No. 23-60626

United States Court of Appeals for the Fifth Circuit

NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS,
MANAGED FUNDS ASSOCIATION, AND
ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Orders of the
Securities and Exchange Commission

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Roman Martinez
Peter E. Davis
Peter A. Prindiville
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

March 12, 2024

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

No. 23-60626, *National Association of Private Fund Managers et al. v. Securities and Exchange Commission*

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities listed in Petitioners' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

***Amicus Curiae*:**

Chamber of Commerce of the United States of America

Counsel for *Amicus Curiae*:

Roman Martinez
Peter E. Davis
Peter A. Prindiville
LATHAM & WATKINS LLP

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER

Dated: March 12, 2024

/s/ Roman Martinez
Roman Martinez

Attorney of Record for Amicus Curiae *The Chamber of Commerce of the United States of America*

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Court Should Provide Guidance For How Agencies Must Consider The Interaction Between Closely Related, Contemporaneously Proposed Rules 5

A. Agencies, Regulated Entities, And The Public Would Benefit From Clarity On This Issue 5

1. Agencies Increasingly Issue Rules That Ignore Closely Related, Contemporaneous Rulemakings 7

2. Agencies' Refusals To Consider Contemporaneous, Closely Related Rules Harm Regulated Entities And Ultimately Consumers 13

B. This Court Should Hold That Agency Explanations And Cost-Benefit Analyses That Fail To Consider Closely Related, Contemporaneously Proposed Rules Violate The APA 16

1. The APA Requires Agencies To Consider Closely Related Rules Because They Are "An Important Aspect of the Problem" And A "Relevant Factor" 16

2. Agency Cost-Benefit Analyses Must Account For Closely Related Rules 20

II. This Court Should Set Aside The Challenged SEC Rules For Failing To Take Account Of Each Other 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

BNSF Railway Co. v. Federal Railroad Administration,
62 F.4th 905 (5th Cir. 2023) 3, 17, 18, 23, 26

Browning-Ferris Industries of California, Inc. v. NLRB,
911 F.3d 1195 (D.C. Cir. 2018)....................11

Chamber of Commerce of the United States v. Department of Labor,
885 F.3d 360 (5th Cir. 2018) 20

Chamber of Commerce of the United States v. SEC,
412 F.3d 133 (D.C. Cir. 2005)....................26

Chamber of Commerce of the United States v. SEC,
85 F.4th 760 (5th Cir. 2023) 8

Chamber of Commerce of the United States v. SEC,
88 F.4th 1115 (5th Cir. 2023) 8, 26

Encino Motorcars, LLC v. Navarro,
579 U.S. 211 (2016)....................17, 23

FCC v. Prometheus Radio Project,
592 U.S. 414 (2021)....................22, 28

Huawei Technologies USA, Inc. v. FCC,
2 F.4th 421 (5th Cir. 2021) 3, 21, 22, 27

Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.,
463 U.S. 29 (1983)....................3, 16, 19, 23, 26

Office of Communication of the United Church of Christ v. FCC,
707 F.2d 1413 (D.C. Cir. 1983)....................19

Portland Cement Association v. EPA,
665 F.3d 177 (D.C. Cir. 2011)....................3, 15, 18, 19, 28

Page(s)

Sierra Club v. EPA,
939 F.3d 649 (5th Cir. 2019) 17

Southwestern Electric Power Co. v. United States EPA,
920 F.3d 999 (5th Cir. 2019) 17

Texas v. Biden,
10 F.4th 538 (5th Cir. 2021) 17

Texas v. United States EPA,
No. 23-60069, 2023 WL 7204840 (5th Cir. May 1, 2023) 10

Zen Magnets, LLC v. Consumer Product Safety Commission,
841 F.3d 1141 (10th Cir. 2016) 19

STATUTES AND REGULATORY MATERIAL

2 U.S.C. § 1532 21

5 U.S.C. § 603 21

5 U.S.C. § 604 21

5 U.S.C. § 804(2)(A)...6

15 U.S.C. § 77b(b) 20

15 U.S.C. § 78w(a)(2)...20

29 U.S.C. § 152(3) 11

44 U.S.C. § 3501 et seq...21

84 Fed. Reg. 33,318 (July 12, 2019)...28

87 Fed. Reg. 8443 (Feb. 15, 2022) 9

87 Fed. Reg. 8686 (Feb. 15, 2022) 9

87 Fed. Reg. 9545 (Feb. 22, 2022) 9

87 Fed. Reg. 11,659 (Mar. 2, 2022)...25, 27

Page(s)

87 Fed. Reg. 20,036 (Apr. 6, 2022) 10

87 Fed. Reg. 80,266 (Dec. 29, 2022) 12

87 Fed. Reg. 80,362 (Dec. 29, 2022) 8, 9

88 Fed. Reg. 128 (Jan. 3, 2023) 12

88 Fed. Reg. 3786 (Jan. 20, 2023) 12

88 Fed. Reg. 33,240 (May 23, 2023) 13

88 Fed. Reg. 36,002 (June 1, 2023) 8

88 Fed. Reg. 37,946 (Oct. 27, 2023)....................11

88 Fed. Reg. 75,100 (Nov. 1, 2023)....................24, 27

88 Fed. Reg. 75,644 (Nov. 3, 2023)....................23, 26, 27

89 Fed. Reg. 1638 (Jan. 10, 2024) 11

SEC, Disclosure of Order Execution Information, Final Rule, https://www.sec.gov/files/rules/final/2024/34-99679.pdf (Mar. 6, 2024) 12

