ORAL ARGUMENT NOT YET SCHEDULED
No. 24-5105

United States Court of Appeals for the District of Columbia Circuit

INSTITUTIONAL SHAREHOLDER SERVICES, INC.

Plaintiff–Appellee,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Defendant–Appellant,

GARY GENSLER,

Defendant–Appellant,

NATIONAL ASSOCIATION OF MANUFACTURERS

Intervenor–Appellant.

On Appeal from the United States District Court for the District of Columbia (No. 19-cv-3275) (Hon. Amit Mehta)

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE CENTER ON EXECUTIVE COMPENSATION AS AMICI CURIAE SUPPORTING INTERVENOR-APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amici curiae the Chamber of Commerce of the United States of America, Business Roundtable, and the Center On Executive Compensation certify as follows:

A. Parties and Amici

The Chamber of Commerce of the United States of America, Business Roundtable, and the Center On Executive Compensation are participating as amici curiae. All other parties appearing to date in this Court are referenced in the Brief for Intervenor-Appellant, Doc. 2085229, filed on November 15, 2024.

B. Rulings Under Review

The ruling under review is listed in the Brief for Intervenor-Appellant, Doc. 2085229, filed on November 15, 2024.

C. Related Cases

This case was not previously before this Court or any court other than the district court below. Counsel are unaware of any related cases currently pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America, Business Roundtable, and the Center On Executive Compensation state that they are not subsidiaries of any other corporation. Amici are nonprofit trade groups that have no shares or securities that are publicly traded.*

Pursuant to D.C. Circuit Rule 26.1(b), amici identify below their general nature and purpose, insofar as relevant to this litigation:

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

Business Roundtable is an association of over 200 chief executive officers of America's leading companies representing every sector of the U.S. economy and with employees in every state. Business Roundtable works to promote a

* The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

thriving United States economy and economic opportunity for all Americans by advocating for sound public policies.

The Center On Executive Compensation (Center) is part of the HR Policy Association, a public policy advocacy organization representing the chief human resource officers of major employers. The Center is dedicated to developing and promoting principled pay, human capital management, and governance practices while advocating for compensation policies that serve the best interests of shareholders, employees, and other corporate stakeholders. The Center currently represents more than 160 companies across multiple industries.

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GLOSSARY

NAM	National Association of Manufacturers
PVAB	Proxy Voting Advice Business
SEC	Securities Exchange Commission

INTEREST OF THE AMICI CURIAE

An important function of the Chamber, Business Roundtable, and the Center is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. All three organizations regularly file amicus curiae briefs in cases like this one that raise issues of concern to the nation's business community.

Amici have a particular interest in this appeal because many of their members are registrants with the Securities Exchange Commission, have publicly traded shares, are covered by proxy voting advice businesses (PVABs), and are affected by the agency rulemaking at issue in this litigation. Because of the problems amici and their members have identified with PVAB recommendations, the organizations devoted considerable time and energy to supporting the reasonable reforms to the PVAB industry required by the Commission's 2020 rulemaking.

INTRODUCTION

Every year, shareholders of publicly traded companies cast votes by proxy on thousands of important questions, from corporate governance and executive pay to the environment and board composition. The least regulated and most influential parties involved in the shareholder voting process are a few privately owned for-profit companies, known as proxy voting advice businesses (PVABs). In exchange for fees, PVABs provide recommendations to their shareholder clients on how to vote, and those clients almost always vote in line with the PVABs' recommendations. Through "robo-voting" services, PVABs even seek and get their clients' proxies to vote their shares automatically before clients even know the recommendations.

PVABs' ability to command votes in line with their recommendations is not a coincidence; it is their entire business model. PVABs' profitability depends in large part on their ability to persuade customers to vote as PVABs recommend. Investors purchase a PVAB's advice on the understanding that the PVAB's recommendations will be accepted by a majority of shareholders. If shareholders routinely rejected a PVAB's advice, that PVAB would lose credibility in the market, and with it customers.

Companies also purchase PVABs' supposedly separate corporate-governance consulting services. But these consulting services are valuable only because of PVABs' ability to influence the outcome of shareholder votes. Beyond these financial interests, PVABs also promote their own ideological goals and those of their largest customers, whose business they desire to maintain.

PVABs' efforts to obtain shareholder proxies and their enormous influence over proxy voting brings them squarely within any understanding of the Exchange Act's definition of proxy solicitation. Congress enacted Section 14(a) of the Exchange Act to promote transparency and accuracy in the shareholder voting process by making it unlawful to "solicit any proxy" in contravention of the rules established by the Commission. 15 U.S.C. § 78n(a). Since 1956, the Commission has used its explicit authority under the Act to define the phrase "solicit any proxy" to include any communication "reasonably calculated to result in the procurement, withholding, or revocation of a proxy." Accordingly, the Commission has long taken the position that providing proxy advice for a fee is proxy solicitation, even while using the Commission's authority to exempt PVABs from complying with the full scope of its proxy rules.

