acting U.S. Attorney in the Eastern District of New York from 1990 to 1993. She now works as a Partner at Debevoise & Plimpton LLP as the leader of the firm's Strategic Crisis Response and Solutions Group. White is recognized as an Eminent Practitioner in Securities Enforcement and White Collar-Crime and Government Investigations by Chambers USA (2023), where she is said to be "a leading light in the securities practice." White graduated from William & Mary, Phi Beta Kappa with a B.A., The New School for Social Research with an M.A. in Psychology, and Columbia Law School with a J.D., where she was an officer of the Law Review.

WELCOME AND INTRODUCTORY REMARKS

Meredith Berger: Hi, everyone, we are going to get started. Thank you to everyone in person and online for joining the *Fordham Journal of Corporate & Financial Law* for our annual symposium.

I will be back to cover some housekeeping items and provide opening remarks. But first I'm going to turn the mic over to the Dean of Fordham Law and Paul Fuller Professor of Law, a prominent scholar of social welfare, law and policy, and an esteemed leader of our law school, Matthew Diller.

Dean Diller: Thank you, Meredith, and thank you for all your fantastic work in organizing today's program. It's wonderful to see you all here.

I'm here to do a couple of things. The first is to say welcome. I want to welcome those of you in this room and those of you at home viewing on Zoom. My second goal is to sing the praises of the *Journal of Corporate & Financial Law*. It is one of the crown jewels at Fordham Law School. We are a business law powerhouse. As far as I know, we are the only American law school that requires Corporations for every JD student, and we have about 100 business law courses across our curriculum, have leading business law scholars, including Professors Caroline Gentile, and Sean Griffith, who helped organize today's program. I want to thank and acknowledge them. We also have a leading center, our Center on Corporate Law,[1] which is incredibly active in the field and has a fantastic podcast series that I recommend to you, run by Amy Martella, who is the executive director. In sum, we take business law extremely seriously here. And that brings us to today's symposium.

For many years I taught administrative law. These days I've been in the dean's office and out of the rotation. But as an administrative lawyer, my head is exploding with all the different things that are going on in the field, and how, there's more on the table for reexamination and change in the field. There is more on the table for reexamination and change in the field of administrative law than at any time since the 1930s when the field was created. It is striking that business regulation is at the forefront of so many of the key cases that the Court has decided in recent years, revisiting many of the fundamentals in administrative law through a particular

1. *See* Corporate Law Center, FORDHAM L., https://www.fordham.edu/school-of-law/centers-and-institutes/corporate-law-center/ [https://perma.cc/J6K5-Z6SG] (last visited Feb. 8, 2024).

business law lens. This brings us to the Securities and Exchange Commission ("SEC") in particular.

Today's program will focus on two key issues around constitutional dimensions of the SEC and the SEC's activities. The first one focuses on the status of administrative law judges in our system of administrative law and administrative governance. This issue comes to us, as so many of these appointment powers cases have, in the context of business law. Here, the issue centers on the SEC. The last case was the Consumer Finance Protection Board. The case before focused on the Public Company Accounting Oversight Board ("PCAOB"). The second issue really focuses on the limits of the SEC's power to regulate under the Constitution. Issues have been particularly raised about the SEC's foray into ESG disclosure and regulation, and how that impacts constitutional rights such as the First Amendment. I think you are all in for a treat this afternoon.

I want to also thank Shanelle Holley and Morgan Benedit, of our Office of Public Programs, and of course, the *Journal* for bringing us all together. The *Journal of Corporate & Financial Law* was established in 1995, and it's one of the premiere student-edited business law journals in the country. It is the second most cited specialty law journal in banking and finance. And it is among the top ten student-edited specialty journals in the field of corporations and business associations. I know we are in for a treat this afternoon. Thank you all for being here. I'm going to give the podium back to Meredith. Thank you.

Meredith Berger: Thank you for the kind introduction, Dean Diller. Once again, good afternoon to all. My name is Meredith Berger. I am the *Journal of Corporate & Financial Law*'s Volume XXIX's Symposium Editor. I'm thrilled to see so many of you live in the audience and on Zoom. We have a wonderful event in store today.

We are honored to have a truly impressive panel of prominent practitioners and leading scholars here with us today to share their insights and expertise on constitutional questions facing the SEC.

Today's symposium is titled a Major Question for the SEC: Analyzing Constitutional Limits on Regulatory Authority. We will cover two of the most prominent constitutional issues currently facing the SEC. Our first panel, called Administrative Law Judges in the SEC: A Supreme Court issue, will address a case up for review at the Supreme Court this term, *Jarkesy v. SEC.*[2] *Jarkesy* is challenging the SEC's use of

2. *See* No. 22-859, 2023 WL 4278448; Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

administrative law judges to decide its controversies with three constitutional arguments. We will dive into those arguments and discuss how the case will impact future SEC action. Our second panel will turn its focus to a proposed rulemaking of the SEC released for public comment in March of 2022.[3] The proposed rule would require corporations registered with the SEC to include climate-related disclosures in their yearly reports and registration statements. We will discuss the Major Questions Doctrine challenges to this rule, and how we expect the SEC to move forward. We will conclude with a Keynote Address from former chair of the SEC, Mary Jo White. We will reserve the last 10 to 15 min of each panel, and of the keynote, for questions from the audience.

3. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 29059 (proposed Apr. 11, 2022).

PANEL ONE: ADMINISTRATIVE LAW JUDGES AND THE SEC: A SUPREME COURT ISSUE

Meredith Berger: I will now introduce the members of our first panel, who we are thrilled to have in person with us here today. Our first panelist is Professor Samuel W. Buell. Professor Buell is the Bernard M. Fishman, distinguished Professor of Law at Duke University School of Law. Professor Buell's scholarship explores, in part, the conceptual structure of white-collar offenses and the treatment of the corporation and the white-collar offender in the criminal justice and regulatory systems. He has written a textbook on corporate crime, featuring a chapter on Civil Regulatory Enforcement in the SEC.[4] Our second panelist is Professor John M. Golden. Professor Golden is the Edward S. Knight, Chair in Law, Entrepreneurialism, and Innovation at the University of Texas at Austin School of Law. Professor Golden has published scholarship on non-article III adjudication,[5] as well as in an amicus brief in the very case we will be discussing, *Jarkesy v. S.E.C.*[6] I will be the moderator for this panel.

Before we get into our questions for today, I wanted to give a rundown of the facts of *Jarkesy v. S.E.C.*, the three constitutional issues, and why the resolution is important to our theme of challenges to SEC authority. In 2011, the Securities and Exchange Commission launched an investigation looking into George Jarkesy's investment activities with his two hedge funds. Following the investigation, the SEC brought a fraud action against Jarkesy and his associates in an agency proceeding, using one of the SEC's own administrative law judges ("ALJ") as the adjudicator of the charges. The ALJ found that Jarkesy committed fraud. Jarkesy appealed within the agency, and the SEC affirmed the fraud ruling. Jarkesy then challenged the SEC's ruling in the Fifth Circuit. The Fifth Circuit held that the SEC proceedings were unconstitutional. The SEC then sought a writ of certiorari from the Supreme Court and the Court granted cert. Oral argument is scheduled for November 29th of this year, so it's coming up.

The case has three questions presented, all of which call into question the breadth of the SEC's authority under the Constitution. The questions

---

4. SAMUEL W. BUELL, CORPORATE CRIME: AN INTRODUCTION TO THE LAW AND ITS ENFORCEMENT (3d ed. 2023).

5. *See* John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113 (2023).

6. Brief of Professors John M. Golden and Thomas H. Lee as Amici Curiae in Support of Reversal on the First Question Presented, *Jarkesy*, 34 F. 4th (No. 22-859).

are as follows, the first is, whether statutory provisions that empower the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties, violate the Seventh Amendment right to a jury trial. The second is whether statutory provisions that authorize the SEC to enforce the security laws through an agency adjudication, instead of filing a district court action, violate the non-delegation doctrine. The third is whether Congress violated Article II by granting for-cause removal, protection to the administrative law judges within federal agencies whose leaders enjoy for-cause removal protection.

So now, with that introduction, we'll move on to our panelists. I wanted to start with this question for Professor Golden. Jarkesy argues that the SEC's use of ALJ's in deciding his controversy, violated his Seventh Amendment right to a jury trial. What are the SEC's arguments that the right to a jury trial is not infringed upon? Do you think that this argument will be persuasive to the Court?

Professor Golden: I should first mention that this is the question presented for which I co-wrote a brief with one of your professors here, Professor Tom Lee of Fordham. And also the articles I've co-written on non-article III adjudication have all been written with him.[7] So, in part, I'm a stand in for him, although, I should say, nothing should be attributed to him.

The Seventh Amendment question interacts, in part, with the Court's jurisprudence—just generally—on when you can have a non-Article III federal tribunal. Article III grants judicial power to the Article III courts which encompasses various types of cases or controversies. And so, then the question is, when can a non-Article III tribunal, like the ALJ or SEC itself, hearing the case on a plenary basis potentially after the ALJ, actually engage in that adjudication?

The Court has said that even if it's something to which the judicial power extends, you can have a federal non-Article III tribunal if the question involved is one of public right. And then, of course, one question is going to be what's a matter of public right, to which I'll get to in a moment. But the Court has said that once you decide that something is a matter of public right and fit for adjudication by a non-Article III federal tribunal, then that also resolves the jury question. Some people have

---

7. *See also* John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547 (2022); John M. Golden & Thomas H. Lee, *Article III, the Bill of Rights, and Administrative Adjudication*, 92 FORDHAM L. REV. 397 (2023).

questioned this, but the Court has reaffirmed that position as recently as 2018 in the *Oil States* case, in an opinion written by Justice Thomas.[8] So, assuming the Court sticks with its precedent, the key question is what's a matter of public right?

Our brief does argue that the SEC is standing on solid ground, based on a lot of prior precedent of the Court, in that, in a case from 1932, *Crowell v. Benson*, the Court defined a matter of public right as one that has, now I'm quoting, "arise[n] between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[9] It seems to me an SEC fraud action which the SEC is authorized to bring as an enforcement action fits that definition quite well. Again, assuming you accept that definition.

Meanwhile, if you consider what's a matter of private right and look at the *Crowell v. Benson* decision definition, there, the Court defined a matter of private right as one "of the liability of one individual to another under the law as defined." And so, the fact that the Government is recovering money is not seeming to fit this model for a matter of private right, which seems to contemplate a shift of money from one private person to another as in *Crowell v. Benson*, which was essentially a kind of workers compensation case.

So, on that sort of classic background, the SEC looks to be in good shape. Now we have a number of justices, however, who are not necessarily satisfied with this—with these definitions—and who will undoubtedly, I think, focus on the fact that when the SEC is looking to recover money from an individual; that there's a sort of a deprivation of private property that's involved, which, more colloquially can sound like a matter of private right. My co-panelist may talk about this better given the expansion in the SEC's ability to recover money from private individuals over the last few decades. The Court is probably likely to be somewhat more suspicious of this power.

That's, I think giving you the idea of the basic issues in play here. I will say, one further fact is that, though this might be considered a matter of public right, if the SEC pursued this enforcement action in a district court, the jury right would apply. And so, that's another point of disconnect that justices who are a bit uncomfortable with what they might view as the overextension of administrative adjudication will almost

8. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325 (2018).

9. Crowell v. Benson, 285 U.S. 22 (1932).

certainly react to, and which certainly the Fifth Circuit seemed very focused on. If this action were brought in district court, there would be no question you could get a jury in relation to the SEC seeking this fine. Why do you lose the Seventh Amendment jury right when the agency has moved? Something to sort out even maybe presumptively for the agency itself.

Meredith Berger: Thank you. Professor Buell, do you have anything to add?

Professor Buell: I think most of my comments will come in later in the discussion, because, unlike my colleague John here, I'm not a scholar of administrative law or constitutional law. I study corporate enforcement so I can talk a little bit more about how some of this might play out. But I guess, well before I do that, I just also wanted to say thank you for bringing me to New York and thank you all for coming here. I grew up here as a lawyer. It's always great to be back. My kids fled for New York as quickly as they could from North Carolina. So now I have even more reason to want to be in New York, and I haven't been at Fordham since this new facility was built. And it's incredible. I mean, this is just beautiful.

So, I think you know of all the things that John said, the one that—in his very honest and concise accounting of how the Seventh Amendment issue has been presented—the one that grabbed me the most, I think, was the last point about how the SEC has this two-track system which Congress has intentionally created for the SEC. And is beefed up over time, as John said, where there's an administrative adjudication process, and then there's an Article III district court process, and they cover the same conduct. We can talk a little bit later about some distinctions there, particularly when it comes to fraud cases like this. This is a case about a guy who set up a hedge fund and lied about it and lied about how much money was in the fund and didn't register properly. It was a very classic kind of fraud case in the SEC world. Why is it that the SEC could sort of avoid a jury? I'm not sure that's even something they want to do, but could avoid a jury by taking it administratively. That's a nice hook. The rest of the argument, it strikes me as a non-constitutional lawyer, as a problem in terms of I don't see how the opinion writes. Because you're talking about a scheme in which there's an integrated set of remedies that are available to the SEC for securities fraud. Whether they go administratively or they go to district court money recovery is only one small part of that scheme.

The scheme from a legislative and regulatory standpoint is very self-consciously and intentionally remedial. If you're in the administrative process, the SEC is seeking a cease-and-desist order, which is administrative lingo for basically injunctive relief. If you're in the district court, you're seeking injunctive relief. Those injunctions and cease-and-desist orders can do a whole bunch of things, and, in fact, the legislation at some point was amended to say that whether on the district court side, the SEC can seek any equitable remedy that would be in the interests of investors. So, the Congressional intent to invoke broad remedial powers couldn't be plainer. The statutes say, in either path, the SEC can seek director and officer bars or other kinds of industry bars. If we're dealing with licensed financial advisors and disgorgement of ill-gotten gains, injunctions and cease-and-desist orders can have lots of forward-looking things in them. When these cases are settled, pursuant to consent decrees, which is the settlement version of an injunction or a settled cease-and-desist order, the settlements have more and more these days started to look like the kind of things that you see in deferred prosecution agreements and non-prosecution agreements. When the DOJ settles criminal cases with companies where there's all kinds of stuff in there about compliance and management changes and monitors and all these things. So this is all happening in a context which could not be farther removed in my mind from sort of the ye-olde tort suit, or whatever it is we're trying to go back to when we're doing; the Blackstoneian kind of originalism here, and I have a hard time. But again, I'm not a constitutional law scholar, seeing how you write an opinion that sort of says, well, as to this one subsection of the statute that gives this one particular kind of remedy, there's a big jury trial problem. But, as to everything else that the SEC is doing, I don't see how you even get off square one saying that there should be a jury trial right, and that from a sort of remedial standpoint, remedial in terms of what the Court does here, seems like a complicated problem.

Meredith Berger: Definitely. As to our next question, Jarkesy further argues that Congress unconstitutionally delegated legislative power to the SEC by allowing the SEC to decide whether to bring an action before an ALJ or in an Article III court without an intelligible principle to guide the SEC in making this choice. Professor Golden, what do you make of the non-delegation doctrine? And do you see it being successfully applied to this controversy by Jarkesy?

Professor Golden: This is often viewed, this non-delegation determination that was made by the Fifth Circuit, is commonly viewed as the weakest part of the Circuit's opinion. In part because it just seems that

it's about the question of where an enforcement action is going to be brought. Once Congress has decided that there's an ability to choose one forum or the other, the question of which forum you bring the action in, whether before an SEC tribunal or before the district court, seems like a classic issue of enforcement discretion. Now, maybe the most classic form of enforcement discretion which the Supreme Court reemphasized this past term in the *United States v. Texas*[10] is just simply declining not to pursue an enforcement action at all. But it would still seem like choosing when and where you go forward with your action would seem to be a classic kind of discretion for an enforcement body to have. True, Congress could set conditions and limits on where and when you could go forward. But it at least doesn't seem to me to be a fundamentally legislative decision as to where and when you go forward within the bounds allowed by Congress.

So, this, again, I think, is one where many people feel it's quite likely that the Court, maybe this is many people being hopeful, but many people feel that the Court will be quite likely not to find a non-delegation problem here. On the other hand, as was emphasized by your Dean earlier, we are in an age where more things are up in the air and are in play than has been the case for decades in administrative law. We have a number of justices who are very concerned that the non-delegation doctrine is not having the amount of bite they want. A number of them, I think, don't believe the intelligible principle test, at least as it's been deployed by the Court, is restrictive enough, and, I think, Justice Gorsuch has indicated that he would like an alternative test or series of tests in place of that. I think it's always possible the Court could say, look, the legislature could decide where and when you have to go before which type of forum, and therefore when they delegate that decision, even though it might seem like a classic Article II executive decision to an Article II executive actor, consistent with the normal nondelegation doctrine (at least as it's currently understood), Congress needs to provide some sort of guidance as to what criteria you're supposed to use in making that decision. So that's possible. But, as I said, I think many people feel like it's a classic situation of enforcement discretion.