OTHER AUTHORITIES

Advancing the Frontiers of Benefit-Cost Analysis: Federal Priorities and Directions for Future Research, Annual Report by the Subcomm. on Frontiers of Benefit-Cost Analysis of the Nat'l Sci. & Tech. Council (Dec. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/12/FINAL-SFBCA-Annual-Report-2023.pdf....................20

Keith B. Belton, *Regulatory Activity in the Biden Administration*, *Regulation: Regulatory Review* (2022), https://www.cato.org/sites/cato.org/files/2022-09/regulation-v45n3-4.pdf....................6

Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)....................6, 21

Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011)....................21

Page(s)

Exec. Order No. 14094, 88 Fed. Reg. 21,879 (Apr. 6, 2023)....................................21

Mark Febrizio, *Considering Cumulative Regulatory Costs in Economic Analysis*, The Regulatory Review (June 25, 2019), https://www.theregreview.org/2019/06/25/febrizio-considering-cumulative-regulatory-costs-economic-analysis/ 5

Patrick McLaughlin, Nita Ghei, & Michael Wilt, Policy Brief, *Regulatory Accumulation and Its Costs: An Overview*, Mercatus Center at George Mason University (Nov. 2018), https://www.mercatus.org/media/69126/download?attachment 13

Patrick McLaughlin, Policy Brief, *How Regulatory Overload Can Make Americans Less Safe*, Mercatus Center at George Mason University (Nov. 14, 2018), https://www.mercatus.org/media/69121/download?attachment 14, 15

Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 Stan. L. Rev. Online 9 (Apr. 29, 2013)....................................20

Securities and Exchange Commission, *Investor Bulletin: An Introduction to Short Sales* (Oct. 29, 2015), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_shortsalesintro 24

Securities Industry and Financial Markets Association, SEC Rulemaking Tracker: Data Set, https://www.sifma.org/resources/general/sec-rulemaking-tracker/ (last accessed Mar. 7, 2024) 6, 7

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. Here, the Securities and Exchange Commission ("SEC") committed an all-too-common error of agency decision-making: It failed to consider the impacts of and relationships between contemporaneously proposed, closely related rules. This deficiency inflicts considerable harm and unnecessary cost on American businesses.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important and recurring issue of administrative law on which this Court's guidance is needed: whether agencies promulgating a final rule must consider the impacts of contemporaneously proposed and closely related rulemakings. The answer is clearly yes, both as a matter of administrative law and common sense. Yet federal agencies—including the SEC in the rules at issue here—are routinely ignoring this legal responsibility. While the Chamber takes no position on the substance of either of the challenged rules in isolation, it submits this brief to explain the need for this Court's guidance to protect businesses and other regulated entities. This Court should set aside the challenged SEC rules for failure to provide a rational explanation of how they interact with one another.

American businesses are increasingly confronted with agency rules that fail to consider the impact of other contemporaneously proposed, closely related rules, including their aggregate costs and benefits. These failures inflict considerable harm on those businesses, other regulated entities, and ordinary citizens. There are several species of the problem. Such rules are often duplicative, increasing costs without providing additional benefits. These rules can also compound one another, for example where Rule A applies only to a seemingly small defined class, but Rule B redefines the class, making Rule A's impact far more profound. Or the rules can conflict—working at cross-purposes and creating inconsistent or illogical regimes.

As a result, businesses and regulated entities must shoulder additional—and unnecessary—regulatory costs. And they must navigate considerable legal uncertainty, which hinders innovation and economic productivity, ultimately harming customers too.

These negative impacts are problematic in their own right. But this increasingly common agency practice also violates the Administrative Procedure Act ("APA"). The APA requires an agency to consider all "important aspect[s] of the problem" it seeks to address, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and all "relevant factors" when justifying its new rules, *BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 910 (5th Cir. 2023) (citation omitted). This means, as the D.C. Circuit has squarely held, that agencies must "acknowledge and account for . . . contemporaneous and closely related rulemaking[s]" that affect the "regulatory posture." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (per curiam). And, as this Court has noted, agencies must ensure that their cost-benefit analyses are not predicated on a "serious flaw," such as failing to consider relevant data or facts. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 452 (5th Cir. 2021) (citation omitted).

This Court should take the opportunity to clarify that contemporaneously proposed and closely related rules are virtually always a relevant factor and an important aspect of the problem that agencies seek to address, because they shape

the regulatory environment in which agencies' rules operate. This is equal parts common sense and administrative law: Agencies do not write on a blank slate, but instead issue rules that inevitably interact with the regulatory environment that they (and other federal agencies) have created. So failing to consider how new rules interact with other closely related rules necessarily ignores a key aspect of the problem, and is therefore arbitrary and capricious in violation of the APA. The same is true of an agency's failure to consider the aggregate costs and benefits of new rules' interaction with other closely related contemporaneously proposed rules, because it yields an incomplete and fatally flawed cost-benefit analysis.

The two SEC rules at issue in this case are particularly egregious examples of this problem. Here, the SEC promulgated two rules that are closely—indeed intimately—related because they regulate two elements *of the same underlying short sale transactions*. Yet the agency nowhere considered how the two rules would interact, yielding an inconsistent and illogical regulatory approach to the same underlying issue. While this brief takes no position on the rules' substance, the Chamber urges this Court to set the rules aside because they suffer these fundamental procedural flaws in violation of the APA. The Chamber also urges this Court to provide guidance to agencies, businesses, and regulated entities on what the APA requires in these circumstances.

