UNSUSTAINABLE AND UNORIGINAL: HOW THE REPUBLICANS BORROWED A BOGUS ANTITRUST THEORY TO PROTECT BIG OIL

Democratic Staff Report
Committee on the Judiciary
U.S. House of Representatives

June 11, 2024

FORWARD BY THE RANKING MEMBER

Innovation and free enterprise were once central tenets of the Republican party. In 1981, in an address to the World Bank and the International Monetary Fund, President Ronald Reagan expressed his deep faith in these ideas:

> We who live in free market societies believe that growth, prosperity and, ultimately, human fulfillment are created from the bottom up, not the government down. Only when the human spirit is allowed to invent and create, only when individuals are given a personal stake in deciding economic policies and benefiting from their success—only then can societies remain alive, dynamic, prosperous, progressive, and free.[1]

President Reagan would have found today's Republican majority unrecognizable. Through environmental, social, and governance ("ESG") investment strategies, private investors are working together in an attempt to solve the world's most pressing problems—chief among them, global climate change—and to turn a profit while they are doing it. On the flimsiest of legal theories, Chairman Jordan has positioned himself as their main antagonist. His effort has been bad for the planet, bad for small "c" conservatism, and bad for the bottom line of hundreds of thousands of private citizens.

This staff report, *Unsustainable and Unoriginal: How the Republicans Borrowed a Bogus Antitrust Theory to Protect Big Oil*, is a comprehensive analysis of Chairman Jordan's investigation so far. As the report lays out in painstaking detail, the legal theory underpinning the Republican investigation is a total sham. There is no theory of antitrust law that prevents private investors from working together to capture the risks associated with climate change. There is certainly no antitrust law that prevents investors from asking corporations how they plan to transition to a climate-resilient economy. To the extent that House Republicans have ever clearly articulated such an argument, as this report shows, they are plainly mistaken.

Moreover, House Republicans appear to have borrowed both this lackluster legal argument and their heavy-handed oversight demands from a climate change denying nonprofit organization funded by the oil and gas lobby. This report details how Chairman Jordan copied his entire strategy—his theories about the Sherman Act, his overbroad oversight requests, and his aggressive use of subpoenas—from one Texas-based "think tank." The Majority did not find evidence of wrongdoing in the 2.5 million pages of documents they collected over the course of this investigation, but that was never the point. Their purpose was to use the Committee as a cudgel, and to bully investors into withdrawing from ESG partnerships. And when they succeeded, this report also shows, they took to social media to gloat about it.

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[1] *Reagan Talk to IMF and World Bank*, N.Y. TIMES (Sep. 30, 1981), at D22, https://timesmachine.nytimes.com/timesmachine/1981/09/30/issue.html.

This petty, short-sighted effort is no way to conduct Congressional oversight. It is also no way to address the crisis of climate change. Chairman Jordan can try to score cheap political points against "woke capitalism," but his cynicism will mean little to the Americans impacted by the next hurricane, or heatwave, or flood, or wildfire.

Climate change is real and requires a serious response. I commend to you this report, which sets the record straight on both the facts and the law.

Jerrold Nadler
Ranking Member
House Judiciary Committee

Executive Summary

Even as inflation comes down and economic growth continues to surge, unchecked monopolies and oligopolies unnecessarily raise costs for American families. Decades of consolidation in virtually every sector of the economy have helped push prices higher, making it harder for consumers to afford basic necessities like groceries and prescription drugs. Meanwhile, recent allegations of price-fixing by U.S. oil companies, which keeps prices at the pump artificially high and drives inflation across the economy, show how giant corporations use their market power to bolster profits at the expense of their customers. In short, the economic challenges that Americans face in their day-to-day lives stem to a great degree from a lack of competition in the economy—and demonstrate the need for vigorous enforcement of the antitrust laws.

But rather than focus on these issues—rather than focus on even *one* of these issues—Chairman Jordan and the Majority on the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust have wasted the past year and a half on an aimless crusade against the use of Environmental, Social, and Governance ("ESG") factors by the investment community. These investment strategies, which have existed in some form for decades, reflect investors' basic judgment that environmental issues, social issues, and corporate governance can have a material impact on the long-term value of their investments. Perhaps the most urgent is the risk caused by climate change, whose effects are already felt throughout the economy and will only intensify in the decades to come.

The Majority's investigation seeks to convert these private investment decisions into something nefarious, darkly alleging that investor-led ESG initiatives amount to an illegal antitrust conspiracy. Tossing out words like "cartel," "collusion," and "boycott" in factual contexts where they make little sense, the Majority posits that investors and others seeking to mitigate the incontestable effect of climate change on their portfolios' long-term value are actually engaging in an anticompetitive scheme to harm the oil and gas industry. With vanishingly little factual basis, the Majority has issued open-ended demands for documents and testimony to a cross-section of industry players, hoping to turn up something—anything—that would corroborate their bald assertions of unlawful conduct.

Chairman Jordan's antitrust theories are questionable, but they are not original; rather, his entire investigation is merely one front in a national attack on investor-led ESG initiatives funded by right-wing advocacy groups and Republican officials. Over the last four years, dark money groups with ties to former Trump administration officials, the oil and gas industry, and prominent far-right activists and donors such as Leonard Leo and Charles Koch, have waged a coordinated assault on companies factoring ESG considerations into their business decisions. The Majority appears to have copied its investigative strategy from these dark money groups, which have pushed state officials to investigate financial institutions that employ ESG and urged them to subpoena as many documents as possible from financial institutions in the hopes of cooking up a basis for an antitrust action.

This Report details the views of the Democratic staff of the House Judiciary Committee on the results of the investigation to date. These views are informed by transcribed interviews and a deposition with four witnesses and the document productions that parties to the investigation made to the Committee, which, despite the dubious foundations of the Majority's inquiry, have been robust and thorough. The Committee has received more than 256,000 documents totaling 2.5 million pages, an exceptionally large volume for a congressional investigation. Staff has also taken into account the views of these parties as well as others with knowledge in the field. Based on this review, we make the following findings:

- **Investor-led ESG initiatives respond to a genuine demand from investors for greater transparency into public companies' exposure to climate change.** Institutional investors, many of them public pension funds with a fiduciary duty to their individual plan holders, need to understand how the corporations they invest in will bear the effects of a changing climate and their preparedness for the coming transition to a climate-resilient economy. Asset managers, in turn, owe a duty to the clients whose money they invest to ensure that public companies have adequately accounted for climate-based risk.

- **The evidence produced in this investigation undermines, rather than supports, theories of potential antitrust liability for these ESG initiatives.** Financial institutions that commit to reduce financing for carbon-emitting activity do so independently and voluntarily. By encouraging companies to provide investors with more information about material risks from climate change, ESG initiatives promote competition.

- **This investigation is an abuse of the Committee's oversight authority.** The weakness of Chairman Jordan's case, combined with the broader landscape of right-wing attacks on ESG, leads us to conclude that the Majority launched this investigation with an improper purpose; namely, to impose a cost on investors and financial institutions that take seriously the threat of climate change and to chill legitimate business activity. Chairman Jordan's weaponization of the Committee in service of far-right interests is not surprising—but in this case, given the high stakes for the economy and the planet, is all the more indefensible.

Key Findings

Finding 1: Investor-led ESG Initiatives Respond to a Demand for Climate Transparency.

The basic facts of the climate crisis are not subject to dispute. Scientists agree that human activity producing greenhouse gas emissions has raised global average temperatures above preindustrial levels, with 2023 clocking in as the hottest year in recorded history and 2024 poised to surpass it. Rising temperatures are making extreme weather events around the globe deadlier and more frequent. The destructive wildfires that took place on Maui last August, killing at least 100 people, are just one vivid example of the new normal on a warming planet. Extreme heat waves, droughts, wildfires, tropical storms, flooding, and hurricanes have all left a mounting toll of devastation that stands to worsen further without urgent action. And while U.S. greenhouse gas emissions have recently begun to fall, experts have warned that the pace of decline must dramatically increase to prevent the worst effects of climate change from coming to pass.

Embedded in this environmental catastrophe is an economic one. No category of human activity is immune from the effects of climate change. The same extreme weather events that pose an existential risk to human populations around the globe also threaten corporations' assets and commercial dealings. Businesses that fail to take proactive steps to reduce their greenhouse gas emissions face potentially dramatic compliance costs as governments implement policies to protect the planet from ecological ruin. But the crisis also presents an opportunity to those businesses wise enough to recognize it. Forward-thinking government policies, such as the historic investments in clean-energy technology and infrastructure made by the Biden administration and congressional Democrats, offer businesses the chance to reap significant financial rewards as they align their operations with the coming transition to sustainable emissions levels.

It is therefore unsurprising that investors have undertaken initiatives to better understand how the companies whose securities they own have incorporated climate-related risk into their decision-making. These efforts have taken on a new scope since the 2015 adoption of the Paris Agreement, which aims to hold global temperature increases to 1.5°C above preindustrial levels by the end of this century. Scientists agree that achieving this target requires global greenhouse gas emissions to fall to net zero by 2050. Many corporations have announced plans to reduce their emissions, including some that have made net-zero commitments. But investors frequently lack information to assess the credibility of these targets, prompting new investor-led initiatives to increase transparency around companies' transition plans.

One such initiative is Climate Action 100+ ("CA100+"), an effort led by a global group of investor networks. Its methodology is straightforward: CA100+ maintains a list of more than 100 "focus companies," representing some of the biggest greenhouse gas emitters in the world. It publishes assessments of each focus company's performance on a range of climate-related metrics, including disclosure of its emissions and adoption of credible emissions reduction targets. When companies fail to take these steps proactively, investors participating in CA100+ lobby them to go further. Investors have a variety of means at their disposal to advocate for net zero-aligned policies, including face-to-face engagements with company management; shareholder proxy resolutions on climate-related matters; and elections of directors committed to their preferred policies.

Another effort that arose in the wake of the Paris Agreement is the Net Zero Asset Mangers initiative ("NZAM"), a group of more than 300 asset managers that have committed to the goal of net zero emissions by 2050. Unlike CA100+, which aims to directly influence the policies of greenhouse gas-emitting corporations, NZAM signatories seek to align their own assets under management with the attainment of net-zero emissions. While both CA100+ and NZAM agree on the need to achieve net zero by 2050, neither initiative prescribes a rigid formula for doing so. Specifically, neither CA100+ nor NZAM calls for a divestment from or phaseout of any particular source of emissions.

The Majority's allegations of a collusive scheme to harm oil and gas, which echo advocacy from industry-funded dark money groups like the Texas Public Policy Foundation ("TPPF"), centered originally on CA100+ and NZAM. From there its investigative focus has hopscotched around the broader ESG investment sphere in a desperate search for facts that fit its predetermined narrative. Its first demands for documents went to two members of the CA100+ steering committee: Ceres, a sustainability-focused nonprofit investor network, and the California Public Employees Retirement System ("CalPERS"), the country's largest public pension fund. From there, the Majority turned its attention to the world's three largest asset managers—BlackRock, Vanguard, and State Street—based on their past or present participation in CA100+ or NZAM. While the asset managers offer their clients ESG-compliant investment options, they maintain substantial holdings in oil and gas, making them unlikely participants in a conspiracy against those industries. Undeterred, the Majority trained its sights on a group of much smaller asset managers that have incorporated ESG goals into their missions. For good measure, the Majority also issued demands to a handful of consultants providing shareholder engagement and proxy advisory services.

The Majority's demands imposed significant burdens on the parties to this investigation, especially the small firms and nonprofits with limited resources to devote to compliance with congressional inquiries. The Majority consistently refused to engage in good-faith negotiations prior to production to limit the scope of its expansive demands or even prioritize categories of responsive material, and then cited alleged deficiencies in the parties' productions as a basis for threatening or issuing subpoenas. Nevertheless, all parties who received demands for documents have made productions, many of which are substantial, and compliance is ongoing. These productions cover a range of highly sensitive material about these parties' business activities, including internal correspondence, meeting minutes, grant proposals, and board-level presentations.

Finding 2: The evidence produced in the investigation undermines any possible theory of antitrust harm.

Although the vague and shifting nature of the Majority's antitrust theories makes them difficult to describe, let alone evaluate, the legal claim underlying their various arguments appears to be that investor-led ESG initiatives violate Section 1 of the Sherman Act, which prohibits anticompetitive agreements in restraint of trade. Based on our view of the evidence produced in this investigation, we find that these theories suffer from the following fundamental flaws:

First, the parties to the investigation have not entered into agreements that could be subject to antitrust liability. The agreement is an essential element of any Section 1 conspiracy; without it, there is no violation. But the evidence produced to date in this investigation tends to show that investor-led ESG initiatives like CA100+ and NZAM rely on the voluntary compliance of their participants, who act independently of one another. Multiple asset managers publicly affirmed upon joining the initiatives that they would retain full authority to allocate assets in the best interests of their clients, and several members have terminated their membership during the pendency of this investigation. Even if CA100+ or NZAM purported to require their participants to divest from any class of assets, which they have not, the evidence shows that they lack the power to bind their participants to that or any other requirement.

Second, even if the evidence in this investigation were sufficient to show an agreement, that agreement would be subject to a rule of reason analysis, which weighs the agreement's effect on competition against the facts and circumstances of the industry, rather than per se condemnation. Under current antitrust law, per se rules are generally reserved for horizontal agreements between competitors to restrict price and output. Put simply, there are no such agreements at issue here. Asset managers and other participants in ESG investment initiatives obviously lack the power to set the price or output of commodities, and there is no evidence that competitors have formed such agreements with respect to the investment funds and asset management services they supply.

Third, a rule-of-reason analysis of investor-led ESG initiatives would tilt heavily in the initiatives' favor for several independent reasons. First and foremost, there is substantial evidence that ESG investing is pro-competitive. Given the material economic effects of climate change, ESG initiatives and net zero-aligned investment options benefit investors seeking to maximize the value of their portfolios against climate-related risk. Next, an antitrust conspiracy against the oil and gas companies would be economically irrational for asset managers who hold significant ownership stakes in those companies and lack the means to target them for divestment, given the share of their assets committed to passive investment vehicles like index funds. Third, with domestic oil and gas production at all-time highs and the largest producers enjoying record profits, there is no plausible case that investor-led ESG initiatives have caused competitive harm. Finally, the smallest asset managers clearly lack market power, while the largest asset managers' power would depend on untested questions of market definition.

Fourth, the Majority's theory of harm fares no better if styled as a group boycott, for all the reasons already listed. A boycott obviously requires that the perpetrators refuse to do business with the victim, which is not the case for investor-led ESG initiatives. Indeed, the basic theory of change of an initiative like CA100+ *requires* the participation of investors in fossil fuel companies using their ownership to advocate for change.

Fifth, and finally, to the extent the Majority predicates its alleged conspiracy on investors petitioning for climate-related policy change or exercising their right to vote on shareholder proxy resolutions or director nominees, its theories collide with longstanding precedent immunizing expressive activity from antitrust condemnation.

Individually, each of these flaws—lack of agreement, pro-competitive justifications, and absence of competitive harm—would severely undermine the claimed basis for antitrust concern against investor-led ESG initiatives. Collectively, they so thoroughly demolish it that they call into question the Majority's basic credibility in leveling the accusations in the first place.

None of this is meant to dismiss legitimate concerns about anticompetitive coordination in the financial sector or elsewhere. To the extent that these firms have market power and use it to restrict access to capital markets on competitive terms, such conduct would certainly be proper grounds for investigation by the appropriate antitrust enforcement authorities. But voluntary agreements to align investment strategy with settled scientific fact are not the sort of business activity that the Sherman Act has historically proscribed. This may explain why the Majority has not brought its concerns about investor-led ESG initiatives to the Department of Justice or the Federal Trade Commission.

Finding 3: The Majority's investigation is an abuse of Congress's oversight power.

Ultimately, the Majority's ESG obsession is not a serious or genuine antitrust investigation but a new theater in the right's never-ending culture war, one which seeks to turn "ESG" into an epithet and rebrand responsible investing as "woke capitalism." The Majority's transparent objective in this effort is to impose monetary and reputational costs on companies that accept the scientific consensus on climate change and bully them into reversing investment decisions with which the Majority disagrees.

Around the country, Republican politicians have relentlessly harassed companies for incorporating ESG factors like climate risk into their operations, filing lawsuits, blacklisting individual firms, even (absurdly) threatening to turn ESG investing into a criminal offense. In this Congress alone, the House has voted to repeal a Labor Department rule on ESG investing, and at least two other committees have advanced anti-ESG legislation. In these efforts, Republicans have received support from a network of dark money groups, many funded by conservative billionaires and the oil and gas industry, to develop legal theories and dig up material to use against the companies in their crosshairs.

One such group is the TPPF, a climate-denying nonprofit funded by the oil and gas lobby. In June 2021, TPPF published a white paper that laid out a roadmap for plaintiffs to bring Sherman Act claims against investor-led ESG initiatives, including CA100+. The following year, at a conference of the American Legislative Exchange Council ("ALEC"), a TPPF official outlined a strategy for wielding TPPF's playbook against companies. According to the official, state legislators would use their subpoena authority to demand "truckloads" of documents from financial institutions and turn them over to Republican state attorneys general, who would then comb through them for evidence supporting TPPF's antitrust theories. Multiple Republican state attorneys general announced they were opening ESG-related antitrust investigations following publication of TPPF's white paper.

Chairman Jordan appears to have cribbed his strategy for this investigation straight from TPPF's playbook. The Majority's demands for documents, which cite TPPF's white paper as legal authority, sweep as broadly as possible, with few meaningful limitations. In other words, they bear all the hallmarks of the Majority improperly using the Committee's oversight authority to dig up material that prospective plaintiffs in ESG lawsuits would be unable to obtain on their own. Even if no viable antitrust case ever results, however, the burden of responding to the Majority's demands and misplaced concerns about their legal exposure may lead some participants in investor-led ESG initiatives to conclude that such efforts are not worth the risk, while dissuading potential participants from joining in the first place.

Unfortunately, there is some evidence that the anti-ESG campaign is already having such a chilling effect. Several financial firms, including multiple parties to this investigation, have withdrawn from ESG initiatives in the past year. In February, several major financial institutions, including BlackRock and State Street, announced that they were scaling back their participation in or departing entirely from CA100+, decisions for which Chairman Jordan immediately took credit for on social media. Public reporting indicates that the manufactured political controversy around ESG has caused other major players in the financial sector to scale back their ESG commitments. If the Majority's investigation contributes to this exodus, it would be an unfortunate overreaction to a political campaign that from the start has been more calculated to generate headlines than any sort of cognizable antitrust claim.

Conclusion

Sustainable investment is good for companies, good for investors, and good for everyday Americans—including teachers, firefighters, and other public servants who depend on sound investments to protect their retirement savings. Placing artificial, politically motivated limits on investors' freedom would inject insecurity into the financial system while undermining the fight against climate change. We hope that our findings will help put those misguided efforts to rest.

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I. STATUS OF THE INVESTIGATION.

Chairman Jordan's focus on ESG initiatives dates back to the closing days of the 117th Congress, when he began demanding information about the investment initiative Climate Action 100+ ("CA100+"), which he said "seems to work like a cartel."[2] In the ensuing investigation, the Majority issued sweeping demands for documents to 13 entities involved in CA100+ and other ESG investment efforts, including financial institutions, nonprofits, non-governmental organizations, and proxy advisory firms. Nine of those entities subsequently received subpoenas based on what the Majority termed their inadequate compliance, even though the Majority consistently refused to entertain discussions about narrowing the scope of its demands or easing their burden on private parties. Nevertheless, every recipient has made substantial productions of responsive material, and the Committee has received more than 2.5 million pages of documents to date. The Majority also issued requests for transcribed interviews to 10 individuals at two of the entities and has taken testimony from four of them.

A. Parties to the investigation include nonprofits, non-governmental organizations, institutional investors, financial institutions, and proxy advisors.

The 13 entities that received document demands comprise: two nonprofit organizations (Ceres and As You Sow); one non-governmental organization (GFANZ); one institutional investor (CalPERS); the so-called "Big Three" asset managers (BlackRock, State Street, and Vanguard); four other asset managers (Arjuna, Aviva, Engine No. 1, and Trillium); and two proxy advisory firms (ISS and Glass Lewis). Brief descriptions of these entities follow.

1. Nonprofits

Ceres. Ceres is a Boston-based nonprofit organization focused on sustainable finance and a founding partner of CA100+. Founded by a coalition of environmentally conscious investors in the aftermath of the 1989 Exxon Valdez oil spill, Ceres convenes global networks of companies, financial institutions, and nonprofits to promote sustainable business practices.[3] Ceres uses a range of strategies, including engagement with political and corporate leaders, to advocate for sustainable policies addressing climate change, water scarcity, pollution, and human rights abuses.[4] The organization has a staff of roughly 200 employees and a $36 million annual budget supported primarily by private foundations.[5] Ceres also holds a seat on the CA100+ Steering Committee and is one of six Founding Partners that manages the Net Zero Asset Managers initiative ("NZAM"), an international group of asset managers that have committed to reaching net zero greenhouse gas emissions by 2050.[6]

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[2] Letter from Ranking Member Jim Jordan, Rep. Dan Bishop, et al. to Mindy Lubber & Simiso Nzima (Dec. 6, 2022), at 1.
[3] *About Us*, CERES, https://www.ceres.org/about-us (last visited June 8, 2024).
[4] *Annual Report 2022*, CERES at 5, https://www.ceres.org/sites/default/files/Ceres%202022%20Annual%20Report.pdf (2023).
[5] *Id*. at 35–36.
[6] *About*, CA100+, https://www.climateaction100.org/about/ (last visited June 8, 2024); *The Net Zero Asset Managers initiative – FAQ*, NZAM, https://www.netzeroassetmanagers.org/faq/ (last visited June 8, 2024).