Professor Buell: I would agree with that 100%. Just the brief-reading lawyer in me got to that part of Jarkesy's brief and the Solicitor General's,[11] and Jarkesy didn't even really spend very much time on it in

10. United States v. Texas, 599 U.S. 670 (2023).
11. Reply Brief for the Petitioner, SEC v. Jarkesy, 143 S. Ct. 2688 (2023).

their brief. I thought the Solicitor General just nailed that one. I will confess I don't really understand the nondelegation doctrine. I mean, as somebody who doesn't teach Constitutional law, legislation delegates. That's what it does. The whole idea is to write law in general terms and empower institutions to do things, and of course discretion has to be exercised. Obviously, I get the idea that you couldn't have some kind of really extreme statute like Congress passes a statute that says DOJ shall write regulations, deciding what shall be a crime or something. But this is so far from that and the enforcement discretion piece that jumps out most prominently at me in this context is not the question of whether the SEC goes administratively or in a district court, but whether the case goes civilly or criminally, or both. The securities laws very clearly empower not only DOJ to bring criminal charges for the same things that the SEC can bring civil charges for, but also they explicitly say that the Commission should refer cases to DOJ for consideration of whether there should be criminal prosecution. And it's actually a pretty hard thing to teach to students a kind of framework on like, well, how do I know when a case is going to be civil, criminal, or both? And the answer is, well, you're not going to find that in the statutes. You're going to find that in the pattern in practice or the common law of enforcement. If you begin to identify patterns about, for example, insider trading, what kinds of cases does the DOJ tend to want to do criminally? It's a small subset of the ones that the SEC would do.

I was just teaching this week the *Dresser Industries* case out of the DC Circuit,[12] which is the famous case on parallel proceedings, and whether there's any basis on which to object that you're being looked at by the SEC and a grand jury at the same time, and that SEC and DOJ are sharing information. And not only does the D.C. Circuit says that you don't have a legal basis to complain about that, except if there's some improper conduct going on, but they go on at length about how this is the scheme that Congress intended to create. They want this flexibility and the ability to share information—to choose on a case-by-case basis—how you're going to proceed. I'm not sure I see how you could, from all of that which I don't think is in question, distinguish this lesser question of administrative versus district court.

Meredith Berger: The third issue in this case is that Jarkesy challenges that the SEC and by extension its ALJs are meant to be accountable to the President, so the people can exercise their voice with their vote to change who they do not believe are doing well in their

12. SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir. 1980).

positions. However, ALJs have been given "for cause" removal protections by the SEC, undermining this ideal. Professor Golden, please explain what the court will weigh in determining whether this is constitutional and what you believe the merits to be.

Professor Golden: This issue really follows quite straightforwardly from an earlier decision the Court made regarding the SEC from a little over a decade ago, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[13] There, Congress had created this PCAOB. The Court found the PCAOB to have policy-making powers, enforcement powers, as well as some adjudicative power. And that Congress gave the members of that Board for-cause removal protection. Under standard background administrative law that would not be necessarily so shocking. The courts have upheld civil service protections or tenure of inferior officers within the government for well over a century. The Court in this case found that there was a problem with giving for-cause removal protection here, in particular, because of the SEC Commissioner assumption. This was such a strange part of the opinion, making what became a linchpin for striking down at least part of a statutory scheme as unconstitutional just an assumed fact. But they assumed that the SEC Commissioners are also only removable for cause. The statute, for some reason, perhaps just because it's an older statute, doesn't actually make that explicit. And then the Court held that these PCAOB members were overly insulated from presidential control because the President could only remove the SEC Commissioners for-cause by assumption, and the SEC Commissioners could only remove members of the PCAOB for cause.

The Court also tried to qualify this, at least as to what it was deciding at this time, indicating that it wasn't indicating that the Civil Service protections were generally going to be problematic within administrative agencies. They did look to the particular powers that the members of the board had. They noted that the for-cause removal protection in that case was viewed as particularly strong in some ways, and they also suggested explicitly that perhaps adjudicative bodies or officers would be treated differently. Part of the problem, in the Court's view, is that the PCAOB members were engaging in policymaking and enforcement which could be viewed as a more kind of classic Article II-type functions that the President really needs to control, to take care that the laws are faithfully executed. So, a first issue, really, I think, before the Court now is how differently does it view adjudication. And the Court also has indicated, as

13. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

you see when it's worried about non-Article III adjudication versus Article III adjudication, it's worried about lack of insulation—the impartiality of these officers who are operating within administrative contexts.

Now, when the Court gets to this third question presented, it's potentially pushing from the other side, saying, well, you're too insulated from the President and that's a problem under Article II. So, the Court, at least from my perspective, will hopefully at least take this tension seriously, which seems to arise out of its caselaw. This is often viewed as the issue where the Fifth Circuit's opinion was most well-grounded, given that it's just coming off of the *Free Enterprise* decision. Much of the question really is: how differently do we treat officials like ALJs, who are essentially, primarily if not purely, adjudicative and then, how much weight will we give to perhaps differences in terms of what we view as the level of authority or the degree of for-cause removal protection with regard to the level of authority?

Before I close, I'll just add that it is relevant how the ALJs, or at least you might think it's relevant at least, how ALJs are reviewed and subject to review under the Administrative Procedure Act ("APA").[14] Under the Administrative Procedure Act,[15] the Commission always retains the power to conduct plenary review of the decisions of ALJs. The Commission might choose to give deference to ALJs, but it has plenary review authority, meaning it could just completely open up the evidentiary record itself. And so, that could be something that comes into play in this case, although the court did not find it a reason to not find ALJs to be officers in an earlier case, the *Lucia* case,[16] which it has heard and where it decided there were Appointments Clause restrictions, relevant Appointments Clause restrictions, with respect to ALJs.

Professor Buell: I just have 2 things to add on that one. One is, as John knows, because he's studied the briefs even more closely, there's a couple of suggestions coming from briefers around this issue in or adjacent to the case. One is the idea that the Supreme Court could rule in a way that would essentially strike the for-cause protection for the ALJs and leave it in place for the SEC Commissioners, thereby removing the for-cause alleged special Article II problem, right? The other proposal is,

14. Administrative Procedure Act, 5 U.S.C. §§ 551–59.
15. *Id.*
16. Lucia v. SEC, 585 U.S. 237 (2018).

which the amicus brief of professors[17] has suggested, you could rule that actually the SEC Commissioners don't have for-cause protection. It actually isn't anywhere in the statute,[18] and I'm embarrassed to say that was news to me. I didn't know. I mean, everyone has always assumed that the SEC is kind of like the Fed. These are protected kind of commissioners and that may be more a norm than a textual thing. That strikes me as a very bad idea though. I don't think it would be very good for us to make the SEC, which is one of these bipartisan commissions with appointments from both sides, to be totally uninsulated from the whims of a President who just doesn't like what they're doing and decides to swap them out. So, there're some potentially narrower issues relative to the first and second issues there.

In the third issue, there's a narrower path to resolving it, in this case, in a way that might not be terribly disruptive to the practicalities of SEC enforcement, and in a way maybe not carry over to create a whole host of problematic issues dealing with all kinds of other federal agencies that have ALJs in them. John pointed to this whole thing about SEC ALJs—they really got started as a kind of cause among certain sectors, particularly of the business world celebrities like Mark Cuban and Elon Musk, who didn't like the fact that the SEC was telling them how to do their business.[19] As a kind of push against this idea that the SEC has too much power through its administrative adjudication process and that this is a kangaroo court or its home court advantage, or all of that. And it's just deeply ironic that that would end up in an argument that basically says you can't give these judges the kind of protections that Congress designed to make them fairer to the litigants. The whole idea of giving these folks for-cause protection is so that it's harder to fire them if you don't like the way they're ruling, which presumably for the SEC, would be ruling for defendants too much. And I don't think that's ever happened, but that's the idea. So, it sort of seems like a wrong remedy for the problem that you started worrying about in the first place. I wonder if there is some deeper strategic consistency here around the idea that the same sort of folks who would like constitutional law to be very

---

17. *See* Brief of Professors John M. Golden and Thomas H. Lee as Amici Curiae in Support of Reversal on the First Question Presented, *supra* note 6.

18. *See* Securities Act of 1933, 15 U.S.C. §§ 77a–aa; Securities Exchange Act of 1934, 15 U.S.C. § 78.

19. *See* SEC v. Musk, No. 18 Civ. 8865 (LJL), 2022 WL 1239252 (S.D.N.Y. Apr. 27, 2022); SEC v. Cuban, 620 F.3d 551 (5th Cir. 2010).

empowering of the President also don't like the civil service, so it's sort of like, don't protect people too much from being fired by the President. But also, we just don't really like what they're doing at all.

Professor Golden: I do want to add something on the administrative law professors' brief that made this argument about—potentially you could strike the for-cause protection or, recognize that there is no for-cause removal protection for the SEC Commissioners.[20] As a fellow administrative law professor, I'm sympathetic with this view that they are pointing out. And I think it's helping to emphasize that striking for-cause removal protection for the ALJ is a big step, arguably a much bigger step than what the Court did in *Free Enterprise*[21] because you're now really striking down a fundamental part of the bargain that was struck in the federal Administrative Procedure Act[22] sometimes described as a quasi-constitutional statute—a statute that, remarkably, was enacted unanimously by both Houses of Congress in 1946. So, I think that's part of what's motivating the administrative law professors, but also a result of what they're doing is, I think, putting before the Court that this is something very significant. You can't claim that this sort of for-cause removal protection for ALJs is something that was newly invented by Congress within the last few decades.

Meredith Berger: So, continuing with that, how do you think that resolution of these 3 issues will impact the current functioning of the administrative state in general and the SEC in particular?

Professor Buell: Why don't we start with the SEC because that's what the case is about. John will be able to talk about what other areas it may have impact in which I will not be able to. So, here's a really interesting fact: after all this kerfuffle over these last years about SEC ALJ adjudication, it turns out that in the last two years the SEC has only had four contested cases before ALJs, in each of the last two years. They are primarily using the ALJ process, or I shouldn't even say the ALJ process because if you settle a case administratively, you don't need an ALJ. The settlement is signed by the Commission and the cease-and-desist order, which the defendant is agreeing to be bound by, is issued by the Commission. There need be no adjudication, because the parties have agreed, and as many in this room probably know, just like in a lot of other realms of law these days, settlement overwhelmingly characterizes SEC

20. *See* Brief of Professors John M. Golden and Thomas H. Lee as Amici Curiae in Support of Reversal on the First Question Presented, *supra* note 6.

21. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

22. Administrative Procedure Act, 5 U.S.C. §§ 551–59.

practice. So, they are using the administrative process very commonly to settle cases. But again, that process doesn't involve the work of an administrative law judge when they have gone to contested cases in the last couple of years.

They've brought very few in the last 2 years. I'm told that there are only two ALJs currently active at the SEC. Almost all the contested cases are going to the district court, and the SEC, by the way, does very well in District Court. So, this idea that this kind of got started with: "There's a home court advantage", "It's not fair", "We want to be in district court because it's all rigged on the administrative side" was kind of an exaggeration in both directions. Now, it's a little bit hard to tease out the causality because it probably is the case that, while this constitutional litigation was kind of brewing, the SEC may have decided that we don't want to hang too many cases on the administrative process and then have them be maybe vulnerable later if a constitutional ruling comes down that is problematic for administrative adjudication.

But, I also think they've always used district court a lot, and they're very comfortable with the district court. I think one of the things they don't like about the district court is the possibility that federal judges might try to meddle in their settlements. You know some of you may be familiar with the bruhaha after the financial crisis between Jed Rakoff and the SEC.[23] In the SEC settlement with Citibank over a mortgage-backed securities transaction,[24] Rakoff wrote this, I thought, very persuasive opinion, although it was overbroad from the standpoint of being able to hold up on appeal. He said, I'm not going to accept this settlement because you're asking me to issue an injunction and asking a Federal judge to use his or her injunctive powers is really a big deal, and it's not just a rubber stamp on your private agreement. I'm being asked to issue an injunction, and that's a big deal, and I need more facts, and I don't like the looks of the settlement.

23. SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

24. Press Release, U.S. Dep't of Just., Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (July 14, 2014), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-globalsettlement#:~:text=All%20News,Justice%20Department%2C%20Federal%20and%20State%20Partners%20Secure%20Record%20%247%20Billion,About%20Securities%20Containing%20Toxic%20Mortgages [https://perma.cc/T2PX-ANLN].

They took him up to the Second Circuit.[25] Consent decrees, which is what we say when an injunctive action settles a consent, are a convenience that the executive branch uses to resolve cases. It's up to the SEC how they want to do that. But the SEC had to litigate all of that. If they go administratively with the settlement, the Commission isn't going to sit there and go, "We don't like this settlement." They're going to sign off on it. It's complicated, right? Because we have these three questions presented and there's some interaction between them, and each one, as we went through them, have their little sub issues in ways that they might branch off differently. And certainly, if they said you have a constitutional right to a jury, determination on, let's say, fines rights, which is the strongest argument. According to John's account of the Seventh Amendment Article III issue, then the SEC would have no reason to use administrative proceedings anymore for any case in which they wanted a money sanction. And you're not going to bifurcate your enforcement proceedings so that you go for money in district court, but injunction in administrative. That wouldn't make any sense, it would seem to me.

There is a little bit of a wrinkle here that I'm not super familiar with, because I and my colleagues, I don't think, even teach the part of SEC enforcement that deals with investment advisors. So, in that statutory scheme there is apparently some enforcement activity that has no district court equivalent venue for that you could only enforce against the miscreant investment advisor for certain things in an administrative process. If that enforcement process includes monetary penalties, which I believe it does, and that were basically said to be part of the Seventh Amendment problem, then you would have a category of cases that the SEC could not enforce as a constitutional matter under the current statutory scheme, and then I think it would seem to me there'd be a very powerful argument for a Congressional fix of some sort that would say: okay, this category of cases that we had over in the administrative part of the statute, we're just going to mirror that over in the Article III part of the statute now, and you can take those people to federal court.

Professor Golden: I'll try to talk a little more generally. It's a bit difficult to say. As Sam suggests, even if the Court, say, rules against the SEC, there would be a question of how broadly it writes its opinion. In *Free Enterprise*,[26] this background case, which is implicated by question three, the Court had reserved a number of issues which are somewhat coming to the fore now, so I'll just tick through them to say a little bit

25. *See* SEC v. Citigroup Glob. Mkts. Inc., 752 F.3d 285 (2d Cir. 2014).

26. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

about each of them. On question one, the Fifth Circuit, basically argued it was distinguishing a prior decision by the Supreme Court, *Atlas Roofing*,[27] where the unanimous Court upheld the administrative adjudication of a fine by the Occupational Safety and Health Regulatory Commission, and for many of us, this looks very much in line with what's going on here. The Fifth Circuit said, well, this is involving fraud, and then this is where Blackstone was referenced, Blackstone's discussions of fraud. But at the time that *Atlas Roofing*[28] case was also argued, I believe the kind of action there, under the Occupational Health and Safety Act,[29] was viewed as somewhat like or analogous to various types of tort actions you might bring, and that argument about this being like a tort action, I believe, was made at that time. So, for many, it seems like the Court would be more likely to view this issue more broadly, and feel that it might need to revisit and potentially overturn *Atlas Roofing*.[30] And if it does that, you could have a quite broad decision, saying that administrative agencies essentially cannot issue administrative issue fines, and so that I think could have a fairly broad effect within the administrative state.

On the second question presented, which I again view with the government in this case as centering on what seems like a fundamental question of enforcement discretion, I would think, if the Court upholds the Fifth Circuit's decision, you're just going to get a tremendous amount of uncertainty as to what remaining enforcement discretion is okay, and where Congress is going to have to revisit a number of these statutes in order to essentially provide the guidance needed for such discretion to be constitutional. So, that's one where I do think an affirmance could generate a lot of uncertainty. I don't know how the opinion would be written. Maybe that could be contained.

The third question presented again has been presented as giving the Court the opportunity to call into question or really overturn for-cause removal protection for ALJs across the administrative state, or at least for ALJs within independent or thought-to-be-independent regulatory commissions, at least classically. But, as I mentioned, if the court follows some of the model of its prior decisions, it could try to make this more specific to the particular powers exercised by SEC ALJs, and the fact that the Court believes those to generate a special sensitivity with respect to

---

27. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).
28. *Id.*
29. 29 U.S.C. § 15.
30. *Atlas Roofing Co.*, 430 U.S.

Presidential control, so there might be opportunity for limiting things there. If an affirmance is written broadly, however, this could be more disruptive for other administrative agencies that haven't relied so strongly on adjudication before the district courts as opposed to administrative processes. Being someone who does intellectual property law, particularly patent law, in addition to administrative law, I often think of the International Trade Commission, which does hear some number of what are essentially patent infringement cases. I'm not sure how they really get refashioned in a world in which the Commissioners can't have for-cause removal protection or the ALJs can't have for-cause removal protection unless you're just going forward with adjudication without that kind of traditional insulation. To turn all this over to Article III Courts, they would then perhaps call into question why you have the International Trade Commission deal with these types of cases at all. So my sense is, it could actually in this sense suggest that this may be one case where it's sort of odd to have the viability of ALJs within at least a significant chunk of the administrative state—ALJs within bodies where the heads have for-cause removal protection—eally being put to the test in relation to an agency that doesn't seem to rely so much, generally speaking, on ALJ adjudication.