ARGUMENT

I. THIS COURT SHOULD PROVIDE GUIDANCE FOR HOW AGENCIES MUST CONSIDER THE INTERACTION BETWEEN CLOSELY RELATED, CONTEMPORANEOUSLY PROPOSED RULES

Agencies often propose closely related rules with similar objectives, duplicative mandates, and significant combined cost—leading to inconsistent or illogical regulatory programs. Yet agencies are nevertheless failing to consider the aggregate impact or cost of their rules, opting to consider each standing alone. This practice inflicts considerable harm on businesses and regulated entities, which must shoulder increased regulatory costs and navigate inconsistent and sometimes conflicting compliance obligations. This practice also violates the APA because closely related, contemporaneously proposed rules are important aspects of the problem that agencies seek to address. This Court should provide sorely needed guidance in this area and hold that an agency's failure to consider the interrelationship of closely related, contemporaneously proposed rules is arbitrary and capricious.

A. Agencies, Regulated Entities, And The Public Would Benefit From Clarity On This Issue

"Although the number of new regulations issued each year fluctuates, the total amount of regulation in the U.S. economy has steadily risen" in recent years. Mark Febrizio, *Considering Cumulative Regulatory Costs in Economic Analysis*, The

Regulatory Review (June 25, 2019), https://www.theregreview.org/2019/06/25/febrizio-considering-cumulative-regulatory-costs-economic-analysis/. And the data show that the pace and economic effect of this rulemaking is steadily increasing. During President Biden's first 18 months in office, agencies proposed 142 major and 451 significant rules.[2] *See* Keith B. Belton, *Regulatory Activity in the Biden Administration* 1, *Regulation: Regulatory Review* (2022), https://www.cato.org/sites/cato.org/files/2022-09/regulation-v45n3-4.pdf. During the previous administration, agencies had proposed only 81 major and 270 significant rules in that the same period. *Id.* This is a *75 percent* increase in major rules and a *67 percent* increase in significant rules. *See id.*

The SEC has followed the same pattern. During the first 18 months of Chair Gensler's tenure, the Commission proposed 38 new rules. *See* Securities Industry and Financial Markets Association, SEC Rulemaking Tracker: Data Set, https://www.sifma.org/resources/general/sec-rulemaking-tracker/ (last accessed Mar. 7, 2024) (choose "SEC Rulemaking Tracker.xls"; then choose sheet titled "Proposals Comparison"). During that same period of Chair Clayton and White's

---

[2] "[M]ajor rules" include (among others) those that have resulted in, or are likely to result in "an annual effect on the economy of $100,000,000 or more." 5 U.S.C. § 804(2)(A). During the cited period, "significant rules" were defined (among other things) as those with an annual economic effect of $100 million or more. *See* Exec. Order No. 12866, § 3(f)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

tenures, the Commission had proposed only 18 rules. *Id.* This is a *111 percent* increase in proposed rules compared to the previous two chairs' tenures.

Such rapid, consequential rulemaking must be undertaken with care because rules frequently interact with each other in important ways—including as to their substance, costs, and benefits. Yet agencies often fail to consider these important interrelationships, the aggregate impact of an agency's rulemaking on regulated entities, or spillover costs or benefits. This means, at best, that agencies are missing important aspects of the regulatory problems they are addressing; at worst, they are intentionally blinding themselves to the cumulative consequences of their actions. The result is bad for American businesses and regulated entities, which must contend with regulatory uncertainty, duplicative or contradictory mandates, and inflated compliance costs. While this Court has yet to consider this issue directly, the D.C. Circuit has recognized that contemporaneously proposed, closely related rulemakings are relevant factors an agency must consider when promulgating new rules. The Chamber urges this Court to require at least as much of agencies and provide clarity on how agencies must consider closely related rules in their rulemaking processes.

1. Agencies Increasingly Issue Rules That Ignore Closely Related, Contemporaneous Rulemakings

As agencies amp up their regulatory actions, they are often issuing final rules that fail to consider other, closely related and contemporaneously proposed rules.

For example, the SEC recently finalized two rules, not at issue in this case, that reflect this phenomenon. In its Share Repurchase Disclosure Modernization ("Stock Buyback") Rule, the SEC imposed new, onerous disclosure requirements on nearly two-thirds of domestic stock issuers who repurchase their shares. *See* 88 Fed. Reg. 36,002 (June 1, 2023).[3] The SEC justified this rule on a theory that corporate executives "may" misuse share repurchases to induce temporary share price spikes, boost the value of executive stock compensation, and thus "realize additional gains unavailable to other investors." *Id.* at 36,006.

