THE CFTC, MQD, AND CLIMATE CHANGE

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In June 2022, the Commodity Futures Trading Commission (CFTC) issued a request for information (RFI) "to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets." The financial regulatory agency is one of several working to address climate-related risks present within the financial system. Given its unique role in regulating derivatives and overseeing commodity markets, the CFTC is working to ensure that the private sector may effectively use those products to address its own climate-related risks. Because such risks threaten the nation's financial stability and private-sector operations, it is imperative the CFTC continue this important work.

In responding to the RFI, opponents of these efforts claimed that any resulting rulemakings will violate the major questions doctrine (MQD). One group of Republican state attorneys general argued that "if CFTC uses its regulatory authority over exchange-traded derivatives to try to address climate change, that effort would constitute the kind of 'extravagant statutory power' that the Supreme Court addressed in West Virginia *[*v. EPA*]."*

This Essay rebuts opponents' claims, explaining why they misconstrue the Supreme Court's MQD inquiry. It further undertakes a rigorous MQD analysis of the policy options the CFTC may pursue and concludes that actions the agency may take are unlikely to run afoul of the doctrine.

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INTRODUCTION

In June 2022, the Commodity Futures Trading Commission (CFTC) issued a request for information (RFI) "to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets."[1] The CFTC is one of several financial regulatory agencies working to address climate-related risks present within the financial system. Given its unique role in regulating derivatives and commodity markets, the CFTC is working to ensure that the private sector may effectively use those products to address their own climate-related risks. Because such risks threaten both the nation's financial stability and private sector operations, it is imperative the CFTC continue this important work.

Soon after the RFI's release, opponents began claiming that any resulting rulemakings would violate the "major questions doctrine" (MQD),[2] as articulated in the 2022 case *West Virginia v. EPA*.[3] One group of Republican state attorneys general (AGs) argued that "if CFTC uses its regulatory authority over exchange-traded derivatives to try to address climate change, that effort would constitute the kind of 'extravagant statutory power' that the Supreme Court addressed in *West Virginia*."[4]

This essay rebuts opponents' claims, explaining how they misconstrue the Supreme Court's MQD inquiry. It further undertakes a rigorous MQD analysis of the policy options the CFTC may pursue and concludes that any actions the agency may take are unlikely to run afoul of the doctrine.

I. BACKGROUND

A. Derivatives and the CFTC

Derivatives are financial contracts for which "prices are determined by, or 'derived' from, the value of some underlying asset, rate, index, or event" and are used by people and corporations in the financial and real economies to manage their risks and effectively plan for

1 Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34856 (June 8, 2022).

2 Letter from Patrick Morrisey, Att'y Gen., W. Va., to Rostin Behnam, Chairman, CFTC (Oct. 7, 2022) [hereinafter AG Letter], https://www.texasattorneygeneral.gov/sites/default/files/images/press/Final%20CFTC%20Letter-c1.pdf [https://perma.cc/HY43-FUNG].

3 *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

4 AG Letter, *supra* note 2, at 4 (footnote omitted) (quoting *West Virginia*, 142 S. Ct. at 2609).

the future.[5] For example, farmers use derivatives to focus on raising crops and livestock, rather than worrying about market fluctuations.[6]

Recognizing a "national public interest" in guaranteeing well-functioning derivatives markets, Congress enacted the Commodity Exchange Act (CEA) and created the CFTC to "promote responsible innovation and fair competition," "deter and prevent . . . disruptions to market integrity," and "ensure the financial integrity of all transactions . . . and the avoidance of systemic risk."[7] Courts have further articulated that Congress enacted the CEA to "protect[] the innocent individual investor . . . from being misled or deceived"[8] and to "prevent undue speculation."[9]

As the D.C. Circuit has noted, the CFTC retains "regulatory jurisdiction over a wide variety of markets in futures and derivatives"[10] and, per the agency's organic statute, has authority "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the CEA[11] and to enforce its provisions.[12]

Beyond its general grant of rulemaking authority, the CFTC also possesses specific authority to regulate certain entities and types of financial transactions:

Market Participants. Participants in the derivatives markets can generally be categorized as large traders, advisors, or brokers. All must

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5 FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 45–46 (2011).

6 *See id.* at xxiv.

7 7 U.S.C. § 5 (2018) ("It is the purpose of this chapter to serve the public interests . . . through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission."); FIN. CRISIS INQUIRY COMM'N, *supra* note 5, at 46.

8 CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1329 (11th Cir. 2002).

9 Hunter v. Fed. Energy Regul. Comm'n, 711 F.3d 155, 157 (D.C. Cir. 2013).

10 Inv. Co. Inst. v. CFTC, 720 F.3d 370, 372 (D.C. Cir. 2013).

11 7 U.S.C. § 12a(5) (2018). *See also* CFTC v. Schor, 478 U.S. 833, 845 (1986) (noting, with regard to this provision that, "[a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference").

12 *See, e.g.*, 7 U.S.C. § 6b-1 (2018) (providing the CFTC enforcement authority over regulations related to swaps); *id.* § 2(c)(2)(B)(iv)(III) (2018) ("Notwithstanding items (cc) and (gg) of clause (i)(II), the Commission may make, promulgate, and enforce such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions of, or to accomplish any of the purposes of, this chapter in connection with the activities of persons subject to subclause (I).").

register with the CFTC[13] and abide by its recordkeeping and reporting rules.[14] For large traders (i.e., swap dealers (SDs) and major swap participants (MSPs)) and brokers (i.e., futures commission merchants (FCMs)), the CFTC may write regulations to ensure their financial health.[15] For advisors (i.e., commodity pool operators (CPOs) and commodity trading advisors (CTAs)), the CFTC may require customer disclosures.[16]

Trading Platforms. There are two relevant types of trading platforms: exchanges and clearinghouses. All must register with the CFTC before operating.[17] Exchanges (i.e., swap execution facilities (SEFs) and designated contract markets (DCMs)) must "minimize sources of operational risk" to ensure their continued operation with minimal downtime[18] and follow acceptable business practices.[19] Clearinghouses (i.e., derivatives clearing organizations (DCOs)) must maintain "adequate financial . . . resources,"[20] maintain eligibility standards for clearing members,[21] and collect margin from members.[22]

Contracts. The CFTC also regulates the trading of derivatives contracts. It may write rules and bring enforcement actions to address fraud and manipulation in the derivatives and underlying spot markets,[23] implement and enforce position limits,[24] and prevent new

13 *See id.* § 6s(a) (requiring swap dealers (SDs) and major swap participants (MSPs) to register); *id.* § 6f(a) (same for futures commission merchants (FCMs)); *id.* § 6n(1) (same for commodity pool operators (CPOs) and commodity trading advisors (CTAs)).

14 *See id.* § 6s(f) (requiring SDs and MSPs to abide by recordkeeping and reporting rules); *id.* § 6f(c) (same for FCMs); *id.* § 6n(3) (same for CPOs and CTAs).

15 *See, e.g.*, *id.* § 6s(b)(4) (providing that the CFTC may write "rules that limit . . . [SDs' and MSPs'] activities"); *id.* § 6s(e) (including but not limited to restricting the risks that they take and imposing capital and margin requirements); *id.* § 6f(b)–(c) (providing that FCMs must meet "such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligation as a registrant" and conduct risk assessments as directed).

16 *See id.* § 6n(1) (permitting the CFTC to write regulations governing CPOs and CTAs).

17 *See id.* § 7a-1(a) (providing that derivatives clearing organizations (DCOs) must register); *id.* § 7b-3(a) (same for swap execution facilities (SEFs)); *id.* § 8(a) (same for designated contract markets (DCMs)).

18 *Id.* §§ 7(d)(20), 7b-3(f)(14).

19 *See id.* § 7a-2(a).

20 *Id.* § 7a-1(c)(2)(B)(i).

21 *See id.* § 7a-1(c)(2)(C) (requiring DCOs to "establish . . . appropriate admission and continuing eligibility standards" for clearing members).

22 *See id.* § 7a-1(c)(2)(D)(iv).

23 *See id.* § 9(1)–(2); *See also* CFTC v. McDonnell, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018) ("CFTC does not have regulatory authority over simple quick cash or spot transactions that do not involve fraud or manipulation." (citing 7 U.S.C. § 2(c)(2)(C)(i)(II)(bb)(AA))).

24 *See* 7 U.S.C. § 6a(a)(2)(A) (2018).

instruments from trading.[25] The CFTC may also decide which swaps (a type of derivative) must be centrally cleared,[26] and enact regulations as it "determines to be necessary" to prevent evasion of that requirement.[27]

B. Climate-Related Financial Risks and Climate-Related Financial Instruments

"Climate-related financial risks are risks to the financial system and its participants from the impacts of climate change."[28] Climate change may inflict harm on the financial system as both physical risks[29] and transition risks,[30] and do so in ways that map directly onto the traditional categories of financial risk.[31] Lenders face credit risk as borrowers may succumb to climate-related losses before their loans are fully repaid, financial market utilities face operational risk as climate-exacerbated natural disasters may damage their technology, and market participants face liquidity risk as counterparties cease to function. As the CFTC notes, climate-related financial risks hold the potential to cause "heightened market volatility, disruptions of historical price correlations, and challenges to existing risk management assumptions."[32]

The Financial Stability Oversight Council (FSOC), created by Congress and charged with "respond[ing] to emerging threats to the stability of the United States financial system,"[33] has declared climate-related financial risks "an emerging threat to the financial stability of the United States."[34] In a 2021 report, FSOC issued thirty-five

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25 *See id.* § 7a-2(c).

