No. 24-5105

In the
United States Court of Appeals
for the District of Columbia Circuit

INSTITUTIONAL SHAREHOLDER SERVICES, INC.,
Plaintiff-Appellee,

v.

SECURITIES & EXCHANGE COMMISSION, and GARY GENSLER,
in his official capacity as Chair of the SEC,
Defendants-Appellants,

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 P. Mehta, Judge Presiding

**BRIEF AMICI CURIAE OF
THE COUNCIL OF INSTITUTIONAL INVESTORS, ET AL.,
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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RULE 26.1 DISCLOSURE STATEMENT

The Council of Institutional Investors (CII) is a 501(c)(6) non-profit organization and has no parent company. No publicly held company owns an interest in CII. CII is a "trade association" within the meaning of Circuit Rule 26.1(b).

The additional amici are the California Public Employees' Retirement System, the California State Teachers' Retirement System, the Comptroller of the City of New York, Miller/Howard Investments, Inc., and the Seattle City Employees' Retirement System. Each of these amici is a member of the Council and is described more specifically in the appendix. None of the additional amici has a parent company, and no publicly held company owns an interest in any of the amici.

All parties have consented to the participation of the amici and to the filing of this brief.

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INTEREST OF AMICI CURIAE

The Council of Institutional Investors (CII or Council) is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments, with combined assets under management of approximately $5 trillion. Its associate members include non-U.S. asset owners with more than $4 trillion in assets and a range of asset managers with more than $55 trillion in assets under management. The Council's hundreds of members share a commitment to healthy public capital markets and strong corporate governance. Those members include major long-term shareowners with duties to protect the retirement assets of millions of American workers and their families, including public pension funds with more than 15 million participants—true and real "Main Street" investors who rely on their hard-earned pension funds. The Council's members work to protect those assets through proxy votes, stockholder resolutions, negotiations with regulators, discussions with management and boards, and, when necessary, litigation. The Council is thus a leading voice for effective corporate governance, strong stockholder rights, and

vibrant, transparent, and fair capital markets, and it regularly advocates on behalf of these goals to Congress, the Securities and Exchange Commission (SEC or Commission), and state and federal courts.

The additional amici are the California Public Employees' Retirement System (CalPERS), the California State Teachers' Retirement System (CalSTRS), the Comptroller of the City of New York, Miller/Howard Investments, Inc., and the Seattle City Employees' Retirement System. Each is a member of the Council and described more specifically in the appendix.

The issue before the Court directly implicates the interests of amici.[1] Institutional investors bear, and faithfully execute, fiduciary duties to the millions of individuals on whose behalf they manage funds. Among those fiduciary duties is the obligation to vote fund securities in the best interests of the fund's beneficiaries. However, because

[1] In the interest of full disclosure, the Council notes that appellee Institutional Shareholder Services Inc. (ISS) and another large proxy advisory firm, Glass Lewis & Co. (Glass Lewis), are non-voting associate members. In aggregate, ISS and Glass Lewis pay annual dues representing less than 1.0% of CII's membership revenues. In addition, CII and several of the additional amici are clients of ISS, Glass Lewis, or both. However, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amici or their counsel has made a monetary contribution to the preparation or submission of the brief. The views expressed in the brief are those of amici alone.

institutional investors commonly hold thousands of different portfolio securities, it would be prohibitively expensive and economically inefficient for every institutional investor to perform individually the research and analysis necessary to cast informed votes on the thousands of proposals presented annually at meetings of portfolio companies. To ensure they can fulfill their fiduciary duties to the Main Street investors who are their beneficiaries, institutional investors often contract with proxy voting advisors to obtain independent, timely, and cost-effective research, analysis, and vote recommendations based on voting directives or guidelines selected by the investor. The critical, independent research and analysis performed by proxy advisors, and the vote recommendations they deliver based on criteria and/or custom guidelines selected by the clients they advise, efficiently fulfill a key need for institutional investors and their beneficiaries. Accordingly, amici have a strong interest in ensuring that high-quality independent proxy voting advice remains available in the marketplace and that regulatory actions that threaten the timeliness, cost-effectiveness, integrity, and quality of such advice, like the rule amendments struck down below, are not adopted.

Argument

Proxy advisors effectively and efficiently serve as collective research providers for large numbers of institutional investors, providing an affordable, high-quality alternative to the otherwise-prohibitive cost of analyzing in-house the thousands of ballot proposals decided at shareholder meetings each proxy season. Because proxy advisors do not "solicit" investors' votes in any meaningful sense since they provide such advisory services only when hired by the investors, the district court rightly held that the challenged amendments to Rules 14a-1, 14a-2, and 14a-9 were contrary to law and exceeded the SEC's authority.