As You Sow. As You Sow is a nonprofit organization headquartered in Berkeley, California that engages with corporate leadership and institutional investors to advocate on behalf of shareholders for environmentally and socially responsible management.[7] The group accomplishes its mission by producing research in its chosen issue areas, raising issues directly with corporate management, and filing shareholder resolutions requesting corporate action.[8] While As You Sow is not an asset manager, it owns small amounts of stock in some companies and will bring shareholder resolutions in its own name at those companies' annual meetings.[9] As You Sow has 38 employees and an annual operating budget under $10 million.[10] As You Sow has been a member of CA100+ since the initiative's inception.[11]

2. Non-governmental organizations

GFANZ. The Glasgow Financial Alliance for Net Zero ("GFANZ") is an initiative that provides technical guidance to financial institutions that have committed to aligning their business with net zero by 2050. The group began in 2021 as a project of the U.K. government in advance of the 26th Conference of the Parties ("COP26"), the annual conference on climate change convened by the United Nations.[12] At the conclusion of COP26, the U.K. government transferred management of GFANZ to a new Secretariat under the leadership of Michael R. Bloomberg.[13] GFANZ's voluntary guidance aims to give financial institutions "a consistent framework" to meet the demand for credible net zero transition plans.[14] While GFANZ says the "intended beneficiaries" of its work are the sector-specific alliances of financial institutions committed to net zero, including NZAM, GFANZ operates independently from the alliances.[15] GFANZ has an annual operating budget of roughly $20 million, funded by Mr. Bloomberg.[16]

3. Institutional investors

CalPERS. The California Public Employees Retirement System ("CalPERS") is the largest public pension fund in the United States, with net assets of $439 billion.[17] CalPERS administers retirement benefits for nearly 2.2 million members and health benefits for 1.5 million members and their families.[18] The fund's mandate as a fiduciary to its members is codified in the

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[7] *About Us*, As You Sow, https://www.asyousow.org/about-us (last visited June 8, 2024).
[8] Interview with Danielle Fugere at 10:23-12:25 (As You Sow) (Jan. 18, 2024) (transcript on file with Committee) [hereinafter "Fugere Testimony"].
[9] *Id*. at 15:6-16, 16:5-11.
[10] *Id*. at 47:8-15.
[11] *Id*. at 61:25-62:2.
[12] Interview with Mary Schapiro at 7:15-20 (GFANZ) (Feb. 14, 2024) (transcript on file with Committee) [hereinafter "Schapiro Testimony"].
[13] Letter from Thomas A. McGrath and John W. Eichlin to Chairman Jim Jordan at 3 (Dec. 1, 2023). Mr. Bloomberg and Mark Carney, both of whom hold special envoy roles related to climate change at the U.N., serve as GFANZ's co-chairs. *Id*.
[14] Schapiro Testimony at 8:2-14.
[15] *Id*. 7:21-8:2.
[16] *Id*. 24:1-8.
[17] *2021-22 Annual Comprehensive Financial Report*, CalPERS, at 7 (2022), https://www.calpers.ca.gov/docs/forms-publications/acfr-2022.pdf.
[18] *Id*.

California Constitution, which states that CalPERS' responsibility "to its participants and their beneficiaries shall take precedence over any other duty."[19] In pursuit of its purpose, CalPERS has adopted a set of investment beliefs, which require in part that it view its investments over the long term and consider physical risks such as climate change.[20] CalPERS helped convene the investor networks who founded CA100+ and served as the initiative's first chair and a member of its steering committee.[21] It is also a member of the Net Zero Asset Owner Alliance ("NZAOA"), the NZAM counterpart for institutional investors.[22]

4. "Big Three" asset managers

BlackRock. New York-based BlackRock, Inc. ("BlackRock") is the largest asset manager in the world, with $10 trillion in assets under management ("AUM").[23] BlackRock provides asset management services for both retail (i.e., individual) and institutional investors, such as pension funds, foundations, and sovereign wealth funds.[24] The firm offers clients a range of active and index-based investment strategies and is a leading provider of exchange-traded funds ("ETFs").[25] BlackRock's CEO, Larry Fink, has in the past defended the consideration of ESG factors in BlackRock's investment decisions, stating "Climate Risk Is Investment Risk."[26] Within the firm, a dedicated staff unit called the BlackRock Investment Stewardship team ("BIS") is responsible for engaging with public companies on behalf of BlackRock's investors to encourage sound corporate governance.[27] BIS also develops guidelines for voting on management resolutions and shareholder proposals for clients who have authorized BlackRock to vote on their behalf.[28] BlackRock is a signatory to CA100+ and NZAM.[29] In February, however, BlackRock announced that it would transfer its participation in CA100+ away from the parent corporation to a non-U.S. subsidiary, BlackRock International.[30]

Vanguard. The Vanguard Group, Inc. ("Vanguard") is an investor-owned asset manager based in Malvern, Pennsylvania with $8.6 trillion AUM as of December 31, 2023.[31] Vanguard serves an array of retail and institutional investor clients.[32] While Vanguard offers both active

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[19] CALIF. CONST. art. XVI, § 17.
[20] *CalPERS' Investment Strategy on Climate Change*, CALPERS at 7-8, CALPERS_000100 at -08–09 (Jun. 2020).
[21] *Id*. at -18.
[22] *Members*, NET ZERO ASSET OWNER ALLIANCE, https://www.unepfi.org/net-zero-alliance/alliance-members/ (last visited June 8, 2024).
[23] BlackRock, Inc. Form 10-K at 1 (2023).
[24] *Id*. at 3–5.
[25] *Id*. at 1, 4.
[26] Larry Fink's 2020 Letter to CEOs, *A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://www.blackrock.com/americas-offshore/en/larry-fink-ceo-letter.
[27] *2022 Investment Stewardship Annual Report*, BLACKROCK, at 2, BLK-HJC-00000010 at -11 (2023).
[28] *Id*. at -98; *see BlackRock Investment Stewardship, Global Principles*, BLACKROCK (Jan. 2024), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf.
[29] *Investor Signatories*, CA100+, https://www.climateaction100.org/whos-involved/investors/page/3/; *Signatories*, NZAM, https://www.netzeroassetmanagers.org/signatories/ (last visited June 8, 2024).
[30] David Gelles, *More Wall Street Firms Are Flip-Flopping on Climate. Here's Why*, N.Y. TIMES (Feb. 19, 2024), https://www.nytimes.com/2024/02/19/business/climate-blackrock-state-street-jpmorgan-pimco.html.
[31] *Why Vanguard*, VANGUARD, https://www.vanguard.ca/en/advisor/about-vanguard (last visited June 8, 2024).
[32] *What We Offer: Advice*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/what-we-offer/advice.html (last visited June 8, 2024).

and passive asset management strategies, the firm has been best known as a pioneer of index investing since it launched the first index fund for individual investors in 1976.[33] Today, Vanguard's clients can choose from a broad menu of investment products, including mutual funds and ETFs.[34] Vanguard's Investment Stewardship team is responsible for monitoring risks to its clients' long-term investments and engaging directly with portfolio companies to understand how each company discloses and addresses risk, including climate-related risk.[35] Vanguard Investment Stewardship also develops region-specific proxy voting policies.[36] Vanguard joined NZAM in 2021 but departed the initiative the following year.[37]

State Street. State Street Global Advisers ("SSGA" or "State Street") is the investment management division of State Street Corporation, a global financial institution headquartered in Boston. SSGA oversees $4.34 trillion AUM, primarily on behalf of institutional investors.[38] Like its competitors, SSGA offers clients a variety of investment products and services, including active and index investment strategies, as well as its own branded mutual funds and ETFs.[39] SSGA has an Asset Stewardship team that engages with companies in its clients' portfolios on issues affecting their investments and exercises proxy voting authority on behalf of clients when authorized.[40] SSGA is a signatory to NZAM and was a signatory to CA100+ until February 2024, when it announced its departure from the initiative.[41]

5. Other asset managers

Arjuna. Arjuna Capital ("Arjuna") is a Durham, N.C.-based wealth management firm with $357 million in AUM.[42] It is a mission-driven company that seeks to manage client funds in a sustainable manner on issues including climate change, pay equity, and reproductive rights.[43] Arjuna pursues its mission through a three-part strategy: divesting client funds from sectors that are not aligned with its sustainability goals, investing in companies that contribute to those goals,

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[33] *What We Offer: Enduring Investments*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/what-we-offer/investment-products.html (last visited June 8, 2024).
[34] *Investment Products*, VANGUARD PERSONAL INVESTORS https://investor.vanguard.com/investment-products (last visited June 8, 2024).
[35] Letter from Robert K. Kelner to Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop at 2–3 (Jul. 20, 2023).
[36] *Our Commitment to Disclosure*, VANGUARD INVESTMENT STEWARDSHIP, https://corporate.vanguard.com/content/corporatesite/us/en/corp/how-we-advocate/investment-stewardship/reports-and-policies.html (last visited June 8, 2024).
[37] Letter from Robert K. Kelner, *supra* note 35, at 4.
[38] *Who We Are*, STATE STREET GLOBAL ADVISERS, https://www.ssga.com/us/en/institutional/etfs/about-us/who-we-are (last visited June 8, 2024).
[39] State Street Corp. Form 10-K at 8 (2023).
[40] *Making it Plain: Our Asset Stewardship Approach*, STATE STREET GLOBAL ADVISERS (Apr. 4, 2023), https://www.ssga.com/us/en/institutional/etfs/insights/making-it-plain-asset-stewardship-approach.
[41] *Signatories*, *supra* note 29; Gelles, *supra* note 30.
[42] *Signatories: Arjuna Capital*, NZAM, https://www.netzeroassetmanagers.org/signatories/arjuna-capital-2/ (last visited June 8, 2024) (58 percent of AUM ($207 million) committed to align with net zero).
[43] *2023 Impact*, ARJUNA CAPITAL, at 2 (Jan. 2024), https://static1.squarespace.com/static/5bc65db67d0c9102cca54b74/t/65cbe54d712c615ec481f661/1707861327081/Arjuna+Capital+-+2023+Impact+Report.pdf.

and engaging with corporate management on sustainability issues.[44] As such, Arjuna offers clients an investment strategy that screens out fossil fuel securities.[45] Arjuna is a signatory CA100+ and NZAM.[46]

Aviva. Aviva Investors Americas is the Chicago-based U.S. presence of Aviva Investors plc ("Aviva"), an asset manager based in the U.K.[47] Aviva oversaw $277 billion in AUM at the end of 2022, overwhelmingly from institutional clients.[48] It offers a diversified array of products and services across asset classes and investment strategies.[49] Aviva believes that ESG-related risks materially impact the value of its clients' investments. The firm publishes policies and statements of philosophy on how it incorporates ESG factors into its investment strategy.[50] Aviva's Baseline Exclusion Policy, for instance, describes how the firm screens assets from certain sectors out of its actively managed funds.[51] Aviva also routinely engages with corporate management on sustainability issues.[52] Aviva is a signatory to CA100+ and NZAM.[53]

Engine No. 1. Engine No. 1 L.P. ("Engine No. 1") is a San Francisco-based investment firm that reported $653 million in holdings as of September 30, 2023.[54] It invests in companies driving what it sees as the major macroeconomic trends of the future: industrialization, electrification, and technological development.[55] In addition to active management of its own proprietary ETFs, the firm's investment approach includes corporate engagements, proxy voting, and activist campaigns.[56] Engine No. 1 is best known for its 2021 campaign to elect a new slate of independent directors to ExxonMobil's board of directors, which culminated in the election of three of its nominees.[57] The firm is a CA100+ signatory.[58]

Trillium. Trillium Asset Management ("Trillium") is a Boston-based asset management firm with $4.9 billion AUM.[59] It was acquired by the Australian financial firm Perpetual Ltd. in

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[44] *Id.*
[45] *A Performance-Driven Approach to Fossil-Fuel Free Investing*, ARJUNA CAPITAL at 1 (Sep. 2023), https://static1.squarespace.com/static/5bc65db67d0c9102cca54b74/t/655500387230507683429bd5/1700069432665/Arjuna+Capital+-+350+Equity+Strategy+Fact+Sheet+-+09.2023.pdf.
[46] *Investor Signatories*, *supra* note 29; *Signatories*, *supra* note 29.
[47] Letter from Jonathan Su to Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop at 1 fn.1 (Aug. 29, 2023).
[48] *Responsible Investment Review 2022*, AVIVA at 53, AV00096605 at -57 (reported as £222.6 billion).
[49] *Capabilities*, AVIVA INVESTORS, https://www.avivainvestors.com/en-gb/capabilities/ (last visited June 8, 2024).
[50] *Policies and Documents*, AVIVA INVESTORS, https://www.avivainvestors.com/en-gb/about/responsible-investment/policies-and-documents/ (last visited June 8, 2024).
[51] *Baseline Exclusions Policy – Summary*, AVIVA, at 4, AV00000711 at -14 (Aug. 2023).
[52] *Responsible Investment Review 2022*, AVIVA at 84, AV00096605 at -88.
[53] *Investor Signatories*, *supra* note 29; *Signatories*, *supra* note 29.
[54] Fund Management at Engine No. 1 LLC, Form 13F (Nov. 14, 2023).
[55] Letter from Christoper M. James to Chairman Jim Jordan at 3–5 (Aug. 28, 2023).
[56] *ETF Trust Semi-Annual Report*, ENGINE NO. 1, at ENGINENO1-118HJC-PROD-00001054; *Perennial Fund*, ENGINE NO. 1, ENGINENO1-118HJC-PROD-00002516 at -25 (Jun. 2021).
[57] *ExxonMobil: One Year Later*, ENGINE NO. 1 (May 25, 2022), https://engine1.com/transforming/articles/exxon-mobil-one-year-later/.
[58] *Investor Signatories*, *supra* note 29.
[59] *About Trillium*, TRILLIUM, https://www.trilliuminvest.com/about (last visited June 8, 2024).

2020.[60] Trillium offers clients a range of investment strategies, all of which incorporate ESG-related factors.[61] The firm conducts its own research on companies' management of ESG-related risks and integrates its findings into its investment decisions.[62] One aspect of this integration is a set of exclusionary screens Trillium employs against certain sectors, including coal mining and tobacco.[63] The firm also promotes policy change on ESG-related issues through voting and advocacy on shareholder proposals.[64] Trillium is a signatory to both NZAM and CA100+.[65]

6. Proxy advisory firms

ISS. Institutional Shareholder Services Inc. ("ISS") is a leading provider of corporate research and market intelligence operating in 15 countries.[66] Among the services it offers are proxy voting solutions, which include recommendations on how investors should vote on shareholder resolutions.[67] ISS offers investors a choice of voting policy guidelines for determining how to vote on shareholder proposals.[68] Clients can choose between the ISS "benchmark" policy, which outlines its default recommendations on potential votes, or value-based policies intended to cover a range of possible investment philosophies, including faith-based policies, climate-aligned policies, and more.[69] ISS also allows clients to customize their own unique voting policy guidelines based on their specific needs.[70] ISS's software platform, Proxy Exchange, allows clients to track their proxy voting activity.[71]

Glass Lewis. Glass, Lewis & Co. ("Glass Lewis") is another global provider of corporate governance research and related services, including proxy advisory services. The company is headquartered in San Francisco.[72] Like ISS, Glass Lewis offers clients a range of voting policies from which to choose, including country-specific benchmark policies and thematic policies like

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[60] *Id*.
[61] *Firm Overview*, TRILLIUM (Dec. 31, 2023), https://www.trilliuminvest.com/documents/firm-overview.
[62] *ESG Criteria: Positive Thresholds*, TRILLIUM, https://www.trilliuminvest.com/esg/esg-integration-criteria (last visited June 8, 2024).
[63] *Exclusionary Screens*, TRILLIUM (June 2023), https://www.trilliuminvest.com/documents/exclusionary-screens-brief.
[64] *Our Approach to ESG: Advocacy & Policy*, TRILLIUM, https://www.trilliuminvest.com/esg/advocacy-policy (last visited June 8, 2024).
[65] *Investor Signatories*, *supra* note 29; *Signatories*, *supra* note 29.
[66] *About ISS*, ISS, https://www.issgovernance.com/about/about-iss/ (last visited June 8, 2024).
[67] *Proxy Voting Services*, ISS https://www.issgovernance.com/solutions/proxy-voting-services/ (last visited June 8, 2024).
[68] *Policy Formulation & Application*, ISS, https://www.issgovernance.com/policy-gateway/policy-formulation-application/ (last visited June 8, 2024).
[69] *United States Proxy Voting Guidelines Benchmark Policy Recommendations*, ISS (Jan. 2024), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=1 [hereinafter "ISS 2024 U.S. Benchmark Guidelines"]; *Voting Policies 2024*, ISS, https://www.issgovernance.com/policy-gateway/voting-policies/ (last visited June 8, 2024).
[70] Letter from Aaron S. Cutler to Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop re: Request for Documents and Information from ISS (Aug. 17, 2023), at 2.
[71] *Proxy Exchange: Reimagine the Proxy Voting Experience*, ISS, https://www.issgovernance.com/solutions/proxy-voting-services/proxy-exchange (last visited June 8, 2024).
[72] *Company Overview*, GLASS LEWIS, https://www.glasslewis.com/company-overview/ (last visited June 8, 2024).

"Climate," "Corporate Governance Focused," and "ESG."[73] Glass Lewis also offers clients a proprietary online platform, Viewpoint, that lets investors track corporate engagements and proxy votes.[74]

B. The Majority used threats and bluster to bully parties into producing as many documents as possible based on far-fetched antitrust theories.

From the outset, the Majority's demands for documents in this investigation have had the appearance of a fishing expedition. The Majority consistently refused good-faith requests from parties to refine its demands in a way that would have facilitated a more efficient identification and collection or responsive documents. The purpose seems to have been to drag in as much of the parties' confidential business material as possible regardless of its relevance to any legitimate subject of inquiry.

1. Vaguely articulated antitrust concerns

The Majority has described its investigation into ESG investment as "conducting oversight of the adequacy and enforcement of U.S. antitrust laws."[75] In the early stages of the investigation, the Majority focused on CA100+, which it said "seems to work like a cartel to ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change."[76] It subsequently broadened its inquiry to include NZAM, alleging the initiative had violated the law by "coordinating [its] members' agreements to 'decarbonize' their assets under management and reduce emissions to net zero."[77]

The nature of the Majority's alleged antitrust violation has been a moving target, but at its most specific, it amounts to a claim that CA100+ and NZAM have facilitated a conspiracy against fossil fuels in violation of the Sherman Act, the federal antitrust law prohibiting business combinations or conspiracies in restraint of trade.[78] The Majority claims that, by committing to reduce their greenhouse gas emissions to net zero by 2050, participants in the initiatives have entered into "collusive agreements" that would "chok[e] off investment" in the oil and gas industries.[79] The Majority has emphasized, however, that the initiatives would still be illegal even if they did not affect oil and gas prices, as long as they impeded "the free opportunity to select among alternative offers."[80] At other times, the Majority has appeared to suggest that *any* collective action toward ESG-related goals could be illegal, stating that "when companies agree

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[73] *Proxy Voting Policies*, GLASS LEWIS, https://www.glasslewis.com/voting-policies-current/ (last visited June 8, 2024).
[74] *Proxy Voting Services – Viewpoint*, GLASS LEWIS, https://www.glasslewis.com/proxy-voting-2/ (last visited June 8, 2024).
[75] *See*, *e.g.*, Letter from Chairman Jim Jordan and Rep. Dan Bishop to Mindy S. Lubber at 1 (May 5, 2023) (citing Rules of the House of Representatives R. X (2023)).
[76] Letter from Ranking Member Jim Jordan, *supra* note 2, at 1 (internal quotations omitted).
[77] Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop to Michael R. Bloomberg & Mary L. Schapiro at 1 (Jul. 6, 2023).
[78] *See* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.").
[79] Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop to Larry Fink at 2 (Jul. 6, 2023).
[80] *Id*. (quoting *Nat'l Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978)).

to work together to punish disfavored views or industries, *or to otherwise advance environmental, social, and governance (ESG) goals*, this coordinated behavior may violate the antitrust laws."[81]

The Majority's letters hint at possible theories of antitrust liability for the various parties to ESG initiatives. Assuming that net zero emissions goals require divestment from fossil fuels, the Majority alleges that "Wall Street firms"—presumably, the asset managers—are "[b]oycotting certain energy investments."[82] As to the non-financial institutions leading CA100+, NZAM, and other ESG initiatives, the Majority claims that they "invite or facilitate collusion to achieve progressive policy goals."[83] The Majority also appears to suggest that CA100+ operates as a hub-and-spoke conspiracy, a type of agreement in antitrust law involving firms at different levels of competition.[84] Finally, the Majority alleges that the proxy advisory firms, ISS and Glass Lewis, "have colluded with institutional investors" to achieve net zero through by recommending votes against incumbent directors at companies tracked by CA100+ "unless the company is aligned with a Net Zero by 2050 trajectory" or has committed to specific climate disclosures.[85]

As authority for these antitrust theories, the Majority's letters mostly cite statements from other Republican politicians and conservative interest groups, including a letter from 19 Republican state attorneys general;[86] *Wall Street Journal* op-eds;[87] and tweets from Vivek Ramaswamy. The Majority appears to have drawn its theory about CA100+ from a June 2021 white paper by the Texas Public Policy Foundation ("TPPF").[88] The TPPF paper, authored by the late former Reagan White House counsel C. Boyden Gray, discusses several theories of legal liability for ESG investment initiatives and business practices, including a discussion of potential antitrust violations.[89] The TPPF white paper claims that CA100+ and other ESG investment initiatives "appear like invitations to collude on a boycott of America's energy infrastructure."[90] The white paper also suggests that, as "boycott agreements instigated by a third party to coordinate firms that ordinarily compete against each other to unreasonably restrain market competition," climate change-related activist campaigns directed at financial firms might amount to hub-and-spoke conspiracies.[91] It notes, however, that a successful suit would require specific factual allegations of coordination, facts which "might be unearthed by a federal or state

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[81] Letter from Ranking Member Jim Jordan, *supra* note 2, at 2 (emphasis added).
[82] *Id*.
[83] *Id*. at 3; Letter from Chairman Jim Jordan, *supra* note 77, at 2.
[84] Letter from Ranking Member Jim Jordan, *supra* note 2, at 4 fn.26. For more background on hub-and-spoke conspiracies, *see infra* § III.a.3.
[85] Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop to Gary Retelny at 1 (Aug. 1, 2023)(internal quotations omitted) [hereinafter "Retelny Letter"]; Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop to Kevin Cameron at 1 (Aug 1. 2023) [hereinafter "Cameron Letter"].
[86] Letter from Ranking Member Jim Jordan, *supra* note 2, at 3 fn.17.
[87] *Id*.
[88] Letter from Ranking Member Jim Jordan, *supra* note 2, at 3 fn.24.
[89] *See* C. Boyden Gray, *Corporate Collusion: Liability Risks for the ESG Agenda to Charge Higher Fees and Rig the Market*, TEXAS PUBLIC POLICY FOUND. (Jun. 2021), https://www.texaspolicy.com/wp-content/uploads/2021/06/2021-06-RR-Gray-LP-Corporate-Collusion.pdf.
[90] *Id*. at 6.
[91] *Id*.

investigation."[92] The Majority appears to have answered the call, as each of these theories made its way into the demands for documents underpinning this investigation.