But just months before issuing the Stock Buyback Rule, the SEC had adopted another final rule—the Insider Trading Arrangements and Related Disclosures ("Insider Trading") Rule—that addressed the closely related problem of corporate insiders using material nonpublic information to gain advantage in the markets. *See* 87 Fed. Reg. 80,362 (Dec. 29, 2022). These two rules were *proposed on the same day* and then were pending together at the proposal stage. And even though the SEC proposed the soon-to-be-finalized Stock Buyback Rule to address the same issue as the Insider Trading Rule, the SEC justified the Insider Trading Rule, in part, on a

[3] This Court recently granted the Chamber's petition to set aside the Stock Buyback Rule because the SEC "acted arbitrarily and capriciously in failing adequately to (1) respond to petitioners' comments and (2) substantiate the rule's benefits." *See Chamber of Com. of the U.S. v. SEC*, 85 F.4th 760, 779 (5th Cir. 2023). After the SEC failed to "remedy the deficiencies in the rule" during a remand period, the Court vacated the rule. 88 F.4th 1115, 1118 (5th Cir. 2023) (citation omitted).

theory that it would stop corporate executives from timing corporate actions for personal gain. To address this perceived abuse, the Insider Trading Rule imposed a "cooling-off period" preventing corporate insiders "from improperly influencing the timing of corporate disclosures to benefit [executives'] trades." 87 Fed. Reg. at 80,369, 80,380.

This close relationship was so obvious during the proposal stage that the SEC acknowledged the rules addressed "similar concerns" and proposed them on the same day so they could "coordinate the two releases." 87 Fed. Reg. 8686, 8688 (Feb. 15, 2022); 87 Fed. Reg. 8443, 8466 (Feb. 15, 2022). Yet despite this acknowledgment, the SEC's final Stock Buyback Rule never considered whether the just-finalized Insider Trading Rule's cooling-off period obviated the need for the Stock Buyback Rule. The result was predictable: Overlapping and duplicative regulatory requirements where one likely could have achieved the same objective.

A similar problem features in the EPA's recent Good Neighbor Rule, now pending on a stay application before the U.S. Supreme Court. In 2022 and 2023, the agency sought to regulate ozone emissions through two sets of inextricably linked actions. In the first, the EPA proposed disapproving 21 states' implementation plans for satisfying new ozone standards under the Clean Air Act's "Good Neighbor" provision. *See, e.g.*, 87 Fed. Reg. 9545 (Feb. 22, 2022). In the second, issued a few months later and while the proposed state disapprovals were still pending, the EPA

proposed its own federal plan—ostensibly a single, coordinated plan to reduce air pollution collectively from the 21 states whose plans it proposed to disapprove, plus two other states that had not submitted state plans. 87 Fed. Reg. 20,036 (Apr. 6, 2022). The EPA later finalized the state disapprovals and federal plan as proposed.

Months later, though, EPA's disapprovals of twelve of the individual state plans were stayed by multiple circuit courts, thereby undercutting the entire rationale for EPA's federal plan. *See, e.g.*, *Texas v. U.S. EPA*, No. 23-60069, 2023 WL 7204840, at *1 (5th Cir. May 1, 2023) (per curiam). Yet the agency had failed to address whether implementing the federal plan would make sense in this scenario, where the federal plan would take effect in only a fraction of the states it was originally slated to govern. As Justice Kavanaugh later noted at oral argument, EPA's justification for the federal plan had completely neglected to consider the relationship between EPA's federal plan and its state disapprovals on which that plan was based. Transcript of Oral Argument at 34, *Ohio v. EPA*, 2024 WL 218766 (U.S. Jan. 22, 2024) (No. 23A349) (noting EPA's "goose egg" on this point). Apart from a conclusory statement about severability, EPA failed to consider the interaction between its various pending rulemakings.

This sort of failure arises in rulemakings across different agencies as well. Recently, the National Labor Relations Board ("the Board") and the Department of Labor each promulgated final rules establishing tests for whether an individual is an

employee of a given business. The question before the Board was whether two or more businesses may be considered joint employers of a group of employees under the National Labor Relations Act, 88 Fed. Reg. 37,946, 73,982 (Oct. 27, 2023); the question for the Department of Labor was whether certain workers are employees or independent contractors under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1664 (Jan. 10, 2024). While technically distinct, these questions can intersect in important ways. For example, Congress expressly excluded independent contractors from the definition of employee under the NLRA, 29 U.S.C. § 152(3), and courts have thus made clear that the Board's "joint employer" test must respect the distinctions between employees and independent contractors. *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1218-19 (D.C. Cir. 2018). Yet neither agency meaningfully considered these important aspects of the issue. The result is a test that "swallows the common-law distinction between employees and independent contractors." Mot. Summ. J. 28, *Chamber of Com. of the U.S. v. NLRB*, No. 6:23-cv-553 (E.D. Tex. Nov. 13, 2023), ECF No. 10.[4]

Agencies are continuing to make similar mistakes in recently proposed rules. For example, the SEC has proposed three separate rules that would—working

[4] On March 8, 2024, the district court granted the Chamber's motion for summary judgment and held the rule "contrary to law" because it "exceeds the bounds of the common law." Opinion and Order 26, No. 6:23-cv-553 (E.D. Tex.), ECF No. 44.

together—radically alter the structure of the nation's equity markets by changing the ways stock orders are regulated. *See* 88 Fed. Reg. 3786 (Jan. 20, 2023) (Disclosure of Order Execution Information Rule); 87 Fed. Reg. 80,266 (Dec. 29, 2022) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders Rule); 88 Fed. Reg. 128 (Jan. 3, 2023) (Order Competition Rule).