In 2020, after a bipartisan decade-long information gathering process, the Commission exercised its rulemaking authority to codify its longstanding position as to the meaning of solicitation. *Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) (2020 Rule) (JA__). Amici and their members participated in that thorough process and expressed concerns about PVABs' involvement in the shareholder voting process. As amici and many other commenters explained to the Commission, PVABs often operate under conflicts of interest and issue recommendations based on inaccurate information.

There are two PVABs that control over 90% of the market—Institutional Shareholder Services (ISS), which brought this suit, and Glass Lewis & Co. ISS contended that the Commission lacked authority to amend the regulatory definition of "solicit" to expressly include proxy voting advice for a fee. The district court granted summary judgment to ISS and vacated the Commission's definitional amendment of "solicitation." Op. 34 (JA__). The effect of that decision is that, for the first time since PVABs were created, for-profit companies that exert tremendous influence over the decisions of American public companies are able to operate entirely outside the reach of the proxy rules.

The district court reached that surprising result by making two mistakes, one factual and the other legal. First, the court fundamentally misunderstood how PVABs work. The court viewed PVABs as "disinterested" actors who do not care about particular vote outcomes, Op. 28 (JA__), despite overwhelming evidence that PVABs *are* interested—both financially and nonfinancially—in the outcomes of shareholder votes. Second, the court adopted an unusually narrow definition of solicitation as requiring a stake in the outcome of a shareholder vote, and held that PVABs do not fall within that narrow definition. Both of those conclusions were error, and this Court should reverse.

STATEMENT OF THE CASE

A. Factual Background

1. Section 14a of the Exchange Act

Public markets in the United States are premised on a system of shareholder democracy: the shareholders of publicly traded companies vote on all manner of critical corporate proposals. As securities in public companies grew increasingly dispersed at the turn of the twentieth century, however, it became impossible for shareholder voting on these key issues to take place in person at a shareholder meeting. Instead, shareholders began appointing others to act as their "proxies." *See Proposed Amendments to Rule 14a–8*, 47

Fed. Reg. 47,420, 47,420-47,421 (Oct. 26, 1982). But issues arose with this system, including that shareholders did not know which proposals would be voted on in advance of the shareholder meeting, and so could not effectively manage their proxies. *See* Sheldon E. Bernstein and Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. Chi. L. Rev. 226, 227-228 (1940).

In the wake of the 1929 stock market crash, and in recognition of the growing importance of proxy voting to "corporate suffrage," Congress passed Section 14(a) of the Exchange Act in 1934. H. R. Rep. No. 73-1383, at 13 (1934). Congress sought to ensure that stockholders had "adequate knowledge" about "the major questions of policy, which are decided at stockholders' meetings," so they could cast informed votes. S. Rep. No. 73-792, at 12 (1934). To that end, Congress's "central concern" in passing Section 14(a) was promoting "disclosure"—namely, "prevent[ing] management *or others* from obtaining authorization for corporate action by means of deceptive or inadequate disclosure." *Bus. Roundtable* v. *SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990) (emphasis added).

Congress therefore made it unlawful in Section 14(a) "for any person . . . to solicit any proxy or consent or authorization in respect of any security . . . in

contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78n(a). The Commission has used that delegated authority to adopt comprehensive proxy rules. Those rules prohibit the solicitation of a proxy unless each person solicited has been furnished with a written proxy statement. 17 C.F.R. § 240.14a-3(a). The proxy statement must be filed with the Commission, cannot be false or misleading, and must disclose information such as voting procedures, background on the proposal, and any conflicts of interest. *Id.* § 240.14a-101. Taken collectively, the rules ensure that the United States proxy system "operates with the accuracy, reliability, transparency, accountability, and integrity that shareholders and issuers should rightfully expect." *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982, 42,983 (July 22, 2010).

Congress also provided that "[t]he Commission . . . shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter." 15 U.S.C. § 78c(b). In 1935, shortly after the Exchange Act's passage, the Commission used this authority to define "solicit[ing]" as a "request" for, or the furnishing of, a proxy, consent, or authorization. *SEC Release Notice*, Release No. 378, 1935 WL 29270 (Sept. 24, 1935). In 1956, the Commission refined the definition of "solicit[ing]" to include any

"communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy." *Amendments to Proxy Rules*, 21 Fed. Reg. 577 (Jan. 26, 1956); *see* 17 C.F.R. § 240.14a-1(l)(1)(iii). That definition remained unchallenged in the courts for nearly seven decades.