The Commission no longer defends those amendments, yet intervenor National Association of Manufacturers (NAM) appeals to revive them. The Court should affirm. There is no valid basis in law or policy for the misbegotten, now-abandoned effort to reclassify proxy voting advice as "solicitation." The district court's well-reasoned decision to set the amendments aside should stand.

If revived, the amendments would put at serious, unwarranted risk the continued availability of timely, high-quality, and independent advice and analysis of issues subject to shareholder vote. Institutional

investors—the clients of proxy advisors and supposed principal beneficiaries of the rule revisions—did not ask for the amendments, do not want them, and do not believe they will facilitate or enhance investors' ability to make informed voting decisions. As Commissioner Herren Lee rightly observed in dissenting from their adoption, the rule amendments were, and have always been, "unwarranted, unwanted, and unworkable." Comm'r Herren Lee, *Paying More for Less: Higher Costs for Shareholders, Less Accountability for Management* (July 22, 2020), https://perma.cc/DF75-YJGP ("Lee Dissent"). Amici agree.

I. BECAUSE PROVIDING VOTING ADVICE AT INVESTORS' REQUEST IS NOT "SOLICITING" A PROXY, THE RULE AMENDMENTS ARE CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS.

A. Providing Voting Advice to an Investor Paying for Such Advice, Based on Voting Guidelines Selected by the Investor, Does Not "Solicit" a Proxy.

Providing proxy voting advice upon request is not a solicitation within the meaning of Section 14(a). *See* 15 U.S.C. §78n(a). An advisor evaluating and providing advice on matters to be voted by proxy according to criteria agreed between the advisor and investor, without any significant interest in the outcome of any vote, does not "solicit" a proxy under any reasonable construction of that term. That conclusion

does not change simply because the advisor is paid for its research and analysis or because it markets its advisory services generally.

The court below reached that correct conclusion via well-reasoned and well-supported application of standard tools and techniques of statutory analysis. Amici raise two additional grounds that buttress the district court's spot-on conclusion.

First, a first-principles analysis of the relations and interactions between investors and proxy advisors signals that no solicitation of a proxy vote is involved in providing voting analysis and advice.

One key factor is that provision of such research and analysis occurs within the context of a contractual agency relationship. Under ISS's standard services agreement, for instance, subscribing investors appoint ISS as their agent for that purpose. In that context, the investor, as principal, directs ISS to provide it, as needed, with research, analysis, and voting recommendations following investor-selected criteria and guidelines. Thus, insofar as any solicitation might be said to occur, it runs the other way—the investor is actively requesting advice from its advisor pursuant to a prior delegation of authority. The advisor, correlatively, is under a duty to provide such advice; it need not request or importune the

investor to execute that responsibility. An agent does not "solicit" its principal when exercising authority that has already been delegated to it. *See, e.g.*, Restatement (Third) of Agency §2.02 cmt. d (once "a principal's manifestation to an agent expresses the principal's wish that something be done, it is natural to assume that the principal wishes, as an incidental matter, that the agent take the steps necessary and that the agent proceed in the usual and ordinary way").

Another crucial factor is that advisors' research and analysis are governed by, and their resulting voting advice tailored to, criteria and guidelines selected, or even crafted, by the investor. Shareholder votes require answering a question; proxy advisors answer a meta-question posed to them by investors: "The principles I follow in proxy voting are X, Y, and Z; given those, how ought I answer this voting question?" Thus, put again in terms of the principal-agent relationship, the investor always retains control over the advisor's advice-giving function and remains responsible for the ultimate vote decision. That is true even though the advisor exercises professional judgment in developing the advice it gives. *See, e.g.*, Restatement (Third) of Agency §1.01 cmt. c.

Relatedly, because advice is individually developed according to investors' criteria, the advisor has no interest in whether it is followed by shareholders when exercising their votes or whether a recommended voting position ultimately prevails. Voting analysis and recommendations are thus crucially distinct from a solicitation: They do not seek a particular response; their function is purely informational, not entreating.

These factors, which complement the term's plain meaning as exhaustively explicated by the court below, confirm that delivering proxy voting advice to a client paying for that advice does not "solicit [a] proxy," 15 U.S.C. §78n(a)(1), nor are the circumstances under which proxy voting advice is delivered ones "reasonably calculated to result in the procurement, execution, or revocation of a proxy." 17 C.F.R. §240.14a-1(*l*)(1)(iii). Extending the definition to encompass proxy voting advice is, accordingly, contrary to law.