Despite these considerable potential market impacts, the agency's proposals do not meaningfully consider the rules' interrelated nature nor their combined costs on regulated entities. Indeed, these cross-cutting impacts are so pronounced that the Department of Justice submitted comments to the SEC noting that the "number of changes contemplated by the [proposed rules] means that there are a number of ways in which these rules could interact with one another" and urging the agency to "carefully consider potential interactions among" the rules before final promulgation. Antitrust Division of the U.S. Dep't of Justice Comment Letter at 6 (Apr. 11, 2023). Yet when the SEC recently finalized the Disclosure of Order Execution Information Rule, it expressly rejected commenters' requests that the agency consider the "aggregate" economic impacts of the contemporaneously "proposed rules." SEC, Disclosure of Order Execution Information, Final Rule at 22, https://www.sec.gov/files/rules/final/2024/34-99679.pdf (Mar. 6, 2024).

So too with EPA's recent proposed Power Plant Greenhouse Gas Emissions Rule, which sets new standards for fossil fuel-fired power plants. *See* 88 Fed. Reg. 33,240 (May 23, 2023). As the Chamber noted in comments before the agency, EPA's proposal fails to account for significant increases in electricity demand that EPA *itself* projects will be caused by its separate proposed Greenhouse Gas Emissions Standards for Heavy-duty Vehicles Rule and Light-duty Vehicles Rule. *See* Chamber of Commerce of the U.S. Comment Letter at 43-44 (Aug. 8, 2023) ("Chamber of Commerce Letter"). Yet the agency has not assessed how the power sector would be able to meet the significant, combined increase in electricity demand caused by the rules' simultaneous adoption. By declining to consider the closely related rules, the agency has relied on inconsistent assumptions and projections and failed to account for the full costs of its regulatory program.

2. Agencies' Refusals To Consider Contemporaneous, Closely Related Rules Harm Regulated Entities And Ultimately Consumers

Agencies' failure to consider the intersections between—and aggregate cost of—closely related rules is bad for businesses and other regulated entities. For one thing, it leads to irrational and inconsistent decision-making. Conflicting rules put businesses in an obvious bind: to comply with one rule risks violating another. Where such conflict is the result of rulemaking across multiple agencies, this complexity and cost is only amplified. *See* Patrick McLaughlin, Nita Ghei, &

Michael Wilt, Policy Brief, *Regulatory Accumulation and Its Costs: An Overview*, Mercatus Center at George Mason University (Nov. 2018), https://www.mercatus.org/media/69126/download?attachment.

Agencies' refusals to consider closely related, contemporaneous rules can also yield overlapping regulatory requirements that purport to address the same underlying issues—as with the Stock Buyback and Insider Trading Rules. But in applying two solutions to one problem, agencies often end up with no solution at all. "The difficulty of complying with" an increasingly complex web of regulations harms innovation and increases costs, "diverting attention away from [important goals like] improved safety and toward compliance to avoid sanctions." Patrick McLaughlin, Policy Brief, *How Regulatory Overload Can Make Americans Less Safe* 3-4, Mercatus Center at George Mason University (Nov. 14, 2018), https://www.mercatus.org/media/69121/download?attachment. These kinds of harms might be reduced by a proper cost-benefit analysis—one which accounts *both* for the aggregate costs of contemporaneously proposed rules, *and* for the diminished marginal benefits of the rules when considered against each other. Yet agencies all too frequently fail to undertake the proper analysis. *See supra* at 7-13.

The harms are borne not just by businesses, but also by workers and consumers. Regulatory accumulation can make workers less safe because such "regulation can confuse ends and means, diverting attention away from improved

safety and toward compliance to avoid sanctions." McLaughlin, *supra*, at 4-5 (citing studies in nuclear power and freight industries). So too with consumers, who inevitably feel the effects of lost innovation and competitiveness on businesses, and also encounter added regulatory warnings for minor issues that inevitably "obscure more important rules." *Id.* at 3 & n.8.

Finally, the common agency practice of slicing-and-dicing regulatory programs into interrelated (but siloed) rules limits the courts' ability to ensure holistic and meaningful review of agency action. If agencies can artificially separate different elements of one regulatory program—without ever considering those separate elements collectively—they can avoid scrutiny of the actual costs and other effects of their regulations. This undercuts the point of judicial review under the APA.

Agencies and regulated entities would greatly benefit from this Court's guidance on how closely related rules must be considered during the rulemaking process. Over a decade ago, as discussed below, the D.C. Circuit held that agencies must "acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (per curiam). But this Court (and other circuits) have not directly considered this issue, and agencies continue to flout the APA's reasoned decision-making obligation

by adopting closely related rules without considering their interrelated effects. This case presents an excellent opportunity to clarify how agencies must address closely related, contemporaneously proposed rules.

B. This Court Should Hold That Agency Explanations And Cost-Benefit Analyses That Fail To Consider Closely Related, Contemporaneously Proposed Rules Violate The APA

The APA requires agencies to take into account the impacts of closely related, contemporaneously proposed rules, because such rules are virtually always important aspects of the problem an agency seeks to address and a factor relevant to the agency's decision-making. The failure to consider these closely related rules necessarily renders the actions arbitrary and capricious in violation of the APA. Likewise, an agency must consider the aggregate costs and benefits of other closely related, contemporaneous rules in their cost-benefit analyses—and their failure to do so renders those analyses arbitrary and capricious.