Professor Buell: I will just add, there was a period where one of the things that kind of got us down this path, not that we wouldn't have been here in some other way, was the Dodd-Frank legislation after the financial crisis,[31] and the legislation did do some leveling up of the remedies between the district court and the administrative side. So, prior to Dodd-Frank, I don't believe that the SEC had the ability to get money fines on the administrative side, they could get disgorgement and injunctive type relief, and one of the things that the agency went to Congress about in the wake of the financial crisis, was about giving them more enforcement power to be more effective at hitting people in the industry who are engaged in fraud. The Commission said give us the monetary penalties on the administrative side, so that we have more freedom of action. This was when Mary Jo White was chair, and we can ask her when she comes later. I believe the numbers went up for a while. There was naturally a sense that well, we have this power now on the administrative side that's additional, let's use it. But still not as much as I think. I think I read one article that said that the high watermark was maybe 40% on the administrative side. It was never even half. And, as I said earlier, the water has receded. Maybe partly because of this litigation. I'm not sure, it's hard

31. Dodd-Frank Wall Street Reform & Consumer Protection Act, 12 U.S.C. § 53.

to say. It's not clear in the current world that this would really impact terribly much what the SEC is doing, at least when it comes to fraud cases against securities issuers.

Meredith Berger: Professor Golden, you mentioned that the Court might rule more broadly, and then that would have implications on the greater administrative state or might rule more narrowly. Do you have any opinions about what you think the Court is more likely to do—if they're likely to rule more narrowly or more broadly?

Professor Golden: Yes, I guess I haven't sat down to think exactly about how the Court coalition might form on these issues. Chief Justice Roberts, who's written a number of the opinions leading up to this, including a recent decision in *United States v. Arthrex*[32] in the patent adjudication context has tended to try to write things so that the Court is moving step by step. *Free Enterprise*[33] did, as I mentioned, reserve a lot of questions, and in the *Arthrex* case, he also has language that seems to tie it ultimately to some judgment or understanding of what the power and specific authority is of the administrative patent judges in that case. So, if he's writing the opinion, you might very well have these kinds of reservations. On the other hand, we have other justices, such as Justice Gorsuch, who wrote the dissent in the *Oil States* case that I referenced earlier, which Chief Justice Roberts joined.[34] My sense is that Justice Gorsuch would tend to address these kinds of issues more broadly because he has, at least broadly speaking, well-developed objections to much of the current structure, or what he might characterize as an overextension of the modern administrative state. I think it depends a bit exactly on what the coalition is that you think will arise. And then who out of that coalition ends up being given the pen.

Meredith Berger: Professor Buell, what are some of your biggest concerns related to the resolution of this case? And would you like to see the Court rule in one way?

Professor Buell: Well, I guess you know I'm in favor of a robustly empowered SEC enforcement division. I write about fraud and corporate

32. United States v. Arthrex, 594 U.S. 1 (2021).

33. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

34. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325 (2018).

misconduct,[35] that's my teaching and central research area, so I spend most of my time reading about the bad things that people do with other people's money. And I think really in the bigger picture, obviously there are many reasonable debates about how to strike the right balance between robust government enforcement and freedom of space for innovation in markets and all of that, but I think it's hard to argue with the proposition that the Securities and Exchange Commission and these securities laws have been one of the great success stories of not just the New Deal, but American law in general, in terms of the project of regulating a rapidly growing and burgeoning national economy with a huge financial sector. And you compare our markets and our system to others around the world, and we sure have our problems these days, but over the longer span, it's been a pretty big success story. Capital flows into this country.

Never bet against the American economy as Warren Buffett says.[36] One of the reasons that all is true is because we have robust, incredible regulation that is enforced, and the SEC has a reputation. John and I were talking about this at lunch. I mean, even among the alphabet soup of agencies that are potentially affected by what we're talking about today, the SEC really has a reputation for being one of the top offices in Washington. I really try to encourage my students, many of whom want to be assistant US attorneys, to think about also going and being an SEC enforcement lawyer. That's sort of where I come at this from. And so, as a result, I look at this as a non-constitutional scholar and try to tease out all the potential implications. Let's not throw the baby out with the bathwater here, let's be careful.

As I prepared for this conference, though, and digging into the data, I was surprised to learn that the administrative stuff seems to be less critical to what the SEC is doing on a day-to-day basis than I would have thought. And we're certainly in an administration right now and under an SEC chair who is definitely not trying to dial back on enforcement. Maybe this seems like a bigger deal than it really would be. But I also, and maybe John would worry about this more even than I would as an administrative

35. *See* Samuel W. Buell, *Corporate Criminal Liability* in RESEARCH HANDBOOK ON CORPORATE LIABILITY (M. PETRIN & C. WITTING EDS.) (2023); *see also*, Samuel W. Buell *Criminally Bad Management* in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (J. ARLEN ED. 2018).

36. *See* Warren E. Buffet, *To the Shareholders of Berkshire Hathaway, Inc.* (Feb. 27, 2021), https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2021/02/27/2020ltr.pdf [https://perma.cc/AQ8R-63PE].

law scholar, but there is a feeling of creep in the jurisprudence here that's bothersome. Obviously, there's movement going on the rulemaking side this term. I guess we're going to lose *Chevron*.[37] Is that what we're supposed to assume? But maybe not. But the SEC also does a lot of rulemaking, which is a very, very important assault here that this is a part of, and so maybe my worry isn't so much exactly what the particular outcome in this case might do in a couple or 6 months to SEC enforcement, but as a gradual erosion of the ability of administrative enforcers to do what they do.

Our economy is so complicated and so massive, we have got to have these specialized agencies that are experts in particular sectors of industry and have the project of dealing with whatever the externalities that industry produces. And I don't have to tell a New York audience that the finance industry was one of the top industries in this country that you would think about in terms of needing to have an effective regulatory project. I'm talking more about the atmospherics and a concern that we not have a Supreme Court that is becoming, or becomes, kind of hostile to the overall project in a way that I think the United States Supreme Court has never been in securities law. I mean the law, the decisions of the sort of postwar, post-New Deal era right up into the *Enron*,[38] and even beyond that era, have stayed out of the Supreme Court. Sometimes they've curtailed, but mostly in the area of private lawsuits, not in the area of public enforcement, and the Supreme Court has, I think it's fair to say, generally been supportive historically, of this project, and I would not want to see that change.

Meredith Berger: Professor Golden, what are your concerns? Would you like the Court to rule in one certain way?

Professor Golden: I share the concerns that the Court, which may have justified concerns about certain aspects of how the administrative state has grown, might rule in a way that might undercut our ability to have an effective governance system and a governance system that responds to the choices by Congress, by the political branches together, as to what makes good and effective government in the United States. That's the broadest concern.

I would like the Court to be sensitive to this concern, despite the obvious doubts of many of the members of the current Court about the

---

37. Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

38. *In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002).

current extension of the administrative state, perhaps their sense of some complacency or maybe their sense of excessive ease on the part of Congress in passing things along to administrative agencies rather than trying to tackle them themselves. Recent events with Congress might give you a sense of how, if you want effective governance, you may need Congress to make some hopefully well-considered decisions at some time as to what the basic policies are that need to be implemented and then use expert administrative actors to try to carry those policies out.

On a narrow point, I would say, regardless of how the Court comes out, I would hope that the Court will really face up to this tension that we flagged earlier between emphasizing what might be viewed as due process-like concerns when they're talking about Article III adjudication versus non-Article III adjudication and this emphasis on presidential or political control and how that emphasis on presidential or political control comes into some conflict with this concern with matters that might be considered resonant, at least, with due process. Now, a further point that can be made, and it's one that Professor Lee and I have made in our writings and brief, is that you can try to address these due process-like concerns, which we see resonating in a lot of the briefs on the Jarkesy side of this case, through something we have, namely, a Due Process Clause in the Constitution, and perhaps particularly when there are huge private interests at stake. And as we were discussing earlier, in my view, these lifetime bars from involvement in industry activities seem to raise for me the due process concerns significantly more than many admittedly substantial fines. The lifetime bars to me seem arguably goes to fundamental liberty interests and ability to pursue an occupation. And yet that's being hidden and overridden by the supposed concern, the focal concern on civil monetary penalties in this case, and thus, one thing that I think at least I have, and I don't want to speak for him in his absence, but possibly also my coauthor, is a hope that to the extent people and the members of the Court are concerned with these due process-like issues, they actually look to invigorate the due process jurisprudence to try to address them.

Meredith Berger: Perfect, thank you. We now have time for audience questions. If you're live, please raise your hand, and someone will cover over to you with a microphone. If you have a question and you're on Zoom, drop your question in the Q&A box and someone will read it out if time allows.

Audience Question 1: Thank you. Professor Golden, when you were drafting your amicus brief, which particular justices were you trying to

persuade, and which ones, do you think are going to be the least inclined to your arguments that there is no right to a jury trial?

Professor Golden: Well, I will say we previously did draft an amicus brief in the *Oil States* case,[39] which was a patent case and an administrative law case, and then it had an Article III angle. So, I thought that Professor Lee teaches Federal Courts and it would be good to get a Federal Courts person on board as well. In that case, we really had a specific justice in mind, which was Justice Thomas, who ended up writing the opinion for the Court. In that case, I can't say we helped convince Justice Thomas, but we had noted that some of his prior opinions, and an opinion I think he joined with Justice Alito had suggested he would be amenable to the view that the validity of a patent grant was a matter of public right. So I will say we had a very clear justice we were writing for, and then we included some stuff for Justice Kennedy. He was still on the Court then, so we thought we would have some things that that might appeal to Justice Kennedy as well.

This one is more difficult because Chief Justice Roberts has been one of the real leaders of championing the role of Article III Courts and protecting their role. He wrote the opinion for the Court in *Stern v. Marshall*,[40] a bankruptcy case that really relaunched this area of jurisprudence for the Supreme Court in the last decade or so. And he joined Justice Gorsuch's dissent in *Oil States*, which is very telling.[41] We were wondering, at least I was wondering, where he was going to come out there. Normally, you would think we'd be aiming for what looks currently like the middle 3 members of the Court under the analysis coming out of this past term with Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett. But I will say we're still writing things that we hope made quite a bit of what Justice Thomas said in *Oil States*, and so there's some hope that Justice Thomas and Justice Alito, who also signed on to that, might at least take seriously our arguments in this case. But, as I said, it is a tricky one, I think now, because Chief Justice Roberts, who's someone you might view as one of the more median justices in this case seems, in recent history at least, to have been more on the extreme. I

39. Brief of Professors John M. Golden and Thomas H. Lee, as Amici Curiae in Support of Respondent, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325 (2018).

40. Stern v. Marshall, 564 U.S. 462 (2011).

41. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325 (2018).

can't say it's totally clear in my mind exactly who we're most likely to get here to the extent anyone's paying attention to what we're saying at all.

Audience Question 2: This question came in through Zoom, the viewer asks: How do defendants typically fare before ALJs versus in District Court? Is there a preferred forum? Do defense attorneys have the ability to negotiate with the SEC on this point before a case is formally brought?

Professor Buell: That's a great question and I do not have the data at my fingertips. And I almost want to ask if there is someone in the audience who practices defense work before the Enforcement Division who could talk about the situations their clients have been in. Anecdotally, I hear different things depending on which lawyers I talk to. As I said, the use of ALJs has gone down dramatically in the last four years. Although I haven't seen the data, I've had conversations with people about it, and my sense is that the success rate is extremely high for the SEC in both fora and settlement dominates in SEC practice because the chances of beating the SEC are pretty low. Mark Cuban managed to do so, but it was in District Court, so he knew what he was doing. I mean, he got himself a jury in Dallas, and testified in his own case, and he owns the basketball team there. He's kind of a celebrity in Dallas, so that was a peculiar case, but I think in general, the SEC is prevailing just like the DOJ does most of the time.

I've also heard mixed accounts from lawyers about the procedural advantages and disadvantages, which was the other part of the question. So when administrative adjudication was ramping up Post-Dodd Frank, and the complaint started getting going, there was this whole idea of, oh, it's home court advantage, and it was a little unclear whether the complaint was oh, the ALJs are in the bag because the SEC hires them so they're never going to rule for the defense. Or, it was the rules of civil procedure don't apply in ALJ decisions, and we don't get the same discovery. But I've been told that, I'm not intimately familiar with the procedural rules for the ALJ process on the SEC-side, there are some aspects of those rules that are better for defendants than what would happen under the federal rules of civil procedure.[42] For example, I believe there is a sort of equivalent rule in ALJ proceedings that's sort of like *Brady*[43] rule in criminal cases where the SEC has an obligation to disclose helpful evidence to the defense whether or not the defense has asked for

42. FED. R. CIV. P.

43. Brady v. Maryland, 373 U.S. 83 (1963).

it, so I haven't studied this to get it all the way to the ground, but my sense is that it's a much muddier picture, at least superficially, than one might think it to be. Obviously it's better for the SEC to proceed within themselves than to go in District Court. But I think that's at least much less true in reality than one might think.

Meredith Berger: Thank you both so much for your insights and time. This concludes our first panel discussion.

PANEL TWO: SEC CLIMATE DISCLOSURE AND THE MAJOR QUESTIONS DOCTRINE

Meredith Berger: Welcome back everyone, I will now introduce the members of our second panel. Our first panelist is Suzanne Ashley. Suzanne served as the Special Advisor and Senior Counsel to the SEC's Director of Enforcement, Robert Khuzami, from 2010 to 2013, where she oversaw national priority investigations as well as managed the division's legislative and congressional work and all enforcement-related aspects of SEC rulemaking. She recently founded Materiality Strategies, where she advises public companies on optimizing strategies for ESG and sustainability goals including preparation for the SEC's proposed climate-related disclosure rule while enhancing corporate governance. Suzanne is also part of the Yale University 2023 to 2024 cohort for the Climate Change and Health Certificate Program.

Our second panelist is Coy Garrison. Coy served as counsel to SEC Commissioner Hester Pierce and held a number of leadership positions in the SEC's Division of Corporation Finance during his 8 year tenure at the Commission. He is now a partner at Steptoe and Johnson, where he advises public companies, SEC registrants and corporate insiders on disclosure, compliance, and general corporate law matters, including the growing area of environmental, social, and governance matters.

Our third panelist is Professor Aaron Saiger. Professor Saiger is a Professor of Law here at Fordham. He has published scholarship addressing many constitutional issues, including those regarding administrative law and agency interpretation of Congressional mandates in addition to teaching classes on administrative law, legislation, and regulation and executive power in the administrative state.

Our moderator for this panel is Suman Naishadham. Suman is a Climate Reporter at the Associated Press. She has covered drought in the American West, federal regulation of the environment, and climate. Prior to this role she was a journalist in Mexico, writing for Bloomberg, Bloomberg Industry Group, the Wall Street Journal, Reuters, and more. I will now turn it over to Suman to give an introduction of our topic and moderate our panel.

Suman Naishadham: Thank you. And thank you for having me be a part of this discussion. I will just briefly introduce the topic that my panelists will be talking about. Last March, the SEC proposed a rule to make companies disclose the greenhouse gas emissions that they produce and how climate risks affect their business. The proposals were approved on a three-to-one vote, and would require companies to report on their

climate risks, including the costs of moving away from fossil fuels as well as risks related to the physical impact of storms, drought, and higher temperatures intensified by global warming. Companies would also be required to lay out their transition plans for managing climate risk, how they intend to meet climate goals, progress made, and the impact of severe weather events on their finances. One of the central and more controversial elements which many companies, and I assume some people in this room are closely anticipating, is that companies might have to disclose their Scope 3 emissions. Those are the emissions that aren't produced by a company itself, or the assets that are owned or controlled by them, but that a company is indirectly responsible for up and down its value chain.

For some context about the general climate in which the SEC proposed these rules, in recent years the number of investors seeking more information on risks related to global warming has grown dramatically. Many companies already provide climate-related disclosures voluntarily.[44] So, one argument for making such a role is that uniformity in what companies report would allow investors and possibly consumers to compare companies within industries and sectors.

Whatever the final rule contains, the SEC's climate disclosure rule is going to face, almost certainly, legal challenges primarily through the application of the so-called Major Questions Doctrine, which the Supreme Court, in its 2022 decision in *West Virginia v. EPA*,[45] gave more weight to. The crux of the argument is whether Congress has given an agency the authority to regulate big questions, big issues, or major questions, like climate change. Those who recognize the doctrine essentially argue that when Congress wants to give an agency the authority to regulate certain issues, it must do so through a clear legislative directive. Proponents of the Major Questions Doctrine would say that if the language of an agency-enabling statute does not do so, then the agency can't presume that Congress granted broad authority over a major question. Since the SEC's mandate is to protect the financial integrity of security exchanges and protect investors from financial fraud, those seeking to challenge its climate disclosure rule along these lines will

---

44. *See, e.g.*, Whieldon et al., *Climate Disclosures Are Increasing in the US but Still Far from What the SEC Has Proposed*, S&P GLOB. (Apr. 5, 2022), https://www.spglobal.com/esg/insights/climate-disclosures-are-increasing-in-the-us-but-still-far-from-what-the-sec-has-proposed [https://archive.ph/AuOsH].