NAM ignores all that. Its main argument is that proxy voting advice is a solicitation because some proxy advisors also offer services to exercise investors' delegated voting authority in accordance with voting advice. That makes no sense. Most voted shares are tied to custom voting policies

that investors have crafted for themselves, rather than to an advisor's benchmark or specialty voting policies. And investors can apply streamlined, even custom conditional factors to their voting criteria to best reflect their voting preferences. Given that extremely broad level of available customization, it is not possible to credibly argue that carrying out vote execution at the investor's instruction is solicitation.

In any event, the amendments define solicitation to include provision of proxy voting advice, full stop—irrespective of whether advisors also "seek to assume their clients' voting authority." Aplt. Br. 19. All that is needed is "a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited," where that recommendation is furnished by someone who markets their expertise in providing advice and sells it for a fee. *Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55082, 55154 (Sept. 3, 2020) ("Adopting Release"). Offering or providing vote-execution services is irrelevant to that definition—neither necessary nor sufficient to bring an advisor's activity within its ambit.

The Commission's own analysis confirms the point. Observing that "certain firms involved in the proxy process" exercise "delegated voting authority on behalf of their clients" but "do not supply research, analysis [or] recommendations to support the voting decisions of their clients," the Adopting Release specifically excludes such firms from the amendments' scope. *Id.* at 55126. If the fact proxy advisors might provide vote-execution services incidental to their core advisory function were significant to determining that such assistance constituted solicitation, that exclusion would not exist. It is instead strictly that core advisory function—the provision of paid voting advice—that the amendments target; they thus must be justified on that basis alone. What NAM unjustly derides as "robo-voting" is a red herring, nothing more.

Second, the district court's thorough and well-grounded analysis of the original public meaning of "solicit," when used in the context of proxy voting, is corroborated by actual contemporaneous usage.

Consider, for example, what the New York Court of Appeals meant by "solicitation," as it used that term in *Lawyers' Advertising Co. v. Consolidated Railway Light & Refrigeration Co.*, 80 N.E. 199, 187 N.Y. 395, 399 (1907). Rejecting the corporation's liability for publishing

certain notices prepared by board members—"proceedings by one faction in its contest with another for the control of the corporation"—the court directly tied their nature as "solicitation" to the underlying self-interest of the parties directing their publication: "the purpose of procuring proxies *in their behalf*," that "these proxies should be executed and returned for use by one faction in its contest" for corporate control. *Id.* (emphasis added).

To the same effect is the Iowa Supreme Court's decision in *State ex rel. Pugh v. Meredith*, 167 N.W. 626, 628 (Iowa 1918). Holding that a state statute forbidding corporate agents from soliciting proxies did not nullify otherwise-valid proxies gathered in violation of its prohibition, the court observed that the statute's purpose was "not to disfranchise the member or members so solicited, but rather to prohibit and punish the misuse by agents of their position in the organization to promote the selfish interests of themselves or of others." *Id.*

The lexical connection to self-interest inherent in such usages excludes advisors' work from the category of "solicitation" of proxies as that term was commonly understood at the time of the Exchange Act's

passage.[2] Contrary to NAM's misleading assertions, proxy advisors have no "ideological stake" or other interest in the outcomes of shareholder votes. Aplt. Br. 34. Given the wide diversity of investor-set voting priorities according to which proxy advisors analyze any particular vote, it should surprise no one that—as a matter of routine—ISS and other advisors issue voting recommendations to clients that conflict with other, simultaneously issued recommendations on the same measure made to other clients reached by following those clients' different voting criteria. From the proxy advisors' standpoint, there is no one "correct" way to vote; every recommendation is, instead, made in accordance with voting policies or guidelines that the investor selects, such as one of an advisor's benchmark or specialty policies, or, in the case of a custom policy, that it provides to the advisor to implement on its behalf. Because solicitation,

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[2] Contemporary scholarship describing the landscape of state proxy-voting regulation before 1934 reinforces the point. *See, e.g.*, Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. CAL. L. REV. 881, 886, 889-90, 898-99 (2023) (describing proxy solicitation targeted by pre-Act state legislation as characterized by "savvy actors pursu[ing] shareholders to request—or even purchase—their delegated votes" for their own ends, citing, e.g., Act of May 13, 1865, ch. 236, §1, 1865 Mass. Acts 224, 224, which "specifically prohibited officers and directors from 'asking for, receiving, procuring to be obtained, or using any proxy vote in the corporation'" (cleaned up)).

as Congress used the term, demands an interest in the outcome of the vote in question, disinterested proxy voting advice cannot qualify.