26 *See id.* § 2(h)(2)(A).

27 *Id.* § 2(h)(4)(B)(iii).

28 FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK 3 n.9 (2021) [hereinafter FSOC REPORT].

29 *See id.* at 12 (defining physical risks as harms "to people and property arising from acute, climate-related disaster events"). Physical risks include damage to office buildings, damage to the computers that operate exchanges, and reduced worker productivity. *See id.*

30 *See id.* at 13 (defining transition risks as "stresses to certain institutions or sectors arising from the shifts in policy, consumer and business sentiment, or technologies associated with the changes necessary to limit climate change"). Transition risks include losses as fossil fuel infrastructure investments lose value due to new government policies and changes in consumer demand for products produced by net-zero-aligned companies. *See id.*

31 *See id.* at 13 (noting that, as a result of climate change, "the financial sector may experience credit and market risks associated with loss of income, defaults and changes in the values of assets, liquidity risks associated with changing demand for liquidity, operational risks associated with disruptions to infrastructure or other channels, or legal risks").

32 Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34857 (June 8, 2022).

33 *See* 12 U.S.C. §§ 5321–22 (2018) (creating FSOC and dictating its mandate).

34 FSOC REPORT, *supra* note 28, at 3.

recommendations to regulators,[35] and in response, the nation's financial regulators have acted. The federal banking agencies proposed[36] and issued supervisory guidance for managing climate-related risks,[37] the Securities and Exchange Commission (SEC) promulgated a rule requiring public companies to disclose their climate-related financial risks,[38] and the CFTC issued its RFI.[39]

Although climate-related risks are inherent in all financial markets, they are particularly acute in the derivatives markets for three specific reasons. First, derivatives contracts are used like insurance, rather than as investments.[40] Just as a homeowner may pay their insurer a monthly or biannual premium for insurance, one party to a swap may pay the other a monthly fee for coverage in case of a negative credit event.[41] It is easy to imagine, for example, an institution entering into weather derivative contracts only to find that its counterparty's balance sheet is negatively correlated with the risk it is insuring against—that is, it has assets in climate-affected industries or geographic locations.

Second and relatedly, derivatives markets rely heavily on central clearing to avoid crisis when markets deteriorate. Central clearing is the process by which an intermediary—in this case, a DCO—stands between two parties to a contract so that if one fails to complete its end of the deal, the intermediary takes its place.[42] In doing so, the

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35 *See id.* at 118–25.

36 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, PRINCIPLES FOR CLIMATE–RELATED FINANCIAL RISK MANAGEMENT FOR LARGE BANKS (Dec. 16, 2021) (proposing principles); Statement of Principles for Climate–Related Financial Risk Management for Large Financial Institutions, 87 Fed. Reg. 19507 (proposed Apr. 4, 2022) (same from the FDIC); Principles for Climate–Related Financial Risk Management for Large Financial Institutions, 87 Fed. Reg. 75267 (proposed Dec. 8, 2022) (same from the Federal Reserve).

37 *See* Principles for Climate–Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. 74183 (Oct. 30, 2023).

38 *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

39 *See* Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34856 (June 8, 2022).

40 *See* Steven Nickolas, *How Can Derivatives Be Used for Risk Management?*, INVESTOPEDIA (Sept. 29, 2022), https://www.investopedia.com/ask/answers/052615/how-can-derivatives-be-used-risk-management.asp [https://perma.cc/FAR5-C87D].

41 *See* Alexander Braun, *Pricing Catastrophe Swaps: A Contingent Claims Approach*, 49 INS.: MATHEMATICS & ECON. 520, 522 (2011) (explaining that, with catastrophe derivatives, "the protection buyer (fixed payer) agrees to make periodic premium payments to the protection seller (floating payer) in exchange for a predetermined binary compensation payment contingent on the occurrence of a trigger event (covered event) in the covered territory").

42 *See* Andrew Bloomenthal, *What Is a Central Counterparty Clearing House (CCP) in Trading?*, INVESTOPEDIA (Aug, 27, 2024), https://www.investopedia.com/terms/c

intermediary faces counterparty risk in lieu of the parties, including counterparty risk stemming from climate change.[43] Although central clearing is used in many financial markets, it is of the utmost importance in derivatives markets due to their distinctive nature. Whereas one party's failure in equity markets means that the other will not receive purchased stock, for example, a failure in the derivatives markets means that the other party will not receive insurance at the time it needs it most; the lack of central clearing in financial derivatives was one reason the 2007–08 financial crisis was so deep.[44]

Third, many of the derivatives or commodity pools (i.e., investment companies that invest in commodities and derivatives) regulated by the CFTC are based on commodity prices, which are highly affected by climate change.[45] Researchers find that climate change will result in "dramatic increases in the variability of corn yields from one year to the next . . . which could lead to price hikes and global shortages"[46] and will impact "both gas demand and supply," causing price volatility and making pricing predictions difficult.[47] This volatility harms consumers who rely on commodities and commodity pool investors who lack sufficient climate-related risk disclosures.[48]

Unlike climate-related financial *risks*, climate-related financial *instruments* are financial products that exist to help the private sector address and manage their risks from climate change.[49] Many are CFTC-regulated derivatives that allow traders to hedge their climate-related

/ccph.asp#toc-what-are-derivatives-clearing-organizations-dcos [https://perma.cc/DC2M-RBPW].

43 *See id.*

44 *See* Dietrich Domanski, Leonardo Gambacorta & Cristina Picillo, *Central Clearing: Trends and Current Issues*, BANK FOR INT'L SETTLEMENTS Q. REV. 59, 65 (2015).

45 *See* Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34861 (June 8, 2022) (Statement of Commissioner Christy Goldsmith Romero) ("Commodities markets have been impacted by significant climate disasters such as wildfires, hurricanes, flooding, and other disaster events that have caused devastating financial losses to farmers, ranchers, and producers—losses that impact our derivatives markets.").

46 Hannah Hickey, *Warmer Climate Will Dramatically Increase the Volatility of Global Corn Crops*, STAN. DOERR SCH. OF SUSTAINABILITY (June 11, 2018), https://sustainability.stanford.edu/news/warmer-climate-will-dramatically-increase-volatility-global-corn-crops [https://perma.cc/9MHB-QCAS].

47 Jason Bordoff, *Why This Energy Crisis is Different*, FOREIGN POL'Y (Sept. 24, 2021, 12:28 PM), https://foreignpolicy.com/2021/09/24/energy-crisis-europe-gas-coal-renewable-prices-climate/ [https://perma.cc/KC5U-36DJ]; Hickey, *supra* note 46.

48 *See* Mirza Muhammad Naseer, Yongsheng Guo, Tanveer Bagh & Xiaoxian Zhu, *Sustainable Investments in Volatile Times: Nexus of Climate Change Risk, ESG Practices, and Market Volatility*, 95 INT'L REV. FIN. ANALYSIS 1, 3 (2024).

49 *See* Stefano Battiston, Yannis Dafermos & Irene Monasterolo, *Climate Risks and Financial Stability*, 54 J. FIN. STABILITY 1, 3 (2021).

risks.[50] Such instruments include water futures, which can fluctuate based on droughts in specific regions;[51] weather or climate derivatives, which address high-probability, low-risk events such as the temperature in a certain location exceeding some threshold;[52] and catastrophe bonds, which address low-probability, high-risk events related to natural disasters and other catastrophes.[53]

Relatedly, voluntary carbon offsets (VCOs) are used by individuals and corporations to claim reductions in their net greenhouse gas emissions. Offsets are "tradable 'rights' or certificates linked to activities that lower the amount of carbon dioxide (CO2) in the atmosphere,"[54] and fall under the CFTC's jurisdiction thanks to their status as commodities.[55] Although demand for VCOs is increasing as more companies wish to become net-zero, verification that these offsets are permanent, additional, and do not "leak" is an acute problem such that it is practically impossible for purchasers to "realistically verify on their own that the promised reduction in emissions is occurring."[56] As CFTC Commissioner Christy Goldsmith Romero explained, "concerns about transparency, credibility, and greenwashing may hamper the integrity and growth of these markets."[57]

Climate change can significantly affect the use and operation of these instruments, making regulation much more important. For

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50 *See* Christy Goldsmith Romero, Comm'r, CFTC, The CFTC's Role with Voluntary Carbon Credit Markets (July 19, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement071923b [https://perma.cc/2T3J-X5N2].

51 *See Hedging with Water Futures*, CME GRP. (May 26, 2021), https://www.cmegroup.com/education/articles-and-reports/hedging-with-water-futures.html [https://perma.cc/YR96-548E].

52 *See* The Canadian Derivatives Inst., *Hedging Against Climate Risks Using Weather Derivatives*, INV. EXEC. (Sept. 10, 2021, 4:27 PM), https://www.investmentexecutive.com/inside-track_/the-canadian-derivatives-institute/hedging-against-climate-risks-using-weather-derivatives/ [https://perma.cc/5YPK-2KA6].