45. West Virginia v. EPA, 597 U.S. 697 (2022).

question whether the SEC had the authority, in the first place, to mandate what companies tell shareholders and the government about their impact on the climate and environment.

And with that, we will go to some questions for our panelists. To start off, the proposed rule has generated a lot of backlash, with many arguing that this rule would violate the Major Questions Doctrine, and therefore not be a constitutional use of the SEC's power. I want to turn to the three of you and ask whether you agree with this criticism, and why?

Coy Garrison: Sure, I'll go ahead and jump in. I'll answer the question directly, and then I'll go in a little deeper. Yes, I think it is an incredibly valid criticism. To lay the foundation of what I think the real debate is here, and we'll all get length about the Major Questions Doctrine and the ins and outs of it, but, at its core here, let's take a step back and remind ourselves what the SEC's role is in requiring corporate disclosures. A public company can incur disclosure obligations under the SEC in a couple of ways. If you have an IPO, if you sell stock through a registration statement, well, you have disclosures you have to make under the 1933 Act. If you're listed on a stock exchange, or if you cross certain thresholds for a number of shareholders, and size of assets and the like, then well, you have to register under the '34 Act right? So, you have 2 different statutes, both of which permit the SEC to propagate rules requiring corporations to disclose certain information.

Now, what's really interesting about that is that within each statute, there is no broad authority to ask companies to disclose anything they want. Typically, Congress, when they wrote the 1933 and 1934 Act, they included specific examples of information they wanted. In the 1933 Act, they started with schedule A,[46] and there was, I think it's about 27 enumerated factors. Some of the factors are information about the condition of the business, the financial information, and discussion about management directors hitting conflicts of interest. The disclosure obligations are designed to get out the same thing on the 1934 Act side. There are specific examples of mostly financial information that Section 12 and Section 13 refer to, of the type of information that the SEC should request. So typically, the SEC's authority in requiring disclosures is limited when read in the context of the 1933 and 1934 Act, and you may be thinking, but there's tons of quirky examples, and sure there are, but many of those examples come from times that Congress has directly authorized the SEC to require different disclosures. Right? So, one thing I like to think of is most recently Congress passed something called the

46. 17 C.F.R. § 230.610a.

Holding Foreign Companies Accountable Act,[47] and it had to do with public companies that are based in China, but listed in the U.S. And a number of different standards that had to be met to ensure that they were complying with the same audit rules that U.S. companies were complying with. But a little-known fact of that statute is that Congress directed the SEC to mandate specific disclosures concerning the executives of these Chinese companies and their ties to the Communist Party, so the SEC requires that disclosure in public filings.

But if we take a step back and ask, if you ask me, would the SEC be able to require that disclosure absent, an express grant by Congress to tell it to do so? I would say no. I'm not sure that's material information that you need to make an investment decision—whether somebody's a member of the Communist party or not. So that's one example. We're talking about climate today, and I think many people have very strongly held beliefs from a policy matter view that we need to do something about climate change. But, taking a broader view, this principle, if the SEC is unmoored from any limiting principle in the disclosures it can require, can also be used for any number of things. The Chinese thing is just one example. But think of any number of hot button issues that people have strongly held beliefs on. So, you know, I think it's important to think through that prism of, does the SEC have authority to do what it's doing in this context? And then, we can take the legal discussion from there.

Suzanne Ashley: Thanks. Setting aside the relative merits of the content of the rule and the reach of the rule, I actually do think there's a strong argument that the SEC has the authority to issue this proposed rule. Again, setting aside the merits, and focusing on the authority, I think the question there really relates to a couple of things. When you look at the Major Questions doctrine as applied in *West Virginia*,[48] and an underlying case of *FDA v. Brown & Williamson*,[49] there are situations where there's not really a coherent statement of judicial doctrine that's being articulated in the Major Questions Doctrine. It's sort of this amorphous: if a question is too big or politically significant or economically significant, then we don't give agency deference as to how the agency is interpreting the underlying statute that was authorizing their actions by Congress. But we

47. Holding Foreign Companies Accountable Act, Pub. L. No. 116-222 (Dec. 18, 2020).

48. West Virginia v. EPA, 597 U.S. 697 (2022).

49. Food & Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

need to then require a separate additional Congressional authorization for such a rule, and I think, first of all, and Professor Saiger can speak to this as a constitutional expert. In his views, that there is still a place for *Chevron* deference, and that, more importantly, the SEC is not acting in this space in a way that is parallel to the underlying case. For example, in *FDA v. Brown & Williamson*,[50] the FDA conceded that in all of the years since the authorization of the underlying statute—and this involved whether the FDA could regulate cigarettes as delivery devices for tobacco—it had never actually acted in the space under the statute in all the years. But here, if you look at the behavior and actions of the SEC, they have, in fact, since 1970 made clear that they can require corporate disclosures in the area of environmental impact. So, going back to the Nixon administration, there was advisory, related to disclosure where issuers needed to disclose if they had legal proceedings that related to climate or civil rights issues. Then, following up until as recent as 2010 when Mary Schapiro was chair of the SEC, there was an issue of interpretive guidance which made clear that MD&A disclosure that's required should also include risks related to changing international and national environmental regulations, potential legislation, potential business demand, and shift in business needs based on increasing amounts of assets that are interested in moving towards a carbon neutral economy.[51] Unlike the FDA in the *Brown & Williamson* case,[52] on which *West Virginia*[53] is analogizing or relying, I think that they have acted. And so again, whether or not I agree with the scope, we'll get to that—the extent of the rule, particularly as to Scope 3. I think there is authority for the agency to act in the space.

Suman Naishadham: I did want to ask all three of you whether you think the Major Questions Doctrine is a valid doctrine in the first place, and whether you agree with the criticism that the SEC's proposed climate disclosure rule is not a constitutional use of its power?

Professor Saiger: I think my job this afternoon is the be the doctrinalist for a couple minutes. There are at least two ways to describe

---

50. Food & Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

51. *See* Speech by S.E.C. Chairman: Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change (Jan. 27, 2010), https://www.sec.gov/news/speech/2010/spch012710mls-climate.htm [https://perma.cc/8VZG-2NA8].

52. Food & Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

53. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

the Major Questions Doctrine which are not unrelated, but are distinct, and this is actually one of those situations where the distinction really has weight. I want to say first what I think the two are. There are two ways to understand what this doctrine is, which are consistent with the cases that we have but not with each other, so I think it's helpful to understand what the possibilities are. One is that the Major Questions Doctrine is an exception to the *Chevron* rule.[54] Many of you know, the *Chevron* case was mentioned in the last panel. We may not know it for much longer, but it's an important case and it says that when statutes are ambiguous, courts should read that ambiguity in to authorize agencies to resolve the ambiguity as long as they do so in a reasonable way. That's been the rule since 1984, when *Chevron* was decided.

In the Major Questions Doctrine cases that have come out of this sitting Court in the past few years, some of what the Court has said about major questions is that major questions are an exception to the *Chevron* rule. When an agency decides to answer the major question, you shouldn't read the ambiguity of a statute to authorize the agency to pick any reasonable interpretation that it prefers. The reviewing court should do its best to come up with the most reasonable construction of that statute *de novo* in the judgment of the court, and not defer to the agency.

On that version of the Major Questions Doctrine, it's a doctrine about ambiguous statutes. It's a doctrine that says, when you have an ambiguous authority, this is how courts should review what agencies do with it, and when they're courts with major questions, they should resolve their ambiguities on their own. [55]

The other way to read the Major Questions Doctrine that is also consistent with the cases is that it's not a doctrine about ambiguity at all; it's a doctrine about delegation. And here, the way you can read what the Court is saying is that if Congress wants to authorize an agency to deal with a major question, it must do so clearly and explicitly. It's a clear statement rule about the authority of agencies to deal with major questions. It doesn't matter if there's ambiguity or not. The issue here is that the non-delegation doctrine says that the legislative power is in Congress, and that Congress can't delegate its legislative power to

54. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).
55. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021); West Virginia v. Env't Prot. Agency, 597 U.S. 697, 723 (2022).

anybody else, including the agencies.[56] So when agencies make rules, they have to be understood as enforcing the law or executing the law, and not as making the law because only Congress can make laws. And this version of the Major Questions Doctrine says, if you're faced with deciding a major question, that's what making the law is, and therefore Congress has to do it. You cannot have general grants about that—let agencies function as roving commissions to solve the major issues of our time.

The SEC statutes are general but not ambiguous, that's the way I read them. I think it's pretty hard to see a major questions problem on the first version of the Major Questions Doctrine in a rule like this one, because the grants are grants of the rough form, to do things that are in the public interest—protecting investors. These are not hard to understand, not ambiguous—they're just very broad. And so, the version of the Major Questions Doctrine that is concerned with ambiguity, I think, does not have much play here, and the version of the Major Questions Doctrine that is about breadth has an enormous amount of play.

Now, the first version of Major Questions may not matter for much longer, because if we lose *Chevron* totally, and never defer to agencies about the construction of ambiguity, it is not going to matter much longer whether that's being done in the context of a major question or not. We do not know how the case that will be heard this spring—*Loper-Bright*,[57] will come out on this. But the smart money, as was mentioned in the last panel, I think, is that the Court will go in that direction. What *Loper-Bright* will probably not tell us is whether the Major Questions Doctrine had been an exception to *Chevron*, which is no longer with us, or whether it was a non-delegation rule. We're going to have to wait for that, and so this open question still matters to the resolution of a case like this.

If we're thinking about the breadth question, it's a non-delegation violation to give an agency power to resolve big questions unless they do so with specificity and the whole controversy over this rule rests on whether this is a big question or not. You use the phrase hot button. It's tempting to think of this as the hot button questions doctrine. And sometimes I do this exercise with my students where I'm like, what are you telling me? Your question is whether it's the kind of question that ends up on the front page of the Times or the Journal. If it's on the front

---

56. *See West Virginia*, 597 U.S. at 738–39 (Gorsuch, J., concurring); Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

57. *Loper Bright Enters., Inc. v. Raimondo*, 45 F. 4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023).

page of the Times or the Journal, then it's a hot button question, and therefore the doctrine applies. Or, if you want to be particularly cynical, a major question is the kind of question about which the Supreme Court grants cert, because why would it bother itself with minor questions? So that's how you know its major, whether they're interested in deciding it. And then this rule comes when the Supreme Court decides cases, they decide them this way and otherwise they're not so major.

But there is language in the cases that tries to do a slightly better job than those kinds of rules by talking about economic impact. How big the economic impact is, how large the departure from prior agency practice might be. With respect to those, it really depends on how you're going to say what this rule is about. If this rule is about whether civilization is going to end because of climate change, then that's a major question. If this rule is about the best way to protect the subset of investors who are making investment decisions based on climate considerations along with other things, then it's not such a major question. One of the greatest ironies of this doctrine is that it encourages agencies to try to portray what they are doing as not very important. Agencies have more freedom of action the more they can convincingly argue that what they're doing doesn't matter very much. And if you look at what the SEC has written in its notice of proposal making, that's basically the path that it has taken. It just said, oh, we're not doing anything new here, not really that much. We are just slightly extending the kinds of rules that we've always had, and we're only worried about investors and their decisions. We're not trying to force information into the public domain and regulate by information release. We're certainly not trying to save the planet. That's the farthest thing from our minds. All we're trying to do is investor protection and even then, for a certain kind of investor interested in certain kinds of things. That's how the SEC appears to be setting itself up.

All I've not done is answer your question about whether that's okay or not. Maybe I won't do that.

Coy Garrison: Can I jump in with two thoughts on that?

Professor Saiger: You saved me from having to give my opinion.

Coy Garrison: I agree that the contours of the Major Questions Doctrine are entirely unclear to me, and I think to everyone. I would be interested in your thoughts of Justice Barrett's concurrence in *Biden v. Nebraska*.[58] She doesn't think it's a clear rule—a non-delegation principle—but she takes it as an interpretive guide to interpreting the text

58. *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

of when an agency has exceeded its authority, and she kind of skirts the issue of expressly saying that it's an exception to *Chevron*. And so, to me, it's this amorphous concept, but the Court seems to be using it with increasing frequency.

And the second point I wanted to jump in on is the securities laws. You made the point of providing disclosures for investors that are interested in climate disclosures. The SEC, in my mind, cannot take that stance. I think the SEC needs to tie any disclosure obligation to what is material, which is not a requirement under the statute, but it has to be something that is broadly important to investors, because if the SEC is in the business of requiring specific disclosures for specific groups, then there is really no limiting principle in what it can require, and we'll be playing this game for the rest of time.

Suzanne Ashley: If I can add, again not opining on the rule itself, but with respect to the purpose underlying such a rule is, you hear, in the media, folks who oppose the rule, have made statements to the effect well, the SEC, because of its existing authority under Regulation S-K, and the MD&A disclosures that are already taking place and other disclosure that's taking place, that that's sufficient, that we have voluntary disclosure, and we should allow that to continue, because that's sufficient. And I think the question there for the SEC is its responsibility under its authorizing statute. Obviously there is the fundamental responsibility to protect investors—well, how do you do that? You have to provide clear and comparable, or there's this somewhat new term, decision-useful information, which I've heard Gensler and others use. That is the purpose of such a rule. In the absence of a rule requiring comparability among disclosure, again setting aside whether it should go all the way down to Scope 3 in the absence of clear and comparable information available to all investors, you actually end up with those who are sort of greenwashing as climate positive, advantaging themselves in the market, yet with no check on the quality and comparability of the metric they are using or the analysis they are using. I think that is the risk that the agency is seeking to protect and to get at here. I think that's really the question of whether that is within the scope of the agency's statutory authority here.

Suman Naishadham: I think all of you had touched on this a bit, but I did want to ask how broad of a mandate do you believe Congress gave the SEC when it authorized the agency to create disclosure rules as necessary or appropriate in the public interest, or for the protection of investors?

Professor Saiger: I do not have a strong opinion about that. I am going to leave that to my colleagues.

Coy Garrison: Sure, so I, not surprisingly, have a strong opinion. The public interest is so broad, and the public interest is used in many statutes. It's not just the SEC, many agencies have their authority limited by this public interest standard. There are Supreme Court cases discussing that, and it's always analyzed in the context of the larger statute. So again, I go to the Securities Act of 1933, and the Securities Exchange Act of 1934,[59] and you have to look at the statute within which the SEC is given authority to write rules about corporate disclosures. That's in the 1933 Act—that's section 7, information in a registration statement. Again, information in registration statement is limited to information that Congress decided to include in schedule A. And then, in addition, rules that the SEC deems appropriate in the public interest or protection of investors, right? And that typically has been connected to financial information, business information, information about management and the like—information that as an investor you need and the SEC has used over time again— not required by the statute. But the SEC has used the concept of materiality to help narrow itself into thinking—what disclosure should we be requiring for materiality? It's borrowed from a Supreme Court case about fraud. Is there a substantial likelihood that a reasonable investor would find this information important to an investment or a voting decision? It's not a perfect test. It's a test that's been well applied over time, and I think has served us very well.

The challenge for Chair Gensler and the SEC now in the proposal try to closely tie everything into explaining why it's material for investors and the like. The challenge for the courts will be to answer the question—is this information actually relevant to investors? I'm using the term relevant, but that is a very low threshold, is it something more? We cannot just tie on anything to any disclosure requirement and say, well because some investors want it, because then the SEC disclosure rule swallows up every aspect of the federal government. So, I think there has to be some limitation on it.

Suzanne Ashley: We certainly can speak about the scope of underlying statutes, but I think it is useful to look at how the SEC has acted in the space. It's relevant that the SEC has, over time, as we mentioned going back to some early interpretive guidance advisory release in the 1970s and then more recently in 2010, and even in Dear Issuer letters that came out recently, have made clear that they view their

59. *See* Securities Act of 1933, 15 U.S.C. §§ 77a–aa; Securities Exchange Act of 1934, 15 U.S.C. § 78.

authority to extend to this level of disclosure.[60] Again, it's important to recall we're talking about, not the regulation of the underlying conduct with respect to greenhouse gasses, or how you've developed your internal metric around transitioning to a carbon neutral economy, it's about how you are disclosing your activities. I think the SEC certainly views itself as having this authority and that will be a question decided by the Court whether that is the right view. But I do think there is, as I mentioned, authority for this rule, whether or not it survives in this current version and is rolled back and Scope 3 drops out. That's something for us to talk about.

Professor Saiger: What I'd like to say about this is that this is the set of questions that lawyers would have answered in the antediluvian time when I went to law school, before there was serious talk about the Major Questions Doctrine. None of what both of you have said is about the "majorness" of this issue, and quite properly, there's a lot to say. One of the differences between Supreme Court litigators, law professors, and law students on one side, and lawyers with actual clients on the other side, is that the goal of the lawyers is to win, and the goal of the law professors is to know which rule you're going to use. But the weaknesses of the rules—such as they are much less about whether the questions are major and much more about older— administrative law doctrine such as the goals that the agency uses to support its rule have to be consistent with the goals that Congress allows the agency to consider. Those cases are from the DC Circuit and Supreme Court from the 1970s, 80s, and 90s. [61] So, the kinds of arguments that I hear you making are not about this question but is one on which the fate of civilization hinges or the converse. These are arguments that the agency is trying to do something that's out of its mandate, and we've had that often, long before the moment that the Dean described as a foment in contemporary administrative law. And it's entirely visible to me how you could resolve the legality of a rule like this without reference to most of the contemporary foment.