B. Regardless, the SEC's Failure to Explain Its U-Turn on the Meaning of "Solicit" Renders the Amendments Arbitrary and Capricious.

For decades, the SEC had refused to treat voting advice that investors actively request from proxy advisors as constituting a solicitation under Section 14(a). In the rule amendments, the SEC reversed course. Because it neither explained or even acknowledged that interpretive U-turn, its action was arbitrary and capricious, and the amendments cannot validly be revived.

"Agencies are free to change their existing policies," but only so "long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). An agency "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* at 2125-26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)); *accord, e.g.*, *Lone Mtn. Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (insisting that course-changing agencies "must supply a reasoned analysis indicating that prior policies and standards are being

deliberately changed, not casually ignored"). Conversely, an "'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,'" and such a regulation "is itself unlawful." *Encino Motorcars*, 136 S.Ct. at 2126 (quoting *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

Pursuant to decades of agency precedent, the SEC had heretofore treated delivering proxy voting advice actively requested by investors as *not* constituting a proxy solicitation—in contrast to unasked-for voting advice, which did. Thus, in 1964, the SEC confirmed that brokers' proxy voting advice is a solicitation only insofar as they "go[] beyond [their] advisory function" to distribute advice "to persons who have not asked for it," whereas providing such advice "in [their] capacity as adviser to the customer" is not. *Broker-Dealer Participation in Proxy Solicitations*, 29 Fed. Reg. 341, 341 (Jan. 15, 1964). And in 1979, the agency expressly recognized that an advisor furnishing proxy voting advice within the context of a fiduciary relationship with an investor is not soliciting a proxy. *Shareholder Commc'ns, Shareholder Participation in the*

Corporate Electoral Process, and Corporate Governance Generally, 44 Fed. Reg. 68764, 68767 n.11 (Nov. 29, 1979).

Flatly reversing that settled interpretation in adopting the rule amendments, the SEC opined that the same considerations that had previously excluded proxy voting advice from being considered solicitation now provide the critical factors justifying its inclusion under that term. *Compare, e.g.*, Adopting Release at 55091 & n.124 (noting amendments' application "to entities that market their proxy voting advice as a service that is separate from other forms of investment advice to clients or prospective clients and sell such advice for a fee"), *with Broker-Dealer Participation*, 29 Fed. Reg. at 341. Yet neither the Adopting Release, nor any of the regulatory documents that preceded it, provides anything approaching a reasoned justification for the agency's about-face.

Instead, the SEC simply denied historical reality, insisting no change had occurred. *E.g.*, Adopting Release at 55089 (claiming a "long-held Commission view that the furnishing of proxy voting advice generally constitutes a solicitation governed by the federal proxy rules"). It did so principally on the basis of a guidance document, issued without

notice or comment and immediately challenged via the suit underlying this appeal, that equated proxy voting advice with solicitation. That guidance, though, is itself devoid of analysis justifying the significant change in the agency's understanding of what "solicit" means. It merely announces the historically inaccurate assertions about the SEC's prior treatment of proxy voting advice that the Adopting Release later parroted. So, to avoid the obligation to explain its regulatory U-turn, the SEC turned to bootstrapping. *See id.* at 55132 (refusing to treat pre-guidance status quo as baseline for economic analysis, despite guidance conducting no analysis of costs and benefits).

Such legerdemain does not even begin to satisfy the agency's explanatory responsibilities. Having abdicated the duty to explain and justify in the guidance its departure from the prior regulatory regime, the SEC could not justify subsequent action by simply claiming consistency with the guidance's unexplained new policy. "An agency may not depart from a prior policy sub silentio" by degrees any more than it can in a single fell swoop. *Grace v. Barr*, 965 F.3d 883, 898 (D.C. Cir. 2020) (cleaned up). Nor could the SEC simply elide the inconvenient historical fact of its prior rejections of proxy voting advice as constituting

solicitation, as documented in "repeated official agency statements" and "decades of agency practice." *Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 924 (D.C. Cir. 2017). Blinders, as the Court has noted, "may work for horses, but they are no good for administrative agencies." *Id.*

The SEC's refusal to acknowledge historical reality created serious and inexcusable deficiencies throughout the analysis supporting the rule amendments. *See* Part II *infra*. But even if one assumed—incorrectly—that providing proxy voting advice could fall within the meaning of "solicit" as used in Section 14(a), the agency's determined refusal to explain and justify its reversal on that interpretive question provides an independent basis to find the amendments arbitrary and capricious and thus refuse to revive them.