1. The APA Requires Agencies To Consider Closely Related Rules Because They Are "An Important Aspect of the Problem" And A "Relevant Factor"

It is axiomatic that "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Under the APA, agency action must be set aside as arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem," *id.* at 43, or failed to consider a "relevant

factor[]," *BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 910 (5th Cir. 2023) (citation omitted). Agencies may not take "paradoxical action[s]," *Sw. Elec. Power Co. v. U.S. EPA*, 920 F.3d 999, 1016 (5th Cir. 2019), or "create[] 'unexplained inconsistencies in the rulemaking record,'" *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019) (citation omitted); *see* Pet. Br. 29-30. "[W]here an agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016).

The impact of new agency action on the current regulatory environment is virtually always an important aspect of the problem an agency seeks to address and a factor relevant to an agency's decision-making. This Court has previously made a similar point in the context of agency rescissions. When an agency seeks to change the regulatory landscape by rescinding previous actions, it must consider "reliance interests," the "benefits" of former actions, and "potential alternatives" to rescission, because these are necessarily relevant factors and important aspects of the problem. *Texas v. Biden*, 10 F.4th 538, 553 (5th Cir. 2021).

So too with closely related, contemporaneously proposed rules. Agencies rarely draft rules on a blank slate. To the contrary, each rule they issue necessarily exists against the backdrop of the broader regulatory universe—a backdrop that includes not just longstanding rules, but also contemporaneously proposed ones.

Indeed, an agency's ability to achieve its objectives through a proposed rule can only be understood in the context of its other actions (proposed or final) bearing on those same objectives. Accordingly, agency explanation that fails to consider how a rule interacts with other contemporaneous, closely related rules is arbitrary and capricious because it ignores these important aspects of the problem the agency seeks to address and relevant factors essential to the agency's decision making. Such analysis is inconsistent with the reasoned decision-making required by the APA and "evinces 'a clear error of judgment.'" *BNSF*, 62 F.4th at 910 (citation omitted).

The D.C. Circuit rightly held as much in *Portland Cement*. There, the EPA had contemporaneously considered two rules governing cement kiln emissions—the first would set a "National Emission Standards for Hazardous Pollutants (NESHAP)" standard for these emissions, and the second would reclassify some of the same kilns as "commercial and industrial solid waste incinerators (CISWI)" subject to a distinct emissions standard. 665 F.3d at 182-85. The NESHAP rule was proposed and finalized first, but the CISWI rule was pending during the same period. The petitioner challenged the first rule under the APA, arguing that EPA's failure to account in its NESHAP rule for the reclassification of certain kilns in the *still-pending, and proposed,* CISWI rule rendered the NESHAP rule arbitrary and capricious.

The D.C. Circuit agreed, holding that the agency's failure to consider how these two rules interacted was arbitrary and capricious because the rules were "clearly a 'relevant factor[]'" and "an 'important aspect of the problem' that must be considered." *Id.* at 187 (alteration in original) (quoting *State Farm*, 463 U.S. at 42-43). Agencies have an "obligation to acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking." *Id.*; *see also Off. of Commc'n of the United Church of Christ v. FCC*, 707 F.2d 1413, 1441-42 (D.C. Cir. 1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would take rulemaking action undercutting another "concurrent" rulemaking process). The court made quick work of EPA's assertion that it had no obligation to account for potential changes to the regulatory environment, explaining that "[i]t is not absurd to require that an agency's right hand take account of what its left hand is doing." *Portland Cement*, 665 F.3d at 187.[5]

This Court should make clear that such consideration is an essential element of reasoned decision-making under the APA. At best, an agency's failure to consider

[5] The Tenth Circuit has similarly recognized that agencies must consider in their rules the existing "regulatory posture"—there, how the agency's enforcement policies affected the need for a new rulemaking. *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1150 (10th Cir. 2016) (quoting *Portland Cement*, 665 F.3d at 187).

closely related rules can cause duplicative, and often compounding, mandates or costs. *See supra* at 13-16. But often this failure causes far greater problems, leading to illogical or inconsistent agency action. *See supra* at 8-12. And as this Court has explained, "[i]llogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *Chamber of Com. of the U.S. v. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018); Pet. Br. 38.

2. Agency Cost-Benefit Analyses Must Account For Closely Related Rules

An agency's failure to account for contemporaneously proposed, closely related rules in its cost-benefit analysis creates a separate fatal problem. "A basic premise of federal evidence-based decision-making is that the public benefits of a decision should justify the costs."[6] For independent agencies in particular, proper cost-benefit analysis helps to ensure "good governance and democratic accountability." Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 Stan. L. Rev. Online 9, 10 (Apr. 29, 2013). To that end, some statutes, including the SEC's statute at issue here, explicitly require the agency to assess the economic implications of its actions. *See* 15 U.S.C.

---

[6] *Advancing the Frontiers of Benefit-Cost Analysis: Federal Priorities and Directions for Future Research*, Annual Report by the Subcomm. on Frontiers of Benefit-Cost Analysis of the Nat'l Sci. & Tech. Council (Dec. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/12/FINAL-SFBCA-Annual-Report-2023.pdf.

§§ 77b(b), 78w(a)(2); *see also* 5 U.S.C. §§ 603, 604 (Regulatory Flexibility Act); 44 U.S.C. § 3501 et seq. (Paperwork Reduction Act); 2 U.S.C. § 1532 (Unfunded Mandates Reform Act). And more generally, Executive Orders Nos. 12866 and 14094 explicitly require many federal agencies to conduct cost-benefit analysis of "significant" agency rules. Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 14094, 88 Fed. Reg. 21,879 (Apr. 6, 2023); *see also* Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (generally requiring agencies to "tailor . . . regulations to impose the least burden on society" and account for "the costs of *cumulative* regulations" (emphasis added)).