Suzanne Ashley: Just to add to that, I think that the interpretation of the Major Questions Doctrine as applied to this rule, really turns on one's view of the administrative state. I mean, there are lots of law review

60. Sample Letter to Companies Regarding Climate Change Disclosures, SEC (Sept. 22, 2021), https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures [https://perma.cc/VW9U-6NUT].

61. Preeminently, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983).

articles being written about this concept—and again, *Chevron* is probably going away—that Congress has reserved itself the authority to pass laws in every particular context? Or does one believe that Congress has agencies with expertise here, with the SEC, not in the environment, but in financial disclosure and transparency of information to investors? And if that's the case, then why? I think Justice Kagan talks about this in her dissent—why would we adopt a Major Questions Doctrine that actually just supplants the view of the Court for the view of the agency? And I think that's the challenge doctrinally with the Major Questions Doctrine.

Suman Naishadham: It seems like the conversation is headed this way anyways, but my next question is—if this rule is challenged, the final rule is challenged in court, which it seems very likely it will be, how do you see that litigation playing out?

Coy Garrison: I'll take the first stab. If we're applying the Major Questions Doctrine as a substantive rule, then I think the SEC loses, right? I'll just walk you through my high-level proof, and you guys can tell me where I'm wrong. The Major Questions Doctrine says a couple things: one, you look at the history and breadth of the argument raised by the agency of its authority. Here, the SEC is claiming authority to require corporate disclosures about climate change information at an incredible scale. Right? I've said it three times now, so I'm not going to go through the statutes again. But I think there are great arguments under the statute of the limitations on the SEC's authority there. Second, I see the experience from the 1970s slightly differently on the environmental disclosures in that when NEPA[62] was passed, some environmental groups petitioned the SEC to write rules. Actually, not that different than what we're seeing in some respects, it was basically requiring public companies to disclose information about the pollutants they put into the air. The SEC said no, we do not want to do that. So then they got sued in the DC Circuit, and a district court judge said, no, you actually have to consider this, and the district court judge required the SEC to actually consider the views of an ethical investor, and to wrestle with this issue we're talking about.[63] From what perspective do you ask for corporate disclosure here right now? The SEC held a bunch of hearings, and it came to the conclusion—there is an SEC release out there that we require disclosure that is tied to financial information, and it takes a very narrow view more tied to the

---

62. 42 U.S.C. § 4321.

63. Ctr. For Biological Diversity v. Fed. Energy Regul. Comm'n, 67 F.4th 117 (D.C. Cir. 2023).

statute and rejects this concept of ethical investments of an ethical investor concept and the like. Now, at the same time, it was engaged in rulemaking and that's when it adopted those very specific environmental regulations which, to my knowledge, I think there're only two. It's on legal proceedings—basically, if a government agency is suing you as a public company and it's on an environmental proceeding, then you have to disclose it, regardless of the financial threshold, although I think we in 2020 changed it. So, it's a little more complicated on the threshold and on the business conditions of whether there are environmental impacts on your business that you need to disclose.

Those are the scope and you rightly point out the commission guidance from 2010 or 2011 as well.[64] I think you know there is some history of environmental disclosures, but I think it's been very limited in my mind and tied to the SEC in a more traditional sense. I take that as the one bucket—the history and breadth of this information. I think it's significant that the SEC in the past, even though it was in the 1970s, decided it did not have this authority. That's the type of thing the Court's going to care about. And then, you go and look at the economic and political significance of what the SEC is claiming. From that perspective, the SEC's climate proposal estimates, I think it's 6-8 billion dollars in direct costs to the economy, because of this rule. That's enormous. That's what we're not talking about—oh, you just have to disclose a few things. This is essentially a new parallel corporate disclosure requirement on climate-related information in addition to everything public companies already disclose. Six billion dollars of cost on the economy is on par with the cases we've seen that are in the billions of dollars for *West Virginia v. EPA*,[65] for the student loan case, for the vaccine case.

And then, if you're looking at political significance, there's plenty of examples of Congress attempting to pass bills requiring the SEC to demand this disclosure from corporations. The closest bill that has gotten to pass was, I think, the House passed a bill in 2021 that did not pass the Senate, but there are many examples, and I think those are the things that based on the cases you'll see raised in these briefs. And again, I think I view this more as probably the Justice Barrett question—does the SEC have authority to do this? It's pure statutory interpretation, but the Major

64. Commission Guidance Regarding Disclosure Related to Climate Change, SEC (Feb. 2, 2010), https://www.sec.gov/files/rules/interp/2010/33-9106.pdf [https://archive.is/DTK52].

65. West Virginia v. EPA, 597 U.S. 697 (2022).

Questions Doctrine can be used to help facilitate that. But I think that's a minority view on the court. I'm not sure how they're going to see it.

Professor Saiger: The question of economic and political significance is so radically indeterminate at this point that it's very hard to see which kinds of arguments that the lawyers will make—they will surely make ones that sound correct. And remember, you don't start in the Supreme Court. Right, so you have to make them sound correct to an uncertain audience. Professor Goldman was asked, who are you aiming at? You don't know when you try the litigation at whom you're aiming, in the sense of which judge. I think it's very easy to say, oh, yes, this is going to cost so much. And I think it's very easy to say, this is just an information-forcing regulation. It doesn't tell anybody what to do or not what to do. So this is not a major question like forgiving people's loans[66] or preventing people from having needles put in their arms[67] or throwing people out of their homes.[68] Those were the most recent Major Questions Doctrine cases that we've had. I'd be perfectly happy getting up and making any of those arguments. But I'd tell my client each time, I would have no idea whether they were going to work or not because I don't think you can predict, based on what we have in terms of this amorphous category, whether that kind of importance is the kind of importance or unimportance that's going to resonate.

One of the things, both as lawyers and as citizens, to keep in mind about the Major Questions Doctrine is that all cases are deeply important to somebody, and so it's not the case that people litigate these kinds of things through the system at enormous expense, even though they don't really care. They care a lot, right? And a number of people care. That's almost certainly not enough. Many cases in the lower courts fairly clearly do not involve a major question. It's sort of a minor issue, but it's deeply important to a number of people. It's easy for the lawyer to go up and say this matters a lot to an important sector, and so I think that it's very hard to have prediction about the major questions.

I do think that so many of the arguments track the old-fashioned administrative law question of—what is the scope of the authority that was intended by the Congress. I think Justice Barrett would like us to

66. Biden v. Nebraska, 143 S. Ct. 2355 (2023).

67. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022).

68. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021).

think that the Major Questions Doctrine is just a gloss on a gloss of that doctrine.[69] I agree with you. She doesn't have a coalition for that view, but that doesn't mean that those arguments won't be made anyway because the lawyers have to make the argument.

Suman Naishadham: Something you had said earlier struck me as interesting—that the SEC has come out and said that it's not trying to "save the world" with this rule. I wanted to ask you as a follow up in so much that that might be one of the legal defenses presented, how convincing do you think that is or that it may be to its audience?

Professor Saiger: The black letter doctrine on this is quite confused. Agencies have to justify their rules based on considerations that Congress intends to or has authorized. An agency cannot justify its rule based on considerations that the statute does not permit. But the cases also say that the agency need not give all of its real reasons for doing something as long as it can justify what it's doing based on permissible reasons. It can have other reasons as long as the other reasons are not explicitly forbidden. But even if they're not permissible, if the rule can be justified based on only permissible reasons, then the rule is fine even though there are other reasons. Like the President wants to win Indiana, this is the example I tend to use in class, from the Obama era. The fact that somebody in the White House has identified some swing state as utterly crucial to his political future, he would like his agencies to do X,Y, and Z. The agencies are fully aware of this. They also sort of want Obama to win the election. In the rule, they don't write that the purpose of this rule is to reelect the President. That's not a legitimate reason under the statute, but the courts do not require that it never have occurred to them. But it would sure be nice to reelect the President. That's not our doctrine. As long as the agency can justify what it's doing, based on permissible considerations, it can be thinking in its heart of hearts to the extent that agencies have a collective consciousness of this kind.

So, if what you're asking is, is it at all plausible that the SEC is only doing this out of the very narrowest reasons that it describes in the notice of proposed rulemaking? I don't know a ton about what the folks at the SEC are thinking, but I think it strikes me as implausible. But that's not what they have to do. What they have to do is to be thinking about the things that they said that they're thinking about and have to be thinking about them hard, reasonably and coherently. And if they're doing that, and on the surface of the rule, the proposed rule does a pretty good job of suggesting that the rule is justifiable on the considerations that the SEC

69. *Biden*, 143 S. Ct. at 2378–79 (Barrett, J., concurring).

has laid out, the kinds of counter arguments that you're making are available. So, I think the plausibility of the claims depends on exactly what claims you're asking about the plausibility of.

Suzanne Ashley: To elaborate on that if you want to, let's say you take the position that the SEC has stated a sufficient basis and has statutory authority for the rule, and then you look at how it would be analyzed. I mean, if you look at one of the two cases I already mentioned, the *FDA v. Brown & Williamson* case.[70] But another interesting case is this, *Alabama Realtor's* case,[71] where the CDC's moratorium on evictions during COVID was challenged, essentially, as an overreach of its authority under this doctrine, and the Court agreed. I think you could see that there are very strong differences between the SEC, who has historically regulated disclosures for the protection of investors, and the CDC, who has tried to get in the business of landlord-tenant disputes. So that case seems distinguishable for folks that will be eventually litigating this case on the major political and economic significance questions. If you look at *FDA v. Brown & Williamson*,[72] again, the FDA conceded it hadn't acted under this statute in years since the statute was passed in the 1970s, and I think we are there again in a different context for the SEC where they have acted in requiring disclosures. I do think, though, there's some vulnerability on the economic question. And I think that is, the rule states and projects, a 6 billion dollar economic impact? I have seen others. The 16,000 comment letters that have been submitted? You know there are some economists who are marshaling some evidence that's nowhere near the potential impact. And that's of course, including Scope 3. I think there's some real questions there. So if Scope 3 stays in, I think this economic consequence aspect of the Major Questions Doctrine could become more relevant, whereas I think the political one could fall out. It's open.

Coy Garrison: I'm so excited because there's a moment of agreement for us. I just want to highlight the SEC's own estimates. I think the comment file appropriately is raising some concerns with the cost estimates. Some of them are just facially absurd, right? I think there's an estimate that in order to get assurance for greenhouse gas emissions and for the new requirements that auditors will have to look at the notes and

70. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

71. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

72. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120.

the financial statements, that guess is $150,000-$350,000. Anybody that's ever worked with Big Four auditing firms knows those fees are way too low. Public companies are writing in saying,—no, it's not going to cost $600,000 for us to get these reports up and running. It's actually going to be in the millions of dollars. Maybe the truth is somewhere in the middle there, but I think this is why we have a notice and comment period. It's a very good thing that people are writing in saying a lot of these cost estimates are way off here.

Suman Naishadham: I wanted to ask you how you think the controversy that's been generated, and will probably continue to be generated over the climate disclosure rule, will impact the SEC's future actions and possibly other agencies going forward.

Suzanne Ashley: You've recently worked on some controversial rulemaking.

Coy Garrison: Sure, I look at this in the larger context. I don't think you know, the SEC, under chair Gensler's leadership has been very aggressive in reshaping the capital markets in a number of different ways. The climate rule is highly controversial, but there's a lot of other controversial efforts. Equity market structure is being revamped. Things like payment for overflow. Things are really being changed from the ground up. The custody rule is a very boring backwater rule, but the SEC's proposal in this context is having massive implications for a number of industries that you wouldn't think it even has implications for. As boring as how a mutual fund strikes its NAV on a daily basis is, it is being radically proposed to be radically reworked. So it's a very ambitious, aggressive agenda. And I think that however this plays out, there's eight other massive changes going on at the SEC in the capital markets, and I don't see that slowing down. I think the SEC has been for a long time, and it will continue to be an area for very contentious rulemaking and policy making. Because people understand, especially in the corporate disclosure world, you can import politics into SEC obligations pretty easily. I think it's the job of the Commission, and for the most part, I think it does a fairly decent job of trying to keep that out as much as possible.

Professor Saiger: I think I agree with most of what you said. One thing I don't is that it is more important that people give credit to, in thinking about these kinds of regulatory policy, is political bleed over rulemakings which are substantially discrete. The farther away the way you are, it's very hard to observe what those look like. This is a question for the insiders and I defer to them.

Suzanne Ashley: The other question around backlash is—if the regulatory environment is so contentious, then the better approach for the agency to what some people say, we'll talk about this a bit later—to say, regulate by enforcement. I'm an Enforcement person. I was in Enforcement. And so I know that there's really important discussions happening about how are cases being theorized. How would they be charged? How would they be brought? I'm not there now, but I know that I've been a part of lots of those discussions. And so I think here, the potential backlash actually is that there is regulation by enforcement, which some have views on. I'm going to be agnostic on even that phrase. But you know, Enforcement is on its own working in these areas and it's not yet brought a case that really would squarely fit within the level of disclosure that's at issue in this rule. But there's definitely a push in the context around alternate currencies. There was a question of, is there enforcement happening in lieu of regulation? I think that's always a question of backlash when rulemaking is this complex. Isn't it easier to just start bringing some cases? I think that's—if the cases that are brought are around the perimeter or the edges of the rule. That seems fair. And I think that's the question for those that are running the agency now—on how they are going to be charging such cases or seeking settlements in such cases.

Professor Saiger: The other thing about these informational rules is that, since the National Environmental Protection Act,[73] the idea that a primary regulatory mechanism in environmental regulation is just to put organizations in the position that they have to admit what they're up to will affect their primary behavior. They won't want to admit what they're up to, so they will change what they're up to without us telling them that they must change is at the heart of one version of this rule. It's extremely hard to predict how that will work compared to an enforcement perspective, where what you're doing is telling an organization what to do. Instead, you're creating this sort of problem for it to navigate. How badly do I not want the press to have easy access to information about how many tons of carbon we're putting out? There is a different question than, will you let me put that many tons of carbon out there? And so agencies that can live with uncertainty about what information regulation by information disclosure will do, they are in some sense enforcing. But they're just using this informational mechanism. I think many people

73. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321.

think that NEPA was a great success in this way.[74] You force people to put out all this information. There are no consequences for what it says. The NEPA statute is very clear that if your environmental impact statement says I will destroy every living thing within 1,000 miles of life, that's fine, you can say it and then go on to do it, but no one was willing to say it.[75]

Suman Naishadham: Do you think there are any states or countries that are requiring corporate climate disclosures currently, in a way that the federal government could model itself on?

Suzanne Ashley: The most obvious statute to discuss here is the California law[76] that was just passed, and I think that we should probably have a separate panel on how that would be litigated because that'll have its own dormant commerce clause and first amendment questions. But I think that there's a lot of interest in obviously, countries in the EU have adopted certain standards—TCFD standards.[77] And the real fundamental question is voluntary disclosure versus required disclosure. And I think that's the key question. The SEC has taken the position that this level of disclosure should be required for the purpose of having comparable and fair and accurate information for investors. I think that underlying purpose is, of course, the purpose that should matter to the markets and to everyone.

Coy Garrison: I always love Justice Thomas' opinions on the dormant commerce clause. He says there is no dormant commerce clause, period, end of story. In the US, there's two games that US companies are thinking about—the new California rules and the impact of that on SEC rules will be very interesting. Because obviously there is some overlap there of public companies that will have to abide by those. Then, in Europe you have the CSRD, the Corporate Sustainability Reporting Directive.[78] That is now, in effect. I believe the first filings will be made in 2024 on that. Now, those are much more expansive than even what the

74. 42 U.S.C. § 4321.

75. *Id.*

76. *See* Climate Corporate Data Accountability Act, Health & Safety Code § 38532.

77. *See* Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information, EUR-LEX (June 6, 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0620(01) [https://perma.cc/W52Q-Z84K].

78. *See* Directive (EU) 2022/2464, of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, EUR-LEX (Dec. 16, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464 [https://perma.cc/25TE-PV6V].

SEC is proposing. The interesting thing that I'm watching in that respect, I know Chair Gensler was at the US Chamber yesterday and made an argument suggesting that US companies should hold off on suing the SEC on the climate rule, because if they're multinationals, they'll have to comply with the more difficult European rules. And I just want to highlight that the CSRD has a substituted compliance regime, but the EU has to sign off on the US SEC rules being an equivalent regime, and that is far from clear. So I think that argument is really hollow in my mind, and the US can follow the EU, but it can do its own thing. It has many, many different options here.

Suman Naishadham: Could you actually clarify what you mean, because I did mean to ask you about what Gensler said a couple days ago. Could you repeat your point about why an agreement that US companies should not sue the SEC for this rule for ease of reporting standards if they have operations in Europe?