II. REGULATING PROXY VOTING ADVICE AS SOLICITATION IS UNJUSTIFIED, BOTH LEGALLY AND ECONOMICALLY.

The rule amendments have always been a solution in search of a problem. The simple reality is that NAM and the issuers backing its advocacy want to choke off independent advice that assists shareholders in holding management to account. Institutional investors pay for voting advice from proxy advisors precisely *because* they are independent from

management and thus able to report objectively and critically on executive compensation plans, director qualifications and independence, and other issues informing shareholder votes. As the SEC's Investor Advocate sagely observed, "proxy advisors have given asset managers an efficient way to exercise much closer oversight of the companies in their portfolios, and those companies don't like it." Rick Fleming, Speech, *Important Issues for Investors in 2019*, at The SEC Speaks in 2019 (Apr. 8, 2019), https://perma.cc/HZ2N-47GZ.

In 2020, the Commission adopted issuers' result-driven approach: no matter what the evidence showed, its decision to regulate proxy advice as solicitation was a foregone conclusion. That embrace of motivated reasoning led to fundamental, fatal weaknesses in the Commission's rulemaking—a blanket disregard of commenters' evidence challenging its underlying factual premise, a cost-benefit justification that wholly ignored critical aspects of the problem, and readily foreseeable effects that contradict the asserted purpose of taking regulatory action in the first place. The district court, rightly holding that Section 14(a) does not encompass paid proxy voting advice, had no need to pass on these issues. Yet even if not technically alternate grounds for affirmance, they strongly

reinforce the rectitude of the outcome below: Because adopting the amendments was arbitrary and capricious, they should not be reinstated.

A. The Justification for Regulating Proxy Voting Advice as Solicitation Has Been Thoroughly Debunked.

Issuers and management may dislike critical evaluations generated through analytical frameworks different from their own, but critical analysis does not equal "error" simply because it is unwelcome. Nonetheless, the Commission predicated extending the proxy solicitation rules to voting advice on the equation of issuer *complaints* with the existence of actual, material *errors* in proxy voting advice. There is, however, no reliable evidence of any meaningful volume of actual errors in proxy voting advice, as the SEC knew full well. Commenters, including the Council, refuted the Commission's presupposition of such errors, and the Commission made no effort to develop an evidentiary record that could justify regulatory action despite that debunking.

The proposal for extending the proxy rules to voting advice was explicitly motivated by unsubstantiated allegations from issuers and their advocates of significant rates of factual and analytical errors in proxy voting advice:

> [W]e are concerned about the risk of proxy voting advice businesses providing inaccurate or incomplete voting advice … . In light of these concerns, we are proposing amendments to the federal proxy rules that are designed to enhance the accuracy, transparency of process, and material completeness of the information provided to clients of proxy voting advice businesses.

Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, 66520 (Dec. 4, 2019) ("Proposing Release"). That key premise underlying the rule amendments is wholly unsupported.

Even before the Commission issued its proposed rules, it knew the evidence of proxy advisors' purported errors was unreliable and overstated. Commenting on the guidance that preceded the amendments' proposal, the Council detailed its reanalysis of a study by the American Council on Capital Formation (ACCF) that, virtually alone, underpinned issuers' assertions of a pervasive pattern of voting advice errors. CII, Letter to SEC Chairman Clayton et al. (Oct. 24, 2019), https://perma.cc/H4Y3-KK47. The Council showed the ACCF study was itself riddled with miscategorizations and errors—of 139 purported errors alleged, at most 18 represented factual inaccuracies that could be blamed on proxy advisory firms. *Id.* at 2-4. Given that ISS and Glass Lewis issued 31,830 reports during the three-year study period, those 18

examples meant just 0.057% of reports had any actual advisor-generated error. *Id.*

When the Proposing Release relied on nose-counting 2018 supplemental proxy filings expressing issuers' "concerns" about negative vote recommendations, *see* Proposing Release at 66546 (Table 2), the Council repeated that debunking exercise. CII, Letter to SEC Sec. Countryman (Feb. 4, 2020), https://perma.cc/3R8B-N2C3. As with the ACCF study, the Council demonstrated that the Commission overstated the number of asserted factual or analytical errors; that the purported analytical errors actually represented only disagreements over analytic methodology; that issuers made assertions of factual error in just 7 of 84 identified filings; and that most of those assertions were incorrect. *Id.* at 8-18. The ultimate conclusion—that of more than 11,000 proxy advisor reports issued in 2018, factual errors occurred in just 0.06%—aligned strikingly with the multi-year error rate documented in, but obscured by, the ACCF study. *See id.* at 11.