53 Gary Barnett, CFTC No-Action Letter, CFTCLTR No. 14-152, 2014 WL 7331119 (Dec. 18, 2014) (exempting issuers of insurance-linked securities from CFTC regulations).

54 Angelo Gurgel, *Carbon Offsets*, MIT CLIMATE PORTAL (Nov. 8, 2022), https://climate.mit.edu/explainers/carbon-offsets [https://perma.cc/RHD3-WQ2V].

55 *See* 7 U.S.C. § 1a(9) (2018) (defining the term "commodity" as a variety of specified commodities, "all other goods and articles," and "and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in," with limited exceptions).

56 Alex Fredman & Todd Phillips, *The CFTC Should Raise Standards and Mitigate Fraud in the Carbon Offsets Market*, CTR. FOR AM. PROGRESS (Oct. 7, 2022), https://www.americanprogress.org/article/the-cftc-should-raise-standards-and-mitigate-fraud-in-the-carbon-offsets-market/ [https://perma.cc/AYC2-WHJ8].

57 *See* Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34861 (June 8, 2022) (Statement of Commissioner Christy Goldsmith Romero).

example, water futures may affect purchasers' incentives to conserve,[58] weather derivatives can only work as effective hedges if the issuers adjust metrics in line with changing climate patterns and improved science,[59] and catastrophe bonds operate effectively only when disasters occur in a non-systematic, uncorrelated manner.[60]

C. *The CFTC's Request for Information*

The CFTC issued its RFI in June 2022 "to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets."[61] The RFI covered ten topics divided into thirty-four multipart questions.[62] Eight topics were related specifically to the regulation of registered entities, market participants, and markets generally,[63] and two were related to streamlining the CFTC's internal operations or making them more effective.[64] Most questions sought to inform the CFTC about "how climate-related financial risk may affect . . . the soundness of the derivatives markets" and "how market participants use the derivative markets to hedge and speculate on various aspects of physical and transition risk."[65] Only several questions related to how the CFTC should "adapt its oversight of the derivatives markets," such as those asking "how registrants and registered entities may need to adapt their risk management frameworks" and asking for information about "new or

58 *See* Letter from Ams. for Fin. Reform Educ. Fund & Pub. Citizen to Christopher Kirkpatrick, Sec'y of the Comm'n, CFTC, 6 (Nov. 7, 2022), https://ourfinancialsecurity.org/wp-content/uploads/2022/11/CFTC_Climate-RFI_Americans-for-Financial-Reform-Education-Fund-and-Public-Citizen_2022.pdf [https://perma.cc/7UK3-TCTU] (arguing that purchasers of water futures "have no need to conserve" and encouraging the CFTC to ban such instruments).

59 *See generally* Zulfiqar Ali, Javed Hussain & Zarqa Bano, *Pricing Weather Derivatives in an Uncertain Environment*, 12 NONLINEAR ENG'G 1 (2023) (describing difficulty pricing weather derivatives).

60 *See Facts + Statistics: Catastrophe Bonds and Other Insurance-Linked Securities*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-catastrophe-bonds [https://perma.cc/C27T-36Z3] (alleging that catastrophe "bonds pay high interest rates and diversify an investor's portfolio because natural disasters occur randomly, and are not correlated with other economic risk").

61 Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34856 (June 8, 2022).

62 *Id.* at 34858–60.

63 *Id.* (those topics were Data, Scenario Analysis and Stress Testing, Risk Management, Disclosure, Product Innovation, Voluntary Carbon Markets, Digital Assets, and Financially Vulnerable Communities).

64 *Id.* at 34860 (those topics were Public-Private Partnerships/Engagement and Capacity and Coordination).

65 *Id.* at 34858.

amended derivative products created to hedge climate-related financial risk."[66]

Based on the questions posed, one can imagine the CFTC taking any of nine possible actions in three broad categories (in addition to operational or capacity-building activities not subject to legal challenge):

1. Trading Platforms and Market Participants. The CFTC may (1) update disclosure requirements to include information about climate-related aspects of listed derivatives products, reported transactions, and/or open positions,[67] (2) require incorporation of climate stress tests into risk management processes,[68] (3) require implementation of climate-related risk management policies,[69] or (4) modify minimum capital and liquidity requirements.[70]

2. Product Regulation. The CFTC may (5) update or implement rules to better enable trading of derivatives used to manage or facilitate price discovery of climate-related financial risks[71] or (6) update or implement rules to promote market integrity in climate-affected products.[72]

3. Voluntary Carbon Markets. The CFTC may (7) create a registration framework for market participants,[73] (8) enact rules to enhance the integrity of markets,[74] or (9) conduct oversight of markets to address fraud and manipulation.[75]

D. The Major Questions Doctrine

The MQD traces its lineage to a pair of cases at the turn of the millennium.[76] In 2021, however, the Supreme Court began deploying a more aggressive version of the doctrine, culminating in *West Virginia*

66 *Id.*

67 *See id.* (question two). Such disclosures could be tailored, *see id.* at 34859 (question fifteen), and focus on "governance, strategy, risk management, and metrics and targets," *see id.* (questions fourteen and seventeen).

68 *See id.* at 34859 (question seven).

69 *See id.* (questions eight, nine, ten, and eleven).

70 *See id.* (question twelve).

71 *See id.* (question eighteen).

72 *See id.* (question nineteen).

73 *See id.* at 34860 (question twenty-four).

74 *See id.* (question twenty-two).

75 *See id.* (question twenty-three).

76 *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

v. EPA.[77] In that opinion, Chief Justice John Roberts articulated a two-step test for resolving "certain extraordinary cases" in which "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[78]

First, a court must assess whether a given exercise of authority is "major."[79] It does so by assessing "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion."[80] Put differently, skepticism is due, the Court suggested, when an agency (1) claims "to discover in a long-extant statute an unheralded power" that (2) represents a "transformative expansion in [its] regulatory authority."[81] Some indicators that an agency might be acting in such a manner include regulating outside

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77 *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (finding that "it is a stretch to maintain that [the Public Health Service Act] gives the CDC the authority to impose this eviction moratorium" and "the sheer scope of the CDC's claimed authority under [the act] would counsel against the Government's interpretation"); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) ("Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."); West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) ("To overcome that skepticism, the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner." (quoting Util. Air Regul. Grp. v. EPA (*UARG*), 573 U.S. 302, 324 (2014))).

78 *West Virginia*, 142 S. Ct at 2609 (quoting *UARG*, 573 U.S. at 324). The Court's two-step analysis fails to acknowledge that some agency actions fall outside the MQD's domain such that a "step zero" may be required for which courts must first ask whether an agency action is one for which the MQD analysis should apply. *See* Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 757 (2024) (arguing that "[b]ecause judicial enforcement actions are the core of the executive law enforcement function, the MQD's application to these actions would imperil Article II power"). Those actions for which "there is no separation-of-powers concern," such as enforcement actions brought in federal court to effectuate statutes' plain meanings, should not be subject to the MQD's two-step. *Id.* at 756; *see, e.g.*, SEC v. Coinbase, Inc., No. 23 Civ. 4738, 2024 WL 1304037, at *15 (S.D.N.Y. Mar. 27, 2024) (declining to apply the MQD primarily because "the SEC is exercising its Congressionally bestowed enforcement authority").

79 *See West Virginia*, 142 S. Ct. at 2609.

80 *Id.* at 2608 (alteration in original) (quoting *Brown & Williamson*, 529 U.S. at 160).

81 *Id.* at 2610 (alteration in original) (quoting *UARG*, 573 U.S. at 324). Importantly, Justice Gorsuch's opinion, styled as a concurrence, and which seems to suggest that any one of several indicia—for example, an agency "claim[ing] the power to resolve a matter of great 'political significance'" or "seek[ing] to 'intrud[e] into an area that is the particular domain of state law'"—would be sufficient to independently trigger MQD scrutiny, received the support of only one other Justice, and so does not constitute binding precedent. *Id.* at 2616, 2620–21 (Gorsuch, J., concurring) (final alteration in original) (first quoting *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665; and then quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

of its traditional sphere of expertise,[82] seeking to draw new classes of entities into its regulatory orbit,[83] diverging from its regulatory antecedents,[84] regulating when Congress has tried and failed to enact legislation in keeping with the agency's legal interpretation,[85] and upsetting the traditional balance of federal-state powers.[86] The Supreme Court has also suggested that an agency may be attempting to impermissibly expand its regulatory authority when it cites an "ancillary provision" of a statute "designed to function as a gap filler" and "rarely . . . used in the preceding decades" to justify its action.[87]

Second, in the event a court determines that a given agency action does pose a major question, that action will survive only if the government can point to "clear congressional authorization" for its interpretation, which requires "something more than a merely plausible textual basis."[88]

II. MAJOR QUESTIONS DOCTRINE ANALYSIS OF THE CFTC'S RFI

As mentioned above, the CFTC might pursue regulations of trading platforms and market participants, certain financial products, and voluntary carbon markets in the wake of its RFI. Though a thorough analysis will be required of any rulemaking proposal from the agency,

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82 *See, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015) ("It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."); *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) ("[S]kepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."); Gonzales v. Oregon, 546 U.S. 243, 269 (2006) ("The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.").