The APA's reasoned decision-making requirements apply with full force to agency cost-benefit analyses, and "if the [cost-benefit] analysis rests on a 'serious flaw,'" the agency action in question is "'unreasonable.'" *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 452 (5th Cir. 2021) (citation omitted). While courts "afford agencies considerable discretion in conducting" cost-benefit analysis, such discretion cannot excuse agencies' failure to ignore completely an important element in its cost-benefit analysis. *Id.*

Ignoring the costs and benefits of other contemporaneously proposed, closely related rules is a serious flaw because the agency's analysis will thereby fail to account for the actual, real-world impact of its actions on regulated parties. Indeed, as the Supreme Court has noted, agencies' "predictive judgment[s]" must account

for "the evidence [the agency has]." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 427 (2021). Agencies always have knowledge of other final or near-final rules. Thus, if the regulatory baseline in the cost-benefit analysis does not encompass the regulatory universe in which regulated entities must actually structure their affairs, it is necessarily incomplete and inaccurate. Such analyses thus "'render the rule unreasonable.'" *Huawei*, 2 F.4th at 452 (citation omitted).

This problem can arise in a variety of common rulemaking contexts. Consider the EPA's Power Plant Greenhouse Gas Emissions Rule, discussed *supra* at 13. The agency sought to take three actions with obvious interrelationships—new emissions control for power plants, and heightened emissions standards for heavy duty vehicles and light duty vehicles. The latter two would, in EPA's own view, significantly increase electricity demand, with obvious effects on the costs to power plants associated with the new emissions standards. *See* Chamber of Commerce Comment Letter, *supra*, at 43-44. Yet EPA failed to consider the collective costs and benefits of those rules.

Ignoring collective costs and benefits effectively stacks the deck in favor of more regulation. When a regulated entity must comply with two sets of rules—whether conflicting or not—compliance and other costs will rise. And even while costs of attacking a single problem with two rules rise, benefits fall. This is because the agency's effort to address a single problem in one rule may well reduce the

benefits of addressing that same problem in a second rule. Accordingly, the failure to consider aggregate costs and benefits will dramatically skew the analysis in favor of *more* regulation—much like what occurred in this case.

II. THIS COURT SHOULD SET ASIDE THE CHALLENGED SEC RULES FOR FAILING TO TAKE ACCOUNT OF EACH OTHER

The challenged rules violate these fundamental administrative law principles. In promulgating the rules, the SEC "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and ignored a "relevant factor[]," *BNSF*, 62 F.4th at 910 (citation omitted), because it did not consider how the two challenged rules interacted nor did it evaluate the two rules' aggregate economic costs and benefits. Because the SEC "has failed to provide even a minimal level of analysis [of these essential elements and factors], its action[s] [are] arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars*, 579 U.S. at 212. Thus, while the Chamber takes no position on the rules' substance, we urge this Court to grant the petition and set the rules aside due to these procedural errors.

A. Petitioners challenge two separate SEC rules. The first challenged rule, the Reporting of Securities Loans ("Securities Loan") Rule, requires covered entities to report information about individual securities lending transactions on a daily basis. *See* 88 Fed. Reg. 75,644 (Nov. 3, 2023). The second challenged rule, the Short Position and Short Activity Reporting by Institutional Investment Managers ("Short Sale") Rule, requires certain investment managers to report information

about their ultimate short sale activity, which is then aggregated, anonymized, and published following a delay. *See* 88 Fed. Reg. 75,100 (Nov. 1, 2023).

The SEC was required to consider the impacts of the two challenged rules because they are closely related—indeed, they regulate different aspects of the same underlying short sale transactions. When executing a short sale, a seller borrows stock and then sells it at the current market price. *See generally* Securities and Exchange Commission, *Investor Bulletin: An Introduction to Short Sales* (Oct. 29, 2015), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_shortsalesintro. If the market price of the stock falls, short sellers make a profit. If the price rises, they incur a loss. *See id.*; Pet. Br. 8-11.

Because the first step in a short sale is a securities loan, such loans are proxies for the ultimate transactions. This means that the Securities Loan Rule's reporting requirement is, in many instances, duplicative of the Short Sale Rule's disclosure requirement—if a regulated entity discloses a securities loan, they are also disclosing their short sale. Yet the two disclosure regimes do not function in the same fashion: The first rule requires *daily* reporting of individual securities lending activity (and, by proxy, short sales), whereas the second aggregates, anonymizes, and delays the reporting of actual short sales to discourage anticompetitive, copycat trading behavior. *See* 88 Fed. Reg. at 75,132-33.

Taken together, these rules create an inconsistent and irrational regulatory program: While data regarding short sales is aggregated and delayed to promote competition in the markets, other data regarding securities loans—again, the essential first step in a short sale and a proxy for short sales transactions—are reported *daily* and reflect unaggregated, *transaction-level* activity. The Securities Loan Rule thus conflicts with the Short Sale Rule, actively working against its purported aims. *See* Pet. Br. 34.