Over the years, the Commission applied its definition of solicitation to an evolving market. It has repeatedly and consistently found that advice to shareholders on how to vote their proxies qualifies as a solicitation. *See Broker-Dealer Participation in Proxy Solicitation*, 29 Fed. Reg. 341-342 (Jan. 15, 1964) (advice from broker-dealers regarding shareholder voting qualifies as a solicitation if advice will "influence" shareholder vote); *Shareholder Communications*, 44 Fed. Reg. 68,764, 68,770 (Nov. 29, 1979) ("[T]he furnishing of proxy voting advice by [financial advisors]" constitutes a solicitation "subject to the proxy rule[s]."). And in keeping with that understanding, the Commission found that PVABs "solicit" proxies, although it exempted them from the proxy rules' requirements. *See, e.g.*, *Regulation of Communications Among Shareholders*, 57 Fed. Reg. 48,276, 48,280-48,282 (Oct. 22, 1992).

2. The role of PVABs in proxy voting

PVABs trace their roots to the founding of appellee ISS in 1985. 85 Fed. Reg. at 55,126 (JA__). As of today, the PVAB market remains effectively a duopoly: ISS and Glass Lewis control over 90% of the market. U.S. Chamber of Commerce Comment at 1 (JA__). These businesses sell detailed voting recommendations to institutional investors, such as broker-dealers, banks, mutual funds, and pension plans, regarding how to vote their shareholder proxies. 85 Fed. Reg. at 55,083 (JA__). And the industry is a lucrative one. As of 2020, ISS was valued at $2.275 billion. *See* Tyler Udland, S&P Global, *Institutional Shareholder Services To Sell 80% Stake in Deutsch Borse* (Nov. 17, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/institutional-shareholder-services-to-sell-80-stake-todeutsche-b-246-rse-61338447.

PVABs' voting recommendations are often not tailored to each client's unique interests, but instead are derived from criteria that reflect PVABs' own goals and interests. Recommendations are regularly based on either one-size-fits-all "generally applicable benchmark voting policies" or various "specialty voting policies" that are grounded in PVABs' ideological goals and the preferences of PVABs' largest customers. 85 Fed. Reg. at 55,083 (JA__); *see*

American Council for Capital Formation (ACCF) Jan. 27, 2020 Comment at 9-11 (JA__). For example, ISS favors proposals backed by clients like labor-union pension funds and socially responsible investing funds. *See* James K. Glassman & J.W. Verret, *How to Fix Our Broken Proxy Advisory System* 21-22, Mercatus Research (2013); Saba Capital Management Comment at 2 (JA__).

As modern shareholder voting grew increasingly complex, the responsibility for voting corporate shares became more concentrated in the hands of institutional investors. Those investors lack the resources to analyze the thousands of shareholder proposals on which they are called upon to cast votes, so reliance on PVABs exploded. *See* 85 Fed. Reg. at 55,083 (JA__). As of May 2022, Glass Lewis provided voting recommendations to customers managing $40 trillion in assets of publicly traded companies. *Proxy Voting Advice*, 87 Fed. Reg. 43,168, 43,183 (July 19, 2022). ISS keeps its client-asset size confidential but is estimated to have an even greater reach, with 1.65 times the market share of Glass Lewis. *See* Sharfman Comment at 28 (JA__); Shu Comment at 2 (JA__).

PVABs are enormously successful at translating their recommendations into votes. Institutional investors vote according to PVABs' recommendations

more than 95% of the time. *See* Shareholder Communications Coalition Comment at 5 (JA__); Paul Rose, Professor of Law, The Ohio State University, Comment at 2 (JA__) (institutional investors voted on at least 5,000 management resolutions in line with ISS 99.5% of the time). Unsurprisingly then, PVABs have come to play "the role of quasi-regulator, whereby boards feel compelled to make decisions in line with proxy advisors' policies due to their impact on voting." ACCF Jan. 27, 2020 Comment at 55 (JA__).

That success is no accident. PVABs have designed means of facilitating, and in some instances guaranteeing, adherence to their voting recommendations. Most notably, they offer a procedure known as "robo-voting," where in exchange for a fee PVABs automatically cast shareholders' proxies in line with a PVAB's recommendations. 87 Fed. Reg. at 43,183; Chong Shu, *The Proxy Advisory Industry: Influencing and Being Influenced*, Appendix D (Feb. 7, 2021), https://www.cafr-sif.com/2021/files/138%20The%20Proxy%20Advisory%20Industry%20Influencing%20and%20Being%20Influenced.pdf. The mechanics are simple. The PVAB pre-populates an electronic ballot with its recommendations, and then executes that pre-populated form without any further client approval. Exxon Mobil Comment at 30 (JA__). As

of 2022, ISS directly executed more than 12.8 million proxies annually, representing 5.4 trillion shares. 87 Fed. Reg. at 43,183. There is indirect evidence of even more widespread adoption of robo-voting. For example, in 2019, several companies reported that as many as 40% of their outstanding shares were voted in line with an ISS recommendation within two days. U.S. Chamber of Commerce Comment at 12 (JA__).