83 *See UARG*, 573 U.S. at 324 ("The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.").

84 *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."); *Brown & Williamson*, 529 U.S. at 157 ("[T]he consistency of the FDA's prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.").

85 *See, e.g.*, *Brown & Williamson*, 529 U.S. at 155 (finding that a variety of "actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products").

86 *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.").

87 *West Virginia*, 142 S. Ct. at 2610 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

88 *Id.* at 2609 (quoting *UARG*, 573 U.S. at 324).

below we explain why those categories of regulation are unlikely to merit MQD scrutiny. To assess potential policies under the MQD, we focus on the two core inquiries of the first part of the doctrine's test: (1) whether the actions at issue are "unheralded" or "unprecedented" and (2) whether the actions at issue would work to fundamentally transform the agency's statutory powers.[89] Within this second inquiry, we also address what some have alternatively described as the third prong in determining whether a given action poses a major question: the economic and political significance of that regulatory action.[90]

As a threshold matter, the CFTC possesses the statutory authority "to make and promulgate such rules and regulations as, in [its] judgment . . . , are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the CEA.[91] As the Supreme Court noted with reference to *this provision*,

> [a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is "reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes" of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.[92]

Although it is important to keep this general grant of rulemaking authority in mind, all actions the CFTC may take pursuant to the RFI are also more specifically authorized by additional statutory provisions.[93]

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89 For a brief overview of the MQD test, see Thomas W. Merrill, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy 6 (May 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4437332 [https://perma.cc/3Y63-CW8Q]. *See also* WILL DOBBS-ALLSOPP, RACHAEL KLARMAN & REED SHAW, THE MAJOR QUESTIONS DOCTRINE: GUIDANCE FOR POLICYMAKERS 3 (Nov. 2022); Letter from Anna Rodriguez, Pol'y Couns., Governing for Impact, & Will Dobbs-Allsopp, Dir. of Strategic Initiatives, Governing for Impact, to Krystal Brumfeld, Assoc. Adm'r & Chief Acquisition Officer, Gen. Servs. Admin. 8 (Feb. 10, 2023) [hereinafter GFI Letter], https://governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf [https://perma.cc/CE9T-KQCZ]. Because we conclude that none of the potential policies are likely to pose a major question under the doctrine's first step, we do not proceed to the test's second step (determining whether the agency's interpretation of its statute has been clearly authorized by Congress).

90 *See* Merrill, *supra* note 89, at 6 (identifying whether "the agency action is a big deal" as one of three features characterizing the MQD).

91 7 U.S.C. § 12a(5) (2018).

92 CFTC v. Schor, 478 U.S. 833, 845 (1986) (quoting 7 U.S.C. § 12a(5)).

93 *See* GFI Letter, *supra* note 89. Furthermore, the below analysis only applies to the CFTC's legislative actions taken, such as notice-and-comment rulemakings. *See* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 411 (6th ed. 2019) (identifying "legislative rules" as those that "have the same force and effect as statutes"). To the extent that the agency simply brings enforcement actions under existing law to address climate-related financial risks, no MQD analysis is required.

A. *Efforts to Ensure Derivatives Markets Can Function Safely in Light of Climate-Related Risks Would Not Pose Major Questions*

Climate-related risks are inherent in every financial market, including those regulated by the CFTC. The CFTC can act to address these and other predictable consequences of climate-related financial risks on the derivatives markets without triggering MQD scrutiny.[94]

Such regulations could place familiar obligations on actors already subject to CFTC oversight. For example, sellers of weather derivatives (akin to insurance providers) may have balance sheets that are negatively correlated with the risks they insure against, such that businesses may enter contracts only to find that their counterparties have gone bankrupt just as disaster strikes and they expect payouts. This is not unprecedented: In the years before the 2007–08 financial crisis, many businesses entered into derivatives contracts with American International Group (AIG) to hedge their risks, yet AIG collapsed before those contracts could be paid out.[95] To forestall a repeat of that experience, the CFTC could impose climate-related disclosures and prudential regulations on market participants and trading platforms, including by requiring CPOs and CTAs to disclose to clients the climate risks inherent in particular investments, requiring SDs and MSPs to address climate risks with increased capital or margin requirements, or requiring SEFs and DCMs to address physical risks to their operations.

Further, entire derivatives markets would be at risk if DCOs failed for *any* reason, including as a result of climate-related risks. Derivatives markets rely heavily on central clearing to avoid crises when markets deteriorate, and the vast majority of swaps today are cleared by DCOs, meaning that if DCOs fail to adequately address their climate-related risks, all financial markets may be put at risk. The CFTC may wish to ensure that traders make DCOs aware of their climate risks, ensure that DCOs' algorithms for measuring risks and collecting margin take climate change into account, or conduct examinations of DCOs to ensure they are capable of addressing climate-related risks.

1. Addressing Climate-Related Financial Risks Is Neither "Unheralded" nor "Unprecedented"

New regulation of this kind would follow a "well-trod regulatory path" as the CFTC has an extensive history of using its statutory

94 *See* GFI Letter, *supra* note 89, at 7.

95 *See* Valerie Ross, *What Went Wrong at AIG?*, KELLOGG INSIGHT (Aug. 3, 2015), https://insight.kellogg.northwestern.edu/article/what-went-wrong-at-aig [https://perma.cc/47TT-KSUD].

authorities to impose analogous requirements in similar contexts—a fact which weighs in favor of the agency under the MQD.[96]

Markets rely on information to function effectively. To address situations in which sellers of derivatives (such as weather derivatives) are unable to pay out when needed, Congress requires all registrants to provide disclosures about their risks. For example, Section 6s of the CEA requires SDs and MSPs to "make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of [the SDs and MSPs]" and directs the CFTC to "establish such other standards and requirements as [it] may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the CEA.[97] Similarly, section 6n requires CPOs to "regularly furnish statements of account to each participant . . . in such form and manner as may be prescribed by the Commission."[98]

Using these authorities, the CFTC implemented risk disclosures that allow traders to make informed decisions about whether to trade with a particular counterparty. The agency requires SDs and MSPs to disclose to counterparties the "material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks," and also any "material incentives and conflicts of interest that the [SD] or [MSP] may have."[99] It also allows counterparties of SDs and MSPs to "request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap."[100] Similarly, the CFTC requires that CPOs provide to pool participants a "discussion of the principal risk factors of participation in the offered pool," including "risks relating to volatility, leverage, liquidity, counterparty creditworthiness," and other risks.[101] In sum, were the CFTC to implement climate-related disclosure requirements, it would be building atop these existing regulations.

Further, because mere disclosure of risks is insufficient to ensure a well-functioning market, Congress required the CFTC to implement a variety of prudential regulations that ensure the derivatives markets operate smoothly.[102] These regulations govern, among others, large

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96 *See* GFI Letter, *supra* note 89, at 10.

97 7 U.S.C. § 6s(f)(1)(A) (2018); *id.* § 6s(h)(3)(D) (2018).

98 *Id.* § 6n(3)(B)(4).

99 17 C.F.R. § 23.431 (2024).

100 *Id.*

101 *Id.* § 4.24.

102 *See* EDWARD V. MURPHY, CONG. RSCH. SERV., R43087, WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL REGULATORY POLICY FOR BANKING AND SECURITIES

traders' and trading platforms' "prudential requirements," "minimum capital requirements," and "minimum initial and variation margin requirements" of traders selling coverage;[103] exchanges' system safeguards and efforts to address specific "sources of operational risk;"[104] DCOs' "financial, operational, and managerial resources;"[105] eligibility standards for clearing members;[106] and algorithms for measuring risks and collecting margin.[107] The CFTC routinely makes use of these authorities. It has, for example, issued extensive capital and margin requirements for SDs, MSPs, and DCOs;[108] detailed system safeguard requirements for SEFs, DCMs, and DCOs;[109] and imposed regulations governing DCOs' models that determine the amount of margin required to be collected when entering into swaps.[110] The CFTC also regulates eligibility standards for DCO clearing members and requires DCOs to conduct stress tests monthly.[111] And, perhaps most importantly, the CFTC conducts regular examinations of DCOs to ensure they are fully managing their risks,[112] including by subjecting DCOs to stress tests to ensure their continued operation during times of crisis.[113] Efforts to adjust these regulations to reflect climate-related financial risks would hardly constitute a new regulatory front.

MARKETS 26–27 (2015); *id.* at 1 (defining prudential regulation as "monitoring and regulating the risks that a specific firm engages in").

103 *See* 7 U.S.C. § 6s(b)–(e) (2018). Subsections (d) and (e) provide that the CFTC may not impose prudential, capital, and margin requirements on entities for which there is already a prudential regulator, implying that the CFTC may impose those requirements on other entities. *See also id.* § 6f(b) (prohibiting FCMs from registering unless they "meet[] such minimum financial requirements as the Commission may by regulation prescribe as necessary").

104 *See id.* §§ 7(d)(20), 7b–3(f)(14).

105 *Id.* § 7a–1(c)(2)(B)(i).

106 *Id.* § 7a–1(c)(2)(C)(i).

107 *See id.* § 7a–1(c)(2)(D).

108 *See* 17 C.F.R. § 23.154 (2024) (regulating SDs and MSPs); *id.* § 39.11 (regulating DCOs).