The interrelationship between these contemporaneous rules was so obvious that the SEC reopened comments on the Securities Loan Rule so "that commenters may consider whether there would be any effects of [the proposed Short Sale Rule] that the Commission should consider in connection with [the proposed Securities Loan Rule]." 87 Fed. Reg. 11,659, 11,659 (Mar. 2, 2022). And many commenters responded by noting the troubling conflicts. *See, e.g.*, Investment Company Institute Comment Letter at 2 (Aug. 17, 2023) ("[T]he proposals will irreparably harm investors and the markets by leading to overlapping and conflicting rules that will disrupt the operation and efficiency of the capital markets."); Managed Funds Association Comment Letter at 3 (Apr. 1, 2022) ("[T]he economic analysis of the Proposed [Securities Loan Rule] purports to treat the public disclosure of loan-by-loan information as an unmitigated benefit to the short selling market, even though the Commission concluded the opposite in the Proposed [Short Sale Rule]");

Alternative Investment Management Association Comment Letter at 3 (Apr. 1, 2022) (pointing out that SEC went "to great lengths to highlight the negative impacts" of overdisclosure in the proposed Short Sale Rule while failing "to contemplate or examine th[o]se concerns" in the Securities Loan Rule).

Yet when the agency issued the two final rules, it did not account for the fact that the Securities Loan Rule conflicted with the Short Sale Rule or that the two rules—when working together—created a completely irrational regime. Nor did the agency respond to comments that noted these troubling interactions. *See Chamber of Com. of the U.S. v. SEC*, 88 F.4th 1115, 1118 (5th Cir. 2023) (vacating rule where SEC failed to respond to comments). These failures render the two challenged rules arbitrary and capricious because the SEC "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and failed to consider a "relevant factor[]," *BNSF*, 62 F.4th at 910 (citation omitted). Those failures are especially egregious given that the SEC finalized the interrelated rules *on the same day*.

B. The challenged rules are arbitrary and capricious for an additional reason. When promulgating the rules, the SEC refused to conduct the necessary combined economic analysis, which would have assessed the aggregate costs of the reporting regime on businesses and regulated entities. *See* 88 Fed. Reg. at 75,695. The SEC is required "to determine as best it can the economic implications of the rule it has proposed." *Chamber of Com. of the U.S. v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005);

Pet. Br. 39. The "best" economic analysis here was straightforward: a cumulative analysis of the rules' costs and benefits. The SEC implicitly recognized as much during rulemaking, as it invited "comment on any potential effects" of the two rules. 87 Fed. Reg. at 11,659. And commenters accepted that invitation, urging the SEC not to "consider these rules in isolation because of the potential costs of regulatory accumulation." James A. Overdahl Comment Letter at 14 (Apr. 1, 2022).

Yet SEC utterly failed that requirement. Indeed, even though the agency had proposed and proceeded to issue the rules in tandem, in the Securities Loan Rule, the SEC asserted it did not need to consider the impact of the closely related Short Sale Rule because it "*remain[ed] at the proposal stage*" when the cost-benefit analysis was completed. 88 Fed. Reg. at 75,694-95 & n.725 (emphasis added). But that could only have been true for mere moments, because the SEC finalized the Short Sale Rule at the same open meeting as the Securities Loan Rule. Nor did the agency conduct the requisite analysis in the Short Sale Rule: It stated only that it had considered "potential economic effects" from the "overlap between the compliance period[s]" of the rules. 88 Fed. Reg. at 75,149. The SEC never properly considered the total, aggregate costs of the two rules. *See* Pet. Br. 39-41.

This was a critical, "serious flaw." *Huawei*, 2 F.4th at 452 (citation omitted). The SEC's assertion that it did not need to consider the actual, total cost of the challenged rules because the agency had decided to propose them in tandem, rather

than sequentially, is illogical. *See Portland Cement*, 665 F.3d at 187 (holding that impending regulatory changes are relevant factors). It ignores information that the agency already had—its own rules. *See Prometheus Radio Project*, 592 U.S. at 427. It ignores the real world in which regulated entities are required to operate—subject to both sets of requirements. And it departs from SEC's prior practice of evaluating economic effects of the first rule when it finalized the second rule at the same open meeting. *See* Pet. Br. 42 (citing 84 Fed. Reg. 33,318, 33,437 (July 12, 2019)). If left standing, the SEC's approach here could create an incentive for agencies to ignore actual obligations on regulated entities in its cost-benefit analyses in the future by proposing many closely related rules at once.

The core obligations of administrative law are not so easily evaded. This Court should correct the SEC's error here and should affirm with the D.C. Circuit that agencies must acknowledge and account for contemporaneous, closely related rulemakings when they consider the impacts of their proposed regulations.

CONCLUSION

This Court should grant the petition and set aside the challenged rules.

Dated: March 12, 2024

Respectfully submitted,

/s/ Roman Martinez
Roman Martinez
Peter E. Davis
Peter A. Prindiville
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2024, the foregoing brief was electronically filed with the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF system. All parties represented by registered CM/ECF users will be served by the CM/ECF system.

/s/ Roman Martinez
Roman Martinez

ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to Rule 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to Rule 25.2.1; and (iii) the document has been scanned for viruses using Microsoft Defender and is free of viruses.

Dated: March 12, 2024

/s/ Roman Martinez
Roman Martinez

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,498 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

This document complies with the typeface requirements and type-style requirements of Federal Rule of Appellate Procedure 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: March 12, 2024

/s/ Roman Martinez
Roman Martinez