With the rise of PVABs, two notable issues emerged. First, proxy voting advice frequently contained errors or was incomplete. In recent years PVABs have issued recommendations that reported wildly incorrect net-income figures, misstated director qualifications, and even recommended actions "contrary to longstanding . . . law." ACCF July 10, 2020 Comment at 9-10 (JA__). A 2020 survey by the Society for Corporate Governance found that from 2017 to 2020 *nearly half* of all companies surveyed had been subject to PVAB recommendations riddled with factual or analytical errors. Society for Corporate Governance Comment at 5 (JA__). Because PVABs often issue their recommendations shortly in time before the relevant vote, companies have little to no time to respond and correct inaccurate information. *See* 85 Fed. Reg. at 55,088 (JA__). As a result, investor decision-making suffered.

Second, PVABs' business models led to undisclosed conflicts of interest. PVABs, including ISS, began consulting on corporate governance for some of the same companies on which they issued proxy voting recommendations.[1] That meant PVABs were paid to recommend corporate-governance policies to companies and were also paid to provide voting recommendations to shareholders about such companies' policies. *Concept Release on the U.S. Proxy System; Proposed Rule*, 75 Fed. Reg. 42,982, 43,012 (July 22, 2010). This situation created the risk that PVABs would recommend voting against management policies if the company did not purchase the PVABs' consulting services. One survey of CEOs reported that the "*sole reason* for purchasing consulting services from ISS Corporate Solutions is due to ISS Research's influence over shareholder votes." Center On Executive Compensation Comment at 7 (JA__) (emphasis added); *see* U.S. Chamber of Commerce Comment at 7 (JA__) (58% of issuers reported being approached by the corporate consulting arm of ISS in the same year that the company received a negative vote recommendation).

[1] For instance, PVABs have developed a suite of ESG investing services and corporate-governance rating services. The issuance by PVABs of pro-ESG proxy voting recommendations helps reinforce the importance of these metrics, which in turn attracts customers to the PVABs' own ESG services.

3. The Commission's 2020 rulemaking

With the growing dependency on PVABs, "companies and investors" alike "raised concerns" about their practices, prompting a full evaluation by the Commission of the "role of proxy advisory firms." Chair Mary L. Schapiro, *Opening Statement at the SEC Open Meeting*, SEC (July 14, 2010), https://www.sec.gov/news/speech/2010/spch071410mls.htm. Over a 10-year period, the Commission studied the PVAB industry and sought input from interested parties. *See Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47,416 (Sept. 10, 2019). During this process, parties (including amici) continued to emphasize that there was a high "risk of [PVABs'] providing inaccurate or incomplete voting advice," *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice Release*, 84 Fed. Reg. 66,518, 66,520 (Dec. 4, 2019), and "perhaps the most frequently raised concern about the [PVAB] industry relate[d] to conflicts of interest," 75 Fed. Reg. at 43,011.

The Commission's careful review of PVABs culminated in the 2020 Rule. That rule formalized the Commission's view that "proxy voting advice generally constitutes a solicitation within the meaning of the Securities Exchange Act of 1934," while offering PVABs a way to remain exempt from

the proxy rules' requirements. 85 Fed. Reg. at 55,082 (JA__). To do so, PVABs had to disclose potential conflicts of interest. They also had to provide their recommendations to companies at or prior to the time they disseminated advice to clients, and then alert their clients to any written response by the companies to those recommendations—the so-called Notice and Awareness Conditions. 85 Fed. Reg. at 55,154 (JA__).

In July 2022, after a change in presidential administration, the Commission rescinded the Notice and Awareness Conditions. The Commission left untouched, however, the determination that "proxy voting advice" for a fee is "a solicitation subject to the proxy rules," as well as the conflict-disclosure requirement for PVABs to qualify for an exemption to the proxy rules' requirements. 87 Fed. Reg. at 43,169.[2]

B. Procedural Background

ISS sued to challenge the 2020 Rule, and the National Association of Manufacturers (NAM) later intervened as a defendant. ISS argued that the term "solicit" "refers to actions taken by a person who seeks to *achieve a*

[2] The 2022 rescission of the Notice and Awareness Conditions was vacated by the Fifth Circuit as arbitrary and capricious. *See Nat'l Ass'n of Manufacturers* v. *SEC*, 105 F.4th 802, 806 (5th Cir. 2024). The Commission did not seek further review of that decision.

certain outcome in a proxy vote," which ISS contended is not true of PVABs. ISS Mot. for Summ. J. at 17-18 (JA__). By contrast, the Commission argued that "at the time the Exchange Act was enacted, 'solicit' also could mean '[t]o move to action' or '[t]o urge' or to 'insist upon,'" which covers PVABs' voting recommendations. SEC Mot. for Summ. J. at 22 (JA__) (quoting *Webster's New International Dictionary* 2393 (2d ed. 1934)). The Commission also pointed to its consistent understanding of "solicit" as encompassing proxy advice for a fee, as well as the unanimous approval of courts and Congress. *Id.* at 23-25. Finally, NAM argued that "proxy voting advice to a client . . . easily satisfies" both ISS's and the Commission's preferred definitions of "solicit." NAM Mot. for Summ. J. at 13 (JA__).