109 *See id.* § 37.1401 (regulating SEFs); *id.* § 38.1051 (regulating DCMs); *id.* § 39.18 (regulating DCOs).

110 *See id.* § 23.154.

111 *See id.* § 39.11(c) (requiring monthly stress tests); *id.* § 39.12 (regulating eligibility standards).

112 *See, e.g.*, Press Release, CFTC, CFTC Divisions Announce Examination Priorities (Feb. 12, 2019), https://www.cftc.gov/PressRoom/PressReleases/7869-19 [https://perma.cc/G6DY-T6Y7] ("DCR examines derivative clearing organizations (DCOs) including those that have been designated as systemically important by the Financial Stability Oversight Council.").

113 *See, e.g.*, U.S. COMMODITY FUTURES TRADING COMM'N, CCP SUPERVISORY STRESS TESTS: REVERSE STRESS TEST AND LIQUIDATION STRESS TEST (2019) (describing CFTC supervision of DCO stress tests).

2. Addressing Climate-Related Financial Risks Is Not a "Transformative Expansion" of the CFTC's Regulatory Authority

The Supreme Court has set a high bar for deciding that some assertion of authority is "transformative," a threshold that future CFTC proposals on this issue are likely to clear.

An agency acting outside of its traditional area of expertise is one indication that it seeks to fundamentally revise its regulatory charter. For example, in *West Virginia*, the Court found that the EPA's interpretation of the statute at issue would pose an "assertion[] of 'extravagant statutory power over the national economy'" in part because the interpretation provided that the agency "alone" would be tasked with "deciding how Americans will get their energy"—a task beyond the agency's traditional remit.[114] Likewise, in *National Federation of Independent Business v. Department of Labor*, the Court invalidated the Occupational Safety and Health Administration's ("OSHA") COVID-19 vaccine-or-test mandate because "[t]he Act empowers the Secretary to set *workplace* safety standards, not broad public health measures," and "no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise."[115] By contrast, here the CFTC would be regulating well within its wheelhouse—ensuring the soundness of derivatives markets—and building on a lengthy history of past rulemakings.[116]

Another indication that an agency's action may pose a major question arises when it seeks to draw a number of new entities under its regulatory umbrella. In *Utility Air Regulatory Group v. EPA*, the Court declined to accept an EPA interpretation that "would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements."[117] The Court noted that under the EPA's proposed regulation, "annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from $12 million to over $1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt

114 West Virginia v. EPA, 142 S. Ct. 2587, 2609, 2612 (2022) (quoting *UARG*, 573 U.S. 302, 324 (2014)).

115 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022); *see also* Gonzales v. Oregon, 546 U.S. 243, 274 (2006) ("The Government's interpretation of the prescription requirement also fails under the objection that the Attorney General is an unlikely recipient of such broad authority, given the Secretary's primacy in shaping medical policy under the CSA, and the statute's otherwise careful allocation of decisionmaking powers.").

116 GFI Letter, *supra* note 89, at 12.

117 *West Virginia*, 142 S. Ct. at 2608 (discussing *UARG*, 573 U.S. at 310, 324).

nationwide."[118] By contrast, the types of regulations proposed here would only apply to entities that the CFTC already regulates.[119]

Regarding economic magnitude, the likely compliance costs resulting from new CFTC proposals would pale in comparison to those of past actions deemed major questions—costs that have figured in the billions, tens or hundreds of billions of dollars annually.[120] By contrast, new regulations would affect a limited number of registered entities and registrants: There exist just 106 swap dealers,[121] 18 DCOs,[122] 18 DCMs,[123] 21 SEFs,[124] and 62 FCMs.[125] Rules could require those 57 trading platforms to undertake analyses of, and spend capital to address, their physical climate risks in the same ways that platforms must for other physical risks under existing regulations. Disclosure requirements would affect the fewer than 1,200 registered CPOs and the 1,230 registered CTAs.[126] Although it is impossible to precisely project compliance costs without knowing what the CFTC will propose, potential CFTC disclosures on registrants would likely be similar to those proposed by the SEC.[127] The SEC estimated that complying with new filing requirements would cost roughly $689 per year for each investment adviser and $11,921 per year for each small fund.[128] Applying this

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118 *UARG*, 573 U.S. at 322.

119 GFI Letter, *supra* note 89, at 11.

120 *See id.* at 13 (examining MQD cases and noting that rules in those cases would have imposed billions of dollars in costs); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (describing that the MQD's economic significance appellation applies to actions with economic impacts in the hundreds or tens of billions of dollars).

121 *See Swap Dealer (SD)*, CFTC (Aug. 16, 2024), https://www.cftc.gov/IndustryOversight/Intermediaries/SDs/index.htm [https://perma.cc/55K9-58RC].

122 *See Derivative Clearing Organizations (DCO)*, CFTC, https://www.cftc.gov/IndustryOversight/IndustryFilings/ClearingOrganizations?dir=ASC&col=Status [https://perma.cc/Y62S-PMS4].

123 *See Designated Contract Markets (DCM)*, CFTC, https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizations?dir=ASC&col=Status [https://perma.cc/J5TG-9DMB].

124 *See Swap Execution Facilities (SEF)*, CFTC, https://www.cftc.gov/IndustryOversight/IndustryFilings/SwapExecutionFacilities?dir=ASC&col=Status [https://perma.cc/T42Z-HKN7].

125 *See Membership and Directories*, NAT'L FUTURES ASS'N, https://www.nfa.futures.org/registration-membership/membership-and-directories.html [https://perma.cc/F4M4-LR84].

126 *See id.*

127 *Cf.* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022) (proposing a rule to require disclosure of environmental and other risks).

128 *See id.* at 36735 (estimating the current and revised burdens per adviser at $11,334.96 and $12,024.09 respectively); *id.* at 36741 (estimating the additional compliance

number to the approximately 2,430 CPOs and CTAs would result in a total cost of roughly $15.5 million—far less than the billions at issue in other instances where the Court has found regulatory action to constitute a major question.

Finally, unlike the "little-used backwater" of a statutory provision at issue in *West Virginia*,[129] the CFTC would promulgate any new regulations in this category pursuant to longstanding, prominent statutory authority. The CFTC has been regulating derivatives markets since its creation in 1974; doing so constitutes the agency's core mission.[130]

B. Efforts on Climate-Related and -Affected Products Would Not Pose Major Questions

Businesses are turning to derivatives—including water futures, weather derivatives, and climate-catastrophe bonds—to address their climate-related risks. Given their increasing importance, the CFTC may appropriately decide that climate-related derivatives deserve special attention to ensure that they are not being manipulated and offer the protection that businesses expect. Other instruments based on climate-affected commodities may also need attention if they face heightened volatility.[131] For example, research shows that climate change will "reduce [corn] yields throughout the world" and result in "dramatic increases in the variability of corn yields from one year to the next."[132] Similarly, "extreme weather events and unusual seasonal patterns have impacted both gas demand and supply," which is "a harbinger of more volatility to come as the world copes with the impacts of climate change and accelerates its transition to clean energy."[133] This volatility harms those in the real economy who rely on commodities, as well as speculators of those commodities. With the usual caveat that a thorough legal analysis requires a specific policy proposal, actions to prevent

costs per small fund as $4,272 for Form N–1A, $4,272 for Form N–2, and $3,377 for Form N–CSR).

129 West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022).

130 *See* 7 U.S.C. § 5(b) (2018) ("It is the purpose of this chapter to serve the public interests . . . through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission.").

131 *See* Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34861 (June 8, 2022) (statement of Commissioner Christy Goldsmith Romero) ("Commodities markets have been impacted by significant climate disasters such as wildfires, hurricanes, flooding, and other disaster events that have caused devastating financial losses to farmers, ranchers, and producers—losses that impact our derivatives markets.").

132 Hickey, *supra* note 46.

133 Bordoff, *supra* note 47.

manipulation or reduce excess volatility are unlikely to pose major questions.

1. Facilitating Trading in Climate-Related and -Affected Products Is Neither "Unheralded" nor "Unprecedented"

Maintaining well-functioning derivatives markets that enable companies to voluntarily hedge risks is the CFTC's core charge, even when those derivatives are climate related. The CFTC could take a range of actions to further this statutorily assigned mission that closely track antecedent rulemakings, including anti-fraud measures, central clearing requirements, and even strict position limits.

First, addressing fraud and market manipulation was the chief reason for the CEA's original enactment.[134] The CFTC has issued anti-manipulation regulations[135] and brings many enforcement actions each year.[136] To the extent markets for climate-related products are being manipulated or traders are being defrauded, the agency may bring new enforcement actions or build atop existing anti-fraud requirements to impose new rules.

Further, to the extent that the CFTC becomes concerned that major sellers of weather or climate derivatives may fail, it could require those derivatives be centrally cleared.[137] Congress authorized such determinations after the 2008 financial crisis and directed the agency to "prescribe rules . . . as . . . necessary to prevent evasions of the mandatory clearing requirements."[138] Using this authority, the CFTC requires many classes of swaps be centrally cleared.[139] Were the CFTC to require, for example, weather derivatives to be cleared on the grounds that doing so would help ensure the integrity of those contracts, it would be following strong precedent.