2. Open-ended specifications

The Majority issued broad and sweeping demands for documents to participants in ESG initiatives. Every Specification in the Majority's letters is comprehensive, seeking "[a]ll documents and communications referring or relating to" its subject matter. The demands also cover long timeframes, with some looking back as far as 2016.[93] Despite the breadth of these demands, the Majority imposed unreasonably short return dates, directing each recipient to produce the information requested within two weeks.

The language of the requests contains few limits. Rather than focus on communications between ESG initiatives and their members, where one would expect to find any evidence of anticompetitive coordination, the Majority's document requests reached deep into the initiatives' internal decision-making. For instance, in its letter to Ceres and CalPERS, the Majority requested "[a]ll documents and communications referring or relating to the various markets, sectors, or industries, in which Climate Action 100+ or Ceres help investors, members, or other companies advance ESG-related goals."[94] Given that CA100+'s list of focus companies covers 170 high-emitting firms across more than a dozen sectors,[95] this Specification alone calls for essentially all of Ceres' documents and communications relating to CA100+.

Document demands to private financial institutions reached nearly as far. The Majority's letters to asset managers contained identical Specifications demanding "[a]ll documents and communications referring or relating to the need for [the asset manager] to advance decarbonization and net zero emissions goals, including [the financial institution's] decision to join Climate Action 100+ and NZAM."[96] For the Big Three asset managers, this Specification could reach all climate-related documents and communications from their stewardship business units, which focus on the sustainability of their portfolios. For the boutique asset managers, which have incorporated sustainability factors throughout their business operations (and lack the compliance resources of their much larger competitors), this Specification reaches virtually all of their climate-related ordinary course documents.[97]

Some of the Majority's demands appear to be directed at improper parties. For instance, the Majority sought documents and communications from Ceres and CalPERS "between or

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[92] *Id*.
[93] *See* Letter from Ranking Member Jim Jordan, *supra* note 2, at 4; Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop to Mirza Baig at 2 (Aug. 1, 2023).
[94] Letter from Ranking Member Jim Jordan, *supra* note 2, at 4.
[95] *Companies*, CA100+, https://www.climateaction100.org/whos-involved/companies/ (last visited June 8, 2024).
[96] *See*, *e.g.*, Letter from Chairman Jim Jordan, *supra* note 79, at 3. In the Majority's letter to Vanguard, this Specification instead demanded material related to "Vanguard's decisions to join and withdraw from NZAM." Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop to Tim Buckley at 2 (Jul. 6, 2023).
[97] Some of these demands appear to have been based on an incorrect understanding of the facts. For instance, the Majority demanded that Engine No. 1 provide material relating to its participation in NZAM, even though Engine No.1 is not a member of NZAM. *See* Letter from Christopher M. James to Chairman Jim Jordan Re: Engine No. 1's Response to Letter Dated August 1, 2023, at 1 (Aug. 28, 2023).

among proxy advisory firms ... or financial services companies," even though neither party is a proxy advisory firm or financial services company.[98] The Majority demanded that the proxy advisory firms provide documents and communications on how each firm "developed its decarbonization and net zero emissions targets and commitments," even though neither firm has set any such targets or commitments.[99] Other Specifications sought documents from the proxy advisors regarding how unrelated entities—stockholder engagement service providers and asset managers—"can or should advance decarbonization and net zero emissions goals."[100]

3. Refusal to engage in good-faith negotiations

Given the burden that its demands imposed on private parties, the Majority had an obligation to engage in good-faith negotiations with recipients of its requests to clarify the scope of the Committee's interest.[101] Instead, the Majority did the opposite. Majority Staff refused offers to engage in dialogue about how recipients of document requests should structure their collection of responsive records, and then seized upon alleged deficiencies in their productions to attack their compliance as inadequate.

Majority Staff declined to negotiate lists of document custodians or keyword terms on which to search, which would have aided the parties in locating records most pertinent to the Committee's inquiry.[102] Majority Staff also provided minimal guidance to parties about what categories of responsive records they should prioritize in their collections; for instance, stating a general interest in email communications.[103] Only after parties had begun producing responsive documents did Majority Staff propose custodians or identify specific categories of records it sought, claiming that the parties had withheld them.[104] Categories of interest that Majority Staff identified included communications with named entities or individuals; records from specified timeframes; or specific categories of business records.[105]

Even as parties continued to make rolling voluntary productions, the Majority continued to claim their responses were inadequate, based solely on the volume of documents the parties

[98] Letter from Ranking Member Jim Jordan, *supra* note 2, at 5.
[99] Letter from Nichol Garzon-Mitchell to Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop Re: Letter of August 1, 2023 at 2 (Aug. 15, 2023); Letter from Aaron S. Cutler to Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop Re: December 20, 2023 HJC Subpoena to ISS (Jan. 16, 2024) (noting that ISS understands the Specification to seek documents related to "how ISS made the decision to adopt certain definitional categories developed by Climate Action 100+ as the basis for implementing an aspect of ISS' Benchmark Policy").
[100] Retelny Letter, *supra* note 85, at 3; Cameron Letter, *supra* note 85, at 3.
[101] *See*, *e.g.*, Letter from James D. Barnette to Chairman Jim Jordan at 1 (Jan. 5, 2024) (noting that "collecting, identifying, and producing *all* documents responsive to [the Majority's] requests within two weeks was infeasible, if not impossible").
[102] *See* Letter from Matthew E. Miller to Chairman Jim Jordan at 2 (Jul. 7, 2023).
[103] *See* Letter from Thomas A. McGrath, *supra* note 13, at 2.
[104] In some cases, Majority Staff cited documents in *other* parties' productions to identify an alleged deficiency in a party's production. *See* Letter from Reginald Brown and Raya B. Treiser to Chairman Jim Jordan at 2 (Dec. 10, 2023).
[105] *See* Letter from Thomas A. McGrath, *supra* note 13, at 3 (documents predating Jan. 1, 2022); Letter from James D. Barnette to Chairman Jim Jordan at 1 (Feb. 16, 2024) ("documents and communications relating to airlines and climate change matters"); Letter from Aaron S. Cutler, *supra* note 100, at 4 ("documents and communications related to recommendations made by ISS related to climate-focused votes").

they had so far produced, and proceeded to summarily issue subpoenas.[106] In total, nine parties in the investigation received subpoenas between June and December 2023—Ceres, GFANZ, As You Sow, BlackRock, Vanguard, State Street, Arjuna, ISS, and Glass Lewis. All of the subpoenas that the Majority issued restated verbatim the Specifications from the original document demands.

C. Despite the deficiencies in the Majority's requests, parties to the investigation have diligently complied, producing more than 2.5 million pages of records.

The congressional oversight power is broad, but it is not unlimited. Critically, any subpoena from Congress "must serve a valid legislative purpose," meaning that "it must concern a subject on which legislation could be had."[107] Additionally, under the Constitution's separation of powers, "Congress may not issue a subpoena for the purpose of law enforcement" and "has no general power to inquire into private affairs and compel disclosures."[108] The Majority's heavy intrusion into private parties' commercial affairs, coupled with its attenuated connection to the federal antitrust laws, raises questions about whether the Majority's demands for documents exceeded these constitutional bounds.

All parties to this investigation made good-faith efforts to identify, collect, and produce internal documents under the fastest practicable timelines. Some parties acted with impressive speed: Vanguard, for instance, produced nearly a million pages of documents within 12 weeks of receiving the Committee's subpoena.[109] For small firms and nonprofits, the Majority's demands imposed a heavy burden. The broad scope of the Majority's requests, and their specific demand for employee emails, required many parties to engage third-party discovery vendors to assist with compliance.[110] The president and general counsel of As You Sow, a nonprofit with less than 50 full-time employees, told the Committee that it was "very costly in terms of time and money to respond to these requests."[111] Other parties told the Majority that they faced resource constraints in replying to the Committee's requests.[112]

In total, the Committee received 265,762 documents totaling 2,567,555 pages across all parties. This is a substantial collection of records for a single congressional investigation, one that illustrates the parties' thorough compliance efforts. Documents produced to the Committee contain all categories of records sought by the Majority, including internal and external email correspondence; correspondence on messaging apps like Slack; confidential strategy presentations; meeting agendas and minutes; grant applications; and more.

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[106] *See*, *e.g.*, Letter from Chairman Jim Jordan to Alyssa DaCunha at 1 (Dec. 15, 2023) at 1; Letter from Chairman Jim Jordan to Veronica Renzi at 2 (Dec. 11, 2023).
[107] *Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020) (internal quotations and alterations omitted).
[108] *Id*. (internal quotations omitted).
[109] *See* Letter from Robert K. Kelner to Chairman Jim Jordan at 1 (Mar. 4, 2024); Letter from Robert K. Kelner to Chairman Jim Jordan at 2 (Jan. 8, 2024).
[110] *See*, *e.g.*, Letter from James D. Barnette, *supra* note 102, at 2; Letter from Jonathan C. Su, *supra* note 47, at 4.
[111] Fugere Testimony at 189:9-13.
[112] Letter from Matthew E. Miller, *supra* note 103, at 2.

Party	Pages Produced
Arjuna	20,668
As You Sow	12,639
Aviva	99,820
BlackRock	251,432
CalPERS	50,321
Ceres	85,305
Engine No. 1	36,721
GFANZ	69,186
Glass Lewis	45,560
ISS	395,499
State Street	441,072
Trillium	17,642
Vanguard	1,041,690
Total	**2,567,555**

Finally, in addition to its demands for documents, the Majority requested transcribed interviews with ten witnesses, split evenly between As You Sow and GFANZ. The Committee conducted interviews with three witnesses and took a deposition of one.[113]

II. ROLE OF ESG INVESTMENT INITIATIVES

Climate change is real, and so is its impact on the corporate bottom line. Under the Paris Agreement, nearly every country in the world has committed to bringing greenhouse gas emissions to net zero by 2050, a policy goal with significant ramifications for every industry. Against this backdrop, investors have come to expect that the companies they invest in will disclose and address climate-related risks to their business. Investor-led ESG initiatives like CA100+ and NZAM reflect and respond to this organic demand from investors to measure companies' progress on their climate-related commitments. These initiatives, both of which explicitly disavow divestment from fossil fuels, push corporations to disclose their greenhouse gas emissions and put forward credible plans for reducing them.

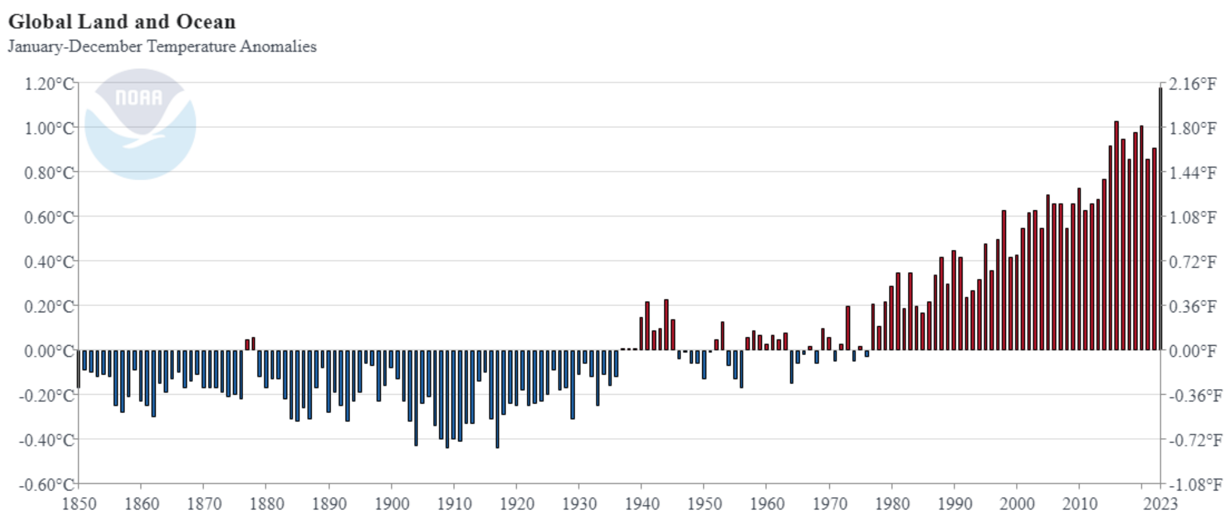
A. Climate change and the drive toward net zero emissions by 2050 have undeniable economic effects on corporations and their investors.

Major corporations accept the scientific consensus that climate change poses an imminent risk to the environment and the economy. Since the adoption of the Paris Agreement, many companies have committed to reduce or eliminate their greenhouse gas emissions by 2050 or sooner. These commitments have fed a desire among investors for clear and consistent standards for assessing the credibility of companies' plans for managing the transition to net zero.

[113] One of the witnesses sat for a deposition pursuant to subpoena. Interview with Andy Behar at 3:1-6 (As You Sow) (Mar. 28, 2024) (transcript on file with Committee) [hereinafter "Behar Testimony"].

1. The clear economic threat of a changing climate

Scientists agree that 2023 was, by some distance, the warmest year in recorded history, with each month between June and December setting a new temperature record.[114] This record-breaking heat caps an alarming trajectory, as each year of the past decade ranks among the 10 hottest years on record.[115] Even these records stand to be surpassed: Already, the first four months of 2024 have set new records for the hottest such months in history.[116] The pace of recent warming is unprecedented, as global temperatures have gone up faster in the last 50 years than they have at any other period dating back 2,000 years.[117] The cause of these anomalous temperature increases is the emission of greenhouse gases—principally, carbon dioxide, methane, and nitrous oxide—caused by human activities.[118] Climate experts estimate that the concentration of greenhouse gases in the atmosphere is higher than it has been "at any time in at least the past 800,000 years."[119]



Source: National Centers for Environmental Information, NOAA

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[114] Nat'l Centers for Environmental Information, *Annual 2023 Global Climate Report*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 2024), https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202313.
[115] *Id.*
[116] Nat'l Centers for Environmental Information, *Monthly Global Climate Reports for January, February, March, April 2024*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jun. 2024), https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202401; Press Release, *February 2024 was globally the warmest on record – Global Sea Surface Temperatures at record high*, EUROPEAN COMMISSION, CLIMATE COPERNICUS (Mar. 5, 2024), https://climate.copernicus.eu/copernicus-february-2024-was-globally-warmest-record-global-sea-surface-temperatures-record-high.
[117] *Fifth National Climate Assessment, Overview*, U.S. GLOBAL CHANGE RESEARCH PROG., https://nca2023.globalchange.gov/#overview (last visited June 8, 2024).
[118] *Climate Change 2023 Synthesis Report: Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, at 4–5, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [hereinafter "IPCC Summary for Policymakers 2023"].
[119] *Fifth National Climate Assessment, Overview*, *supra* note 118; *IPCC Summary for Policymakers 2023*, *supra* note 118, at 4.

There is growing evidence that the warming related to these emissions has increased the frequency and severity of extreme weather events.[120] In 2023, the United States experienced 28 weather disasters causing more than $1 billion in losses.[121] Heat waves, droughts, wildfires, flooding, hurricanes, and other storms have all become more severe due to the changing climate.[122] Americans in every region of the country feel the impact of these changes, which in some cases can be devastating. Last August, high winds from Hurricane Dora, combined with dry conditions, led to the outbreak of fast-moving wildfires on Maui in Hawaii.[123] The wildfires were among the deadliest in American history, killing at least 100 people and leveling the historic town of Lahaina.[124] A few months earlier, Canada's record-breaking 2023 wildfires, which covered enormous swaths of land on both ends of the country, sent thick smoke into the atmosphere and triggered air quality alerts as far away as the Mid-Atlantic region of the United States—a stark reminder that the effects of climate change do not stop at national borders.[125]

Such dramatic changes in the physical environment impact the American economy. Beyond the direct effects of extreme weather events, like loss of infrastructure and harm to human health, climate change and the need to adapt to it can affect the functioning of economic markets.[126] For instance, extreme weather events induced by climate change can reduce crop yields, raising food prices, or make property insurance costly or unavailable, raising the overall price to buy a home.[127] In capital markets, the risks associated with climate change and potential government responses affect the prices of stocks and bonds, especially those issued by high-emitting companies or municipalities exposed to extreme weather.[128] While the sheer breadth and variety of climate-related economic effects makes them hard to quantify, experts estimate that they will rise in proportion to global temperatures, with each additional degree of warming leading to greater negative consequences.[129]

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[120] Fifth National Climate Assessment*,* *Climate Trends*, U.S. GLOBAL CHANGE RESE PROGRAM, https://nca2023.globalchange.gov/chapter/2/ (last visited June 8, 2024).
[121] Nat'l Centers for Environmental Information, *Billion-dollar Weather and Climate Disasters*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.ncei.noaa.gov/access/billions/ (last visited June 8, 2024).
[122] *Climate Trends*, *supra* note 120; *Climate Change Indicators: Heat Waves*. ENVIRON. PROTECTION AGENCY, https://www.epa.gov/climate-indicators/climate-change-indicators-heat-waves (last visited June 8, 2024).
[123] *2023 Maui Wildfires*, ENVIRON. PROTECTION AGENCY, https://www.epa.gov/maui-wildfires (last visited June 8, 2024).
[124] Kurtis Lee, *My Everything — Gone, in a Matter of Moments*, N.Y. TIMES (Feb. 7, 2024), https://www.nytimes.com/2024/02/07/business/economy/maui-wildfire-economy.html.
[125] Adam Voiland, *Tracking Canada's Extreme 2023 Fire Season*, NASA EARTH OBSERVATORY, https://earthobservatory.nasa.gov/images/151985/tracking-canadas-extreme-2023-fire-season (last visited June 8, 2024); Nat'l Environ. Satellite, Data, & Info., Serv., *Smoke from Canadian Wildfires Blankets U.S.*, NAT'L OCEANOGRAPHIC & ATMOSPHERIC ADMIN. (Jun. 8, 2023), https://www.nesdis.noaa.gov/news/smoke-canadian-wildfires-blankets-us.
[126] Fifth National Climate Assessment, *Ch. 19, Economics*, U.S. GLOBAL CHANGE RESEARCH PROGRAM, https://nca2023.globalchange.gov/chapter/19/ (last visited June 8, 2024).
[127] *Id*.
[128] *Id*.
[129] *Id*.

Major corporations, including those in high-emitting sectors like oil and gas, understand that climate-related risks have a material impact on their profitability. Exxon and Chevron Corp. ("Chevron") both list climate change and related government interventions as material risk factors potentially affecting their financial results.[130] Airlines have cited changing weather patterns as material risks, with Delta Airlines ("Delta") telling investors "increases in the frequency, severity or duration of thunderstorms, hurricanes, typhoons, floods or other severe weather events, including from changes in the global climate and rising global temperatures, could result in increases in delays and cancellations, turbulence-related injuries and fuel consumption to avoid such weather, any of which could result in loss of revenue and higher costs."[131] Agriculture companies have noted the risk that climate change poses to their business, with Cargill saying, "Climate change presents both immediate and long-term risk to the vitality of our food system."[132]

Not all the economic impacts of climate change are negative, however. Guided by well-crafted public policy, economy-wide reductions in greenhouse gas emissions offer lucrative opportunities to companies prepared to drive the necessary technological changes.[133] Recently enacted legislation, spearheaded by House Democrats, spurred an influx of private investment and innovation toward decarbonizing high-emitting sectors. The Inflation Reduction Act of 2022,[134] which not a single congressional Republican supported, makes billions of dollars available to companies in the form of loan guarantees, subsidies, and tax credits for developing and deploying clean energy infrastructure, electric vehicles and charging stations, electric appliances, and more.[135] The Bipartisan Infrastructure Law[136] and the CHIPS and Science Act[137] also authorized major new federal investments in clean energy research and development programs.[138]

2. The Paris Agreement and the drive to net zero

The only way for governments around the world to forestall the most damaging ecological and economic effects of climate change is to keep rising temperatures in check. The Intergovernmental Panel on Climate Change ("IPCC"), a U.N.-convened group for reporting on the state of climate science, has reported that the impact of climate change, and the resulting risk to human activities, becomes more severe the further global average temperature increases rise

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[130] Exxon Mobile Corp. Form 10-K at 2, 4–5 (2023); Chevron Corp. Form 10-K at 20, 23–26 (2023).
[131] Delta Airlines, Inc. Form 10-K at 20 (2023).
[132] *2023 ESG Report*, CARGILL, INC. at 14, https://www.cargill.com/sustainability/doc/1432249635993/2023-esg-report.pdf (last visited June 8, 2024).
[133] House Select Committee on the Climate Crisis, Majority Staff Report, *Solving the Climate Crisis 2022: Key Accomplishments and Additional Opportunities* at 3 (Dec. 2022), https://docs.house.gov/meetings/CN/CN00/CPRT-117-CN00-D001.pdf.
[134] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022).
[135] House Select Committee on the Climate Crisis, Majority Staff Report, *supra* note 133, at 11, 19, 25.
[136] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).
[137] Pub. L. 117-167, 136 Stat. 1366 (2022).
[138] House Select Committee on the Climate Crisis, Majority Staff Report, *supra* note 133, at 10–11.

above pre-industrial levels.[139] As increases surpass 1.5°C above pre-industrial levels and approach 2°C, the effects of warming—higher land and sea temperatures, rising ocean levels, extreme weather events, loss of biodiversity, and more—grow accordingly.[140] At a peak temperature around 2°C, the IPCC says, "[s]ome impacts may be long-lasting or irreversible, such as the loss of some ecosystems."[141]

The Paris Agreement[142] seeks to avoid this outcome. Adopted in Paris in 2015, the Agreement is a legally binding multinational treaty that requires signatories to keep global average temperature increases "well below 2°C above pre-industrial levels" and attempt to limit such increases to 1.5°C.[143] To achieve this goal, the Agreement requires signatories to reduce their share of global greenhouse gas emissions to zero and directs the world's developed economies to provide financing and assistance to developing countries in that effort.[144] There are 195 signatories to the Agreement, including 194 states and the European Union.[145] President Biden recommitted the United States to the Paris Agreement on his first day in office.[146]

Keeping global average temperature increases below 2°C and at 1.5°C requires that greenhouse gas emissions reach net zero by 2050.[147] "Net zero" means a state in which any greenhouse gas emissions are offset by natural absorption or carbon capture technology, or, in the words of the Paris Agreement, "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases."[148] Since adoption of the Paris Agreement, signatories to the Agreement have adopted national net zero targets. By one measure, countries adopting such targets account for 90 percent of global GDP.[149] Under the United States-led Net-Zero Government Initiative ("NZGI"), for instance, the United States and 18 other nations have committed to bring emissions from national government operations to net zero by 2050.[150]

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[139] *Special Report: Global Warming of 1.5°C, Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, at 7–10 (2018), /https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf.
[140] *Id*. at 9.
[141] *Id*.
[142] Paris Agreement to the United Nation Framework Convention on Climate Change (Dec. 12, 2015), 3156 U.N.T.S. 79, [hereinafter "Paris Agreement to the United Nations"].
[143] *The Paris Agreement*, UNITED NATIONS, https://www.un.org/en/climatechange/paris-agreement (last visited June 8, 2024); Paris Agreement to the United Nations, *supra* note 141, at Art. 2(1)(a) (2016).
[144] *The Paris Agreement*, *supra* note 143.
[145] U.N. Treaty Collection, Ch. XXVIII 7.d Paris Agreement, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited June 8, 2024).
[146] *Paris Climate Agreement, Acceptance on Behalf of the United States of America,* WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/.
[147] *Climate Change 2023 Synthesis Report, Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE at 19 - 20 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.
[148] Paris Agreement to the United Nations, *supra* note 142, at Art. 4(1).
[149] Schapiro Testimony at 6:23-25.
[150] Council on Environmental Quality, *Net-Zero Government Initiative*, OFFICE OF THE FEDERAL CHIEF SUSTAINABILITY OFFICER, https://www.sustainability.gov/federalsustainabilityplan/net-zero-initiative.html (last visited June 8, 2024).