Coy Garrison: The argument is essentially, if you're a multinational corporation, you're subject to obligations in many different jurisdictions. If you operate in the EU and have a certain amount of assets or revenues, you're going to have to comply with the EU rules. There's an argument out there which I believe is the one that Chair Gensler was referring to of you might as well allow the SEC's rules to go forward because you'd rather comply with the SEC's rules that are less stringent than the EU's rules, because the EU rule has a carve out that says, if you comply with another jurisdiction's set of rules that we deem to be equivalent, then that's okay. Now, the problem with that is that argument assumes that the EU will sign off and say that the US SEC's rules are equivalent.

Professor Saiger: I'd also like to ask—are the estimates for the cost of compliance the marginal cost of compliance or the total cost? If you're a company that operates in either California or Europe, then your cost of compliance could be different. Is that 6 billion dollar number, compliance from scratch, or is it the cost of compliance with the SEC over and above other regulatory regimes that might find you anyway?

Coy Garrison: It's a great question and the proposal went out in March 2022, which would not have taken into account the California rules at all, and the CSRD was not yet in effect. So, I don't know. That's a great question for the DIRA folks listening, or in the audience.

Suman Naishadham: You mentioned earlier that if the proposed climate disclosure rule is knocked down, the SEC might go ahead and regulate by enforcement. What does that mean and what do you think the likelihood of that happening would be?

Suzanne Ashley: I think the backdrop to that question is that companies are already doing this. Depending on your metrics and your estimates— between 60 and 70% of Russell Companies are making lengthy disclosures around sustainability. Companies are thinking about these issues. They're thinking about them in terms of risk, and they are putting out products. So, for example, the SEC has brought an enforcement case—it's the Goldman asset management case they brought against Goldman,[79] for this fund that was labeled an ESG fund, but didn't follow their own internal policy or model around how they determine what underlying companies went into that fund. So that's an example of a case that's been brought and I think you could imagine sort of bigger cases along the lines of what we brought when my old boss brought, when Robert Khuzami had enforcement related to the financial crisis. So you know, like the *B of A* or the *Freddy Mac* cases,[80] you can imagine a case being charged that a company in its MD&A didn't fully disclose what it internally knew. Enforcement could prove such a case based on the documents. Internally, the company knew their risk of a transition to a carbon neutral economy, so if companies are modeling and their CFOs are modeling carbon neutral, and there's increased demand for a carbon neutral and they do not disclose sufficiently in their MD&A, then investors lose and that's the sort of charging theory of some of these cases like the *B of A* and the *Freddy Mac* cases.[81] So you can imagine those being charged, and I think that's an area that will be fertile as this is still emerging, and will be if the rule is passed as proposed and is litigated. But I do think that is always an area. Companies are doing this work. They're writing these disclosures in their MD&As so they're looking for any signals from the agency. So they're looking at enforcement cases.

I think so far, enforcement is really focused on this concept of greenwashing, which I think everyone can agree is problematic. But if there is this long pendency in the absence of a rule, I would imagine there might be a motivation to bring those kinds of cases. And then the doctrinal question for some folks is well, that's a lack of clarity for market participants. And I think folks want to know a clear rule on how they need

79. *See* Press Release, SEC Charges Goldman Sachs Asset Management for Failing to Follow Its Policies and Procedures Involving ESG Investments, SEC (Nov. 22, 2022), https://www.sec.gov/news/press-release/2022-209 [https://perma.cc/ZPD5-DBFT].

80. *See* Press Release, Bank of America Admits Disclosure Failures to Settle SEC Charges, SEC (Aug. 21, 2014), https://www.sec.gov/news/press-release/2014-172 [https://perma.cc/HG6H-N6NR]; *see* SEC. v. Fed. Home Loan Mortg. Corp., Case No. 07-CV-1728 (D.D.C. Sept. 27, 2007).

81. *Id.*

to disclose such that they cannot be sued by shareholders, such that they don't get questioned by corp-fin. And I think those are areas where clarity is beneficial to all market participants. From that respect, I think a rule is certainly governing better policy. And the critical area is here, right now, in the absence of a rule, companies are issuing Corporate Sustainability Reports. These CSR reports are aimed at a different audience and have different material than what would be required under the proposed rule. You know Corp-Fin has issued something called Dear Issuer letters where they may ask: "I notice in your CSR you described certain activities, those weren't in your MD&A, how do you resolve that?" And so that that's happening. I think that we'll have to see if that continues to happen under the absence of a final rule. But there's clear precedent for bringing cases around statements made in context that maybe differ from statements made in disclosure. That's kind of an Enforcement bailiwick. But I think for the question of reliability and accurate information transparency from market participants, a rule is a better way to go about governing than by enforcement.

Coy Garrison: I would echo that thought. The concept of regulation by enforcement is deeply offensive to due process, to individual liberty. It's just not the way that it's supposed to be. Fordham Law was kind enough to have me earlier in the month on talking about crypto issues, and I think that that is a great example of regulation by enforcement where the SEC is interpreting the law in a new way for the first time, without any type of interpretive guidance or rules and the like, and industry participants have no idea what's going on. The first time they learn about something through enforcement action. Now, I think that can be distinguished from a lot of the things that you're talking about in that the greenwashing cases, we have existing rules. You know if you tell investors that you're taking their money and investing in companies based on ESG factors and then you don't consider ESG factors, well, guess what that's a material misrepresentation. We don't need a new ESG rule for that.

I think it's just good government practice. I would agree with you that if we're going to be enforcing specific rules, it should be specific. But we do have nice broad rules. I think that can cover some of the more egregious behavior that that's out there.

Professor Saiger: I think we have panel unanimity about the preferability of rules, although I don't agree about the part about due process because common law is regulation by enforcement and that is where due process begins. But that's not our subject for today. You know,

I think all sensible people would rather see rules, and I think in this context, the critical fact is the partisanship of the climate question. Regulation by enforcement is much easier to turn the ship in a partisan direction than if you're proceeding by rule and given that this is a hyper-partisan issue. However unbelievable that may feel to some of us, one has a good reason to worry that an enforcement agenda can stop fairly abruptly. That's not to say that the current rulemaking partisanship problem is not serious because we were slowly falling, and in many areas where what first term presidents do is spend almost all of their term writing proposed rules to undo the actions of their predecessors, while nominally bound by those actions. And what we have is this bizarre lag, where each administration is governed by the rules of the prior administration and is fighting at the same time to overturn them, but now that it takes three years to change and to finish the rule, much less gets through the courts. So it's not like the rulemaking situation is great—I don't want to give anyone the sense that any of us are saying—regulation by rule is a great system for doing this, because I think there's every likelihood that if the White House changes hands in January, with some lag, there will be a new SEC that's going to write an equally long notice of proposed rulemaking that has a very different approach to these kinds of disclosures. And there will be a panel in this room roughly four years from now about it. In the meantime we'll be in this situation where the current SEC is nominally bound by the rule that they inherit. This is a debate of bad systems, a debate of which is worse, but on that debate I'm with my colleagues there, the rules are better.

Suman Naishadham: If you don't have anything else you want to add, I think we might turn it to audience questions.

Professor Saiger: I'll just say one more thing if I could, which is in the past few years, largely influenced by my Fordham Law school students, as we talk about administrative law and climate issues of all kinds, the discussion more and more lands after a day or two in class, on the following consensus: our Constitutional system is incapable of dealing with the most pressing problem of human civilization. There's nothing to be done under the Constitution about it. As I went through the materials getting ready for today, once again, I'm hearing in my head, the sort of serious possibility that the mechanisms of government that we have are just so ill-suited to emergencies whose clock is measured in periods longer than months but shorter than centuries like COVID, and the climate at this point. I'm not sanguine about this rule doing what its proponents hope for it, any more than I am about its having the disastrous effect that its opponents predict. That's my editorial.

Suzanne Ashley: There's always a question about whether disclosure changes corporate conduct or is it directing corporate conduct? I think opponents of the rule say this disclosure regime is directing conduct but I think there's a very strong argument and that's not necessarily the case. Tremendous amounts of companies are already working to prepare themselves for the changes in this space, and I think it's a question to ponder, but I don't think it's fair to say that the rule directs boards of directors to sit around and discuss the governance question. So the rule has a governance provision, which gets at how the boards of public companies are considering these questions but boards are considering these questions, the rule isn't directing that. It simply is. My view is—making clear the comparable information and the quality of that information that's being shared to the markets rather than directing the conduct, which I think is fair. If the court were to view the rule as a directive, that, I think, is where there will be a major question.

Audience Question #1: Is there any evidence that SEC disclosure requirements affect corporate behavior? For example, aren't CEO compensation levels in this country continuing to rise to astronomical levels notwithstanding executive, compensation tables, pay ratios, and the advisory votes that are required?

Suzanne Ashley: I think that's a terrific example you raised. If I just take a first crack at that and from a different angle, the Major Questions Doctrine would say that if an issue is of major political significance then Congress needs to authorize a new statute first. Actually, in executive pay, it's a great example where, in a previous administration, the SEC had a prior disclosure requirement that was very narrative around executive pay. And then, although it was political, although it was hotly debated, and some in Congress didn't think it was arm's length, nonetheless, there was a requirement that executive compensation disclosure be in table-form. Now that was an improvement. Again, a political issue at the time. I think that that is actually an example where it can be said to say that conduct by clarity, whether it's executive pay or other issues, that the most clear information is the most useful to investors, including investors that are factoring in the totality in this mix of information, that is really what gets at materiality.

Coy Garrison: I'd add just a few real quick things on that. In terms of actual hard evidence, I think a lot of people assume disclosure guides corporate actions, which is why Congress has passed those rules, which I think is also yet again another important distinction. Congressdirected the SEC to impose executive compensation disclosure obligations, but the

SEC cyber security rule, that was just finalized a month ago, was a really interesting because the proposal said, "disclose whether you have a cyber expert on your board of directors, and if not, tell us why." Now the SEC got rid of that at the adoption stage, and one of the concerns was that commenters came back and said that's going to cause public companies to go out and put someone on their board that's a cyber security expert. There're not enough cybersecurity experts out there and you're micromanaging the board. So that's an example of the SEC believing what the industry said and responding, you know what you're right. That's not what we're trying to do. We're not here to direct conduct. So, in my mind, that worked out the way it was supposed to. But others may have different views on that.

Audience Question #2: I'm curious what goes into that 6-billion-dollar price tag put on the passage of the rule? Does that require data gathering that the companies might not be doing now or is it purely auditing costs to have PWC look at whether your disclosures are accurate based on your books and records?

Coy Garrison: It's all of the above. It's putting in policies and procedures in place, just disclosure controls and procedures to gather the information. Maybe you're gathering the information already, but you're probably not doing it within your financial reporting framework. It's very expensive to add that to your financial reporting framework, or maybe you're not collecting it at all. Maybe a lot of people are voluntarily providing this information. If you're just providing your own TCFD report, you can pick and choose what disclosure you have. Well, now you have specific obligations if this rule were to become final. So now you have to build the processes in place all around. It's our internal cost. It's your external cost. You're obviously going to have external legal counsel look at it, the auditors look at it. You're going to have to have third party service providers, consultants look at it. It's a boondoggle in that way.

Suzanne Ashley: Scope 3 in particular is where the costs are just so unknown. And I think that there is the agency is making an argument that it's okay to have that level of data gathering. But Scope 3, is this upstream and downstream? And I think again, that's where the rule is most vulnerable, because the costs are just ballooning and could arguably balloon. And the other problem with the Scope 3 is it could arguably lead to this sort of overreach. The SEC regulates public companies, but some have said Scope 3 would extend to information gathering that the public company is required to gather from a non-public company, and so some have said, this rule would impose that regulation on a non-regulated

entity. I think that is where some of these costs arguably will balloon, but also a question around that is that breadth is highly relevant.

Audience Question #3: This question may be more from a layman's perspective, maybe for Mr. Garrison, but if anyone else wants to answer, when I think of the SEC, I'm thinking fraud investigations—going after crypto scammers or Jordan Belford or something like that. I'm curious about the history of mandating disclosures. How did we get from the SEC investigating fraud to disclosing climate? Because, in theory, based on the governing statutes and history and thinking logically, you'd think well, maybe someone could invest in a company that they know they're doing this, ask, or simply not invest. So that's the premise of my question, I suppose.

Coy Garrison: The history of the securities laws is really fascinating and I think the direct answer to your question is that disclosures and anti-fraud measures are related. This all stems essentially from the 1920s and some very abusive behaviors and highly unregulated securities tradings that were going on. It was regulated at the state level and by the member exchanges, like the New York Stock Exchange, which set itself up to start regulating behavior as a self-regulatory organization before the SEC was around because there were such abuses. People were just buying things on pure speculation and outright lies and the like. So the securities laws are designed to prevent that activity from occurring, and part of that is, the disclosures that were built into those statutes were designed to be with a financial perspective. What do you need to know about this company stock you're buying in? You're not just buying a stock because of the name, or because someone told you it's going up, you want the information asymmetry to be eviscerated, right? Certain, not all information, but certain pertinent information needs to be provided to you and you also need to know that people aren't lying to you, and that if they are lying, there's an agency that could go after them. That's the principle. And then, of course, with the broad authority given, but with important limitations that we've talked about, the SEC is intended to update the disclosure requirements as time goes on. And so the question with climate is, is that beyond the SEC's authority at this point?

Meredith Berger: Thank you all for sharing your insights. This concludes our second panel and we will take another break before our Keynote Address.

KEYNOTE ADDRESS*

Meredith Berger: We are thrilled to have Mary Jo White deliver our Symposium's Keynote Address.

Ms. White served as the Chair of the United States Securities and Exchange Commission from 2013 to 2017. She was nominated by President Obama to lead the SEC and was one of the Commission's longest-serving Chairs. Under White's leadership, the Commission strengthened protections for investors and the markets through rulemakings that addressed major issues raised by the financial crisis, and created the framework for the future regulation of the asset management industry, enhancement of equity market structure, and disclosure effectiveness. The Commission also instituted changes to enforcement that resulted in greater accountability and record levels of actions and monetary remedies ordered.

Also of note, Ms. White served as the U.S. Attorney for the Southern District of New York from 1993 to 2002. She is the only woman to hold the position in more than 200-year history of that office, which has the responsibility of enforcing the federal criminal and civil laws of the nation. She now works as a Partner at Debevoise & Plimpton LLP as the leader of the firm's Strategic Crisis Response and Solutions Group. Ms. White is recognized as an Eminent Practitioner in Securities Enforcement and White Collar-Crime and Government Investigations by Chambers USA (2023), where she is said to be "a leading light in the securities practice." With that, we are excited to invite Ms. White to provide today's Keynote Address.

Mary Jo White: Thank you very much, Meredith, for that kind introduction, and thank you for inviting me to be your Keynote speaker today. I have to say I really do applaud your choice of a very timely theme and your specific focus actually on two critical and much debated, as we've heard, questions affecting the statutory and the Constitutional breadth of the rulemaking and enforcement authority of the SEC.

As you've heard, I had the privilege to Chair the SEC from 2013 to 2017. It is one of the most important independent agencies that I think we have, and the lawful reach of its authority is really quite consequential. So, the topics are terrific. My remarks at your request will actually address the topics on both of your panels. First, whether administrative proceedings presided over by administrative law judges, also known as

*Andrew Stamboulidis, an associate at Debevoise & Plimpton LLP, contributed to this keynote.

ALJs, are Constitutional, or whether at least absent consent, the agency must bring all of its cases in Article III district courts, where a jury trial and a panoply of additional discovery and evidentiary rights are accorded to respondents. The second topic, which we just heard about, is whether the SEC's proposed rulemaking to require disclosure by public companies of climate-related risks and financial impacts, as well as the level of their greenhouse gas emissions, will survive the inevitable judicial challenges to the SEC's authority to promulgate such rules. As you know, some critics say that this rule would convert the SEC from the regulator of financial markets, as intended by Congress, to a climate change cop, a role that the SEC is not permitted to play.

Courts will be asked to decide whether this rulemaking is out of bounds for the SEC, for among other reasons, because it may run afoul of the Major Questions Doctrine, recently invoked and applied by the Supreme Court in *West Virginia v. EPA*, which was a case again, as you know, that involved politically charged and economically impactful rulemakings by the EPA.[82] The majority, concerned about the growing powers of the so-called administrative state, decided that absent clear and explicit statutory authority, it was for Congress, and not the EPA, to decide the major question of whether the power industry must convert to forms of cleaner energy as a means to combat global warming and the pollution of the atmosphere. [83]

My focus today is actually going to be less on the correct legal analysis and more on what is animating this debate and why its resolution matters so much, not just to the functioning of the SEC, but also to investors and our markets, which truly do depend on the SEC to ensure that our capital markets remain the fairest, most transparent, and strongest in the world. Now, I'm going to warn you up front, although some of your panelists also followed this MO, that I do not come bearing many answers to these important questions that your program has posed, and I think the answers are neither clear nor easy.