Lastly, the CFTC may take action to reduce volatility in climate-affected commodity derivatives by implementing strict position

134 *See* Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–26 (2018)) (noting that the description of the Act is, among other things, "to curb manipulation").

135 *See* 17 C.F.R. § 180.1 (2024) (prohibiting "the employment, or attempted employment, of manipulative and deceptive devices").

136 *See* Press Release, CFTC, CFTC Releases Annual Enforcement Results (Oct. 20, 2022), https://www.cftc.gov/PressRoom/PressReleases/8613-22 [https://perma.cc/X5VG-VKW3] (noting that "the CFTC filed 82 enforcement actions" in fiscal year 2022).

137 *See* 7 U.S.C. § 2(h)(2) (2018) (permitting the CFTC to require certain instruments be centrally cleared).

138 *Id.* § 2(h)(4)(A).

139 *See* 17 C.F.R. § 50.4 (2024) (requiring central clearing of, inter alia, fixed-to-floating swaps, basis swaps, forward rate agreements, overnight index swaps, and both North American and European indices).

limits—anti-monopoly measures that limit the percentage of open contracts one trader may hold. Because climate change is likely to affect commodity derivatives through heightened volatility and increased difficulty in predicting prices,[140] the CFTC could impose position limits to reduce that volatility. Congress has prohibited excessive speculation in derivatives markets since 1936,[141] the CFTC has held authority to impose position limits to keep that derivative-driven volatility to a minimum since its creation in 1974,[142] and the agency used this authority most recently in 2021.[143] If the agency finds that existing limits on a derivative are insufficiently stringent to address heightened volatility in light of climate change, it would not be breaking new ground.

2. Facilitating Trading in Climate-Related and -Affected Products Would Not Mark a "Transformative Expansion" of the CFTC's Regulatory Authority

As noted, the bar for concluding under the MQD that an exercise of agency authority is "transformative" is high; many of the rationales outlined in the preceding section—that the CFTC would be acting within its traditional area of expertise, that it would not be drawing new entities under its regulatory reach, and that the statutory provisions cannot be considered "little-used backwater or "ancillary"—apply to this category of potential actions as well.[144]

The economic significance factor also favors the agency. Today, few instruments help manage climate-related risks, and their trading volume is nearly zero. For example, CME offers a single water-based instrument in which no more than ten persons are invested at any one time.[145] Open interest in CME's weather futures is in the hundreds or thousands of contracts per instrument,[146] but those positions are

140 *See* Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34861 (June 8, 2022) (statement of Commissioner Christy Goldsmith Romero) ("Commodities markets have been impacted by significant climate disasters such as wildfires, hurricanes, flooding, and other disaster events that have caused devastating financial losses to farmers, ranchers, and producers—losses that impact our derivatives markets.").

141 *See* 7 U.S.C. § 6a (2018).

142 *See* 17 C.F.R. § 150.2(a) (2024); *The Commission*, CFTC, https://www.cftc.gov/About/AboutTheCommission [https://perma.cc/R99Z-GW8S].

143 *See* Position Limits for Derivatives, 86 Fed. Reg. 3236 (Jan. 14, 2021) (to be codified at 17 C.F.R. pts. 1, 15, 17, 19, 40, 140, 150, 151).

144 *See* discussion *supra* Section II.A.

145 *See Nasdaq Veles California Water Index*, CME GRP. (Sep. 10, 2024), https://www.cmegroup.com/markets/equities/nasdaq/nasdaq-veles-california-water-index.volume.html [https://perma.cc/5F9A-9KLA].

146 *See, e.g.*, *Weather Futures and Options*, CME GRP. (Aug. 27, 2024), http://www.cmegroup.com/daily_bulletin/current/Section24_Weather_Futures_And_Options.pdf [https://perma.cc/QKK2-NHSA] (providing information on weather transactions).

minimal compared to those of more widely traded derivatives.[147] Given their small volumes, no action the CFTC could take regarding these contracts could impose costs at the level required to merit MQD scrutiny.

The volume of climate-*affected* products is larger, but changes would still not constitute a major question. Take position limits, which prevent individual traders from gaining monopolies on open positions in any one instrument such that they may manipulate the price. Were the CFTC to reduce the position limit on Chicago Board of Trade-listed soybean futures from the current limit of 27,300 contracts[148] to 20,000 contracts, one would have lost the chance to make, *at most*, roughly $50 million, based on price volatility year to date.[149] Even then, other traders would likely step in to trade those contracts; because the major questions analysis is based on the change in total private-sector activity and not just losses to specific individuals, limiting some speculators from entering into too many contracts is unlikely to have any net private-sector effect at all.

C. *Efforts to Address the Integrity of Voluntary Carbon Offsets, Their Markets, and Their Derivatives Would Not Pose Major Questions*

Voluntary carbon offsets (VCOs) are "tradable 'rights' or certificates linked to activities that lower the amount of carbon dioxide (CO_2) in the atmosphere" and are used by individuals and corporations to claim reductions in their net greenhouse gas emissions.[150] VCOs are commodities subject to CFTC oversight.[151] Although demand for VCOs is increasing, verification that they are permanent, additional, and do not have leakage is an acute problem; at the moment, it is practically impossible for purchasers to "realistically verify on their

147 *See, e.g.*, *Interest Rate Futures*, CME GRP. (Sept. 27, 2024), http://www.cmegroup.com/daily_bulletin/current/Section09_Interest_Rate_Futures.pdf [https://perma.cc/DKM7-FFJ2] (detailing that interest rate futures transactions trade hundreds of thousands of times daily and have open interest nearing one million contracts).

148 *See* 17 C.F.R. pt. 150, app. E (2024) (prescribing position limits for a variety of contracts).

149 Year to date, closing prices for soybean continuous contracts have ranged between 1,140.75 cents per bushel at the low end to 1,277.00 cents per bushel at the high end as of June 7, 2024. *See Soybean Continuous Contract*, GOOGLE FIN., http://www.google.com/finance/quote/ZSW00:CBOT?window=YTD [https://perma.cc/QK8X-VF5S]. Contracts are 5,000 bushels. *See Soybean Futures and Options*, CME GRP. (Sept. 6, 2024), https://www.cmegroup.com/markets/agriculture/oilseeds/soybean.contractSpecs.html [https://perma.cc/EM3G-LR7R]. If a trader bought low and sold high, they could have made $6,812.50 profit per contract (136.25 cents x 5,000). That is $49,731,250 for 7,300 contracts.

150 Gurgel, *supra* note 54.

151 Fredman & Phillips, *supra* note 56.

own that the promised reduction in emissions is occurring."[152] As one CFTC commissioner explained, "concerns about transparency, credibility, and greenwashing may hamper the integrity and growth of these markets."[153]

Unlike the other possible areas of action stemming from the RFI, the CFTC has begun working to address VCO market integrity. It proposed and requested comments on guidance to DCMs related to the listing of VCO derivatives.[154] This guidance would, if finalized, detail factors that DCMs may wish to consider in order to comply with existing CFTC regulations—including factors around quality standards,[155] delivery points and facilities,[156] and inspection provisions[157]—to ensure the integrity of VCO derivative markets. Beyond this guidance, the CFTC could also take other actions, such as enforcing anti-fraud statutes against project developers and overseeing VCO registries and brokers that mimic the efforts the CFTC takes to ensure the integrity of any novel market. Any such actions are unlikely to pose a major question.

1. Ensuring the Integrity of Voluntary Carbon Offsets, Their Markets, and Derivatives Is Neither "Unheralded" nor "Unprecedented"

To ensure effective derivatives markets that benefit the real economy, Congress authorized the CFTC to delist derivative contracts that fail to deliver useful commodities. The CEA provides that DCMs "shall list [for trade] . . . only contracts that are not readily susceptible to manipulation" and shall "protect markets and market participants from abusive practices committed by any party."[158] The CEA also authorizes the CFTC to approve or deny DCMs' rules (including which contracts

152 *Id.*

153 Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34861 (June 8, 2022) (statement of Commissioner Christy Goldsmith Romero).

154 *See* Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts; Request for Comment, 88 Fed. Reg. 89410 (Dec. 27, 2023).

155 *See id.* at 89417 ("[A] DCM should consider the following VCC commodity characteristics when addressing quality standards in the development of the terms and conditions of a VCC derivative contract: (i) transparency, (ii) additionality, (iii) permanence and risk of reversal, and (iv) robust quantification.").

156 *See id.* at 89418 ("[A] DCM should consider the governance framework and tracking mechanisms of the crediting program for the underlying VCCs, as well as the crediting program's measures to prevent double-counting.").

157 *See id.* at 89419 ("[T]he DCM should consider, among other things, how the crediting program for the underlying VCCs requires validation and verification that credited mitigation projects or activities meet the crediting program's rules and standards.").

158 7 U.S.C. § 7(d)(3), (12) (2018).

they list for trade)[159] and "to alter or supplement the rules of a [DCM] insofar as necessary or appropriate."[160]

The CFTC has previously used this statutory authority to ensure that contracts involving actual delivery of commodities are useful to the real economy. Its regulations require DCMs to "have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery . . . process."[161] It has provided extensive guidance about how DCMs are to draft physically settled contracts, including ensuring that contracts "meet[] the risk management needs of prospective users" and implement "quality standards" so that end users receive the commodities they expect.[162] Given that actual delivery of some VCOs may not result in receipt of usable offsets,[163] were the CFTC to, for example, temporarily pause the listing and trading of VCO derivatives until it has engaged in a thorough and formal review to ensure that delivered VCOs are usable, it would be taking the same kinds of precautionary measures it has in the past. And offering guidance as to how DCMs may avoid such a result—as it proposes to do—is certainly permissible.