Reaching net zero emissions by mid-century requires that private parties as well as governments align their activities with that goal. Many corporations, including major energy-industry emitters like Exxon and Chevron, have publicly announced commitments to bring their emissions to net zero by 2050 or sooner.[151] Some have gone further, committing to interim emissions reduction targets.[152] The UN's The Race to Zero ("R2Z") initiative brings together more than 13,000 entities—including corporations, subnational governments, and nonprofit institutions—in a commitment to cut emissions in half by 2030.[153] These efforts, along with government policies to reduce emissions, have begun to show progress: In the United States, greenhouse gas emissions fell between 2005 and 2019.[154] Nevertheless, warming is still projected to exceed 2°C by the end of this century absent significant further reductions.[155]

3. Need for climate-related disclosures

While many corporations have announced net zero commitments in the wake of the Paris Agreement, shareholders often lack information to assess the credibility of those commitments. Investors and others tracking corporations' emissions reduction targets are wary of "greenwashing," which one witness described to the Committee as "essentially trying to burnish your green credentials, trying to look like you are more environmentally conscious and compliant than you, in fact, are."[156] To ensure that companies' emissions reduction goals are scientifically sound and not mere public relations exercises, investors and other financial industry players developed sets of recommended standards for companies to follow in making climate-related disclosures.[157] These standards rely on input from scientific experts and other stakeholders to identify relevant categories of data for inclusion.[158]

One such effort is the Task Force on Climate-Related Financial Disclosures ("TCFD"). An initiative of the G20, the TCFD brought together a group of business leaders in 2017 to

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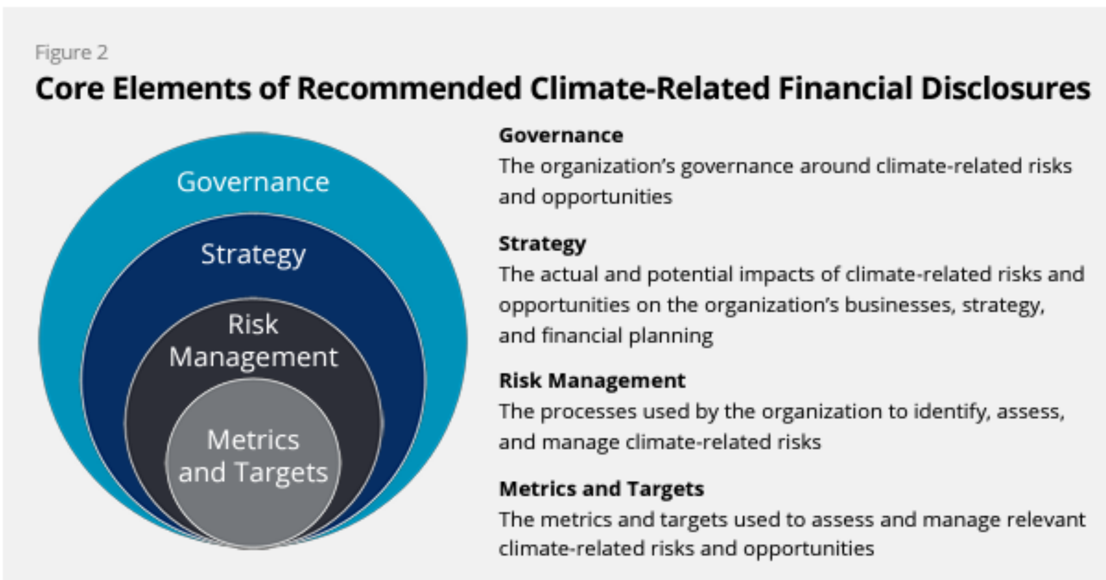
[151] *See*, *e.g.*, Exxon Mobil Corp. Form 10-K at 42 (2023); Chevron Corp. Form 10-K at 25 (2023); American Airlines Group, Inc. Form 10-K at 12 (2023).
[152] *See*, *e.g.*, *Net Zero Benchmark Company Assessment: Ford Motor Co.*, CA100+, https://www.climateaction100.org/company/ford-motor-company (company has set target for reducing emissions between 2027 and 2035) (last visited June 8, 2024).
[153] *Race to Zero criteria consultation 3.0, Summary Report*, UNITED NATIONS at 2–6 (Feb.–May 2022), https://climatechampions.unfccc.int/wp-content/uploads/2022/06/Summary-of-and-reflections-on-Race-to-Zero-criteria-consultations-2022-2.pdf.
[154] Fifth National Climate Assessment, *Ch. 23, Mitigation*, GLOBAL CHANGE.GOV, https://nca2023.globalchange.gov/chapter/32/ (last visited June 8, 2024).
[155] IPCC Summary for Policymakers 2023, *supra* note 11, at 10–11.
[156] Schapiro Testimony at 53:24-25.
[157] These net-zero-specific standards arising in the wake of the Paris Agreement follow earlier established efforts to incorporate ESG goals into investment more generally, such as the Principles for Responsible Investment ("PRI"), a coalition of institutional investors founded by then-U.N. Secretary General Kofi Annan in 2005. *See* Principles for Responsible Investment, *About the PRI*, UNITED NATIONS, https://www.unpri.org/about-us/about-the-pri (last visited June 8, 2024).
[158] *Final Report*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES at 1 (Jun. 2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf [hereinafter "TCFD Final Report"].

develop a framework for measuring climate-related financial risk.[159] As GFANZ co-chair Mark Carney, who chaired the board that brought together the TCFD, told the Committee, "[T]o get somewhere, you need to know where you're starting first."[160] The TCFD's final report, published in 2017, outlines a set of 11 voluntary disclosures for companies to make regarding their climate exposure.[161] These recommendations are grouped into four categories: governance, strategy, risk management, and metrics and targets.[162] A key recommendation of the TCFD relates to companies' disclosure of Scope 1, Scope 2, and Scope 3 emissions. "Scope 1" refers to a company's direct emissions; "Scope 2" refers to indirect emissions a company generates "from consumption of purchased electricity, heat, or steam"; and "Scope 3" refers to all other indirect emissions that occur upstream or downstream in the company's value chain.[163] The TCFD recommends that companies disclose all Scope 1 and Scope 2 emissions and disclose material Scope 3 emissions.[164] Since their publication in 2017, the TCFD's voluntary recommendations have received broad adoption from companies around the world, though only a small number of companies meet all 11 of the recommendations.[165]



Source: Task Force on Climate-Related Financial Disclosures Final

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[159] *Id*. at iii. The TCFD was established by the Financial Stability Board ("FSB"), which comprises the finance ministers and central bank heads of G20 member states. Schapiro Testimony at 48:6-9.
[160] Interview with Mark Carney at 48:8-19 (Apr. 17, 2024) (GFANZ) (transcript on file with Committee) [hereinafter "Carney Testimony"].
[161] TCFD Final Report, *supra* note 158, at 14.
[162] *Id*.
[163] *Annex*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES at 83(Oct. 2021), https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf [hereinafter "TCFD Annex"].
[164] *Id*. at 21–22.
[165] Carney Testimony at 49:14-25; Schapiro Testimony at 49:16-50:7; *2023 Status Report*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES at iv (Oct. 2023), https://assets.bbhub.io/company/sites/60/2023/09/2023-Status-Report.pdf (reporting that 4% of public companies "disclosed in line with all 11" recommendations).

Recognizing investors' need for comprehensive data on material climate-related risks, multiple jurisdictions have in recent years adopted mandatory disclosure regimes.[166] Many of these laws and regulations follow the framework recommended by the TCFD, albeit to varying degrees.[167] While the Securities and Exchange Commission's ("SEC") recently finalized rule for climate-related disclosures used the TCFD framework as a "reference point," the rule differs from the TCFD recommendations in significant respects and does not require companies to disclose their Scope 3 emissions.[168] By contrast, a pair of recently enacted climate disclosure laws in California,[169] as well as the European Union's Corporate Sustainability Reporting Directive ("CSRD"),[170] prescribe disclosure standards that include relevant Scope 3 emissions. Other jurisdictions, such as the United Kingdom, are still weighing mandatory disclosure of Scope 3 emissions.[171]

The adoption of net zero targets and mandatory climate disclosure regimes has not sent the fossil fuel industry into terminal decline. Oil production reached a record high of 13.2 million barrels a day in December 2023.[172] Natural gas production, which is correlated to crude oil production, reached a new high of 3.75 trillion cubic feet.[173] The situation is similar in developing economies, where it is still easier to procure financing for fossil fuel-based energy projects than it is for projects based on renewables.[174] Recently announced acquisitions by ExxonMobil and Chevron show that, far from abandoning their core petroleum business, both companies plan to expand them.[175] The two oil giants emerged from the COVID-19 pandemic in

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[166] *See*, *e.g.*, Securities & Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21,668, 21,673 (Mar. 28, 2024), codified at 17 CFR pts. 210, 229, 230, 232, 239, 249, (noting that, in light of the proliferation of corporate net-zero commitments, "investors have expressed the need for more detailed information to aid their investment and voting decisions").

[167] Schapiro Testimony at 50:8-16.

[168] Securities & Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21,668, 21,673 (Mar. 28, 2024), codified at 17 CFR pts. 210, 229, 230, 232, 239, 249.

[169] S.B. 253, Climate Corporate Data Accountability Act (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253; S.B. 261, Greenhouse gases: climate-related financial risk (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261.

[170] Directive (EU) 2022/2464, amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Dec. 14, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464.

[171] *Scope 3 Emissions in the UK Reporting Landscape: Call for Evidence*, DEP'T FOR ENERGY SECURITY & NET ZERO at 4 (Oct. 2023), https://assets.publishing.service.gov.uk/media/652ea475697260000dccf9db/scope-3-emissions-in-the-uk-reporting-landscape.pdf.

[172] *Crude Oil Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS1&f=M (last visited June 8, 2024).

[173] *Natural Gas Gross Withdrawals and Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/ng/hist/n9010us2m.htm (last visited June 8, 2024).

[174] David Gelles & Vivienne Walt, *The Financial Paradox Blocking Efforts to Combat Climate Change*, N.Y. TIMES DEALBOOK (Dec. 2, 2023), https://www.nytimes.com/2023/12/02/business/dealbook/financing-climate-efforts.html.

[175] Exxon announced an agreement in October to acquire Pioneer Natural Resources, the biggest well operator in the Permian shale oilfield, for $60 billion, while Chevron agreed the same month to buy Hess Corp. for $53 billion. Sabrina Valle & Arathy Somasekhar, *Exxon secures lead in top US oilfield with $60 billion buy of shale rival*

strong condition, with both Exxon and Chevron reporting their biggest annual profits in a decade last year.[176] Yet despite the spike in oil prices in 2022 resulting from Russia's invasion of Ukraine, Exxon and Chevron responded with share buybacks and dividends worth billions rather than new investment.[177]

B. CA100+ and NZAM are voluntary efforts by investors and companies to align their finances with net zero emission targets.

Firms across the financial industry recognize that failing to reach net zero by 2050 would cause significant economic harm and loss of shareholder value. In the wake of the Paris Agreement, many investors and financial institutions have adopted net zero targets of their own and joined voluntary industry initiatives dedicated to their shared goal. Two of these initiatives are Climate Action 100+ and Net Zero Asset Managers. Both CA100+ and NZAM help investors achieve net zero across their portfolios by assuring that their investee companies have credible plans to reach net zero themselves. The initiatives employ various engagement strategies designed to persuade corporate management to disclose their emissions and adopt targets for reducing them in line with the Paris Agreement.

1. Climate Action 100+

CA100+ is an investor-led initiative whose goal is to engage companies around the world "to drive the clean energy transition and help achieve the goals of the Paris Agreement."[178] Its work is overseen by a group of five investor networks: Ceres, Principles for Responsible Investment ("PRI"), the Asia Investor Group on Climate Change ("AIGCC"), the Investor Group on Climate Change ("IGCC"), and the Institutional Investors Group on Climate Change ("IIGCC").[179] Launched in 2017, CA100+ began as a five-year project, but in 2023 it unveiled the initiative's Phase 2, which will run through 2030.[180]

CA100+ has roughly 700 signatories, who managed approximately $68 trillion in assets as of 2023.[181] These include institutional investors like CalPERS and the New York State Common Retirement Fund, as well as asset managers like BlackRock International, Goldman Sachs Asset Management, and HSBC Asset Management.[182] The initiative requires signatories to

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Pioneer, REUTERS (Oct. 11, 2023), https://www.reuters.com/markets/deals/exxon-talks-pay-over-250-per-share-pioneer-bloomberg-news-2023-10-11/; Sabrina Valle & Mrinalika Roy, *Chevron to buy Hess Corp for $53 billion in all-stock deal*, REUTERS (Oct. 24, 2023), https://www.reuters.com/markets/deals/chevron-buy-hess-corp-53-bln-stock-2023-10-23/. The FTC conditionally cleared Exxon's acquisition in May. *In re Exxon Mobil Corp.*, Docket No. C----, (F.T.C.) (May 1, 2024).

[176] Stanley Reed, *Oil Giants Pump Their Way to Bumper Profits*, N.Y. TIMES (Feb. 2, 2024), https://www.nytimes.com/2024/02/02/business/oil-gas-companies-profits.html.

[177] Clifford Krauss, *Surging U.S. Oil Production Brings Down Prices and Raises Climate Fears*, N.Y. TIMES (Dec. 1, 2023), https://www.nytimes.com/2023/12/01/business/energy-environment/us-oil-production-record-climate.html.

[178] *Climate Action 100+ Investor Briefing Pack*, CA100+ CERES0049156 at -59.

[179] *2023 Progress Update*, CA 100+ at 2, https://www.climateaction100.org/wp-content/uploads/2024/01/Climate-Action-100-Progress-Update-2023.pdf [hereinafter "CA100+ 2023 Progress Update"].

[180] *Id.*

[181] *Id.*

[182] *Id.* at 4; *Investor Signatories*, *supra* note 29.

adopt a standardized sign-on statement confirming their support for CA100+'s "three asks" of corporations: governance, emissions reductions, and disclosure. These three commitments require, respectively, "a strong governance framework" for addressing climate risk, "action to reduce greenhouse gas emissions across the value chain" that meets the goals of the Paris Agreement, and "enhanced corporate disclosure" of climate-related planning, consistent with the TCFD's final recommendations.[183] The statement notes that the second ask, emissions reductions in line with the Paris Agreement, "implies the need to move towards net-zero emissions by 2050 or sooner."[184] The sign-on statement is the only action required of investors wishing to join CA100+.

INVESTOR SIGN-ON STATEMENT: 'THREE ASKS'

Investors participating in Climate Action 100+ recognise that decarbonisation of the global economy is complex and will require unique strategies and approaches across different businesses, regions and sectors. However, signatories have agreed there should be a broad common engagement agenda across sectors, regions and business types. This consists of seeking commitments from boards and senior management to:

1. **Implement a strong governance framework** which clearly articulates the board's accountability and oversight of climate risk;
2. **Take action to reduce greenhouse gas emissions across the value chain,** consistent with the Paris Agreement's goal of limiting global average temperature increase to well below 2°C above pre-industrial levels, aiming for 1.5°C. Notably, this implies the need to move towards net-zero emissions by 2050 or sooner; and
3. **Provide enhanced corporate disclosure** in line with the final recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and sector-specific Global Investor Coalition on Climate Change (GIC) Investor Expectations on Climate Change guidelines (when applicable), to enable investors to assess the robustness of companies' business plans against a range of climate scenarios, including well below two degrees and improve investment decision-making.

An important component of company commitments on climate change is the formation of comprehensive business strategies that fully align with the goals of the Paris Agreement and reaching net-zero emissions by 2050 or sooner. These strategies would encompass and actualise the three asks of the initiative in core business decisions of a focus company.

Supporting this high-level agenda, investors are identifying and communicating with companies on more detailed company-specific expectations.

Source: CERES0000320

At the center of CA100+'s work is the Company Focus List. It comprises those companies responsible for most greenhouse gas emissions and others that investors have identified as posing "the greatest climate-related financial risks to their portfolios."[185] The list started with 100 companies, but by 2021, it had expanded to include 166 companies representing 80 percent of global industrial emissions.[186] The list includes oil and gas giants like Exxon and Chevron; industrial heavyweights like Dow Inc. and Berkshire Hathaway; airlines; automotive

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183 *Climate Action 100+ Signatory Handbook, Version 2.0*, CA100+ (Aug. 2021) at 44, CERES0000320 at -63.
184 *Id*.
185 *Id*. at 13, -32.
186 *Id*.

companies; electric utilities; and more.[187] CA100+ used a consistent methodology in developing the Company Focus List. The initial list of 100 companies represented those with the highest Scope 1 to 3 emissions among the firms with the largest market capitalizations.[188] From there, CA100+ surveyed its investor signatories and added companies that investors identified as posing the greatest risk to their portfolios.[189]

To track the progress of Focus List companies toward meeting each of its three goals, CA100+ regularly publishes assessments of each company against its Net-Zero Company Benchmark.[190] In its most recent iteration, known as "Benchmark 2.0," the Benchmark consists of two categories of indicators: Disclosure Framework Indicators and Alignment Assessments.[191] Disclosure Framework Indicators are metrics assessing the company's climate disclosures (e.g., "Net-zero GHG Emissions by 2050 (or sooner) Ambition," "Climate Policy Engagement"), while Alignment Assessments are evaluations of a company's adherence to the goals of the Paris Agreement (e.g., "Climate Policy Engagement Alignment").[192] Notably, both sets of indicators draw on companies' publicly reported data, and CA100+ relies on external parties to conduct the assessments of each company's performance.[193] CA100+ published its first company assessments under Benchmark 2.0 in October 2023.[194]

CA100+ participants encourage Focus List companies to make progress on the group's Benchmark indicators through a set of strategies known as the "engagement process." "Engagement" generally refers to investors lobbying corporate management to adopt policies that further CA100+'s three goals.[195] CA100+ divides its signatories into two tiers based on their ability to engage directly with Focus List companies. "Investor Participants" are expected to engage with at least one Focus List company each year, while "Investor Supporters" do not need to participate in any engagements.[196] Investors typically work collaboratively to engage corporate management, with one investor in each engagement group serving as the Lead Investor and the others as Collaborating Investors.[197] CA100+ provides detailed guidance to investors about how to represent themselves in engagements, stressing that "Climate Action 100+ as an

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[187] *Companies*, CA100+, https://www.climateaction100.org/whos-involved/companies (last visited June 8, 2024).
[188] *Investor Briefing Pack*, *supra* note 179 at -64. Given the difficulties inherent in measuring Scope 3 emissions, CA100+ relied on modeled data from CDP, a nonprofit that provides climate-related data to investors. *See Who we are*, CDP, https://www.cdp.net/en/info/about-us (last visited June 8, 2024).
[189] *Investor Briefing Pack*, *supra* note 178.
[190] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183, at 38, at -57.
[191] *Net Zero Company Benchmark 2.0*, CA100+ at 5 (Mar. 2023), https://www.climateaction100.org/wp-content/uploads/2023/03/Climate-Action-100-Net-Zero-Company-Benchmark-Framework-2.0..pdf [hereinafter "CA100+ 2023 Benchmark"].
[192] *Id*. at 5–6.
[193] *Id*. at 12, 43.
[194] *Background: Net Zero Company Benchmark*, CA100+, https://www.climateaction100.org/net-zero-company-benchmark/background/ (last visited June 8, 2024).
[195] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183 at 7, -26.
[196] *Id*. at -41. While some CA100+ materials describe the engagement expectation for Investor Participants as a requirement, others describe it in less mandatory terms, such as a "requested" commitment. *Investor Briefing Pack*, *supra* note 178 at -78.
[197] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183 at 23-24, -43.

initiative will not act or speak directly on behalf of the investors participating in the initiative."[198] Thus, while investors may describe themselves as "signatories to," "participants in," or "part of" CA100+, they cannot tell companies "that they represent the Climate Action 100+ initiative" or its full AUM.[199] Additionally, CA100+ instructs investors to secure "explicit permission" from other investors in an engagement before claiming to represent them and to "defer to representing only the assets over which they have a fiduciary duty."[200]

When dialogue with management fails to yield progress, investors use various strategies to escalate their engagements with Focus List companies.[201] Some of these strategies involve the exercise of shareholder voting rights. Shareholders can vote on management proposals, such as the election of directors or the acceptance of the Annual Report, at a company's Annual General Meeting ("AGM").[202] Additionally, under rules prescribed by the SEC, shareholders may submit resolutions for inclusion on a company's proxy statement ahead of an AGM or other shareholder meeting.[203] CA100+ recognizes that shareholder resolutions are "a powerful signal and a useful engagement tool," but also that they "can often be resource and time intensive."[204] Under certain circumstances, CA100+ will "flag" upcoming votes on shareholder or management proposals related to the Net-Zero Company Benchmark.[205] CA100+ maintains a public database on its website of votes it has flagged.[206] While CA100+ says that its "signatories are encouraged to disclose their votes and rationale" on flagged proposals, it also makes clear that they "are independent fiduciaries and vote in accordance with their own voting principles and independent internal investment analysis."[207] As such, the initiative does not make voting recommendations, "seek to facilitate block voting," or require its investors to vote in a prescribed manner.[208]

While CA100+ retained the same basic operational framework when it moved to its second phase, it also implemented a handful of changes. These changes include the adoption of Benchmark 2.0 and certain new expectations for signatories.[209] For instance, in the new phase, CA100+ expects Lead Investors to prepare annual "engagement plans."[210] The engagement plan contains a schedule of the investor's planned engagement activities, "regionally appropriate escalation options that may be deployed," and guidance on how other investors can support the

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[198] *Id*. at 28, -47.
[199] *Id*.
[200] *Id*. at 29, -48.
[201] *Id*. at 32, -51 (providing a non-exhaustive list of engagement tactics).
[202] *Id*.; *see* 12 C.F.R. § 240.14a-2.
[203] *See generally* 12 C.F.R. § 240.14a-8. A proxy statement is a form containing certain required information that must be furnished to shareholders in advance of meetings at which votes will be held. 17 C.F.R. § 240.14a-3.
[204] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183 at 33, -52.
[205] *Id*. at 59–60, -78–79.
[206] *2024 Proxy Season Flagged Shareholder Votes*, CA100+, https://www.climateaction100.org/approach/proxy-season (last visited June 8, 2024).
[207] *Climate Action 100+ Signatory Handbook, Version 2.0, supra* note 183 at 33, -52.
[208] *Id*.
[209] *Climate Action 100+ Phase 2: Summary of Changes*, CA100+ at 5, (2023), https://www.climateaction100.org/wp-content/uploads/2023/06/CA100-Phase-2-Summary-of-Changes.pdf [hereinafter "CA100+ Phase 2 Summary of Changes"].
[210] *Id*. at 10.