That vanishingly small rate of actual errors—as opposed to management disagreements with advisors' use of methodologies that result in unfavorable recommendations—presents a clearly insufficient

basis for rulemaking. As then-Commissioner Herren Lee observed about the proposing release, "[w]hat is missing" are "data demonstrating an error rate in proxy advice sufficient to warrant a rulemaking. In fact, as the comment file shows, assertions of widespread factual errors have been methodically analyzed and largely disproven." Comm'r Allison Herren Lee, *Statement on Shareholder Rights* (Nov. 5, 2019), https://perma.cc/MDQ7-L2PD. That remains true today: the SEC never produced "any objective evidence of a problem with proxy advisory firms' voting recommendations. No lawsuits, no enforcement cases, no exam findings, and no objective evidence of material error—in nature or number. Nothing." Lee Dissent.

The Commission offered no response to the exhaustive critiques challenging its assumptions regarding "the likelihood of factual errors or methodological weaknesses in proxy voting advice" that underpinned its proposal. Proposing Release at 66525. Instead, it simply whitewashed its dependence on the supposed prevalence of factual errors in voting advice as justification for the amendments. Nonetheless, the reality that it continued to rely on allegations of errors remains. *See, e.g.*, Adopting Release at 55084, 55085, 55102, 55108 (reiterating, serially, the

proposal's goal of "more transparent, accurate, and complete" voting advice); *id.* at 55091, 55141 (describing aim of "enhancing the quality" and "enhancing the accuracy" of voting advice). As the SEC's Investor Advocate observed, "implicit in this framing" is continued "acceptance at face value of the claims of select market participants"—specifically, concerns about transparency that "all came from the issuer community rather than from clients of proxy voting advice businesses and investors." SEC, Office of the Investor Advocate, *Report on Activities FY 2020* at 5 & n.20, https://perma.cc/TC4Z-GCWN ("2020 Advocate Report"). But the Commission "did not evaluate the substance of these claims or distinguish biased opinion from fact, and these claims remain unsupported by empirical evidence." *Id.*

It was inadequate and fundamentally arbitrary, given the Commission's invocation of a purported rate of advice errors as its tentpole justification for regulating proxy voting advice, to adopt the amendments without ever addressing the Council's full-stop contradiction of that principal motivation for taking up the issue in the first place. An agency "must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency

decision," because "the requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result and respond to relevant and significant public comments." *Bloomberg LP v. SEC*, 45 F.4th 462, 476 (D.C. Cir. 2022) (cleaned up). "Nodding to concerns raised by commenters only to dismiss them in a conclusory manner" does not fulfill the agency's responsibility. *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020). Just the opposite—an agency's "failure to address [such] comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense" of a rule. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010). The Commission's refusal to address the fact that a key assumption motivating its regulatory action was contradicted by the evidence establishes that it did not examine all relevant factors in its decision. After all, "[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of [APA] review." *Id.*

B. The Cost-Benefit Analysis Underlying the Amendments Is Fundamentally Flawed.

When "an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render

the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012). Here, two distinct flaws independently doom the analysis justifying the amendments.

First, given the clear evidence disproving the existence of the errors-in-advice "problem" the Commission meant the amendments to solve, their purported benefits are mere phantasms. No matter how much deference might be afforded the Commission's expertise when it weighs actual burdens against actual advantages, it cannot excuse the Commission blinding itself to a nullity on one side of the scale. On this record, there is no basis to assert that the amendments will have any benefit at all, or that their very real costs will not outweigh the phantom claimed benefits.[3]

Second, because it wrongly claimed that proxy voting advice had always been viewed as a solicitation, the Commission refused to

[3] The amendments would impose serious, unwarranted costs on advisors and investors alike: They risk degrading the quality of investors' decision-making processes by delaying dissemination of voting advice and reducing the already-limited time investors have to consider and apply it in reaching voting decisions. They would increase proxy advisors' internal costs by requiring distribution of advice concurrently (or earlier) to issuers and of issuer responses to clients; such costs would inevitably be passed along to investors "through higher fees for proxy advice." Adopting Release at 55139. Those impacts, moreover, are insignificant compared to the risk of compromising the integrity and independence of proxy voting advice, robbing investors of the opportunity to seek critical opinions on matters up for votes.

acknowledge, much less weigh, many significant costs of codifying that new interpretation. It entirely ignored, for instance, the effects on proxy advisors and investors of creating or expanding liability exposure under Rule 14a-9, simply pretending that such effects were already assumed. *E.g.*, Adopting Release at 55095 ("[A]ny impact from codifying this aspect of the definition of a solicitation likely is already reflected in the manner in which proxy voting advice businesses provide their services and the pricing thereof."). Likewise, it never even mentioned, much less analyzed, proxy advisors' and investors' reasonable reliance interests representing investments and expectations generated under the contrary policy regime that prevailed for decades before the amendments' adoption. *See, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 63 (D.C. Cir. 2019) (agency "must" consider "the significance of reliance interests as a potential weight against its decision").