A. THE SEC AS AN INDEPENDENT AGENCY

First, a little history, maybe, in response to the gentleman's question a little bit earlier, so we understand a little bit more about the role that

82. West Virginia v. EPA, 142 S. Ct. 2587 (2022).
83. *Id.* at 2615–16.

Congress has indisputably given to the SEC, why the SEC was necessary, and how the SEC has carried out its delegated mission since it was created as an independent agency in 1934. Now, much here will be familiar, and I will oversimplify it a bit. But the stock market crashed in 1929, propelling the nation into the Great Depression, and it did not take much study to determine that at least a major cause was the opaqueness, chicanery, and outright fraud in the sale and marketing of securities. The SEC was created to change that and given enumerated powers by Congress to do so. While there have been a number of additional statutory grants of authority to the SEC, the core enacting legislation of the SEC's disclosure authority was the Securities Act of 1933, which mandated that securities offered to the public be registered with the SEC and be accompanied by an array of primarily financial information to enable the public to assess the value proposition of the offered securities to yield profit for investors.[84] The Securities Exchange Act of 1934 requires public companies to file periodic reports of business and financial information so that investors can make informed investment decisions on securities trading and in the market.[85]

The nature and extent of information the SEC is empowered to require to be disclosed is obviously at the heart of the controversy over the SEC's climate disclosure rule proposal. As a personal aside, I regard the risks of climate change to be existential. The science is sufficiently clear to me, and I support a strong and effective governmental response, including making available the best possible information from every quarter to allow an accurate assessment of a risk that needs to be urgently addressed. I personally feel the same way about reforming our campaign finance system to reduce the tainting influence of money on our elections—requiring more transparency about the sources of those monies would also be a good thing. But the wisdom of these and other consequential policy questions is not actually the relevant question we are discussing today. We want to know what, if any, role the SEC may play in these spaces or whether they are the exclusive domain of Congress or other federal agencies.

As we think about all of this, and you've heard one of your panelists comment on this, I think we would all acknowledge the extreme frustration over the paralysis of Congress to address just about anything, let alone something important and controversial. So, the temptation to do something outside the box is strong, and it may be that, in today's world

---

84. *See, e.g.*, 15 U.S.C. §§ 77b(b), 77g.

85. *See, e.g.*, *id.* §§ 78c(f), 78l, 78m, and 78o.

of keen public interest in climate change risks, the SEC, "the disclosure agency," will be found to have sufficient authority to adopt its climate related disclosure role and have it stick. Another disputed aspect of the SEC's authority is the extent and use of its enforcement powers. As with many things in the SEC's remit, there is debate about how much of an enforcer of the law the SEC should be, as distinguished from its role as a collaborative regulator working with, not suing and penalizing, the securities industry and market participants. [86]

The SEC's Enforcement Division today is its largest division—over 1,300 staff members strong, dwarfing the number of staff in the SEC's policy divisions—corporation finance, investment management, and trading and markets to name three of the most important.[87] Congress, usually in response to large scale frauds or other financially damaging events, has given the SEC expanded enforcement powers and resources over time—think Enron and WorldCom, or the 2008 financial crisis. One of those expanded powers granted by the Dodd-Frank Act of 2010 was on your program today, and that's the authority for the SEC itself, as authorized by Congress, to choose whether to bring most of its enforcement cases in either its in-house administrative proceedings process, or in federal district court.[88] The choice matters, as I'm sure you discussed on your first panel, as some kinds of cases and remedies are available in one forum, but not the other, and the rights of litigants in each are different. There is, for example, no right to a jury trial in administrative proceedings and lesser rights to discovery than in Article III Courts.

B. ADMINISTRATIVE PROCEEDINGS

The precise question you discussed on your first panel was whether the SEC may constitutionally bring cases and impose civil penalties through the use of its administrative adjudicative process involving administrative law judges. As we've mentioned, the so-called AP

86. Chairman Harvey K. Pitt, Speech by SEC Chairman: Remarks Before the AICPA Governing Council (Oct. 22, 2001), https://www.sec.gov/news/speech/spch516.htm [https://perma.cc/XH9U-Q3KY] (signaling a gentler relationship with the accounting profession and promising "a new era of respect and cooperation").

87. Fiscal Year 2024 Congressional Budget Justification and Annual Performance Plan, U.S. SEC, https://www.sec.gov/cj [https://perma.cc/YML5-CYMZ].

88. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376, 1862–65 (2010) (codified at 15 U.S.C. § 78u-2).

proceedings challengers to that authority assert that the only valid congressional delegation made to the SEC would require the agency to bring all of its enforcement cases in Article III courts, where respondents do have a right to a jury trial. While there are quite a number of very interesting legal questions posed by these questions, we aren't going to have to wait very long for the answers, because the Supreme Court in *SEC v. Jarkesy* is poised to tell us soon.[89] That case was fully briefed and is scheduled to be argued next month, actually November 29, 2023. So, my analysis and predictions, therefore, are neither needed nor terribly relevant.

The amici briefs filed in opposition to the SEC's defense of its use of AP proceedings were filed last week. Actually, they were interesting, too, and included Mark Cuban and Elon Musk, as named amici, both of whom have litigated against the SEC.[90] In October 2013, Mr. Cuban beat the SEC in an insider trading case following a jury trial. And he has been an outspoken critic of the agency, I think, ever since. [91] He has been joined as an amici in the *Jarkesy* case by Mr. Musk, who also continues to battle the SEC following a settlement in September 2018, over his allegedly misleading tweets about potential funding to take a public company private at a premium over its share price. [92]

I'm going to briefly comment on how criticisms of the SEC have actually animated the more esoteric constitutional issues raised in *Jarkesy*, as well as the importance of what the Supreme Court will likely be deciding. You've discussed the underlying legal issues on your panel, and I'm not going to repeat those. Stay tuned for the answers from the Supreme Court. But as you do stay tuned, know these things as well. Many agencies have the same administrative enforcement regimes as the SEC does, so, the Supreme Court's decision in *Jarkesy* will likely have a significant impact on other federal agencies. Most of the SEC's regulations, designed to protect investors and ensure orderly markets, are very technical. ALJs have the expertise to understand those technicalities

89. SEC v. Jarkesy, 143 S. Ct. 2688 (2023).

90. Brief of Phillip Goldstein, Nelson Obus, Mark Cuban, Elon Musk, Manouch Moshayedi, and Investor Choice Advocates as Amici Curiae in Support of Respondents, *Jarkesy*, 34 F.4th 446 (5th Cir. 2022) (No. 22-859).

91. Jury Finds Mark Cuban Not Liable for Insider Trading, Exchange Act Release No. 22,855 (Oct. 23, 2013), https://www.sec.gov/litigation/litreleases/lr-22855 [https://perma.cc/Q9YL-56QV].

92. Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge, Exchange Act Release No. 2018-226 (Sept. 29, 2018), https://www.sec.gov/news/press-release/2018-226 [https://perma.cc/9QPA-ZTWS].

and to correctly interpret their requirements. We cannot generally expect Article III judges and their law clerks to have that reservoir of knowledge and expertise. In 2016, when I was chair of the SEC, the SEC amended its rules of practice to enhance the discovery and other rights litigants have in AP proceedings,[93] partly in response to criticisms that the SEC's AP proceedings were comparatively unfavorable forums for defendants, "kangaroo courts" where the SEC inevitably won. Upon further statistical analysis,[94] these concerns appear to have been significantly exaggerated and the criticisms have at least diminished. Indeed, many lawyers representing clients charged by the SEC prefer to litigate administratively rather than in federal court to avoid the expense, the length, and the bright lights of a case in federal court. Most parties to SEC enforcement actions prefer to settle SEC actions with a cease-and-desist administrative order rather than have a damning complaint filed in federal court—an option that may be taken away, depending upon how broadly the Supreme Court rules in *Jarkesy*.

Requiring cases to be filed in federal court, could also have implications involving collateral consequences for some defendants, since the Investment Company Act, Section 9(a), disqualifications are triggered by injunctions in federal district court, but not by administrative cease and desist orders.[95]

A decision against the SEC would also add to the federal court caseload and backlog. The SEC would likely, in my view, bring fewer enforcement cases if they all must be brought in the more formal prolonged forum of US district court. Unlike the Department of Justice, which prosecutes criminal securities fraud cases against only the worst offenders, the SEC actually has authority and responsibility to enforce a wider range of securities law offenses, some based on negligence or strict

93. SEC Adopts Amendments to Rules of Practice for Administrative Proceedings, Exchange Act Press Release 2016-142 (Jul. 13, 2016), https://www.sec.gov/news/press-release/2016-142 [https://perma.cc/2GB9-FNCA].

94. Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 349 (2017) (finding that the SEC's success rates were 87.5% in district court and 89.6% before an ALJ for the fiscal years 2007 to 2015); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1178 (2016) (finding that when insider trading cases are excluded from the analysis, the SEC's success rates were 96% in district court and 97% before an ALJ for the fiscal years 2014 to 2016).

95. 15 U.S.C. § 80a-9(a).

liability, and against a much wider swath of market participants. It would not be good for investors or our markets if the SEC's enforcement of the securities laws were to shrink as a result of losing the option of bringing its cases or some of its cases in AP proceedings. If all APs were invalidated by the Supreme Court, the SEC would also seemingly lose its ability to pursue cases as well as bars and penalties under section 102e, which are very important remedies against secondarily liable offenders and professionals, including accountants and, closer to home, lawyers who practice before the SEC.

So that's just a list of some of the things that we should keep our eye on depending upon how this decision comes out. It is no small matter how the Supreme Court decides the *Jarkesy* case, and while the decision will turn on the complex constitutional issues you discussed on your panel, we should not lose sight of the significant real-world impact, and what may be lost were there to be a victory for *Jarkesy*.

C. THE SEC'S PROPOSED CLIMATE-RELATED DISCLOSURE RULEMAKING

So that's my comment on panel one. I'm happy to answer any questions, but let me move to panel two, the SEC's proposed climate-related disclosure rulemaking. As you know, the SEC proposed a broad climate-related disclosure rule on March 21, 2022.[96] It has been met with, and we've talked about this, equally fervent supporters and objectors in great numbers. You heard the number: 16,000 comment letters. That's a lot of comment letters. The controversy over the proposed rule, I believe, stems in part from conflicting views about the validity of the science of climate change and its predicted catastrophic impacts. Advocates for the SEC's rule, largely on the Democratic, capital D side of the aisle, also generally urge aggressive responses by the government to combat the threats from climate change.[97] The anti ESGers, largely Republicans, urge at least skepticism about the science, and voice vehement opposition to regulatory responses to the perceived threat of climate change that would transform our free market system into an administrative state that

96. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478 (proposed on Mar. 21, 2022) (hereinafter "Proposal").

97. Castor, Casten, *Vargas Lead 77 House Democrats to Urge SEC to Finalize Strong and Durable Climate Rule* (Aug. 7, 2023), https://castor.house.gov/news/documentsingle.aspx?DocumentID=404268 [https://perma.cc/SC7T-29C6].

prioritizes addressing speculative long-term climate change risks, no matter how far outside the lines of an agency's congressional authority.[98]

So, is the SEC's climate-related rule making an example of such an *ultra vires* measure, or is it comfortably, or at least sufficiently, within the SEC's broad disclosure authority? SEC Chair Gary Gensler, one of my successors, says that the rule is in the heartland of the disclosure authority that Congress gave the SEC. In the rule, he says, it is not about climate, but about investors and material information they want to have in making their investment decisions.[99] Others take a decidedly different view of both the SEC's motivation and the extent of the SEC's rulemaking authority.[100] The courts will eventually decide. But perhaps I can bring just a little bit more clarity to what the debate is about.

At the outset, we need to appreciate the starkness of the differences between the competing positions on the SEC's disclosure authority. Those favoring broad authority regard it as an easy question with an easy answer. The SEC's view is reflected in the opening pages of its proposing release: all that the Commission needs to determine is that the rule is necessary or appropriate in the public interest or for the protection of investors—language we do find in both the Securities Act of 1933 and the Securities Exchange Act of 1934. And then, game over, so long as the Commission also considers whether the rule will also promote efficiency, competitiveness, and capital formation—more language right out of an enabling statute.[101]

---

98. Cunningham, Lawrence A., *Comment Letter on SEC Climate Disclosure Proposal by 21 Law and Finance Professors*, GW L. FAC. PUBL'NS & OTHER WORKS 1593, https://scholarship.law.gwu.edu/faculty_publications/1593 [https://perma.cc/M7MW-YWGG] (expressing concern that the SEC's proposal exceeds its authority and is neither necessary nor appropriate for either investor protection or the public interest).

99. Gary Gensler, Remarks at Fireside Chat with U.S. Chamber of Commerce's Center for Capital Markets Competitiveness: "Climate Disclosure Developments: The SEC, California, and EU Extraterritoriality" (Oct. 26, 2023) (noting that the Commission is not a "climate regulator" and that it is focused on ensuring full, fair, and truthful disclosures from over 6,000 public registrants it oversees).

100. Former Commissioners Breeden, Lochner, Jr. Atkins, Pitt, and Roberts, Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132519-303005.pdf [https://archive.ph/OmWCo] (arguing that the SEC's disclosure authority is limited to financially material information).

101. National Securities Markets Improvement Act of 1996, Pub. L. No. 104–290, 110 Stat. 3416 (1996); *see also* Proposal, *supra* note 84, at 7.

So, under this formulation, there is little question that the SEC has ample authority to promulgate a mandatory climate-related disclosure rule for public companies, many of which are already making voluntary climate disclosures. And the SEC points to an increasing number of investors, not only asking for but demanding climate-related information, which adds weight, the SEC says, to the validity of the rulemaking, demonstrating that the information required to be disclosed is "material." Query, though, whether investor interest in having information equates to "materiality" under the federal securities laws.[102]

Even the strongest advocates for the SEC's climate disclosure rule would likely agree that the rulemaking must also satisfy various requirements of the Administrative Procedure Act,[103] as all rule makings must. The Commission, for example, is required to appropriately consider the impact of its rules on efficiency, competition, and capital formation, (sometimes loosely referred to as cost benefit analysis) to ensure that the rules are not arbitrary or capricious, as happened when the court vacated the SEC's proxy access rule some years ago, even though the SEC had explicit congressional authority to promulgate that rule.[104] Rules must also not run afoul of the First Amendment as an aspect of the Commission's conflict mineral disclosure rule was found to have done, where, indeed, the congressional mandate to adopt such a rule was clear.[105] So, issues like these will also be raised to challenge the rule.

102. Critics say that investor demand for climate information is not an appropriate "substitute for financial materiality," the "cornerstone of the federal securities laws." Former Commissioners Breeden, Lochner, Jr. et al., Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 76, at 1, 5; *see* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448–49 (1976) (holding that a fact is material if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote "); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 231–32, 234, 238 (1988) (adopting TSC's standard and holding that to fulfill the materiality requirement, "there must be a substantial likelihood" that, in the eyes of the reasonable investor, the facts at issue "significantly altered the 'total mix' of information made available").

103. Administrative Procedure Act, 5 U.S.C. §§ 551–59.

104. Business Roundtable and Chamber of Commerce of the United States v. SEC, No. 10-1305 (D.C. Cir. July 22, 2011) (holding that the rule had been promulgated in violation of the Administrative Procedure Act because the Commission had failed "adequately to consider the Rule's effect upon efficiency, competition, and capital formation," as required by statute).

105. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2014).

Challenges that, by the way, I'm absolutely certain that the SEC is anticipating and taking into account, as it finalizes the rule.[106]

So, what do the opponents of the rule, say? Well, you've heard a fair amount of that on your panel. The only mandatory disclosures the SEC has been authorized by Congress to impose are material business and financial disclosures that all reasonable investors would consider important in making investment or proxy voting decisions.[107] Full stop, they argue, as at least some of the disclosures mandated by the SEC's proposed rule are admittedly neither material nor strictly business or financial.[108]

Not surprisingly, both sides may be exaggerating their positions. It is, for example, certainly the case that financial materiality, as defined by both the Supreme Court and the Commission itself, is a core principle underlying the SEC's historic disclosure function, and there is much to be said for the view that the SEC, absent an explicit congressional directive to do otherwise, should generally confine itself to requiring disclosure of financially material information as opposed to insignificant or non-financial information that might be of subjective interest to some investors, but not important to the reasonable investor in making an investment decision based on the value proposition of a company's stock. But it is also true that the SEC has sometimes required non-material

---

106. Proposal, *supra* note 84, at 7; Statement from Former Commissioner Allison Lee, Shelter from the Storm: Helping Investors Navigate Climate Change Risk (Mar. 21, 2022), https://www.sec.gov/news/statement/lee-climate-disclosure-20220321#_ftn1 [https://perma.cc/5AHM-P56B] (noting the SEC's "broad authority to prescribe disclosure requirements as necessary or appropriate in the public interest or for the protection of investors" and explaining that physical and transition risks from climate change can materialize in financial markets in the form of credit risk, market risk, insurance or hedging risk, operational risk, supply chain risk, reputational risk, and liquidity risk, among others); *see* Commissioner Caroline A. Crenshaw, Moving Forward in Our Lane: Remarks at the Inaugural ECGI Responsible Capitalism Summit (Oct. 21, 2022).

107. Former Commissioners Breeden, Lochner, Jr. et al., Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 76, at 2.

108. The current proposal requires the disclosure of Scopes 1 and 2 greenhouse gas emissions without any limitation to situations in which such information is financially material. Proposal, *supra* note 84, at 158–66; *see also id.* at 7 (referring to the provision of "decision-useful" climate related information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments).

disclosures to ensure, as the SEC is trying to achieve with its climate-related disclosure rule—consistency and comparability of the information disclosed by all public companies.[109] As the SEC has said, you can have a lot of disclosure out there, voluntary disclosure, a lot of information on climate-related risks, but if it isn't consistent and comparable, it's obviously not of as much informational use to either investors or the market. If the disclosures that are out there, are consistent and comparable, the information will be more "decision-useful" for investors choosing how to allocate their resources among the stocks of different companies.