Lead Investor's engagement effort.[211] Additionally, CA100+ expects Lead Investors and investors who engage companies individually to disclose their votes and rationale on all CA100+ flagged votes "where allowable by jurisdiction, if practical, and in line with signatories' own internal policies."[212] Finally, CA100+ made the revised Signatory Handbook for Phase 2 publicly available, in contrast to prior versions of the handbook, which were available only to signatories.[213]

2. Net Zero Asset Managers initiative

NZAM is an international group of asset managers committed to the goal of net zero by 2050. The group launched in 2020 under the leadership of six investor networks: the five networks overseeing CA100+ (AIGCC, Ceres, IGCC, IIGCC, and PRI), as well as CDP, a nonprofit organization that provides climate-related data to investors.[214] Today, NZAM boasts more than 315 signatories representing $57 trillion in AUM, including BlackRock, J.P. Morgan Asset Management, and UBS Asset Management.[215] NZAM is one of several sector-specific alliances of financial institutions supporting the goal of net zero by 2050, including the Net Zero Banking Alliance and the Net Zero Asset Owners Alliance.[216] All of the sector-specific alliances are affiliated with GFANZ, which provides technical assistance to alliance members in achieving their net-zero commitments.[217] However, GFANZ plays no role in overseeing the operations or setting the membership criteria of NZAM or any other alliance.[218]

In contrast to CA100+, NZAM signatories commit to aligning their own financial activities with net zero emissions. All NZAM signatories sign a statement committing to incrementally align their AUM with net zero by 2050, starting with an interim net zero-aligned target proportion and reviewing their progress toward 100 percent alignment every five years.[219] Within a year of joining the initiative, NZAM signatories must disclose the initial target; "fair share" interim targets for increasing the net-zero aligned percentage, and the methodology used to calculate those targets.[220] In furtherance of the initiative's overall net zero goal, signatories also agree to abide by 10 discrete commitments, including measurement of Scopes 1 and 2 and "material" Scope 3 emissions in their portfolios; the implementation of "a stewardship and engagement strategy, with a clear escalation and voting policy;" and the annual publication of

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[211] *Id*.
[212] *Id*. at 14.
[213] *Climate Action 100+ Signatory Handbook*, CA100+ (June 2023), https://www.climateaction100.org/wp-content/uploads/2023/06/Signatory-Handbook-2023-Climate-Action-100.pdf [hereinafter "CA100+ 2023 Signatory Handbook"]; *CA100+ Phase 2 Summary of Changes*, *supra* note 209.
[214] *Net Zero Asset Managers initiative: Progress Report*, NZAM, at 2, CERES0004842 at -43.
[215] *Signatories*, *supra* note 29.
[216] *Sector-specific alliances*, GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, https://www.gfanzero.com/membership/sector-specific-alliances (last visited June 8, 2024).
[217] Schapiro Testimony at 7:21-8:6.
[218] *Id*. 57:16-23.
[219] *Net Zero Asset Managers initiative: Progress Report*, *supra* note 214 at 3, -44.
[220] *Initial Target Disclosure Report*, NZAM at 9 (May 2022), CERES0032415 at -23. "Fair share" targets depend on the emissions reductions the asset manager has already achieved and the specific sectors and regions to which its funds are exposed. *Id*.

TCFD disclosures.[221] The NZAM sign-on statement recognizes that attainment of net zero emissions depends on factors outside asset managers' control, including government policies to achieve the goals of the Paris Agreement.[222] The statement further notes: "In some asset classes or for some investment strategies agreed net zero methodologies do not yet exist."[223]

While NZAM requires signatories to set interim net zero targets, it does not prescribe specific interim targets that they must meet or the methodology they must use to calculate them. Indeed, the initiative describes its commitment as "methodology neutral" and allows signatories to choose from among three endorsed frameworks for setting targets, or some combination of the three.[224] The investor networks that oversee NZAM review signatories' target disclosures "to ensure quality and consistency," and must give signatories a year to cure deficiencies in cases where they reject a target.[225] In the initiative's first year and a half, NZAM published its signatories' disclosures in two waves, once ahead of the COP26 in Glasgow and another in May 2022.[226] Both sets of disclosures included the signatories' current net zero-aligned AUM, interim targets, and target-setting methodologies.[227] As of May 2022, 83 asset managers representing $42 trillion in AUM had disclosed interim targets, with 39 percent of those assets aligned with net zero by 2050.[228] While NZAM hailed this progress, it continued to note the challenges involved in extending net-zero targets to all assets, particularly passive investments and benchmark-tracking index funds that "do not allow for active stock picking or deviation from the benchmark."[229]

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[221] *Net Zero Asset Managers initiative: Progress Report*, *supra* note 214 at 3–4, -44–45.
[222] *Id*. at 4, -45.
[223] *Id*.
[224] *Initial Target Disclosure Report*, *supra* note 220 at 9, -23.
[225] *Bi-Annual Signatories Meeting*, NZAM (Oct. 18, 2022) at 8–12, CERES0051257 at -64–68.
[226] *Net Zero Asset Managers initiative: Progress Report*, *supra* note 214 at 10, -51; *Initial Target Disclosure Report*, *supra* note 220 at 12, -26.
[227] *Net Zero Asset Managers initiative: Progress Report*, *supra* note 214 at 13–82, -854–923; *Initial Target Disclosure Report*, *supra* note 220 at 16–151, -430–566.
[228] *Initial Target Disclosure Report*, *supra* note 220 at 12, -26.
[229] *Id*. at 15, -29.

Net Zero Asset Managers commitment statement

In line with the best available science on the impacts of climate change, we acknowledge that there is an urgent need to accelerate the transition towards global net zero emissions and for asset managers to play our part to help deliver the goals of the Paris Agreement and ensure a just transition.

In this context, my organisation commits to support the goal of net zero greenhouse gas (GHG) emissions by 2050, in line with global efforts to limit warming to 1.5°C. It also commits to support investing aligned with net zero emissions by 2050 or sooner.

Specifically, my organisation commits to:

a. Work in partnership with asset owner clients on decarbonisation goals, consistent with an ambition to reach net zero emissions by 2050 or sooner across all AUM

b. Set an interim target for the proportion of assets to be managed in line with the attainment of net zero emissions by 2050 or sooner

c. Review our interim target at least every five years, with a view to ratcheting up the proportion of AUM covered until 100% of assets are included

Source: CERES0032415

Since its inception, NZAM has been a formal partner of the UN's Race to Zero campaign, which encourages non-state actors to adopt emissions reduction targets.[230] As a result, one of the 10 commitments that NZAM signatories make is to set an interim target consistent with cutting emissions in half by 2030.[231] However, R2Z leaves to its partner organizations the job of implementing and enforcing the Race criteria.[232] For NZAM signatories, the initiative requires only a "[b]rief description of how the asset manager considers the target to be consistent with delivering a fair share of" a halving of global emissions by 2030.[233] Moreover, after R2Z revised its criteria in 2022 to make membership requirements more stringent, GFANZ changed its governance documents to clarify that GFANZ was "not bound by Race to Zero."[234] Thus, neither NZAM's membership criteria nor GFANZ's guidance to the sector-specific alliances requires mandatory adherence to R2Z criteria.

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[230] *Net Zero Asset Managers initiative: Progress Report*, supra note 21 at 2, -43; *Summary Report: Race to Zero criteria consultation 3.0*, RACE TO ZERO at 2 (Feb.–May 2022), https://climatechampions.unfccc.int/wp-content/uploads/2022/06/Summary-of-and-reflections-on-Race-to-Zero-criteria-consultations-2022-2.pdf [hereinafter, "Race to Zero Summary Report"].

[231] *Initial Target Disclosure Report*, *supra* note 221 at 6, -20; Race to Zero Summary Report, *supra* note 230, at 8.

[232] Race to Zero Summary Report, *supra* note 230, at 5.

[233] *Initial Target Disclosure Report*, *supra* note 220 at 10, -24.

[234] GFANZ email re: Follow up from Principals Call (Oct. 25, 2022), GFANZ00066886; Schapiro Testimony at 25:20-26:8. *Compare Terms of Reference*, GFANZ at 2 (May 2022), GFANZ00003141 at -42 (describing sector-specific alliances as "adher[ing] to the minimum commitment requirements for participation" in R2Z) *with Terms of Reference*, GFANZ (May 2023) at 2, GFANZ00056809 at -10 (stating that "Alliances have the sole responsibility for managing their membership criteria, as well as for any changes thereto").

C. Participants in ESG investment initiatives seek to reduce their financed emissions by setting targets and engaging portfolio companies to act on climate.

Signatories to CA100+ and NZAM have adopted those initiatives' commitments to bring global emissions to net zero. Nevertheless, most participating financial institutions—and the largest asset managers especially—retain considerable freedom to set the terms of their involvement in the initiatives. Initiative leaders typically defer to participants' judgment regarding the reduction of their financed emissions, and do not prescribe specific targets or approaches. In corporate engagements and on shareholder votes, moreover, financial institutions' roles as fiduciaries to their clients and beneficiaries take precedence over the preferences of initiative leadership. In sum, without the voluntary acquiescence of their participants, ESG investment initiatives can accomplish very little.

1. Net-zero alignment targets

The primary way that financial institutions further the attainment of net zero by 2050 is by "aligning" their financed activities with that goal. However, there is no single methodology for assessing a financial portfolio's alignment with net zero.[235] As such, financial institutions' publicly announced targets vary widely in their level of detail and underlying assumptions. Moreover, because financial institutions frequently consider assets to be "aligned" with net zero so long as they are invested in companies that have adopted their own net zero targets, the achievement of projected emissions reductions ultimately depends on factors outside the financial institutions' control.

The initial round of targets announced by the Big Three asset managers as part of their participation in NZAM illustrates that portfolio alignment is a highly conjectural exercise. Before setting targets, asset managers must decide which of their funds will fall within the scope of their commitments. For large asset managers with a significant portion of their AUM committed to passively managed strategies, not all assets are equally susceptible to target-setting. Thus, while BlackRock committed to managing 75 percent of its portfolio in line with net zero by 2030, its commitment came with several caveats.[236] First, the scope of the commitment included only "corporate and sovereign assets managed on behalf of clients," limiting its application to 77 percent of BlackRock's total AUM.[237] More importantly, BlackRock couched its commitment in aspirational terms, stating "we anticipate" at least 75 percent of assets in scope would be managed in line with net zero by the end of the decade.[238] Finally, rather than attempt to quantify all the greenhouse gas emissions tied to its invested assets, BlackRock considered

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[235] *Initial Target Disclosure Report*, *supra* note 220 at 9, -23; GFANZ, *Measuring Portfolio Alignment*, GFANZ, at vi, GFANZ00055831 at -37.
[236] *Initial Target Disclosure Report*, *supra* note 220 at 28, -42; *BlackRock's 2030 net zero statement*, BLACKROCK, https://www.blackrock.com/corporate/sustainability/2030-net-zero-statement (last visited June 8, 2024).
[237] *Initial Target Disclosure Report*, *supra* note 220 at 28–29, -42–43.
[238] *Id*. at 28, -42.

assets to be managed in line with net zero when "invested in issuers with science-based targets or equivalent."[239]

BlackRock's competitors took a more cautious approach to these uncertainties, choosing to exclude more assets at the outset instead of making predictions about companies' future adoption of net-zero targets. These modeling choices resulted in much lower headline targets but roughly equivalent levels of ambition. SSGA limited the scope of its net-zero commitment to assets held by "clients who have adopted net zero targets or similar commitments or may be reasonably expected to do so."[240] Notably, among its extensive portfolios committed to index investing strategies, SSGA only included in scope those index portfolios with an existing or planned climate-related benchmark.[241] With these limitations, SSGA's initial commitment of assets to manage in line with net zero amounted to just 14.1 percent of its total AUM.[242] For these assets, SSGA committed to a 50 percent reduction of the "financed Scope 1+2 Carbon emissions intensity" of its portfolio by 2030.[243] Similarly, Vanguard's target-setting applied only to those actively managed funds "that are investing in a net zero-aligned manner" and excluded index funds entirely, resulting in an initial commitment of 4 percent of its total AUM managed in line with net zero.[244] For these $290 billion in net zero-aligned assets, Vanguard pledged 50 percent would be invested "in companies with targets consistent with a net zero glidepath" by 2030.[245]

Even much smaller firms less reliant than the Big Three on passive management strategies subjected their initial target disclosures to significant limitations. Commitments from Arjuna, Aviva, and Trillium covered between 58 and 70 percent of AUM.[246] The firms also took different approaches to setting targets, with Aviva committing to reduce the carbon intensity of its in-scope assets by 2030 and Arjuna and Trillium setting target percentages of in-scope assets to have "approved science-based targets" by the end of the decade.[247]

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[239] *Initial Target Disclosure Report*, *supra* note 220 at 28, -42. Indeed, in its TCFD disclosures, BlackRock has taken the position that the Scope 3 emissions of its investments "should be limited to on balance sheet loans and owned investments," excluding emissions tied to assets that BlackRock manages on behalf of external clients. *2021 TCFD Report*, BlackRock at 39, BLK-HJC-00161742 at -80.
[240] *Initial Target Disclosure Report*, *supra* note 2022, NZAM at 74, -88.
[241] *Id*.
[242] *Id*. at 73, -87.
[243] *Id*. In contrast to an absolute measurement of emissions tied to an investment, "emissions intensity" measures an investment's absolute emissions "divided by the investment volume in USD." *Net Zero Interim Targets*, SSGA, fn.6, https://www.ssga.com/us/en/individual/mf/capabilities/esg/net-zero-interim-targets (last visited June 8, 2024).
[244] *Initial Target Disclosure Report*, *supra* note 220, at 75–76, -89–90.
[245] *Id*. at 75, -89. Both SSGA and Vanguard limited their initial commitments to Scopes 1 and 2 emissions. *Id*. at 73, 75, -87, -89.
[246] *Id*. at 91, 142, -505, -556; *Signatory Disclosure: Arjuna Capital*, NZAM, https://www.netzeroassetmanagers.org/signatories/arjuna-capital-2 (last visited June 8, 2024). Engine No. 1, which never signed on to NZAM, has not disclosed net-zero targets for its assets.
[247] *Translating climate ambition into action*, AVIVA, https://www.avivainvestors.com/en-gb/responsibility/our-climate-approach (last visited June 8, 2024); *Initial Target Disclosure Report*, *supra* note 220 at 142, -556; *Signatory Disclosure: Arjuna Capital*, *supra* note 246.

Despite the varying approaches and proposed metrics, NZAM accepted all these targets.[248] While NZAM reviews target disclosures to ensure they meet the initiative's criteria and correctly employ their chosen methodologies, it does not attempt to independently verify the underlying targets. An exchange between NZAM leadership and BlackRock reflects NZAM's role: Upon receiving BlackRock's submission, a representative of one of NZAM's investor networks asked BlackRock to provide more detail about how it intended to achieve its stated 77 percent of AUM managed in line with net zero.[249] The representative noted, "Many readers will instantly be asking this question, so it may help to get ahead of the game and provide some indication, it only needs to be a couple of sentences if you choose to add something."[250] BlackRock declined the suggestion to add even minimal additional support for its claim, and NZAM accepted the submission for publication.[251]

Recognizing the need for consistent standards to test the rigor of net-zero commitments, several groups have proposed their own frameworks. Among its voluntary guidance to financial institutions, GFANZ has published reports summarizing best practices on portfolio alignment and advising "real economy" (i.e., non-financial) companies on how to meet the expectations of net zero-committed investors.[252] Another group, the Science Based Targets initiative ("SBTi"), has developed a target-setting framework for use by financial and non-financial institutions alike.[253] The upshot is that ability of financial institutions to align their investments with net zero depends almost entirely on the extent to which their portfolio companies' "net zero" or "science-based" targets result in actual reductions in greenhouse gas emissions.[254] Such outcomes, in turn, rely on assumptions about future demand in heavy-emitting sectors, government policy, and the pace of technological change.[255] However they structure their targets, asset managers plainly

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[248] While CalPERS is not an asset manager, it is a signatory to the NZAM equivalent for asset owners, the Net Zero Asset Owners Alliance, which requires members to align their portfolios with net zero by 2050 and establish interim targets. Accordingly, CalPERS has committed to reducing the carbon intensity of its holdings in the Energy, Transport, and Industrials and Materials sectors by 2030. *Increasing Climate Ambition, Decreasing Emissions: The third progress report of the Net-Zero Asset Owner Alliance*, NZAOA (Oct. 2023), https://www.unepfi.org/industries/investment/increasing-climate-ambition-decreasing-emissions-the-third-progress-report-of-the-net-zero-asset-owner-alliance; *CalPERS United Nations Net Zero Asset Owner Alliance Participation*, CALPERS (May 11, 2023), https://www.calpers.ca.gov/page/investments/sustainable-investments-program/climate-change/united-nations-net-zero-asset-owner-alliance-partnership.
[249] BlackRock email re: NZAM target submission clarification (May 3, 2022), at 2, BLK-HJC-00165246 at -47.
[250] *Id*.
[251] *Id*. at 1–2, BLK-HJC-00165246 at -46–47.
[252] Schapiro Testimony at 153:18-154:12; *Measuring Portfolio Alignment: Driving Enhancement, Convergence, and Adoption*, GFANZ, GFANZ00055831; *Expectations for Real-economy Transition Plans*, GFANZ GFANZ00000462.
[253] *SBTi Corporate Net-Zero Standard Criteria, Version 1.2*, SCIENCE BASED TARGETS INITIATIVE, at 11 (Mar. 2024), https://sciencebasedtargets.org/resources/files/Net-Zero-Standard-Criteria.pdf.
[254] At bottom, a "science-based" target is simply an emissions reduction target consistent with the goals of the Paris Agreement. *Id*. at 11 ("At a minimum, [S]cope 1 and [S]cope 2 targets shall be consistent with the level of decarbonization required to keep global temperature increase to 1.5°C compared to pre-industrial temperatures."). To some extent, this question-begging premise at the heart of the enterprise limits the utility of even the most detailed plan for net-zero alignment.
[255] *See* Schapiro Testimony at 162:6-21.

recognize that their success in decarbonizing their portfolios depends on their ability to persuade companies and policymakers to adopt emissions-reducing measures.[256] As Vanguard noted in disclosing its initial target, "We believe any successful transition supporting net zero aligned investing will require the action of governments and policymakers."[257] BlackRock also took note of this dynamic in an internal presentation comparing its initial target disclosure to those of its competitors, remarking that as firms placed more assets in scope for their targets, they were more likely to "focus on the engagement lever specifically."[258] In other words, the more ambitious a firm's target is on paper, the more the firm depends for its fulfillment on the actions of others.[259]

a) Fossil fuel divestment

Although NZAM asks signatories to disclose information about their policies "in relation to fossil fuel investment," it does not require firms to divest funds from fossil fuels or any other sector.[260] Some asset managers have voluntarily adopted policies excluding fossil fuel securities from their portfolios. Arjuna does not invest client assets in "any company that receives revenue from oil and gas."[261] Others have made more limited fossil fuel divestments, such as BlackRock's and Aviva's policies divesting from companies generating revenues above certain thresholds from thermal coal.[262] Even as they publicly committed to net zero, however, the Big Three reaffirmed that they would not categorically divest from fossil fuels—and could not do so given the broad array of services they offer, including index investing strategies. BlackRock said that "we expect to remain long-term investors in carbon-intensive sectors like traditional energy, and we do not pursue broad divestment from sectors and industries as a policy."[263] State Street considers "engagement and stewardship efforts," rather than divestment, "the most effective tool to achieve long-term progress on energy transition."[264] Vanguard said, "we do not believe wholesale divestment is a productive way to safeguard the long-term investment returns of our clients."[265]

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[256] *Initial Target Disclosure Report*, *supra* note 221 at 74, -88 ("As we work to increase our in-scope assets to 100% over time, we intend to engage with clients to encourage them to adopt net zero goals and consider strategies that are aligned with net zero, where appropriate").
[257] *Id*. at 75, -89.
[258] *Net Zero Asset Managers Competitor Analysis*, BLACKROCK, at 2, BLK-HJC-00116395 at -96.
[259] In talking points prepared for the press around its NZAM announcement, Vanguard criticized BlackRock's disclosure for claiming that it was managing 77 percent of its AUM in line with net zero while simultaneously admitting that only 25 percent of its AUM was presently invested "in issuers with science-based targets or equivalent." In other words, Vanguard claimed BlackRock was claiming credit for "assets and funds that they hoped would align to net zero at some point in the future." *Talking Points to Press at 2*, VANGUARD, VAN_HJC_00029742 at -43 (emphasis in original).
[260] *Initial Target Disclosure Report*, *supra* note 220 at 10, -24.
[261] *Arjuna Capital 2022 Impact*, ARJUNA at 3, ARJUNA000799 at -801.
[262] *Sustainability as BlackRock's New Standard for Investing*, BLACKROCK (2020), https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter; *Aviva Investors Baseline Exclusions Policy – Summary*, AVIVA (Aug. 2023) at 7, AV00000711 at -17. CalPERS also divested its thermal coal holdings as required by state legislation. *CalPERS' Investment Strategy on Climate Change*, CALPERS (Jun. 2020) at 11–12, CALPERS_0000100 at -12–13.
[263] *Initial Target Disclosure Report*, *supra* note 220 at 29, -43.
[264] *Id*. at 74, -88.
[265] *Vanguard's Report on Climate-related Impacts 2021*, VANGUARD at 8, VAN_HJC_00000003 at -10.