In February 2024, the district court granted ISS's motion for summary judgment. The court rejected the definition of "solicit" advanced by the Commission on the ground that it had become "rare" at the time of the Exchange Act's passage. Op. 22-23 (JA__). The court also rejected NAM's argument that "proxy voting advice comfortably fits within" the definition of solicit advanced by ISS because PVABs "'endeavor to obtain' a vote in line with [their] recommendation[s]." Op. 26 (JA__). In the court's view, PVABs are merely "disinterested individual[s]." Op. 28 (JA__).

ARGUMENT

The district court misunderstood how PVABs work. They are not disinterested entities, but for-profit businesses that depend on persuading shareholders to accept their recommendations. They "solicit" shareholders' proxies under any understanding of that term.

I. THE DISTRICT COURT MISUNDERSTOOD THE BUSINESS OF PROXY VOTING ADVICE.

The decision below is premised on an incorrect understanding of PVABs and the voting recommendations they provide. Without citing any record evidence, the district court concluded that PVABs are "disinterested" firms that merely offer "advice" and have no "financial or governance interest[s] in the outcome of a vote." Op. 26-28, 31 (JA__). The record before the Commission demonstrated that PVABs are anything but neutral. They are large, for-profit companies that often have specific policies that they seek to promote through the proxy process. That is why the Commission "reject[ed] . . . as a matter of fact" the argument that proxy firms "do not have an interest in the outcome of matters being voted upon at shareholder meetings." 85 Fed. Reg. at 55,092-55,093 n.141 (JA__).

A. PVABs Have Financial And Nonfinancial Interests In Shareholder Votes.

1. At the most basic level, PVABs have a clear "financial . . . interest" in the outcome of shareholder votes. *See* Op. 31 (JA__). PVABs like ISS and Glass Lewis are *for-profit businesses*. Their business model relies on their ability to attract shareholder clients and persuade them to vote in line with their recommendations. ISS proudly boasts that "[i]ts approximately 4,200 clients include many of the world's leading institutional investors" who "rely on ISS' expertise to help them make informed investment decisions." *About ISS*, https://www.issgovernance.com/about/about-iss/; *see Glass Lewis, Company Overview*, https://www.glasslewis.com/company-overview/ ("We are a trusted ally of more than 1,300 investors globally who use our [services] to help drive value across all their governance activities.").

The proxy-advice industry depends on convincing shareholders that PVABs' recommendations add value and are worth following. Indeed, ISS and Glass Lewis have built their dominance in the market precisely by convincing a large volume of shareholders to repeatedly follow their advice (as their websites tout). *See* ACCF Jan. 27, 2020 Comment at 17 (JA__) (noting that ISS can "essentially mov[e] a quarter of all votes with a simple recommendation change"). Proxy firms market themselves as "expert" voices

who should be consulted and trusted. *See* 84 Fed. Reg. at 66,522. If a PVAB's voting advice were routinely rejected by shareholders, then the PVAB's clients would no longer believe in the credibility and efficacy of its recommendations and would stop using its services.

In addition to their general financial interest, PVABs can have a specific financial interest in issuing voting recommendations that reflect the priorities of their largest clients. "ISS receives a substantial amount of income from labor-union pension funds and socially responsible investing funds, which gives the company an incentive to favor proposals that are backed by these clients" and "may be oriented toward influencing corporate behavior in a manner that generates private returns to a subset of investors." ACCF Jan. 27, 2020 Comment at 17 (JA__) (quotation omitted); *see* Saba Capital Management Comment at 2 (JA__) (proxy advice reflects the "desire to protect existing revenue streams").

Just as importantly, PVABs profit off both ends of the shareholder voting process. For instance, ISS not only advises shareholders on how to vote but also advises companies on corporate governance and even assigns governance ratings. 85 Fed. Reg. at 55,096 (JA__). The cross-cutting financial interests are obvious. If ISS issues pro-ESG proxy voting recommendations,

it drives up demand for ISS's own ESG advising services. And on the flip side, if companies want to try to influence ISS's proxy voting recommendations (whether on ESG or anything else), they can purchase ISS's consulting services. *See* Center on Executive Compensation Comment at 7 (JA__). All of these profit streams depend on PVABs' ability to persuade their clients to accept their recommendations.

2. PVABs also can have nonfinancial interests that they seek to advance through the proxy voting process. Again without citation to the record, the district court stated that PVABs simply "provide *confidential* advice" that is "exclusively for the investor" and is "tailored to the client's interests, not their own." Op. 30-31 (JA__). Not so. PVABs' recommendations are often based on either "generally applicable benchmark voting policies" or various "specialty voting policies." 85 Fed. Reg. at 55,083 (JA__). Each year, ISS updates its benchmark policies in consultation with not only investors, but also public companies and outside service providers like consultants. ISS in its own discretion then comes up with its yearly policies, many of which promote specific objectives. *See* ISS, *United States: Proxy Voting Guidelines Benchmark Policy Recommendations* (Jan. 24, 2024) (ISS Benchmark

Policies), https://www.issgovernance.com/file/policy/latest/americas/USVoting-Guidelines.pdf.