The point that I think seems to get lost a bit in the debate is whether and to what extent the subject matter of a mandatory disclosure rule is relevant to whether the SEC has the authority to promulgate it. The federal securities laws arguably impose subject matter boundaries on the SEC's authority to require disclosures limiting that authority mainly to information about the business, financial performance, securities, and management of a disclosing company. A pretty compelling case can be made for that limitation, and the issue needs to be very carefully

---

109. *See* 17 C.F.R. § 229.402 (requiring disclosure, regardless of materiality determinations, of executive compensation information for executive officers of registrants). While the topic of executive compensation is generally itself material, the SEC's disclosure rule lays out a specific regime for what each company must disclose, and it was not determined that each individual metric required is material to each public company subject to the rule. Executive Compensation and Related Person Disclosure, Exchange Act Release No. 33-8732A (Aug. 29, 2006); *see also*, *e.g.*, Speech, Commissioner Allison Herren Lee, Living in a Material World: Myths and Misconceptions about "Materiality" (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421 [https://perma.cc/PS4K-5NQU]:

> Indeed our statutory rulemaking authority under Section 7 of the Securities Act of 1933 gives the SEC full rulemaking authority to require disclosures in the public interest and for the protection of investors. That statutory authority is not qualified by "materiality." Similarly, the provisions for periodic reporting in Sections 12, 13 and 15 of the Securities Exchange Act of 1934 are not qualified by "materiality." . . . In practice Regulation S-K has, from the outset, required periodic reports to include information that is important to investors but may or may not be material in every respect to every company making the disclosure. We have done this, for example, with respect to disclosures of related party transactions, environmental proceedings, share repurchases, and executive compensation.

considered by the SEC in adopting its final rule, where it would be advisable for the SEC to tie disclosure requirements as closely as possible to traditional financial condition and performance disclosures that are most clearly within the SEC's disclosure authority as opposed to climate-related disclosures that are less directly connected to the value proposition of a company.[110]

We should probably pause at this point to observe that the competing arguments, and there are lots of them, about the SEC's climate disclosure proposal—really are too many to cover in one keynote or one day or panel. It's a complicated subject, and we can just scratch the surface. But I think I would be remiss given the title of your program, if I ended without saying a few more words about the Major Questions Doctrine. My analysis of this will not be nearly as erudite as your prior panel, but I'm going to give you my reactions to it anyhow.

My first comment is that the doctrine was not a worry I had as chair of the SEC when considering potential challenges to the rulemakings adopted during my tenure. I agree with Justice Kagan, who dissented in *West Virginia v. EPA*,[111] that the Major Questions Doctrine does appear to be a newly crafted higher bar for economically impactful and politically controversial agency rulemakings.[112] Either way, new or old, the doctrine may well be here to stay with at least six members of the Supreme Court, so agency rulemaking will need to adapt accordingly.

How would the SEC's rulemaking fare under the Major Questions Doctrine? As with the other questions we've discussed, that will depend on the eye and point of view of the advocate. Those who believe that the SEC's disclosure authority easily emanates from the broad statutory language of the Securities Act of 1933 and the Securities Exchange Act of 1934 will conclude that the Major Questions Doctrine does not apply at all because Congress is quite clear that rules only requiring disclosure as opposed to compelled changes in how a business may be operated, simply do not raise major questions. That environmental subjects have been historically included in SEC disclosure rules will likely be cited as

---

110. *See* Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules Mercatus Center* 10 (Aug. 2021), https://www.mercatus.org/system/files/vollmer_-_policy_brief_-_does_the_sec_have_legal_authority_to_adopt_corporate_disclosure_rules_on_climate_change_-_v1.pdf [https://perma.cc/HB8Z-9L2P].

111. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

112. 142 S. Ct. at 2633–34 (Kagan, J., dissenting).

further demonstration of the legitimacy of the new climate-related disclosure rule.[113] The SEC's climate-related disclosure proposal is business as usual at the SEC, as Chair Gensler says. It is relying on its nearly 90-year-old history of disclosure powers to promulgate a rule about business risks and information investors want so that they can make better investment and voting decisions. That should end the inquiry according to the proponents of the rule.

Opponents of the rule will predictably say, to the contrary, that *West Virginia v. EPA* clearly invalidates the SEC's rulemaking for many of the reasons, again, we have already discussed.[114] There is nothing, as they will argue, in any enabling legislation that specifically gives the SEC authority to require climate-related disclosures, and therefore, unless what is required to be disclosed can be shown to fall within those categories of material, value proposition financial disclosures that are authorized, the rulemaking is invalid. The critics will also point to the lack of SEC expertise on climate-related issues—they will be right about that. We can be sure they will argue that the agency's lack of relevant expertise triggers Major Questions Doctrine scrutiny and a finding of lack of Congressional authority.

Another area of attack will be that the proposed rule's disclosure requirements, in part, call for information about the external impacts of a company's operations—its greenhouse gas emissions—rather than about internal impacts on a company's financial condition and operations from external sources.[115] The financial statement footnote requirements of the proposed rule, one of its most controversial features, will also surely be challenged.

In proposing this accounting standard, the SEC bypassed the Financial Accounting Standards Board, FASB, the independent private

113. *See* SEC Interpretive Release No. 33-6130 (Sept. 27, 1979) (discussing the Commission's adoption of rules that specifically address disclosure of environmental issues, including "[d]isclosure of the material effects that compliance with federal, state and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries" and "[d]isclosure of any administrative or judicial proceeding known to be contemplated by governmental authorities and arising under federal, state or local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment or any other material pending administrative or judicial proceeding").

114. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

115. Vollmer, *supra* note 110, at 14–15.

sector body that for decades has produced accounting standards subject only to the oversight of the SEC. Instead, here, for the first time I believe in its history, the SEC unilaterally proposed its own accounting standard in a new Article 14 to Regulation S-X[116] that would require new financial statement footnote disclosures of the financial impacts of severe weather events or climate change transition expenditures if the absolute financial impact of those climate related events exceeds 1% of a financial statement line item.[117] In the climate context at least, the 1% threshold would replace the long-accepted 5% quantitative rule of thumb for assessing a material impact on the financial statements viewed as a whole.[118] The footnote disclosure aspect of the rule has been called, by commenters, a "drastic departure," both in substance and by virtue of the process followed or not followed by the SEC.[119] Anything new and different about an economically impactful and politically charged rule or rulemaking process will today likely be viewed as suspect under the Major Questions

116. Proposal, *supra* note 84, at 41:

> We are also proposing to add a new article to Regulation S-X, 17 CFR 210.14-01 and 02 ("Article 14 of Regulation S-X") that would require certain climate-related financial statement metrics and related disclosure to be included in a note to a registrant's audited financial statements. The proposed financial statement metrics would consist of disaggregated climate-related impacts on existing financial statement line items.

117. *Id.* at 120–21:

> The financial impact metric disclosure requirements in proposed Rules 14-02(c), (d), and (i) would require a registrant to disclose the financial impacts of severe weather events, other natural conditions, transition activities, and identified climate-related risks on the consolidated financial statements included in the relevant filing unless the aggregated impact of the severe weather events, other natural conditions, transition activities, and identified climate-related risks is less than one percent of the total line item for the relevant fiscal year.

118. *See* SEC, Staff Accounting Bulletin No. 99 (Aug. 12, 1999).

119. Kothari, S.P. & Lewis, Craig, Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132332-302895.pdf [https://archive.ph/D7ZHq].

Doctrine. Stay tuned, though, for changes in the final rule that reflect the SEC's sensitivity to exactly that risk.

Let me stop on that note and state the obvious. The SEC's climate-related disclosure rule is likely in for a pretty rough and uncertain ride in the courts, but the SEC will be prepared and is preparing for that fight.

I warned you that I came today with mostly questions, not answers. How all of this will turn out will depend on how the SEC's final rule is written, how finely tuned and calibrated it is to the SEC's clearest zones of disclosure authority, and how carefully the agency has weighed the costs, 6 billion dollars and counting, and benefits of the rule. Undoubtedly the delay and the issuance of a final rule is due to the care the SEC is taking to try to ensure that the rule will be found to be a valid exercise of its disclosure powers. Ultimately, the courts will decide whether the SEC has successfully stayed within its congressionally authorized regulatory lane. If it has, the SEC will have increased the transparency about one of the most pressing subjects of our lifetimes by bringing about a greater degree of consistency and comparability of climate-related disclosures by the 6,000 plus public companies that are such an important and visible part of our economy. Stay tuned and thank you for listening.

Audience Question #1: Many companies now have sustainability departments, and some of the sustainability experts are lawyers, some are engineers. Can that be used as part of the SEC's argument in favor of requiring these disclosures?

Mary Jo White: I think the SEC probably looks at that in two ways. One very important piece of their thinking and analysis does relate to how seriously companies are already taking and reporting on sustainability risks, and investors, more importantly, in terms of the authority of the SEC, want that information, they're demanding it. They're using it in their investment decisions. What you're seeing, though, is that all of that, is leading, presumably, to what I would call substantive changes that companies are making because of what they're learning about climate risks, how to adapt to them, how to reduce their carbon emissions, their greenhouse gas emissions. But what the SEC is looking at is that there are all those disclosures out there, but they're voluntary, and therefore they're not consistent. They're not comparable. The comment letters are always all over the place, and when you do a rulemaking about the costs and benefits, to the extent that that whole mechanism is actually easily convertible to what would be required in order to meet the requirements of the SEC disclosure rule, that can reduce the cost side, which helps the SEC as well. The opposing arguments being made, though, are not that,

but rather that to do what the SEC is requiring will not make much use of those existing structures and disclosures.

Audience Question #2: There was some discussion in our last panel about the possibility for regulation by enforcement and if the SEC is relegated to regulation by enforcement, is there a risk that that would have the effect of discouraging companies from making the disclosures that they're currently making voluntarily?

Mary Jo White: Yes, I think it does run that risk because there's no rulemaking right now. There's only guidance about climate disclosure out there, and it's hard to violate guidance unless you lie about something. So to the extent that companies are involved in, whether it's ESG-based investments or doing various other things to take account of climate risk changes, and they are punished for it because the SEC can operate in its enforcement zone mainly against those disclosures and misstatements, there's a risk of that. There really is. It's also, in this space, probably because what I just said about how you can't really enforce guidance very well. Because there's not a broad swath of regulatory authority in the climate space, they'll go right there to act against misstatements about climate-related issues which can discourage companies from talking about it, too, as well as doing things that they may have to talk about. And similar Major Questions Doctrine questions come up, in other SEC contexts, where the enforcement tools are being used aggressively—the crypto industry, the recent cyber incident disclosure rule.[120] So, balancing rulemaking, which is really what people want, if it's good rulemaking, you want to know with certainty, if you're a business or a industry, what do I have to do to comply as opposed to there's no guidance or rulemaking out there. And then you bring a lot of separate enforcement cases because the SEC is feeling the void of the ability to regulate in some spaces. So that's probably more information than you want, but that's my answer.

Audience Question #3: I'm inquisitive, as the SEC does not act as a fiduciary, to what degree will we have this language be more ambiguous and more difficult to understand as the language to convey, to lessen the degree of misinformation and falsified documentation, to comply with this mandate?

Mary Jo White: I'm not sure I've taken your question in its full impact. I mean, I think, what the SEC is trying to do, and frankly, they try to do it with all of their disclosure rules is to make it clear what you do need to disclose. They're seeking clarity there. They're seeking

---

120. 17 C.F.R. §§ 229, 232, 239, 240, 249 (2023).

uniformity there. To the extent that it's ambiguous, the SEC has been known to follow up with guidance and FAQs to answer those questions, but the aim is to be clear, and helpful and give further guidance if needed. The other piece of that is if you violate those clear rules in the SEC's mind, then they will be enforced.

Audience Question #4: This question comes in from Zoom, they say an analysis of all institutional investor comments shows that hundreds of investors, collectively representing over 50 trillion assets under management, support the direction of the draft rule by over 90%. They ask whether there are many cases where you served as chair, where there was such overwhelming support of a highly visible case?

Mary Jo White: The answer to that is probably not to that degree. You almost always get comments, and a lot of them in particular if it's an important rule, if it's an impactful rule, if it's a controversial rule on both sides. But I think institutional investors and many retail investors are overwhelmingly supportive of the SEC's rule. Not everyone—I mean there are investors who have submitted comment letters that say, look, I'm investing to make a profit here, I want the financial information I need to make a profit. This is going to cost my company hundreds or millions of dollars, that's going to hurt my profit potential investing in this company. I don't want that; I don't need that. I'm actually deciding to invest based on the likelihood this company will turn a profit, so there are investors on both sides of that. But it's very heavily weighted, and certainly the institutional investors have been for years now in favor of the SEC proposing a mandatory climate related disclosure rule.

Audience Question #5: You referred to Congress at one point in your remarks. What is your sense of the health of the Congressional support for the SEC, say, if the SEC is prevented from being able to conduct administrative adjudication—whether you think Congress would be able to support adding the resources necessary to pursue enforcement actions generally in the Article III courts? And then on the flipside, what is your perception that we have a healthy process of oversight by Congress with regard to some of the concerns that are being pursued through this litigation, because sometimes it seems, at least in the cases that are litigated before the Supreme Court or perhaps in the opinions of the Court, that people seem to think that political branches are neglecting their oversight functions and rules and checks and balances, and therefore, the court has to essentially play a more aggressive role. To what extent is Congress up to the task, both on the supporting the SEC front and also overseeing it?

Mary Jo White: The comment I made about Congress was to express frustration that people share to some extent, for example, the Major Questions Doctrine may lead you back to Congress on various politically charged, economically impactful rulemakings. What confidence do we have that Congress has its act together? It may be decided that they have the exclusive jurisdiction to act in a certain space, but they are paralyzed, and the lack of bipartisanship is really quite obvious and harmful to them being able to act.

Now your question is different, but I just wanted to clarify what I was talking about in terms of Congress. You know the current SEC, and frankly, ordinarily the SEC, no matter who's generally chairing it, are strong proponents of strong enforcement. Enforcement is a little more bipartisan. People may quarrel about certain kinds of cases, but the big Ponzi schemes, everybody wants the SEC to go after them. If the SEC needs more resources to do that, Congress has historically been supportive. I think I mentioned that cases like that tend to lead to more resources. On the other hand, split on partisan lines, the Congress doesn't uniformly like a strong regulator, and the party in power can take that out on your budget. Unlike the Fed and the banking regulators, the SEC is not self-funded by the fees that it collects. It's dependent upon Congress. So it varies. If there's a crisis, and there's a seen, perceived need for more resources, Congress has been very supportive. But look at what they're doing now in the crypto industry. There are lots of cries for regulating in that space, because it's just not a good fit under the SEC's current regime or the CFTC's current regime. But who do you give that authority to? That's splitting Congress as well. So my dominant reaction to Congress is that there's a paralysis there that is not healthy for the SEC and the agencies and the courts can't write the rules either, and certainly to the extent that you follow the far reaches of the Major Questions Doctrine, there will be fewer rules.

I had a pretty good relationship with most of Congress, clearly butted heads with some of them. Oversight is Congress' job. I would answer their questions and if they wanted to talk about something they'd write a letter, and I'd respond to that letter. I once was told by one of the Congress people on the Republican side, I was obviously appointed by President Obama, he says, you know why we haven't had you up here so much like some of your predecessors—I was up there, a fair amount, mind you—he said, because neither side knows what you're going to say. I took that as a compliment; in Washington though, I am sure it was not intended as a compliment I guarantee you, because it's sort of like the person without a

home. And then I said, you know I try to be true to the SEC's mission, and look for where the merits are, and that's where I'm trying to be. So I did not resent or suffer under the oversight function. I think when I was Chair, Congress was pretty good to the SEC in terms of resources. But it really is cyclical.

Meredith Berger: Amazing, thank you so much Ms. White for a wonderful Keynote Address. We truly appreciate and value your insights and willingness to give us your time today. Before concluding today's event, I wanted to say a few more thank-yous.

Firstly, thank you to all of our panelists for contributing to a significant and, as we said, timely discussion. Thank you to our moderator, Suman Naishadham, as well. Thank you to Professor Caroline Gentile, and Professor Sean Griffith, the Journal's faculty advisers, who provide immense support and guidance in organizing this event. The Journal's very grateful to have such dedicated faculty, and today's symposium would not have been possible without them.

Thank you also to Shanelle Holley, Morgan Benedit, and the office of Public Programming for all their assistance in organizing today's events. I would also like to thank the Journal staff and board members for all their support, as well, especially Editor-in-Chief Alex Lindsey and Managing Editor Vivian Zhang.

Finally, I would like to recognize the Journal's Symposium Committee for their assistance in coordinating the event. You guys all helped me so much, and on behalf of the entire journal, thank you for all for participating and attending today's event for those attending in person. We welcome you to join us for a reception next door. Have a great evening.