The Big Three have come under frequent criticism from activists for their refusal to divest from fossil fuels.[266] Importantly, however, NZAM has resisted efforts to require its signatories to end financing of or investment in fossil fuels, or to even embrace such a goal.[267] When R2Z revised its criteria in 2022 to require an "unabated fossil fuel phase down and out," NZAM's Steering Committee declined to change its own policies in response, opting instead to consult with its Advisory Group and "consider strengthening/accelerating fossil fuel phase out language."[268] NZAM's reluctance to embrace divestment is unsurprising. NZAM, like CA100+, views engagement with corporate leadership as "a key mechanism" for achieving net zero by 2050.[269] Asset managers who divest from a corporation's securities forfeit their ability to engage with its leadership on climate or any other matter. When investors achieve progress on climate-related goals at major companies—for instance, by electing new directors to the Exxon board—they cite their success as validating their choice to engage rather than divest.[270] As CalPERS put it in response to a question about its philosophy on engagement vs. divestment, "Divestment is something we try to avoid. . . we tend to focus on economy-wide decarbonization rather than portfolio decarbonization."[271]

Relatedly, many participants in investor-led ESG initiatives believe that divestment hinders the achievement of net zero by transferring carbon-emitting assets to owners who may not be committed to addressing climate change. GFANZ does not call for divestment in any of the voluntary guidance it provides to the financial industry for this very reason.[272] As GFANZ Vice Chair Mary Schapiro testified to the Committee, "[D]ivestment doesn't actually help with decarbonization. It just moves assets around from one company to another."[273] GFANZ instead calls for a "managed phaseout" of assets with significant carbon emissions, which requires net

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[266] *See*, *e.g.*, Catherine Clifford, *Climate activists criticize BlackRock CEO's support for slow transition off oil and natural gas*, CNBC (Jan. 18, 2022), https://www.cnbc.com/2022/01/18/blackrock-ceo-larry-finks-support-for-fossil-fuels-criticized.html; Phillip Inman, *Green investment funds pushing money into fossil fuel firms, research finds*, THE GUARDIAN (May 2, 2023), https://www.theguardian.com/business/2023/may/02/green-investment-funds-pushing-money-into-fossil-fuel-firms-research-finds.

[267] *Steering Committee Meeting Minutes*, NZAM (July 27, 2023), at 2, CERES0073102 at -03; NZAM, *Fossil Fuel expectations*, NZAM (Aug. 2023), https://www.netzeroassetmanagers.org/media/2023/08/NZAM_Fossil-fuel-expectations.pdf ("Signatories are encouraged to adopt fossil fuel financing and investment policies and practices that are based on science-based net zero scenarios and that follow the guidance provided by the target setting methodology adopted by the signatory").

[268] *Steering Committee Meeting Minutes*, *supra* 267 at 2–3, CERES0073080 at -81–82.

[269] *Initial Target Disclosure Report*, *supra* note 220 at 15, -29; *Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 183 at 11, -30.

[270] BlackRock email re: BlackRock's vote at Exxon and Chevron (May 26, 2021) at 1, BLK-HJC-0000670 ("Either way, this shows the importance of engagement v. divestment."); *Engage or Divest? The Question at the Heart of Climate Impact*, SSGA at 2, SSGA-HJC.0057744 at -45 (citing increased uptake of 2°C scenario proposals in response to SSGA's "voting action, engagement, and thought leadership"); Vanguard email re: FW: [External] Members to Net Zero Asset Managers initiative treble but US execs say goal is not viable," (Mar. 29, 2021) VAN-HJC-00029495 at 1 (article stressing need to shift to low-carbon operating models "supports [Vanguard's] case against divestment").

[271] Summary Document, *Investor Practice Masterclass Session 3*, IIGCC (Aug. 2021) at 2, BLK-HJC-00065605 at -06.

[272] Schapiro Testimony at 156:19-157:6.

[273] *Id*. 156:25-157:1.

zero-committed investors to maintain financial support for such assets throughout the net-zero transition.[274] CalPERS has cited similar concerns to justify its policy against divestment, stating, "Divestment does not reduce carbon emissions—it simply makes them 'underground'—away from the public sight."[275] Similarly, As You Sow has noted that asset divestitures can create a misleading view of companies' greenhouse gas emissions when the assets continue to operate under new owners, and has introduced shareholder resolutions calling on companies to exclude emissions from divested assets from its calculation of emissions reductions.[276]

b) Passive investment and index funds

Many climate advocates argue that the growth of index investing poses a potentially intractable barrier to aligning financial industry activity with net zero.[277] Unlike actively managed investment funds, where asset managers allocate capital in an attempt to outperform the market, index funds seek to mimic the market's performance by closely tracking all the securities in a market index, such as the S&P 500.[278] Passive investment strategies allow a portfolio's performance to deviate only minimally from that of the underlying benchmark, which prevents asset managers from screening out securities from firms in high-emitting sectors like oil and gas.[279] Although Vanguard, as the pioneer of the index fund, is most closely associated with passive investment, all members of the Big Three today manage a majority of their AUM according to such strategies, including equity, bond, and mixed index mutual funds and Exchange-Traded Funds ("ETFs").[280] Vanguard and State Street each manage roughly 80 percent of their AUM according to index strategies, while BlackRock invests 66 percent of its AUM in index funds and ETFs.[281] By one measure, passively invested equities in the United States surpassed actively managed equities in 2019.[282]

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[274] *The Managed Phaseout of High-Emitting Assets*, GFANZ, at 6, GFANZ00000186 at -92. While GFANZ also issued a statement supporting R2Z's call for an end to new financing of coal projects, that statement expressed the personal opinions of the GFANZ co-chairs and vice chair and did not reflect an official opinion of the initiative. Email from M. Schapiro to L. Fink et al. re: "Statement on 'no new coal'" (Aug 1. 2022) at 1, GFANZ00041798.
[275] *Investor Practice Masterclass Section 3*, *supra* note 271 at 2, -06.
[276] Fugere Testimony at 120:9-121:1; Proxy Memo, *Exxon Mobil Corporation (XOM), Vote Yes: Item # 11 – GHG Reporting on Adjusted Basis*, AS YOU SOW, at 1–2, AYS001299 at -299–300.
[277] *See*, *e.g.*, *The Passives Problem and Paris Goals: How Index Investing Trends Threaten Climate Action*, THE SUNRISE PROJ., CERES0060613 [hereinafter "The Passives Problem and Paris Goals"]; *Missing the Target: Why Asset Managers Have Not Committed to Net Zero*, UNIVERSAL OWNER (Nov. 2021), SSGA-HJC.0258328 [hereinafter "Missing the Target"]; Adrienne Buller & Chris Hayes, *The Passive Revolution*, COMMON WEALTH (Apr. 2022), https://www.common-wealth.org/publications/the-passive-revolution.
[278] Aleks Vickovich, *Index Funds 'Pose Ethical Dilemma*, AUSTRALIAN FINANCIAL REV. (Jun. 30, 2021) at 1, VAN_HJC_00072254.
[279] *NZAM Target Setting FAQ*, SSGA (May 26, 2022) at 4, SSGA.HJC-006134 at 40; *Initial Target Disclosure Report*, *supra* note 220 at 15, -29.
[280] In contrast to mutual funds, ETFs sells shares only to financial institutions, who trade their shares on national exchanges. *Office of Investor Education & Advocacy, Mutual Funds and ETFs: A Guide for Investors*, U.S. SECURITIES & EXCHANGE COMMISSION at 6, https://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf.
[281] *Initial Target Disclosure Report*, *supra* note 220 at 76, -90; *NZAM Target Setting FAQ*, SSGA (May 26, 2022), at 4, SSGA.HJC-006134 at -40; BlackRock, Inc. Form 10-K at 3 (2023).
[282] *The Passives Problem and Paris Goals*, *supra* note 277 at 6, -18.

Since the Big Three disclosed their initial net zero targets through NZAM, they have faced fierce criticism from activists for excluding their passively managed AUM from the targets' scope. By placing passive assets beyond the reach of their commitments, the activists argue, the asset managers will continue to fund fossil fuels and other high-emitting sectors indefinitely, even as they claim credit for net-zero alignment.[283] As one critic of NZAM's net-zero methodology said in email to BlackRock, "A key part of any green capital allocation strategy would have to find a way of decarbonizing index funds, either at the fund-level or by helping to lead a more general reckoning with indices across the country."[284] To that end, advocates have pressed the Big Three to take steps toward ending passive investment in fossil fuels. Some have argued that asset managers have more discretion than they claim to screen securities out of index-tracking funds, even if the fund's performance deviates from that of the index as a result.[285] Others have suggested that the asset managers pressure the index creators, like S&P Global and FTSE Russell, to exclude high-emitting companies from their indices, or that the asset managers switch to their own in-house indices with such exclusions.[286] The Big Three have refused to entertain such steps.[287]

Despite the criticism, NZAM has not pushed its signatories to take further action aligning their passive investments with net zero. The initiative notes that adding fossil fuel-related screening criteria to index funds would require changing in the funds' terms, which would require approval by the fund's investors.[288] Instead, investor-led ESG initiatives have attempted clarify how net-zero alignment can properly account for the growing role of index investing in the financial system. GFANZ launched a workstream in 2023 to develop guidance that would provide investors a range of options around index funds, noting that simply directing investors to indices that screen out fossil fuels would "exclude companies in high-impact sectors that need finance to transition."[289] Ultimately, asset managers and ESG initiative leaders alike view the passive investment problem as another argument in favor of engagement over divestment.[290] As

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[283] *Missing the Targets*, *supra* note 277 at 6, -33.
[284] BlackRock email re: NZAMI and target-setting (Dec. 13, 2021) at 2, BLK-HJC-00206845 at -46.
[285] *The Passives Problem and Paris Goals*, *supra* note 277 at 15, -27.
[286] *Missing the Target*, *supra* note 277 at 7–8, -34–35.
[287] *See*, *e.g.*, BlackRock email re: Final BLK Board deck on sustainability (Jan. 7, 2022) at 1, BLK-HJC-00206845 (reiterating that BlackRock "will continue to be invested in carbon-intensive sectors as they decarbonize"); *Internal Talking Points* at 1, VANGUARD, VAN_HJC_00130257 ("With respect to index funds, our investors have not asked us to pick winners and losers in the management of the portfolio nor try to tradeoff the value of one company versus another set of companies in our Stewardship practices.").
[288] *Initial Target Disclosure Report*, *supra* note 220 at 15, -29.
[289] *Net-Zero Index Investing Workstream: Concept and Proposal*, GFANZ (Jul. 10, 2023) at 1–2, GFANZ00042210 at -10–11.
[290] *See* Schapiro Testimony at 65:2-5 (agreeing that stewardship and engagement is the "main lever" of influencing passively managed investments); GFANZ email re: Factoids on NZAM targets, esp big 3 passives (Jun. 7, 2022) at 1, GFANZ00022890; *NZAM Target Setting FAQ*, SSGA (Apr. 28, 2022) at 8–9, SSGA-HJC.0020719 at -26–27 ("the recommendation is to take an engagement-focused approach and influence companies to decarboni[z]e in the real world"); *Vanguard's Report on Climate-related Impacts 2021*, VANGUARD, at 8, VAN_HJC_00000003 at -10 ("On behalf of our investors in our index equity funds, we have a mandate to stay invested in constituent companies.").

NZAM states, "index funds have an important responsibility when it comes to engaging with the companies they are invested in."[291]

2. ESG-aligned financial products and services

In addition to setting overall targets to align their business with net zero, financial services firms offer discrete products and investment strategies to clients with climate- and ESG-focused priorities. These offerings reflect the firms' independent commercial choices, as investor-led ESG initiatives do not impose requirements related to their signatories' product mixes.[292] ESG-focused investment products give retail and institutional investors a means of aligning their own assets with net zero emissions or keeping funds out of certain sectors if they desire to do so.

Broadly speaking, investment products can incorporate ESG factors by applying a negative screen, a positive screen, or a combination of both.[293] These screens can come from the asset managers offering the products or third-party index creators.[294] A negative screen excludes securities from a portfolio for failing to meet selected ESG criteria, while a positive screen selects securities for inclusion in a fund based on their alignment with net zero and other ESG goals.[295] Examples of such products applying one or both of these screens include BlackRock's iShares ESG Screened S&P 500 ETF, Bloomberg SASB ESG indices from SSGA, Aviva's Climate Transition Global Credit Fund Ryh GPB, the Arjuna 350 Equity Fund, Engine No. 1's Perennial Fund, and Trillium's Fossil Fuel Free Core fund.[296] Each asset manager uses proprietary metrics and expertise in applying their ESG screens; as such, the content and strategy of ESG-aligned products differs among firms.[297]

ESG-aligned products and investment strategies have fluctuated in popularity. In its 2022 TCFD Report, BlackRock said that its sustainable ETFs were "one of the fastest growing segments" within the overall market and noted that it had expanded its sustainability-focused active investment strategies "in line with growing client demand."[298] Around the same time,

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[291] *Initial Target Disclosure Report*, *supra* note 220 at 15, -29.
[292] As one of the ten commitments that they adopt in joining the initiative, NZAM signatories agree to offer net zero-aligned investment products "[a]s required." *Id*. at 6, -20.
[293] *See 2022 Asset Stewardship Report*, SSGA (May 2023) at 19, SSGA.0005656 at -74.
[294] *Id*.
[295] *Id*.
[296] *Our New Standard: Sustainable Investing at BlackRock*, BLACKROCK, at 4, BLK-HJC-00137166 at -69; *2022 Asset Stewardship Report*, SSGA (May 2023) at 20, SSGA.0005656 at -75; *Climate Transition Global Credit Fund Ryh GBP*, AVIVA, https://www.direct.aviva.co.uk/wealth/FundChoice/SelfSelectFundsList/FundDetails/BMZ3D97/SelfSelectFund?isSIPPTransferJourney=False; Fact Sheet, *Arjuna 350 Equity*, ARJUNA, AT ARJUNA005123 (Mar. 2023); *Perennial Fund*, ENGINE NO. 1 at 18, ENGINENO1-118HJC-PROD-00002516 at -33 (Aug. 2021); *Impact Performance Group*, TRILLIUM at 45, TRILLIUM_00008017 at -61 (Aug. 6, 2020). Most of Vanguard's actively managed funds are handled by external advisers who apply their own screens to their ESG-aligned products. *Vanguard's Report on Climate-related Impacts 2021*, VANGUARD, at 26, VAN_HJC_00000003 at -28.
[297] *Compare 2022 TCFD Report*, BLACKROCK, at 13–16, BLK-HJC-00000210 at -22–25; *with 2022 Asset Stewardship Report*, SSGA at 19–21, SSGA-HJC.0005656 at -74–76 (May 2023); *and Perennial Fund*, ENGINE NO. 1 at 17, ENGINENO1-118HJC-PROD-00002516 at -34 (Aug. 2021).
[298] *2022 TCFD Report*, BLACKROCK at 15, BLK-HJC-00000210 at -24.

SSGA reported that it was "continuing to build out additional climate investment strategies that meet the large investor demand for sustainable investing."[299] Boutique asset managers have presented their own products as better able to serve investors' demand for a sustainable home for their money.[300] More recently, investor demand appears to be on the wane. An analysis from Morningstar found that sustainable investment funds saw more than $8 billion in outflows in the first three quarters of 2023, with nearly 40 funds dropping their ESG criteria or closing altogether.[301] BlackRock and SSGA were among the asset managers that closed sustainable investment funds last year.[302]

Asset managers have faced criticism over their ESG-aligned products that echoes the critiques of their net zero targets. Because asset managers do not follow consistent metrics in applying ESG screens, activists claim that statements about the sustainability of ESG investment products lack credibility.[303] Indeed, such criticisms have not come solely from activists: Critiquing traditional ESG screens, Engine No. 1 noted that four different ratings agencies assigned widely diverging scores to the same firm (Facebook) on ESG metrics.[304] These criticisms also reflect on the integrity of the asset managers' net-zero targets, since asset managers frequently use their own internal ESG classifications in deciding which assets to include within the scope of their commitments.[305] In 2023, the SEC finalized a rule cracking down on the misleading use of ESG labeling in fund names by requiring more funds to adopt a policy of investing at least 80 percent of the fund's value in assets consistent with the fund's name.[306]

3. Corporate engagement

With investor-led ESG initiatives unwilling to push their signatories to divest from fossil fuels, engagement has emerged as the key lever for the initiatives to achieve emissions reductions across the economy. "Engagement," also known in corporate parlance as "stewardship," typically refers to direct interaction between investors and a company at the management or board level.[307] The Big Three asset managers all have dedicated business units to

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[299] *TCFD Report Q2 2022*, SSGA, at 16, SSGA-HJC.0000053 at -68.
[300] *See*, *e.g.*, *Letter to Investors, Q2 2021*, ENGINE NO. 1, at 1, ENGINENO1-118HJC-PROD-00002653 (describing the unsatisfactory results of traditional ESG investing in developing Engine No. 1's Total Value Framework).
[301] Shane Shifflett, *Wall Street's ESG Craze Is Fading*, WALL ST. J. (Nov. 19, 2023), https://www.wsj.com/finance/investing/esg-branding-wall-street-0a487105.
[302] Silla Brush, *BlackRock, State Street Among Money Managers Closing ESG Funds*, BLOOMBERG (Sep. 21, 2023), https://www.bloomberg.com/news/articles/2023-09-21/blackrock-state-street-among-money-managers-closing-esg-funds.
[303] *The Passives Problem and Paris Goals*, *supra* note 277 at 13, -25.
[304] *Perennial Fund*, ENGINE NO. 1 at 6, ENGINENO1-118HJC-PROD-00002516 at -21 (Jun. 2021).
[305] *See*, *e.g.*, *Initial Target Disclosure Report*, *supra* note 220 at 74, -88.
[306] Investment Company Names, 88 Fed. Reg. 70,436 (Oct. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).
[307] *2022 Investment Stewardship Annual Report*, BLACKROCK at 37, BLK-HJC-00000010 at -46. Engagement can also refer to one-sided communications like letter writing, though not all investors include such activity in their engagement statistics. *Id.*

handle their corporate engagement, as do smaller asset managers and asset owners.[308] The pace of engagement typically increases around the time of a company's AGM, as investors seek to understand matters on which they will vote, but engagement continues year-round.[309] Engagement is a routine part of investment activity: In a given year, the largest asset managers will engage hundreds or thousands of companies at least once.[310]

Investors have sought a long list of climate-related actions in their engagements with companies. Many of the most common requests ask companies to disclose information about their net-zero transition plans, including: TCFD-aligned disclosures, any scenario analysis[311] the company has performed, emissions reduction targets the company has adopted, the company's use of carbon offsets, corporate governance of the company's climate transition plan, and more.[312] Some investors seek more far-reaching actions from companies. For instance, while some investors have asked companies to disclose their emissions out to Scope 3, others do not expect disclosures beyond Scopes 1 and 2.[313] Similarly, while some have gone beyond requests for greater disclosure and asked companies to commit to more ambitious emissions reduction targets, not all investors expect companies to set specific targets.[314] Other actions include reduction of methane emissions and disclosure of lobbying activities on climate-related public policy.[315]

Individual engagements vary in duration and specificity and can be initiated by investors or the company.[316] At its core, however, every engagement is essentially a conversation. A 2021 BlackRock engagement with Exxon, for example, followed a tight, high-level agenda, with BlackRock executives presenting their views on climate-related risk and Exxon sharing how it believed the future energy outlook would affect Exxon's business.[317] By contrast, a 2022

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[308] *See id*. at 36, -45; *2022 Asset Stewardship Report*, SSGA, at 29, SSGA-HJC.0005656 at -84 (May 2023); *Global Investment Stewardship Principles*, VANGUARD at 3, VAN_HJC_00000270 at -72 (Nov. 2021); *Our Approach to ESG*, AVIVA, at 4, AV00010375; *Trillium Asset Management*, TRILLIUM, at 3, TRILLIUM_00011110 at -12; CalPERS Corporate Engagement, CALPERS at 3, CALPERS_0001215 at -17 (Aug. 2021).