To list just a few of ISS's objectives, it seeks to promote climate accountability, and opposes age limits for independent directors and "egregious" executive compensation. *See* ISS Benchmark Policies at 17, 19, 47. To be sure, shareholders may purchase ISS's proxy advice because they agree with those goals and want advice in line with them. But the point is that PVABs are not disinterested observers—and by the nature of their business, they cannot be. PVABs make recommendations on a wide range of shareholder proposals, from how much a company should pay its executives to whether the company should make ESG or political donation disclosures. PVABs must have some set of policies to guide their many thousands of recommendations. They are value-laden service providers, not neutral intermediaries.

Indeed, the reality that PVABs are financially and ideologically interested in the outcome of shareholder votes was not merely evident from the record—it was a factual finding made by the Commission. The district court claimed otherwise, asserting that PVABs' interests in the outcome of shareholder votes were "not part of the agency's rationale." Op. 27 (JA__).

Not so. The Commission rejected "commenters' assertion that, as a matter of fact, proxy voting advice businesses necessarily do not have an interest in the outcome of matters being voted upon," pointing to record evidence of PVABs' conflicts of interest and "policy-based" recommendations. 85 Fed. Reg. at 55,093 n.141. That finding was subject to "substantial evidence" review, which the district court did not even purport to apply. *See* NAM Br. 35-36.

B. PVABs Actively Seek To Influence Shareholder Voting.

The district court also viewed PVABs as passive participants in the proxy voting process based on a misunderstanding of the mechanics of how PVABs render their advice. It stated that they only "offer[] advice on *how* to vote," nothing more. Op. 27 (JA__). That is not how PVABs operate.

Firms like ISS take several steps to ensure that clients vote in line with their recommendations. To start, "[r]ather than merely responding to client inquiries," proxy firms "invite[]" the communication "through the marketing of their expertise in researching." 84 Fed. Reg. at 47,419. They then offer recommendations crafted to be highly persuasive, providing a "much more detailed" analysis than an investor could hope to produce on its own. 85 Fed. Reg. at 55,124 n.474 (JA__). And PVABs deliver recommendations "shortly before a shareholder meeting," which "enhanc[es] the likelihood that their

recommendations will influence" shareholders' final decision-making. 85 Fed. Reg. at 55,088 (JA__).

PVABs' efforts to influence shareholder voting do not stop with rendering the advice itself. For a fee, they host online voting platforms with pre-populated proxies to facilitate the casting of votes in line with their recommendations. 85 Fed. Reg. at 55,144 (JA__); Chong Shu, *The Proxy Advisory Industry: Influencing and Being Influenced*, Online Appendix D (Feb. 7, 2021), https://www.cafr-sif.com/2021/files/138%20The%20Proxy%20Advisory%20Industry%20Influencing%20and%20Being%20Influenced.pdf. They also offer "robo-voting" services whereby they automatically submit the investor's vote in line with the PVAB's recommendations. *Id.* In practice, "a substantial number of asset managers" use those robo-voting services. New Tide Asset Management Comment at 4 (JA__); *see supra*, pp. 10-11. Every step of the way, PVABs act to ensure that shareholders follow their recommendations.

* * *

The district court overlooked clear evidence in the record of PVABs' financial and ideological interests in proxy voting and instead adopted ISS's self-interested characterization of its business. These errors infected the

district court's analysis of what it means to "solicit" as that term is used in Section 14(a) of the Exchange Act.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT PROXY VOTING ADVICE BUSINESSES DO NOT "SOLICIT" PROXIES.

Those who advise shareholders on how to vote their proxies "solicit" those proxies under any understanding of that term. The district court erred by adopting ISS's made-up definition of "solicitation," under which only those with a vested interest in a particular vote outcome "solicit" proxies. *See* NAM Br. 44. But even under this unduly narrow definition, PVABs solicit proxies by urging shareholders to vote in line with their own interests.

A. The Ordinary Meaning Of The Term Solicitation Includes Proxy Advice.

1. Because PVABs indisputably move shareholders to vote, their recommendations fall within the ordinary meaning of "solicit." Courts give a statute's undefined "terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 160 (2021). When Congress enacted the Exchange Act, there was a recognized broader meaning of "solicit" that included "'to move to action' or 'to urge' or to 'insist upon.'" SEC Mot. for Summ. J. at 22 (JA__) (quoting *Webster's New International Dictionary* 2393 (2d ed. 1934)).