Lacking a valid basis for regulating, the supposed benefits identified in the Commission's analysis are actually null. And it dismissed wholesale entire categories of costs arising from the misclassification of proxy advice as solicitation by claiming, falsely, that no regulatory change was occurring. In both respects, the Commission

"failed to consider an important aspect of the problem," making the amendments' adoption arbitrary and capricious. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 307 (D.C. Cir. 2018).

C. Interfering with the Independence of Proxy Voting Advice Irrationally Contradicts the Amendments' Purported Purpose.

The central purpose of the rule amendments, according to the Commission, is to "ensure that investors . . . who use proxy voting advice have access to more transparent and complete information with which to make their voting decisions." Adopting Release at 55151. But subjecting proxy advice to the amendments' regulatory framework would impair the independence of proxy advisors, reducing the reliability and completeness of voting advice. In addition, the increased regulatory burden would further inhibit new market entrants, limiting competitiveness among an already small universe of advisors. Those outcomes would run directly and irrationally counter to the Commission's asserted aim.

The Adopting Release expressly recognizes the risk that "the independence [of voting advice] would be tainted as a result of a registrant's pre-dissemination involvement." *Id.* at 55112. It claims to

have eliminated that risk "because Rule 14a-2(b)(9)(ii) does not *require* proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback . . . before such advice is disseminated to clients." *Id.* (emphasis added). Yet, at the same time, "providing registrants with the opportunity to review their proxy voting advice in advance" is still "encouraged to the extent feasible," as doing so "furthers the objectives of th[e] rule." *Id.* at 55109 & n.339.

Given that reality, the amendments' potential for corroding the independence and integrity of proxy advisors' analysis through management review is undeniable. It was precisely on that basis, for instance, that the Commission approved rules banning prior review of financial analysts' reports by the subject companies, *see* FINRA Rule 2241(b), a function widely recognized as "comparable" to proxy voting advice. *E.g.*, Chairman Clayton, *Statement at Open Meeting* (Nov. 5, 2020), https://perma.cc/H3GQ-3NK4. There is no meaningful difference in the risks posed by facilitating management's rebuttals of statements they dislike in proxy advisors' recommendations versus in analysis and opinions from independent financial analysts. Yet the Commission never

explained why it does not just allow, but affirmatively *encourages*, something that would be illegal, under rules it enforces, if done by a financial analyst.

Even if the risk of direct management interference might be lower because the rules do not require—though still permit and encourage—issuers' involvement in finalizing advice, pressures generated by the amendments would nevertheless diminish proxy advisors' willingness to recommend votes against management and reduce the amount of robust, independent analysis available to investors. *See* 2020 Advocate Report at 5 (raising concerns that the amendments "enable[] undue interference in the voting process and will likely result in the suppression of dissenting views").

In particular, self-censorship by proxy advisors would result from exposing them to liability for alleged misstatements or omissions in advice under Rule 14a-9. The Commission recognized as much. *E.g.*, Adopting Release at 55121 ("[T]he lack of legal certainty could affect the quality of analyses by proxy voting advice businesses."); *id.* at 55132 ("To the extent that some proxy voting advice businesses did not previously understand their voting advice to constitute solicitations and thus be

subject to Rule 14a-9 liability, it is possible that this heightened awareness could cause those businesses to take more care in preparing their recommendations."). This Court's precedent likewise forecasts self-censorship: unless speakers "are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues . . . will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is hardly less virulent for being privately administered." *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

The rules' predictable chilling effect on proxy advisors, and the resulting diminution in the quality of voting advice, clearly disserve their ostensible goal of providing investors a "robust discussion of views." Adopting Release at 55123. Yet the Commission rejected those considerations out of hand, refusing to give them any weight whatsoever in its analysis. *See id.* at 55140-41 (dismissing concerns that application of Rule 14a-9 liability would "result in a shift to more pro-registrant proxy voting recommendations," "would have a silencing effect on proxy voting advice businesses," or "could reduce the independence of proxy voting advice businesses and the diversity of thought in the market for

proxy advice" because the amendments purportedly "do[] not change the scope or application of existing law").[4] That is a classic example of an agency "fail[ing] to respond to significant points and consider all relevant factors raised by the public comments." *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019).

CONCLUSION

For these reasons, amici curiae the Council of Institutional Investors et al. respectfully request that the Court affirm.