[309] 2022 Asset Stewardship Report, SSGA, at 32, SSGA-HJC.0005656 at -87 (May 2023).

[310] *2022 Investment Stewardship Annual Report*, BLACKROCK at 79, BLK-HJC-00000010 at 88 (3,886 engagements in 2022); *2022 Asset Stewardship Report*, SSGA at 30, SSGA-HJC.0005656 at -85 (May 2023) (956 engagements in 2022); *Vanguard's Report on Climate-related impacts*, VANGUARD at 35, VAN_HJC_00000003 at -25 (2021) (1,074 companies engaged in 2021).

[311] A "scenario analysis" is a company or investor's assessment of its own exposure to the physical impact of climate change under potential warming trajectories, such as 1.5°C or 2°C above preindustrial levels. Fugere Testimony at 60:1-13.

[312] *2022 Asset Stewardship Annual Report, supra* note 293, at 48, SSGA-HJC.0005656 at -703.

[313] *See id*. at 47, -702; CalPERS email re: CA100+ P&G memo (July 11, 2022) at 5, CALPERS_0003235 at -39; *2022 Investment Stewardship Annual Report*, *supra* note 27, at 139, -148.

[314] *See 2022 Responsible Investment Review*, AVIVA at 17, AV00000490 at -506; *Vanguard Investment Stewardship Engagement Prep, Chevron Corp*., VANGUARD (May 18, 2022) at 1, VAN_HJC_00129369.

[315] *Driving Value Through Active Ownership*, ENGINE NO. 1 at 3, ENGINENO1-118HJC-PROD-00014132 at -34; CalPERS Corporate Engagement, CALPERS (Aug. 2021) at 13, CALPERS_0001215 at -27.

[316] *Compare 2022 Asset Stewardship Report*, SSGA at 51, SSGA-HJC.0005656 at -706 (May 2023) (SSGA initiating engagements with oil and gas companies) *with Vanguard Investment Stewardship Engagement Notes, Exxon*, VANGUARD, at 1, VAN_HJC_00038000 (Mar. 1, 2022) ("Company-initiated engagement to discuss climate/emissions and lobbying disclosures updates").

[317] BlackRock email re: July 15th Draft Agenda (Jul. 13, 2021) at 1, BLK-HJC-00002803.

Vanguard engagement with an independent director and several executives from Chevron covered five pending shareholder proposals, including proposals calling on the company to set Paris-aligned emissions reduction targets and issue a net-zero scenario analysis.[318] Notes from the meeting indicate that the conversation was cordial and that Vanguard accepted Chevron's representation that it was "making progress on [S]cope 3" without asking follow-up questions.[319] Even engagements that turn adversarial will often simply lead to further dialogue between investors and corporate leadership. In 2020, following multiple engagements, BlackRock's Investment Stewardship team emailed Exxon with a detailed list of deficiencies in the company's greenhouse gas reduction targets.[320] Exxon responded by proposing another hour-long phone call between the sides, which BlackRock executives acknowledged internally was unlikely to rectify their concerns.[321]

Danielle Fugere, president and general counsel of As You Sow, described the basic dynamics of engagement in her testimony to the Committee:

> Q. What does a typical engagement between As You Sow and a company look like?
>
> A. So we will meet with the company. They often bring teams from whatever issue area is pertinent. They might have the corporate secretary. They might have legal counsel in the room. We talk about the issues. . . [T]hey want to understand what we are concerned about, what we are asking about.
>
> We listen to what they have to say on the subject. Sometimes we find that companies simply haven't been disclosing what they're doing. And so that's a good outcome, because they, you know, will then generally make those disclosures, because that's helpful to investors. So it's a discussion. It's a dialogue.[322]

While CA100+ engagements include multiple investors, in form and substance they closely resemble investors' individual efforts. Substantively, investors engaging a company through CA100+ typically cover topics that track the CA100+ Benchmark indicators, and share information about the company's most recent scores on the Benchmark.[323] During a 2021 CA100+ engagement with a pair of Chevron directors, for instance, the two sides discussed the company's response to recent climate-related shareholder proposals, as well as Chevron's net zero targets and lobbying disclosures.[324] The agenda for a 2022 CA100+ engagement with Procter & Gamble showed that investors asked the company for more details about its climate-

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[318] *Vanguard Investment Stewardship Engagement Prep, Chevron Corp.*, VANGUARD, at 1–2, VAN_HJC_00129369 at -69–70 (May 18, 2022).
[319] *Id*. at 2, -30.
[320] BlackRock email re: 2020 AGM (May 19, 2020) at 3–4, BLK-HJC-00124851 at -53–54.
[321] *Id.* at 1.
[322] Fugere Testimony at 18:20-19:4.
[323] CalPERS email re: CA100+ P&G memo at 5, CALPERS_0003235 at -39 (Jul. 11, 2022); *Chevron Corp Video Call*, CALPERS, at 1, CALPERS_0009737 (Nov. 3, 2021); *Agenda for Climate Action 100+ Broad Engagement Team with Chevron Team*, CALPERS at 1, CALPERS_0003343.
[324] *Chevron Corp Video Call*, CALPERS at 1, CALPERS_0009737 (Nov. 3, 2021).

related lobbying, Scope 3 emissions, and more.[325] Outside of these face-to-face interactions, investors in an engagement group will often co-author letters requesting meetings with corporate leaders or summarizing their joint position on the company's climate-related efforts.[326] Even when engaging with CA100+, however, companies retain wide latitude to set the terms of the conversation. Exxon, for instance, limits participation in engagements to the company's investors, and cancelled a CA100+ engagement call when it learned that Ceres intended to participate as a subject-matter expert.[327] Other companies, like Caterpillar and Berkshire Hathaway, have in the past resisted engagement attempts by CA100+ or declined to engage through the initiative at all.[328]

Leaders of the CA100+ investor networks supervise the group's engagements to ensure that they cover the full list of focus companies without duplicating efforts. The initiative keeps a running list of the lead and co-lead investors heading each engagement team, and leaders will often seek volunteers from among the CA100+ signatories to join additional engagement groups.[329] CA100+ also asks its signatories to complete semiannual engagement surveys recording any activity at focus companies where the signatory is the lead investor or an individual engager.[330] CA100+ inputs data from its signatories' survey responses into an engagement tracker containing details of meetings and other communications with individual focus companies.[331] An Engagement Coordination Working Group within CA100+ reports to the initiative's Steering Committee about activity across its engagement groups and recent company-level developments resulting from engagement.[332] The working group will also conduct and present analyses of survey responses on metrics like the number of meetings that its engagement groups held, the level of company participation in meetings, and investors' use of the CA100+ Benchmark in engagements.[333]

a) Members' fiduciary duties and information sharing

Many signatories to CA100+ issued statements upon joining the initiative clarifying that they would participate in engagements only to the extent consistent with their primary duties to clients or members. BlackRock averred that it "must independently exercise its fiduciary duties

[325] CalPERS email re: CA100+ P&G memo at 5–6, CALPERS_0003235 at -39–40 (Jul. 11, 2022).
[326] *See*, *e.g.*, SSGA email re: [EXT] RE: Rolls-Royce CA100+ TCFD reporting next steps at 1–2, SSGA-HJC.0033929 at -29–30 (Sep. 1, 2021); CalPERS email re: Chevron note at 8–9, CALPERS_0007203 at -10–11 (Oct. 12, 2022); CalPERS email re: CA100+ Berkshire Hathaway notes, at 1–4, CALPERS_0018555 at -55–58 (Aug. 29, 2022).
[327] CalPERS email re: Internal Exxon strategy call: Oct. 19th @11am ET (Oct. 14, 2022) at 1, CALPERS_0035726.
[328] BlackRock email re: US CA100+ focus companies at 1–2, BLK_HJC_00006612 at -12–13 (Jul. 29, 2020).
[329] *CA100+ Masterspreadsheet FINAL 062220*, CA100+BLK-HJC-0006339; *See Climate Action 100+ Aviation Investor Working Group*, CA100+ at 9–10, SSGA-HJC.0035960 at -68–69 (May 18, 2023); BlackRock email re: US CA100+ focus companies at 2, BLK-HJC-00006612 at -13 (Jul. 29, 2020).
[330] BlackRock email re: Response Requested: CA100+ annual surveys DUE 30 June 2022, at 2, BLK-HJC-00088510 at -11 (Jun. 30, 2022). In certain circumstances, CA100+ allows signatories to engage with focus group companies on behalf of the initiative without collaborating investors. *Signatory Handbook, Version 2.0*, *supra* note 184 at 25, -44.
[331] *CA100+ Engagement Tracker*, CERES0029861.
[332] *See Steering Committee Agenda: July 2021*, CA100+ at 6, CERES0003935 at -40.
[333] *Id*. at 7–11, -41–45.

to our clients in determining how we prioritize engagements and how we will vote proxies."[334] SSGA and Ceres executed a side letter when SSGA joined the initiative, which stated that "State Street will independently exercise its fiduciary duties to clients, including decisions regarding how to engage with an issuer, how to vote proxies, and when to buy or sell securities."[335] Similarly, CalPERS' Investment Beliefs state that its investment decisions must be "consistent with its fiduciary duty to members and beneficiaries."[336] These statements echo CA100+'s policy guidance, which states that "[s]ignatories are independent fiduciaries responsible for their own investment and voting decisions."[337] As investors' primary duty is to their clients or members, it is not surprising that collaborative engagements are the exception, rather than the norm, for many investors.[338]

Recognizing the independent duties owed by its signatories, CA100+ has adopted an information sharing policy that limits the types of intelligence that investors share through engagement groups. The CA100+ handbook states that investors "do not discuss, and do not intend to discuss or exchange material non-public information with other investor signatories" or CA100+ leadership.[339] The policy permits investors to share only the information necessary to facilitate the goals of the initiative, including data related to engagements or a company's progress on the CA100+ Benchmark.[340] When a signatory engages a company on CA100+ issues individually, separate from a CA100+ engagement group, the signatory is not "required to share any information about the company that is not directly related to the Climate Action 100+ agenda."[341] Signatories are cautious about sharing proprietary information with the initiative. For instance, BlackRock told CA100+ in 2022 that it could not complete its engagement survey by the deadline because the firm only used public voting data about its voting and engagement to answer the survey, and the data had not yet been published on BlackRock's website.[342]

b) Independence of CA100+ signatories

CA100+ signatories generally retain the freedom to limit their participation in corporate engagements as they choose. CA100+ leaders frequently urge signatories to join additional engagement groups, engage companies individually on CA100+ issues, or report on their prior engagements.[343] But individual involvement varies. BlackRock chose to engage select focus list

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[334] *Letter to Climate Action 100+ Steering Committee*, BLACKROCK (Jan. 6, 2020) at 2, BLK-HJC-00000001 at -02.
[335] *State Street / Climate Action 100+ Side Letter*, SSGA (Dec. 16, 2020) at 1, SSGA-HJC.0005590.
[336] *CalPERS Corporate Engagement*, CALPERS, at 5, CALPERS_0001215 at -19 (Aug. 2021).
[337] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183 at 2, -21.
[338] *See*, *e.g.*, *2022 Investment Stewardship Annual Report*, *supra* note 27, at 72, -81; *2022 Responsible Investment Review*, *supra* note 314, at 84, -88.
[339] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183 at 35, -54.
[340] *Id*.
[341] *Id*. at 26, -45.
[342] BlackRock email re: Response Requested: CA100+ annual surveys DUE 30 June 2022, at 1, BLK-HJC-00085510 (Jun. 30, 2022).
[343] *See*, *e.g.*, BlackRock email re: US CA100+ focus companies, at 2, BLK-HJC-00006612 at -13 (Jul. 29, 2020); SSGA email re: SSGA, PRI, and CA100+, at 1, SSGA-HJC.0022593 (Jan. 20, 2021); CalPERS email re: [EXXON] Response Requested: CA100+ Bi-annual survey DUE 30 June 2021, CALPERS_0003009; Arjuna email re: Next Steps for Bank lead Engagers, at 1, ARJUNA011716 (Nov. 23, 2022).

companies—Exxon, Berkshire Hathaway, Caterpillar, General Electric, and General Motors—as an individual engager rather than participate in any CA100+ engagement groups.[344] SSGA initially joined engagement groups for two companies, Rolls-Royce and Hitachi, acting as a collaborating (rather than lead) investor in both groups.[345] After two years of participating in the Rolls-Royce group "primarily in listening mode," SSGA saw improvement in the company's disclosure and planned to leave the group.[346] Such limited participation is typical. As Danielle Fugere of As You Sow testified to the Committee, members of CA100+ engagement groups frequently change their participation based on the amount of time they can commit.[347]

CA100+ leadership recognizes that its ability to require greater collaboration on engagements is circumscribed. As the group states in its guidance, "The use of particular engagement tools and tactics, including the scope of participation in Climate Action 100+ engagements, is at the discretion of individual signatories."[348] Individual investors cannot claim to represent other signatories or the initiative as a whole in their engagements.[349] Leaders prod individual signatories to fulfill the requirements of membership, such as the expectation that individual engagers will share information with CA100+ engagement groups covering the same companies.[350] Internally, however, CA100+ has faced complaints that it has not held certain signatories (namely, asset managers) accountable for failing to meet expectations.[351] In particular, the initiative has suffered from a "[l]ack of 'active' participation by asset managers" and "corporate engagement outside of CA100+ inconsistent with a company's benchmark performance and overall progress to align with 1.5C or net-zero."[352] Nevertheless, the group has limited leverage to ratchet up accountability: When CA100+ proposed requiring members to share details about their individual corporate engagements, BlackRock communicated to leadership that it likely could not continue its participation if the initiative imposed the requirement.[353]

4. Shareholder voting

When engagement fails to yield results, investors can also express their views through votes on management proposals and shareholder resolutions, or by offering resolutions of their own. Investors routinely vote on such matters at companies' AGMs, and large asset managers

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[344] BlackRock email re: US CA100+ focus companies, at 1, BLK-HJC-00006612 (Jul. 29, 2020).
[345] SSGA email re: SSGA, PRI, and CA100+ at 1, SSGA-HJC.0033913 (Jan. 26, 2021).
[346] SSGA email, at 1, SSGA-HJC.0047771 (Jun. 8, 2023).
[347] Fugere Testimony at 166:11-17.
[348] *Climate Action 100+ Investor Handbook, Version 2.0*, *supra* note 183 at 2, -21.
[349] *Id*. at 28–29, -47–48; CalPERS email re: Chevron Proxy Statement, at 3–5, CALPERS_0028612 at -14–16 (May 4, 2022).
[350] BlackRock email re: Sharing Biannual Review Forms with Lead Investor, BLK-HJC-00009255 (Jul. 9, 2021) ("A requirement for individual engagers is to periodically touch base with the lead investor for the same company to help ensure that engagement objectives are aligned, wherever possible").
[351] *Steering Committee Agenda*, CA100+, at 11, CERES0061035 at -45 (Mar. 17/18, 2022).
[352] *Id*.
[353] BlackRock email re: Climate Action 100+ feedback, at 2, BLK-HJC-00171742 at -43 (Aug. 15, 2022).

cast tens of thousands of votes each year.[354] Voting against management's preferred position on a proposal or resolution is a way for investors to signal dissatisfaction with the company's performance.[355] Investors often refer to these votes and advocacy campaigns as "escalation," recognizing them as ways to apply external pressure on management when internal dialogue does not succeed.[356]

Climate-related shareholder resolutions cover the same range of actions that investors request from management in their engagements. In the past few years, shareholders have filed resolutions asking companies to disclose their emissions at Scopes 1, 2, and 3; prepare and disclose scenario analyses; adopt Paris-aligned emissions reduction targets; disclose their climate-related lobbying; give shareholders an advisory vote on the company's climate strategy (so-called "Say on Climate" resolutions); and more.[357] While management proposals, such as director elections, typically do not relate directly to climate, investors have cited corporate climate policies when explaining their votes on these proposals.[358] SSGA, for instance, says that "lack of disclosure in alignment with our expectations, including our public guidance on climate," is a scenario in which it will vote against directors.[359] Occasionally, a director election will turn into a proxy fight over a company's climate policies, as with the campaign to unseat Exxon directors in 2021.[360]

Sponsors of shareholder resolutions can be institutional investors, asset managers, or nonprofit groups that own enough shares to meet the qualifications. Recent climate-related shareholder resolutions offered at Exxon and Chevron, for instance, came from asset managers both large (BNP Paribas Asset Management) and small (Arjuna); institutional investors like the Christian Brothers Investment Services and the Sisters of St. Francis Charitable Trust; and nonprofit groups like Follow This and As You Sow.[361] Among nonprofits, As You Sow is unique in its use of shareholder resolutions to influence corporate behavior.[362] From July 2022 through June 2023, As You Sow filed 111 shareholder resolutions covering a host of issue areas,

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[354] *2022 Investment Stewardship Annual Report*, *supra* note 27, at 37- 46; *2022 Asset Stewardship Report*, *supra* note 293, at 33, -88; *Vanguard's Report on Climate-related Impacts 2022*, VANGUARD at 31, VAN_HJC_00000220 at -50.
[355] *2022 Investment Stewardship Annual Report*, *supra* note 27, at 37, -46.
[356] *Climate Action 100+ Investor Handbook, Version 2.0*, *supra* note 183, at 32, CERES0000320 at -51; *2022 Asset Stewardship Report*, *supra* note 293, at 29, -84; *2022 Responsible Investment Review*, *supra* note 314, at 106, -710; Fugere Testimony at 19:5-14.
[357] SSGA email re: CVX and XOM Voting Intentions and Rationale, at 2–3, SSGA-HJC.0209985 at -86–87 (May 20, 2022); *Vanguard's Report on Climate-related Impacts 2022*, *supra* note 354, at 29, -48; *Vanguard Investment Stewardship Engagement Prep: Chevron Corp*., VANGUARD at 1, VAN-HJC_00129369 (May 18, 2022); *Chevron Corp Video Call*, CA100+, at 1–2, CALPERS_0009737 at -37–38 (Nov. 3, 2021).
[358] Investment Stewardship Group, *Voting Bulletin: Exxon Mobil Corporation*, BLACKROCK at 1–2, BLK-HJC-00005949 at -49–50.
[359] *2022 Asset Stewardship Report*, *supra* note 293, at 39, -94.
[360] *Investor Practice Masterclass Session 3*, IGCC; Summary Document, *Corporate Engagement – Engaging the Value Chain*, (Aug. 2021) at 1, BLK-HJC-00065605.
[361] Chevron Corp., Schedule 14A at 110–13 (2023); Exxon Mobil Corp., Schedule 14A at 82–83 (2023); Exxon Mobil Corp., Schedule 14A at 73–77 (2022); Exxon Mobil Corp., Schedule 14A at 73, 80–81 (2021).
[362] Fugere Testimony at 17:10-18:3.

including climate change.[363] Not all of those resolutions proceeded to a vote; As You Sow frequently negotiates agreements with corporate management through which it withdraws its shareholder resolution in response to further action by the company.[364] For the 2023 proxy season, As You Sow reached agreements with companies to withdraw its resolutions in 51 instances.[365] As You Sow posts copies of all of the shareholder resolutions that it files or co-files on a publicly available tracker on its website.[366] The tracker also includes proxy memos that As You Sow prepares for each of its shareholder resolutions setting forth the rationale for the proposal and "giv[ing] investors information to help them decide whether the proposal is something that they want to support."[367]

Asset owners and asset managers publish detailed guidelines explaining how they reach their voting decisions.[368] While different investors emphasize different values in their guidelines, the biggest investors all state that they approach contested votes like shareholder resolutions on a case-by-case basis.[369] To decide how to apply their guidelines on specific votes, major investors will often undertake significant internal research.[370] Investors discuss pending shareholder resolutions or management proposals with corporate management in their engagements.[371] They also meet with the resolutions' sponsors or proponents to hear their views.[372] Votes are allocated to investors according to the shares they own.[373] Asset managers managing funds on behalf of clients vote where clients authorize them to do so.[374] The Big Three have all recently launched initiatives to allow more of their clients to exercise their votes directly. These services—BlackRock Voting Choice, SSGA's Proxy Voting Choice, and Vanguard's Proxy Voting Choice—

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[363] *2023 Shareholder Impact Review: Changing Corporations for Good*, AS YOU SOW at 6, https://www.asyousow.org/2023-shareholder-impact-review [hereinafter "As You Sow 2023 Shareholder Impact Review"].
[364] Fugere Testimony at 125:15-127:5.
[365] *As You Sow 2023 Shareholder Impact Review*, *supra* note 363, at 6.
[366] *Current Resolutions*, AS YOU SOW, https://www.asyousow.org/resolutions-tracker (last visited Jun. 11, 202; Fugere Testimony at 67:22-69:18.
[367] Fugere Testimony at 69:13-70:17; *see also* AYS000608, Proxy Memo, *Vote Yes: Item #6 – Report on Impacts of Net Zero 2050 Scenario*, CHEVRON CORP. (May 25, 2022).
[368] *CalPERS Proxy Voting Guidelines*, CALPERS, CALPERS_0000182 (May 2022); *2022 Investment Stewardship Annual Report*, *supra* note 27, at 49,-58; *2022 Asset Stewardship Report*, *supra* note 293, 29, -84; *Global investment stewardship principles*, *supra* note 308, at 3,-72; *2022 Responsible Investment Review*, *supra* note 314, 118, -722; *Trillium's Approach to Shareholder Engagement,* TRILLIUM, at 2, TRILLIUM_00000037 at -38 (Jun. 30, 2021); *Engine No. 1 Proxy Voting Guidelines*, ENGINE NO. 1, ENGINENO1-118HJC-PROD-00000076 (Apr. 2022).
[369] *2022 Investment Stewardship Annual Report*, *supra* note 27, at 90, -99; *2022 Asset Stewardship Report*, *supra* note 293, at 38–39, -93; *Vanguard's Report on Climate-related Impacts 2022*, *supra* note 354, at 27, -46.
[370] *2022 Investment Stewardship Annual Report*, *supra* note at 27, 51, -60; *Global investment stewardship principles*, *supra* note 308, at 3, -72.
[371] *See, e.g.*, *Vanguard Investment Stewardship, Engagement Prep: Chevron Corp*., VANGUARD (May 18, 2022), at 1–2, VAN_HJC_00129369 at -69–70; BlackRock email re: 2020 AGM (May 21, 2020), at 3–4, BLK-HJC-00002012 at -14–15; CA100+, "Climate Action 100+, Chevron Meeting," Agenda (Apr. 29, 2019), at 1, CALPERS_0007584.
[372] *See Vanguard Investment Stewardship: Engagement Prep: As You Sow*, VANGUARD, at 1, VAN_HJC_00673428 (Mar. 21, 2022); Ceres email re: HIGH PRIORITY: BLK Q1 Stewardship Report: any observations? From the team before a FRI May 1st call with Michelle Edkins, at 1, CERES0007633 (Apr. 30, 2020).
[373] Fugere Testimony at 121:24-122:6.
[374] *2022 Investment Stewardship Report*, *supra* note 27, at 49, -58; *2022 Asset Stewardship Report*, *supra* note 293, at 36, -91; *Vanguard's Report on Climate-related Impacts 2022*, *supra* note 354, at 27, -46.

all give certain investors with funds invested in index strategies the ability to participate in the proxy voting process.[375]

Shareholder resolutions represent a tiny fraction of the matters voted on at AGMs compared to routine management proposals like director elections, approval of dividends, and compensation. BlackRock reported that shareholder proposals accounted for one percent of its votes in 2022.[376] SSGA voted on just under 4,500 shareholder proposals that year, accounting for 0.2 percent of its total votes.[377] Vanguard voted on 5,506 shareholder proposals out of more than 184,000 individual votes.[378] Given the number of votes they cast each year, the Big Three usually do not announce their votes in real time, instead disclosing them publicly on a quarterly basis.[379] For selected high-profile votes, the Big Three will sometimes issue voting bulletins explaining the rationale for their votes.[380] BlackRock, for instance, will provide a rationale for any vote that goes against a board recommendation.[381] Other large investors, like CalPERS, publicly announce their votes before a company's AGM.[382]

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375 *2022 Investment Stewardship Report*, *supra* note 27, at 52, -61; *2022 Asset Stewardship Report*, *supra* note 293, at 35, -90; *Your money, your voice: How Vanguard is piloting proxy voting options for everyday investors*, VANGUARD, at 2, VAN_HJC_00074374 at -75 (2023).