The district court also recited other similar definitions of "solicit," including "[t]o entreat or petition (a person) for, or to do, something; to urge; importune; to ask earnestly or persistently," *The Oxford English Dictionary*, Vol. X, 395 (1933); "[t]o ask earnestly; petition," *Webster's Collegiate Dictionary* 916 (3d ed. 1929); or "[t]o ask for with earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite," *Black's Law Dictionary* 1639 (3d ed. 1933). Op. 20-21 (JA__). All of these definitions have a common thread: asking for or encouraging some sort of action. That is the ordinary meaning of solicitation.

PVABs' communications to shareholders fall within that ordinary meaning. By providing detailed recommendations that tell investors how to vote on every item on a proxy ballot, 85 Fed. Reg. at 55,095 (JA__), PVABs are "inviting" or "urging" or "appealing to" (*e.g.*, persuading or making a case to) investors on how to vote their proxies. PVABs provide those recommendations shortly before the proxy voting deadlines and even automatically cast some investors' votes. *Id.* at 55,144. No one, including ISS, disputes that PVABs influence or "urge" proxy voters "to act" on their recommendations by advising them on how to vote. *See* ISS Mot. for Summ. J. at 20 (JA__) ("There is no question that a proxy advisor's recommendations

might 'influence' the decisions of the investor-client. Why else would the investor hire the proxy advisor?").

2. The district court concluded that "solicit" could not mean "to move to action" because a single dictionary lists it as "now rare." Op. 22-23 (JA__). That is wrong for two reasons. First, as explained above, the common thread among numerous contemporaneous dictionary definitions at the time of the Exchange Act's passage was that "solicit" meant asking, urging, or requesting some action. One usage note should not have carried the day. *See* NAM Br. 44 n.3. Second, other sources confirm that definition was not rare at the time of the Exchange Act's passage. For example, cases that predate the Exchange Act reinforce that a solicitation was understood as "mere advising and effort to influence." *United States* v. *DeBolt*, 253 F. 78, 81 (S.D. Ohio 1918); *see United States* v. *N.Y. Cent. & Hudson River R.R. Co.*, 232 F. 179, 182 (N.D.N.Y. 1916) (defining "solicit" as "to arouse or incite to action").

Nearly a century later, "solicit" is still understood to mean urging or encouraging an action. As the Supreme Court explained just last year, the "terms 'encourage' and 'induce' are among the 'most common' verbs used to denote solicitation." *United States* v. *Hansen*, 599 U.S. 762, 771 (2023). This Court agrees. *Shays* v. *FEC*, 414 F.3d 76, 104 (D.C. Cir. 2005) (interpreting

the term "solicit" in the Bipartisan Campaign Reform Act of 2002 to mean to "suggest" or "recommend"). The district court's conclusion that, by 1934, "urging" or "moving to action" was an obsolete meaning of "solicit" was simply wrong. That was the ordinary meaning of "solicit" 90 years ago, and it remains the ordinary meaning now.

3. Rather than adopt the ordinary meaning of "solicit" that prevailed at the time of the Exchange Act, the district court embraced a narrow definition advanced by ISS that is not found in any dictionary and is not plausible. Specifically, the court adopted ISS's argument that "the words 'solicit any proxy' in Section 14(a) 'plainly refer[] to actions taken by a person who seeks to achieve a certain outcome in a proxy vote,'" as opposed to someone who "urges" action in connection with a proxy. Op. 17-18 (JA__); *see* Op. 26-27 (JA__). According to the district court, in order to "solicit," one must have an "inherent interest in the vote's outcome, whereas a proxy advisor does not." Op. 27 (JA __).

The district court did not point to any commonly accepted meaning of "solicit," whether in dictionaries or other sources, that requires an "inherent interest" in the vote outcome being recommended or urged. The court's definition also defies common sense. Under its definition, a PVAB that

markets itself to shareholders and takes enormous commercial efforts to influence and even cast shareholder votes would not qualify, even though that is the common meaning of solicitation the world over, as any business that hangs a "no-solicitation" sign well knows. Indeed, on the district court's understanding, a statute that applied to "ballot solicitation" would not cover anyone who offers to pick up and cast others' ballots, so long as the offeror is truly neutral as between the candidates. That is not right as a matter of either language or logic.

It is particularly unlikely that Congress would have adopted such a narrow view of "solicit" in the Exchange Act. The broad remedial goal of Section 14(a) was to improve "*communications* with potential absentee voters" by creating a policy of full "disclosure." *Bus. Roundtable*, 905 F.2d at 410. Congress thereby sought to protect shareholders from anyone who by "concealing and distorting facts" could "usurp the franchise" or otherwise "deprive [them] of their voice in the control of the corporation," from "irresponsible outsiders" to "unscrupulous corporate officials." S. Rep. No. 73-1455, at 77 (1934). But according to the district court, everyone from broker dealers to underwriters to PVABs can send "deceptive or inadequate disclosure[s]," 85 Fed. Reg. at 55,087 (JA__), prior to the shareholder vote, so

long as they can claim to be indifferent to the outcome of the vote. That view would rip a hole in Section 14(a) and the interests it serves.