Nor would it be "unheralded" for the CFTC to address fraud and manipulation in the creation and trading of VCOs. The CEA makes it

> unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any . . . contract of sale of any commodity in interstate commerce . . . any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate.[164]

The CFTC has previously used this authority to issue rules[165] and bring enforcement actions to stop activities involving fraud and

159 *See id.* § 7a-2(c)(2).

160 *Id.* § 12a(7).

161 17 C.F.R. § 38.250 (2024).

162 17 C.F.R. pt. 38, app. C (2024).

163 *See, e.g.*, Katie Kouchakji, *Do Renewables Need Carbon Markets?*, ENERGY MONITOR (Apr. 5, 2022), https://www.energymonitor.ai/policy/carbon-markets/do-renewables-need-carbon-markets/?cf-view [https://perma.cc/83LD-XHNK] (quoting the CEO of the largest registry as saying they sold offsets based on projects where they later "came to the conclusion that they were no longer additional").

164 7 U.S.C. § 9(1) (2018). *See also* CFTC v. McDonnell, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018) ("CFTC does not have regulatory authority over simple quick cash or spot transactions that do not involve fraud or manipulation. This boundary has been recognized by the CFTC. It has not attempted to regulate spot trades, unless there is evidence of manipulation or fraud." (citing 7 U.S.C. § 2(c)(2)(C)(i)(II)(bb)(AA))).

165 *See, e.g.*, 17 C.F.R. § 180.1 (2024) (prohibiting "the employment, or attempted employment, of manipulative and deceptive devices").

manipulation—including the false reporting of information[166]—in novel commodities when there are derivatives available for trade of those commodities. For example, it has enforced prohibitions against the manipulation of cryptocurrencies[167] and against the reporting of false information in the creation of indices.[168] To be sure, this authority does not allot the CFTC boundless authority to regulate all facets of VCO markets. But it would hardly be "unprecedented" for the CFTC to enforce the CEA's prohibitions against fraud and manipulation in the creation of VCOs.

Similarly, given the CFTC's history of enforcing these prohibitions against commodity brokers, it may use its anti-fraud authority to oversee VCO registries and brokers. Registries and brokers may serve as traders themselves or may serve simply as "delivery points" where VCO ownership is transferred when futures contracts are settled. The CFTC has long subjected delivery points to regulatory scrutiny[169] and would be following a well-laid path were it to write regulations about what constitutes fraud and manipulation in the sale of VCOs and require registries and brokers to comply with those rules.

Finally, it would not be "unheralded" for the CFTC to work with the VCO industry to develop a voluntary regulatory regime through a CFTC-registered self-regulatory organization (SRO). When creating the CFTC in 1974, Congress expected the industry to engage in self-regulation with oversight by the agency,[170] and it allowed "[a]ny association of persons" to register with the CFTC as an SRO.[171] These SROs must have CFTC-approved rules governing their members,[172] and the CFTC may use its rulemaking authority to add or subtract to SROs' rulebooks.[173] An SRO would supplement the CFTC's authority to regulate fraud and manipulation in the cash markets by permitting industry members to voluntarily abide by CFTC-approved standards of conduct for VCO brokers and regulations regarding the operations and

166 *See* 7 U.S.C. § 9 (2018).

167 *See McDonnell*, 287 F. Supp. 3d at 227, 229; *id.* at 227 ("Where a futures market exists for a good, service, right, or interest, it may be regulated by CFTC, as a commodity, without regard to whether the dispute involves futures contracts.").

168 *See, e.g.*, *In re* Citibank, N.A., CFTC No. 16-17, 2016 WL 3035031, *2 (May 25, 2016) ("Respondents . . . committed acts of attempted manipulation . . . and . . .of false reporting of market information.").

169 *See* INT'L SWAPS & DERIVATIVES ASSOC., VOLUNTARY CARBON MARKETS: ANALYSIS OF REGULATORY OVERSIGHT IN THE US 10–13 (2022) (discussing the CFTC's past efforts to regulate futures delivery points).

170 *See* Heath P. Tarbert, *Self-Regulation in the Derivatives Markets: Stability Through Collaboration*, 41 NW J. INT'L L. & BUS. 175, 182 (2021) (discussing legislative history).

171 7 U.S.C. § 21(a) (2018).

172 *See id.* § 21(b).

173 *See id.* § 12a(7).

listing standards of VCO registries. Although the CFTC could not compel membership in a new SRO, VCO registries and brokers could find membership compelling: joining would provide industry members with a full regulatory framework that guarantees compliance with the CEA's prohibitions, and allow them to advertise that fact to customers.

2. Ensuring the Integrity of Voluntary Carbon Offsets, Their Markets, and Derivatives Is Not a "Transformative Expansion" of the CFTC's Regulatory Authority

Once again, the points made in previous sections about assessing whether those categories of action represented a "transformative expansion" of regulatory authority largely apply here as well.[174] A final word on the economic significance of the potential regulations mentioned here: the possible effects of CFTC regulations on VCO markets are small compared to those activities the Supreme Court previously declared major questions. In 2022, annual trading in the market globally was roughly $1.3 billion.[175] The derivatives markets are even smaller; CME, one of the two major derivatives exchanges in the United States, lists just three instruments with roughly 11,200 open contracts at any one time.[176] It is difficult to conceive of a regulatory regime that could result in compliance costs anywhere near the thresholds that have previously qualified agency action for major questions scrutiny.

III. REBUTTING CRITIQUES

Opponents of the CFTC's efforts have criticized it for issuing the RFI and have argued that any initiatives that result will flout the MQD. These claims—mirroring those levied against the Securities and Exchange Commission's efforts to address climate-related financial

174 *See* discussion *supra* subsections II.A.2, II.B.2.

175 *See* MSCI Carbon Markets, *Trove Research Webinar: VCM 2022 in Review*, YOUTUBE at 33:58 (Jan. 18, 2023), https://youtu.be/NZePdMVgulM?si=7t8labzixdgFQXp7.

176 *See CBL Global Emissions Offset*, CME GRP., https://www.cmegroup.com/markets/energy/emissions/cbl-global-emissions-offset.volume.html [https://perma.cc/4CCN-HNSX] (showing open interest of roughly 4,600 contracts as of September 8, 2024); *CBL Nature-Based Global Emissions Offset*, CME GRP., https://www.cmegroup.com/markets/energy/emissions/cbl-nature-based-global-emissions-offset.volume.html [https://perma.cc/X3TW-9K38] (showing open interest of roughly 4,700 contracts as of September 8, 2024); *CBL Core Global Emissions Offset (C-GEO)*, CME GRP., https://www.cmegroup.com/markets/energy/emissions/cbl-core-global-emissions-offset-c-geo.volume.html [https://perma.cc/7K35-AHSX] (showing open interest of 26 contracts as of September 8, 2024).

risks[177]—charge that, because the Supreme Court in *West Virginia* declared climate change to be a major question, and because Congress never enacted statutes permitting financial regulators to address climate change, the CFTC's activities that affect climate change violate the MQD.[178] For example, two members of Congress wrote in a letter responding to the agency's RFI that "the CFTC is seeking justification to expand its jurisdictional scope and take part in the Biden administration's Green New Deal push."[179] A scholar similarly argued in a comment letter that the CFTC "cannot go too far down the climate change, environmental regulation path without considering limits on its statutory authority [or] its rulemaking will be successfully challenged in court."[180]

Patrick Morrisey, the Attorney General of West Virginia who brought *West Virginia v. EPA*,[181] and twenty other AGs have levied the

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177 The SEC finalized a rule requiring publicly traded companies to disclose how they are affected by climate change. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024). Opponents declared that the rule likely violates the MQD on the basis that "the SEC's policy objective is to impose environmental regulation through the guise of corporate disclosures" and to "seek to change company behavior to focus more on greenhouse gas emissions and climate risk oversight," Christina Thomas, Andrew Olmem & Katelyn Merick, *Supreme Court Decision Casts Doubt on SEC's Climate Proposal and Other Regulatory Initiatives*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 12, 2022), https://corpgov.law.harvard.edu/2022/07/12/supreme-court-decision-casts-doubt-on-secs-climate-proposal-and-other-regulatory-initiatives/ [https://perma.cc/KY5V-H4GT], "would convert the federal securities regulator into a greenhouse-gas enforcer looking over the shoulders of exchange-listed companies' directors," Bernard S. Sharfman & James R. Copland, *The SEC Can't Transform Itself Into a Climate-Change Enforcer*, WALL ST. J. (Sept. 14, 2022, 6:31 PM), https://www.wsj.com/articles/securities-exchange-sec-climate-change-esg-major-questions-doctrine-west-virginia-v-epa-supreme-court-disclosure-rule-11663178488 [https://perma.cc/AQ4A-TFK8], and would allow "institutional investors and climate activists to impose, monitor and enforce climate targets on publicly traded companies, without obtaining explicit authorization from Congress," Rupert Darwall, *Proposed Climate Rule Is Bigger, Badder Deal than Manchin-Schumer Climate Bill*, THE HILL (Oct. 15, 2022, 8:00 AM), https://thehill.com/opinion/energy-environment/3688593-proposed-climate-rule-is-bigger-badder-deal-than-manchin-schumer-climate-bill%EF%BF%BC/ [https://perma.cc/9UVL-2BWN].