[4] Relatedly, the Commission never addressed the Council's comments suggesting, to lessen these concerns, a Rule 14a-9 safe harbor for proxy advisors satisfying the amendments' procedural requirements. That omission leaves the record without explanation for the Commission's apparent conclusion that the supposed benefit of holding Rule 14a-9 liability over the heads of proxy advisors, despite the absence of evidence of material errors in voting advice, outweighs the cost of the self-censorship that would result.

Respectfully submitted,

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Certificate of Compliance

As required by Federal Rule of Appellate Procedure 32(g), I certify that:

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) because this brief contains 5,985 words, excluding the portions of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac, version 16.93, in 14-point Century Schoolbook font.

Date: January 28, 2025

/s/ Ryan P. Bates
Ryan P. Bates

Certificate of Service

I hereby certify that, on the 28th day of January, 2025, I served a copy of the foregoing Brief Amici Curiae on the attorneys of record for all parties via the Court's electronic filing system.

/s/ Ryan P. Bates
Ryan P. Bates

LIST OF ADDITIONAL AMICI CURIAE

CalPERS, the California Public Employees' Retirement System, is the largest defined benefit public pension fund in the United States, with more than 2 million members and over $500 billion in assets under management. As the nation's largest state public pension fund, CalPERS' mission is to deliver retirement and health care benefits to its over 2 million members who serve, or have served, California at the state, regional, and local level through a career in public service, through responsible investment strategies and efficient management of funds. The use of proxy advisory firms is an integral tool for CalPERS in carrying out its mission. Proxy advisory firms play a critical role in CalPERS' ability to execute proxy votes across the globe in more than 50 markets. CalPERS uses such firms for vote execution, record keeping, regulatory filings and research. CalPERS' ability to exercise its voting rights as a fiduciary of plan assets would be greatly curtailed without the services provided by the proxy advisory firms.

The California State Teachers' Retirement System (CalSTRS) was established for the benefit of California's public school teachers over 100 years ago and is the largest educator-only pension fund in the world, with a global investment portfolio valued at approximately $354.5 billion. We serve the investment and retirement interests of more than 1.04 million plan participants and their beneficiaries. The long-term nature of CalSTRS liabilities, and our responsibility as a fiduciary to our members, make the fund keenly interested in the rules and regulations that govern the securities market. Proxy advisors' services are key in assisting investors when voting high volumes of proxies. CalSTRS alone votes

approximately 9,000 global securities on an annual basis. Technological solutions offered by proxy advisors facilitate the timely execution of votes and allow us to prioritize votes so that unique circumstances and contentious votes are adequately reviewed by internal staff.

The Comptroller of the City of New York is the investment advisor to the five New York City Retirement Systems (NYCRS), which had $286 billion in assets under management as of November 30, 2024. The Comptroller, through its corporate governance and responsible investment team, is responsible for casting proxy votes at NYCRS's portfolio companies consistent with NYCRS's proxy voting guidelines. For the year ending June 30, 2024, the Comptroller voted on 16,804 shareholder meetings in 73 markets globally. This includes 3,056 annual and special meetings for U.S. companies. The Comptroller's ability to faithfully apply NYCRS's proxy voting guidelines rests in large part on the timely receipt of independent, expert research from contracted proxy advisory firms including both ISS and Glass Lewis.

Miller/Howard Investments, Inc. is a 100% employee-owned, independent, SEC-registered investment boutique that began managing equity portfolios for institutions and individuals in dividend-focused portfolios in 1991. The firm invests in quality stocks with strong balance sheets, governance and fundamentals, and the ability to grow dividends. We integrate ESG analysis with financial analysis in our pursuit of companies with strong commitments to high operational standards, the environment, social responsibility, and good governance; we believe doing so provides a framework for achieving suitable risk profiles and long-term investment returns

while building sustainable global economies and markets. We vote all proxies in accordance with our publicly available Proxy Voting Policy. We utilize the services of a proxy voting vendor for the facilitation of electronic voting of ballots, records retention and accessing research reports and recommendations. Miller/Howard affirms each ballot, ensuring that voting decisions are in what we believe are the best interests of our clients, and in alignment with our policies and objectives. We rely on the information from the proxy vendor to enhance our own research when voting ballot items.

The Seattle City Employees' Retirement System (SCERS) stewards $4.4 billion in assets (as of September 30, 2024). Investments are managed to further our mission in fulfilling the promise to deliver the retirement benefits our members have earned and in accordance with the SCERS Investment Policy. This policy establishes the goals of the investment program, the investment beliefs of SCERS, the strategic asset allocation and the responsibilities of the Board of Administration and other parties.