4. The district court should have adopted the common definition of "solicit" urged by the Commission. But even under ISS's and the court's definition, PVABs qualify. Most obviously, PVABs market "robo-voting" services whereby in exchange for a fee they fill out and vote investors' proxies on their behalf. If that is not endeavoring to obtain an outcome, it is hard to see what would be.

PVABs devote enormous resources to persuading shareholders to accept their recommendations for a reason: they have interests in specific vote outcomes. As explained earlier, PVABs are for-profit companies that have policies that they seek to promote through the proxy voting process. ACCF Jan. 27, 2020 Comment at 24 (JA__). Their very business model depends on their voting recommendations being followed and they have enormous financial stakes in achieving their recommended outcomes. *See supra*, pp. 17-20. Just like activist shareholders and management, PVABs have interests in (and seek to influence) the outcomes of shareholder votes.

B. Congress And Courts Have Endorsed The Commission's Consistent View That Proxy Advice Is A "Solicitation."

The district court devoted most of its analysis to parsing dictionary definitions. Op. 20-26 (JA__). The Supreme Court has made clear, however, that a statute's meaning "does not turn solely on dictionary definitions of its component words." *Yates* v. *United States*, 574 U.S. 528, 537-538 (2015). Here, the district court should have placed more weight on Congress's and courts' unanimous embrace of the Commission's broader understanding of the term "solicit."

1. The Commission's longstanding view supports defining the word solicit to encompass proxy voting advice. As the Supreme Court recently explained, courts should afford "respectful consideration" to Executive Branch interpretations of vague terms "issued roughly contemporaneously with enactment of the statute and [that] remained consistent over time." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2258 (2024).

The Commission's consistent interpretation warrants respect here. Since 1956, the Commission has defined a proxy solicitation to include any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy." 21 Fed. Reg. at 577. And since 1964, it has consistently explained that those

who give advice on proxy voting are "soliciting" proxies within the meaning of Section 14(a). 29 Fed. Reg. at 341. That understanding has lasted across decades and presidential administrations. *See, e.g.*, *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. at 43,009. Although the Commission is no longer defending its statutory authority in this case (which is itself a notable departure from the Government's usual practice), the Commission has not withdrawn its many clear pronouncements on this topic. Amici's members have relied on this broad definition of "solicit" in structuring their shareholder voting processes.

2. Congress also has accepted the Commission's understanding of solicit as encompassing proxy voting advice. As NAM explains, Congress has amended Section 14's requirements surrounding proxy "solicitations" on multiple occasions without providing a new or circumscribed definition for the term "solicit." *See* NAM Br. 47-48. That decision not "to revise or repeal the agency's interpretation" while making other changes "is persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

The district court disregarded this evidence of congressional approval because Congress "has not held hearings" on the definition of "solicit" and

there was no "pattern of enforcement against proxy advisors." Op. 32-33 (JA__). But those are imagined requirements. What matters is whether there is a "longstanding administrative interpretation," *Schor*, 478 U.S. at 846, that Congress has left untouched. *See Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013).

3. In addition, no fewer than four courts of appeals have defined the word "solicit" broadly enough to encompass proxy voting advice, despite "narrow[er]" interpretations suggested by parties. *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 767 (5th Cir. 1974). As these courts have explained, a communication is a "solicitation" if it is "'reasonably calculated' to influence the shareholders' votes." *Long Island Lighting Co.* v. *Barbash*, 779 F.2d 793, 796 (2d Cir. 1985) (quoting 17 C.F.R. § 240.14a-1). Proxy voting advice fits comfortably within that definition. *See Gas Nat. Inc.* v. *Osborne*, 624 Fed. Appx. 944, 951 (6th Cir. 2015) (letter to shareholders qualified as a solicitation because it was "mailed close in time to an upcoming shareholder vote and actually urged shareholders not to support the company's slate of nominees"); *Dyer* v. *SEC*, 291 F.2d 774, 777–778 (8th Cir. 1961) (communication was a "solicitation" because it "*might* . . . affect the action of a stockholder in his granting of proxy authority") (emphasis added).

The district court discounted these decisions because they did not involve a "communication by a disinterested individual." Op. 28 (JA__). But as explained earlier, PVABs are not disinterested parties. *See supra*, pp. 17-22. And in any event, the decisions establish a clear rule that applies equally here: "urg[ing]" a shareholder to vote in a certain way qualifies as a solicitation. *Gas Nat. Inc.*, 624 Fed. Appx. at 951.

* * *

The district court should have accorded due respect to the longstanding consensus view of the Commission, Congress, and other courts that the term "solicitation" in Section 14(a) encompasses advice on proxy voting, including PVABs' advice. The district court upended that settled understanding based on an incorrect understanding of the PVAB industry.

CONCLUSION

For these reasons and those set forth in the intervenor-appellant's brief, this Court should reverse the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,469 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Century Expanded BT 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

Date: November 22, 2024

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