178 *See, e.g.*, AG Letter *supra* note 2, at 1, 3–5 (arguing that CFTC climate-related rules would violate the MQD without a congressional mandate); Letter from Reps. Byron Donalds & Don Bacon, Members of Cong., to Rostin Behnam, Chairman, CFTC (Sept. 16, 2022) [hereinafter Donalds & Bacon Letter] (on file with CFTC) ("Although the request is being presented as a neutral fact-finding endeavor designed to reduce risk and ensure financial integrity, the supplemental information subsections suggest the CFTC is seeking justification to expand its jurisdictional scope and take part in the Biden administration's Green New Deal push.").

179 Donalds & Bacon Letter, *supra* note 178.

180 Letter from David R. Burton, Senior Fellow in Econ. Pol'y, The Heritage Found., to Christopher Kirkpatrick, Sec'y, CFTC (Aug. 8, 2022) (on file with CFTC).

181 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2597 (2022).

most detailed of such charges.[182] They argue that the CFTC "is abandoning its mandates in favor of the present administration's political goals by assuming the mantle of an environmental regulator,"[183] and evaluate the CFTC's proposal against factors the Supreme Court used in *West Virginia*.[184] These arguments, while detailed, contain significant flaws.

The AGs claim, for example, that the CFTC would be exercising "extravagant statutory power" impermissible under the MQD were it to undertake the activities contemplated in the RFI because exchange-traded derivatives contracts have such a large notional value.[185] Citing data showing that U.S. exchanges traded "15.4 billion derivatives contracts . . . worth nearly $100 trillion in traded value" in 2021,[186] the AGs claim that regulations by the CFTC would "have a substantial economic impact."[187] But the total size of a regulated market is the wrong way of determining "economic significance" under the MQD. Note, for example, that in its MQD decision invalidating the Biden administration's student debt relief plan, the Supreme Court contemplated the program's federal budget impact—estimated between $430 billion and $519 billion—rather than the student loan market's overall size, $1.75 trillion.[188] Rather than taking notice of the aggregate size of a regulated market, the test instead looks to the *change* in expenditures resulting from the regulation, including whether the rule "would result in substantial compliance costs."[189] By the AGs' logic, *any* CFTC regulation of the derivatives market would implicate the MQD.

The AGs next claim that "Congress has already considered whether CFTC's power should encompass climate policy—and it rejected such an expansion" when it considered but declined to enact the American Clean Energy and Security Act of 2009 (colloquially known as "Waxman-Markey"), a bill designed to transition the United

182 *See generally* AG Letter, *supra* note 2.

183 *Id.* at 4–5.

184 *See id.* at 3–5.

185 *Id.* at 4.

186 *Id.* (citing *Global Futures and Options Trading Hits Another Record in 2021*, FIA (Jan. 19, 2022), https://www.fia.org/fia/articles/global-futures-and-options-trading-hits-another-record-2021 [https://perma.cc/S67X-H564]).

187 *Id.* at 4.

188 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2372–73 (2023); *see also* Alicia Hahn & Jordan Tarver, *2024 Student Loan Debt Statistics: Average Student Loan Debt*, FORBES (April 18, 2024, 3:16 AM), https://www.forbes.com/advisor/student-loans/average-student-loan-debt-statistics/ [https://perma.cc/CQ76-LRU9].

189 Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1053–54 (2023).

States to a net-zero carbon economy.[190] Although the Supreme Court has suggested that the MQD may apply when an agency promulgates a policy that Congress has considered and expressly rejected,[191] neither this bill nor any other that Congress has considered and rejected would have directed the CFTC to promulgate any of the rules contemplated in the RFI. Waxman-Markey's CFTC-related provisions would only have provided the agency with the authority to regulate energy commodity derivatives, credit default swaps, and other over-the-counter derivatives—not "climate policy."[192] And although it did not enact Waxman-Markey, Congress ultimately granted the agency those same authorities in the Dodd-Frank Act.[193] In short, Congress has never rejected any legislation that would have required the CFTC to address climate-related financial risks.

Third, the AGs claim that "any CFTC policy or rulemaking that would aim to produce an 'orderly transition to a low-carbon economy' . . . would constitute a 'fundamental revision' of the [CEA],"[194] and that addressing climate change is "an area far afield from the Commission's traditional realms of expertise."[195] But, of course, the CFTC necessarily regulates across a broad range of issue areas. Overseeing derivatives and futures markets requires the agency to regulate financial products relating to crypto assets, interest rates, currencies, agriculture, livestock, weather, precious metals, energy—and, yes, climate. This is not a function of the CFTC seeking to aggrandize its own powers but to regulate financial products that either expressly hedge against climate transition risks or that possess risk profiles that will change alongside a warming climate. For example, one exchange offers a suite of weather-related instruments, including several that relate

190 AG Letter, *supra* note 2, at 4 (citing American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009)).

191 West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) ("[W]e cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times." (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000))).

192 *See* H.R. 2454 § 351 (giving the CFTC regulatory authority over energy commodity derivatives); *id.* § 354 (requiring certain swaps be centrally cleared); *id.* § 355 (imposing limitations on purchasing credit default swaps).

193 *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (implementing provisions similar to those in note 192, *supra*).

194 AG Letter, *supra* note 2, at 4 (citation omitted) (first quoting Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34858 (June 8, 2022); and then quoting *West Virginia*, 142 S. Ct. at 2596).

195 *Id.* at 5 (citing King v. Burwell, 576 U.S. 473, 486 (2015)).

to average daily temperature[196] or water price,[197] and previously listed contracts related to snowfall and rainfall across the United States.[198]

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New CFTC regulatory initiatives cognizant of the realities of a warming climate would not aim to achieve a certain quantity of emissions reductions, but rather would seek to ensure the safety and integrity of derivatives and futures markets—the agency's core charge. In short, so long as it acts with the purpose of effectuating its legal mandates and complies with existing laws and analytical requirements, the existence of second-order effects that could affect greenhouse gas emissions does not mean those actions would constitute MQD violations.[199]

CONCLUSION

The CFTC's RFI marks a prudent step for a regulator aiming to ensure the safety and integrity of derivatives and futures markets amid a changing climate. Critics who have claimed that any subsequent regulation would violate the MQD have misconstrued the landmark case announcing the doctrine and misunderstood the CFTC's goals.

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196 *See Weather Products*, CME GRP., https://www.cmegroup.com/markets/weather.html?redirect=/trading/weather/files/weather-codes.pdf [https://perma.cc/RX68-F4LE].

197 *See Nasdaq Veles California Water Index*, *supra* note 145.

198 *See* Press Release, CME Grp., Delisting of the Snowfall and Rainfall Binary Options Contracts (Dec. 2, 2013), https://www.cmegroup.com/tools-information/lookups/advisories/ser/SER-6935.html [https://perma.cc/NFR7-FSR5].

199 Beyond their MQD-based arguments, the AGs argue that, even if the MQD does not stop the CFTC from acting, "the actions alluded to within the [RFI] would extend beyond the Commission's [statutory] limits," "could present First Amendment concerns," and "could not survive an APA [arbitrary-and-capricious] challenge." AG Letter, *supra* note 2, at 6–8.

One argument made deserves extra scrutiny thanks to its brazenness. The AGs argue that "disclosures about who owns or emits carbon from other derivatives markets would regulate carbon and impact its price" as would other possible policy changes. *Id.* at 7. These efforts would, the AGs argue, "regulate carbon and impact its price," which is prohibited under the CEA. *Id.* That the CFTC may not directly regulate commodities does not constitute a prohibition on any regulatory actions that might affect those commodities. By the AGs' faulty logic, even uncontroversial CFTC requirements already in place would be impermissible. Disclosures and various financial requirements often affect market behavior, but do not constitute impermissible direct regulation of those customers or their purchases. For example, the CFTC requires DCOs to maintain minimum levels of high-quality liquid assets such as U.S. Treasury bonds subject to a formula. *See* 17 C.F.R. § 39.11 (2024). If the CFTC were to change this formula such that DCOs had to acquire additional Treasury bonds, it would *not* be the same as regulating Treasury bonds directly. Similarly, were the CFTC to require DCOs to hold more capital in response to new calculations about clearing members' climate risks, that would not constitute direct carbon regulation.

Contrary to its critics' rhetoric, the CFTC is not contemplating actions that will directly achieve carbon emissions reductions—as desperately as we need those reductions—but rather is considering policies in furtherance of its statutory mandates in response to novel developments in the real world—in this case, climatic developments. In contrast to the haphazard MQD analysis conducted by the AGs that presumes any policy affecting the climate is a per se violation of the MQD, the above analysis shows that so long as the CFTC acts to effectuate its legal mandates and complies with existing laws and analytical requirements, its future regulatory efforts will not implicate the doctrine.