376 *2022 Investment Stewardship Report*, *supra* note 27, 82, -91. "Shareholder proposals" includes both shareholder resolutions and shareholder-proposed director elections.

377 *2022 Asset Stewardship Report*, *supra* note 293, at 38–39, -93–94.

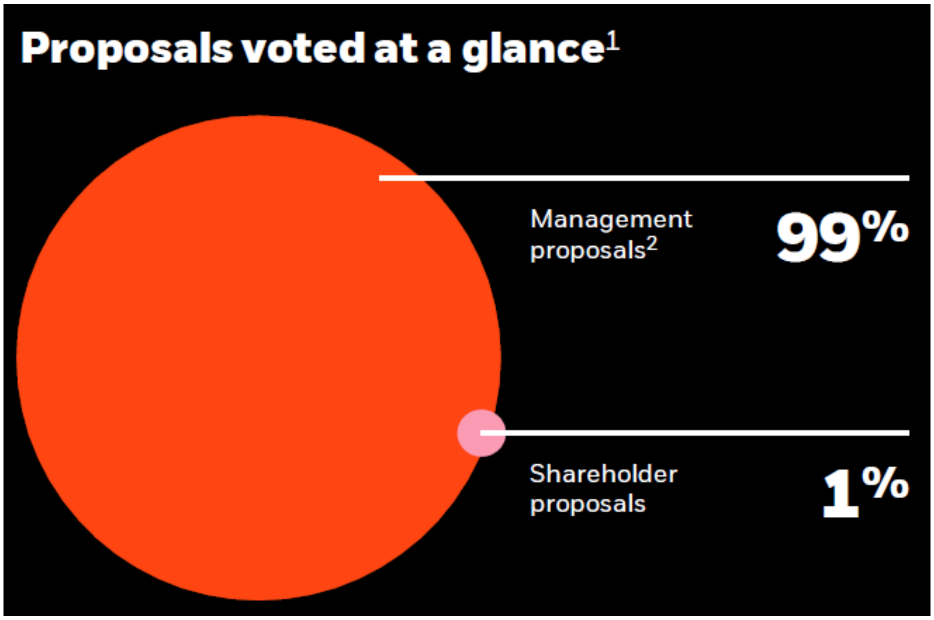
378 *Investment Stewardship 2022 Annual Report*, VANGUARD at 41, VAN_HJC_00027407 at -47. Most of these shareholder proposals originated in Asia. *Id*. at 43, -49.

379 *2022 Investment Stewardship Report*, *supra* note 27, at 64, -73; *2022 Asset Stewardship Report*, *supra* note 293, at 38, -93; *Stewardship in Action: A voice for investors*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/how-we-advocate/investment-stewardship/stewardship-in-action.html (last visited June 8, 2024). CalPERS also posts its proxy voting record on its website. *Notable Proxy Votes*, CALPERS, https://www.calpers.ca.gov/page/investments/corporate-governance/proxy-voting/notable-proxy-votes (last visited June 8, 2024).

380 *2022 Investment Stewardship Report*, *supra* note 27, at 64, -73; *2022 Asset Stewardship Report*, *supra* note 239, at 38, -93; Vanguard Investment Stewardship Insights, *Voting Insights: Climate-related proposal at BP*, VANGUARD, at 2, VAN_HJC_00103760 at -61 (May 2021).

381 *2022 Investment Stewardship Report*, *supra* note 27, at 49, at -58.

382 *CalPERS Proxy Voting Guidelines*, *supra* note 368, at 1, -84.



Source: BLK-HJC-00000010

CA100+ does not direct how its signatories vote on shareholder resolutions, or even issue vote recommendations.[383] The initiative does not (and, because it does not own shares in any company, cannot) file or co-file shareholder resolutions.[384] CA100+ recognizes shareholder voting as an important engagement tool, however, and under certain circumstances, it will flag votes on shareholder resolutions or management proposals originated or supported by a CA100+ lead or co-lead investor.[385] CA100+ encourages signatories to communicate their voting intentions and rationale on votes flagged by the initiative or one of its investor networks.[386] Flagging decisions are not top-down: In accordance with the CA100+ flagging process, the initiative's leaders seek input about whether to flag upcoming votes at a company from members of the company's engagement group.[387] In addition to posting flagged votes on the CA100+ website, the initiative's investor networks promote them by arranging calls for proponents with asset managers and proxy advisors and featuring them in media outreach and email communications.[388] While the investor networks do not issue voting recommendations, they acknowledge that the purpose of these promotional efforts is to build support for the flagged votes.[389]

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[383] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 184 at 33, -52.
[384] *Id.*
[385] *Id.* at 59–60, -78–79.
[386] *Id.* at 33, -52.
[387] *See* CalPERS email re: CA100+ Flagged Votes – Exxon (Feb. 9, 2022) at 4, CALPERS_0014203 at -06; *see Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 184 at 59, -78.
[388] *Id.* at 4, CALPERS_0014203 at -06; CalPERS email re: Flagging Exxon resolution through CA100 comms (Jan. 25, 2021), at 1, CALPERS_0023622; BlackRock email re: IIGCC Corporate Programme Member Update 26 May 2021, at 2–3, BLK-HJC-00009227 at -28–29.
[389] CalPERS email re: CA100+ Flagged Votes – Exxon (Feb. 9, 2022) at 4, CALPERS_0014203 at -06 ("The

Despite these efforts, CA100+ flagging does not necessarily change vote outcomes, as signatories make independent determinations about how to vote. Indeed, signatories do not always agree on which votes CA100+ should flag. In 2022, for instance, CalPERS pushed back against CA100+'s desire to flag votes at ConocoPhillips, Exxon, and Chevron, citing numerous hurdles, including "the divergence of views within each engagement group."[390] On the small number of votes that CA100+ has flagged in recent years, the initiative has seen high-profile defections. While SSGA and BlackRock both voted for a flagged shareholder resolution at Exxon in 2022, they each voted against two flagged climate-related resolutions at Chevron the same year.[391] Both asset managers explained that they were satisfied with the commitments they had received in their engagements with Chevron; they also found the Chevron resolutions to be overly prescriptive, unlike the Exxon resolution, which simply called for a scenario analysis.[392] The previous year, BlackRock voted against a different climate-related shareholder resolution at Chevron that CA100+ had flagged.[393] CA100+ leadership has fretted internally about the inconsistent implementation of its vote-flagging and signatories taking opposing stances on flagged votes.[394] In response to pressure from funders, the initiative has expressed a tepid willingness impose additional requirements on signatories around flagged votes, "i.e., requesting (but perhaps not requiring) that signatories disclose insights into their voting decisions on flagged CA100+ proposals, i.e., similar to a comply or explain approach."[395]

Although CA100+ purported to impose new requirements around flagged votes for lead investors in Phase 2, the language of the requirement is heavily qualified: the revised CA100+ handbook now states that lead investors are "expected to report *after* company AGMs on all votes flagged by Climate Action 100+ and rationale, where allowable by jurisdiction, if practical, and in line with signatories own internal policies."[396] Regardless, CA100+ vote-flagging is just one flavor of public pressure that investors face on contentions shareholder votes, which is often

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CA100+ investor networks. . .support flagged votes by coordinating build-the-vote efforts"); CA100+, "CA100+ North America Q4 Meeting, Engagement Updates and Priorities," (Nov. 17, 2021), at 10, CERES0000382 at -91 (listing flagged votes as "CA100+ Build the Vote Activities").

390 CalPERS email re: Flagging votes (Apr. 2, 2022), at 1–3, CALPERS_0002782 at -82–84.

391 SSGA email re: CVX and XOM Voting Intentions and Rationale (May 20, 2022) at 1–3, SSGA-HJC.0209985 at -85–87; Investment Stewardship, *Vote Bulletin: ExxonMobil Corporation*, BLACKROCK, at 4–5, (May 25, 2022) https://www.blackrock.com/corporate/literature/press-release/vote-bulletin-exxonmobil-may-2022.pdf [hereinafter "BlackRock Exxon Vote Bulletin"]; Investment Stewardship, *Vote Bulletin: Chevron Corporation*, BLACKROCK , at 3–4, (May 25, 2022) https://www.blackrock.com/corporate/literature/press-release/vote-bulletin-chevron-may-2022.pdf; *Proxy Season Archive*, CA100+ https://www.climateaction100.org/approach/proxy-season/ (last visited June 8, 2024).

392 SSGA email re: CVX and XOM Voting Intentions and Rationale (May 20, 2022) at 1, SSGA-HJC.0209985 at -85; Investment Stewardship, *Vote Bulletin: Chevron Corporation*, BLACKROCK, at 3–4, (May 25, 2022) https://www.blackrock.com/corporate/literature/press-release/vote-bulletin-chevron-may-2022.pdf. By contrast, on a non-flagged vote at Exxon on a climate-related shareholder resolution, SSGA voted in favor while BlackRock voted against. SSGA email re: CVX and XOM Voting Intentions and Rationale at 3, SSGA-HJC.0209985 at -87 (May 20, 2022); BlackRock Exxon Vote Bulletin, *supra* note 391, at 6.

393 BlackRock email re: BlackRock Vote Decision, at 1, BLK-HJC-00002851 (May 24, 2021); *Proxy Season Archive*, CA100+ https://www.climateaction100.org/approach/proxy-season/ (last visited June 11, 2024).

394 *Steering Committee Prep Meeting, Agenda*, CA100+ (Apr. 21, 2022), at 14, CERES0062869 at -82.

395 *Signatory Accountability Priorities and Plans*, CA100+ (Mar. 31, 2021), at 3, CERES0023002 at -04.

396 CA100+ 2023 Signatory Handbook, *supra* note 213, at 9 (emphasis added).

broad. In 2020, BlackRock understood it might face "repercussions" if it did not join a campaign led by two institutional investors to oust the Exxon board, even though those elections had not been flagged by CA100+.[397]

a) Role of proxy advisors

Proxy advisory firms play an important role ahead of shareholder votes by providing vote recommendations to investors based on the investors' chosen voting guidelines. The two leading proxy advisors, ISS and Glass Lewis, each publish an array of voting policies, allowing their clients to select the policies that align with their investment philosophies. The firms' benchmark policy recommendations set forth the default guidelines they apply to votes.[398] For clients who vote according to specific values, like combating climate change, the proxy advisors also publish thematic guidelines, such as ISS's Climate Proxy Voting Guidelines and Glass Lewis's Climate Thematic Voting Policy Guidelines.[399] In addition to these standardized policies, both firms give clients the ability to develop custom voting policies based on firm-specific preferences.[400] Prior to votes, proxy advisors issue vote recommendations, backed by proprietary research, for each proposal on a company's proxy form.[401] Because vote recommendations are policy-specific, proxy advisors may recommend that different clients vote different ways on the same vote; for instance, a climate-related thematic policy may recommend a different vote than the benchmark policy.[402] Both proxy advisors also conduct their own research into companies' performance on various climate-related metrics and incorporate the results of that research into their benchmark vote recommendations.[403]

Investors outsource voting-related functions to the proxy advisors to different degrees. Large asset managers with the resources to conduct their own research are less reliant on proxy

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[397] BlackRock email re: NYS confirms it intends to vote against entire Exxon board again this year… at 1, 3, BLK-HJC-00100517 at -17, -19 (Mar. 25, 2020). A separate vote at Exxon that year, to create an independent board chair, was flagged by CA100+. *Proxy Season Archive*, CA100+, https://www.climateaction100.org/approach/proxy-season/.
[398] ISS 2024 U.S. Benchmark Policy Guidelines, *supra* note 69; *2024 Benchmark Policy Guidelines*, GLASS LEWIS https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf [hereinafter "Glass Lewis 2024 Benchmark Guidelines"].
[399] *United States Climate Proxy Voting Guidelines*, ISS (2024), https://www.issgovernance.com/file/policy/active/specialty/Climate-US-Voting-Guidelines.pdf; Glass Lewis, *Climate Thematic Voting Policy Guidelines*, GLASS LEWIS (2024), https://www.glasslewis.com/wp-content/uploads/2024/01/2024-Climate-Thematic-Voting-Policy.pdf.
[400] *Data. Analytics. Insight. Governance. Environmental. Social.*, ISS at 6, ISS-HJC-00052410 at -45; Aviva email re: Custom Policy Implementation - Aviva, at 1–2, GL0010912 at -12–13 (Aug. 2, 2023).
[401] *See*, *e.g.*, *Proxy Analysis & Benchmark Policy Voting Recommendations: ConocoPhillips*, ISS (May 10, 2022), at 1–2, ISS-HJC-00007374 at -74–75; Glass Lewis, Proxy Paper: Shell plc (May 5, 2022), at 1–2, GL0028213 at -13–14.
[402] *Compare Proxy Analysis & Benchmark Policy Voting Recommendations: Chevron*, ISS, at 1, ISS-HJC-00040689 (May 26, 2021), *with Climate Advisory Services' Policy Voting Recommendations: Chevron Corporation*, ISS (May 26, 2021) at 2, ISS-HJC-00354622 at -23; *Draft Letter to IIGCC*, GLASS LEWIS at 2, GL0006286 (explaining that CA100+ companies "receive a more rigorous treatment under our existing climate policy").
[403] *See*, *e.g.*, *Proxy Analysis & Benchmark Policy Voting Recommendations: ConocoPhillips*, ISS (May 10, 2022) at 12–13, ISS-HJC-00007374 at -85–86; *Proxy Paper: JPMorgan Chase & Co*., GLASS LEWIS (May 17, 2022), at 6–8,0 GL0017114 at -19–21.

advisors for research but will contract with them for administrative functions related to their proxy voting.[404] Smaller firms are more likely to adhere to the proxy advisors' published guidelines. Arjuna, for instance, votes clients' shares in its main investment fund using an off-the-rack voting policy from ISS catering to socially responsible investors.[405] Aviva contracts with ISS for research and vote recommendations and began using a custom voting policy from Glass Lewis in 2023.[406] Engine No. 1 uses custom voting guidelines to make its voting decisions but contracts with ISS to execute votes.[407] Whatever the extent of their reliance on the proxy advisors for support, investors emphasize that the proxy advisors do not dictate their final voting decisions.[408] This independence is often borne out in investors' voting: For instance, in its 2022 votes at Chevron and Exxon, SSGA voted against two shareholder resolutions where both ISS and Glass Lewis recommended voting in favor, and against several others where at least one proxy advisor recommended in favor.[409]

Nevertheless, investors and companies alike undeniably regard the proxy advisors' recommendations as influential. As the proxy advisors with the greatest reach, ISS and Glass Lewis create a two-way conduit between corporate boardrooms and the investment community. Both proxy advisors conduct their own engagements with corporations, gathering research and communicating investors' expectations on ESG-related issues to management.[410] Investors, including the largest asset managers, will meet with the proxy advisors and attend presentations before the start of corporate AGMs to learn about the issues expected to dominate the upcoming proxy season.[411] Sponsors of shareholder resolutions seek meetings with the proxy advisors to lobby them for favorable vote recommendations.[412] As You Sow, for instance, meets with both ISS and Glass Lewis each year to pitch all of its upcoming shareholder resolutions.[413] Andrew Behar, As You Sow's CEO, testified to the Committee that the group focuses on securing recommendations for its shareholder resolutions under the proxy advisors' ESG-focused thematic policies.[414]

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[404] *2022 Investment Stewardship Report*, *supra* note 27, at 58, -67; *2022 Asset Stewardship Report*, *supra note 184*, at 35, -90.
[405] *Sustainable Investment Policy*, ARJUNA CAPITAL (Aug. 2023), at 16–17, ARJUNA006236 at -51–52.
[406] *2022 Responsible Investment Review*, *supra* note 314, at 118, -702; Glass Lewis email re: FW: Custom Policy Implementation – Aviva, (Aug. 2, 2023), at 1–2, GL0010912 at -12–13.
[407] *Engine No. 1 Proxy Voting Guidelines*, *supra* note 367, at 4, -79.
[408] *2022 Investment Stewardship Report*, *supra* note 27, at -672022; *Responsible Investment Review*, *supra* note 48, at 118, -702; *Engine No. 1 Proxy Voting Guidelines*, *supra* note 368, at 4, -79.
[409] SSGA email re: CVX and XOM Voting Intentions and Rationale (May 20, 2022), at 2–4, SSGA-HJC.0209985 at -86–88.
[410] *United States Procedures & Policies (Non-Compensation), Frequently Asked Questions*, ISS (Jan. 17, 2023), at 8–9, ISS-HJC-00006957 at -64–65; Glass Lewis, "Active Ownership Engagement Solution," 2021 Annual Report, at 3, GL0009387 at -89.
[411] *BlackRock & ISS Due Diligence 2022*, ISS at 2, ISS-HJC-00246880 at -81; Presentation, *2023 United States and ESG Proxy Season Preview*, VANGUARD, GLASS LEWIS (Feb. 28, 2023), at 9–11, VAN_HJC_00308608 at -16–18.
[412] Fugere Testimony at 100:3-11; *Glass Lewis Resolution Briefing*, GLASS LEWIS, 4–25, GL0000779 at -82–803 (Mar. 16, 2022).
[413] Behar Testimony at 79:21-80:1.
[414] *Id*. at 80:15-81:9.

Both ISS and Glass Lewis have in recent years broadened the scope of climate-related recommendations in their benchmark policies. Both firms' benchmark policies have long recommended in favor of proposals for greater disclosure of risk related to ESG issues, including climate change.[415] Starting with the 2022 proxy season, however, ISS adopted a new policy stating that it would recommend voting no or abstaining in director elections at companies with significant greenhouse gas emissions when it determined the company had failed to take "the minimum steps" necessary to respond to climate change.[416] The policy defined significant emitters as the companies on the CA100+ focus list.[417] ISS adopted this policy in response to the annual survey of investors it conducts to inform changes to its policy guidelines.[418] Investors responding to the 2021 survey "overwhelmingly agreed" that ISS should subject high-emitting companies to "more stringent evaluation."[419] The same year, Glass Lewis began incorporating company-level climate data in its benchmark voting recommendations.[420] The data that Glass Lewis provides is more detailed for companies with "significant climate impacts, such as those represented by Climate Action 100+."[421]

CA100+ and its leaders recognize the influence of the leading proxy advisors over the shareholder voting process and have lobbied both firms to formally incorporate CA100+ metrics into their benchmark policy guidelines. The initiative engages with both ISS and Glass Lewis ahead of each proxy season, and minutes from Steering Committee meetings show that the committee has long hoped to persuade both firms to adopt the CA100+ Benchmark into their policies.[422] A group of investors affiliated with IIGCC, one of the CA100+ coordinating investor networks, wrote to ISS and Glass Lewis in 2021 seeking four actions from the firms, including "[s]ystematically considering and progressively incorporating" the net zero transition into their benchmark policies.[423] The investors also offered to work with Glass Lewis to identify a list of companies to prioritize in its net-zero policies, "which may include an initial focus on Climate Action 100+ companies."[424] While ISS and Glass Lewis have routinely engaged with CA100+ and investors networks, the proxy advisors have balked at external pressure campaigns and

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[415] *See United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, ISS (2020), at 58, ISS-HJC-00030436 at -93; *2021 Proxy Paper Guidelines*, GLASS LEWIS at 59, https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf; *see also* Glass Lewis, Letter to IIGCC at 1, GL0006282 (noting that Glass Lewis has been an "official supporter[ ] of TCFD since 2017").
[416] *United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, *supra* note 415, at 16, -40.
[417] *Id*. at 16 fn. 1, -40.
[418] *Proposed ISS Benchmark Policy Changes for 2022: Requests for Comments*, ISS, at 24–25, ISS-HJC-00000079 at -102–03 (Nov. 4, 2021).
[419] *2021 Global Policy Survey - Climate: Summary of Results*, ISS (Oct. 1, 2021), at 6, ISS-HJC-00000061 at -66 (Oct. 1, 2021).
[420] Glass Lewis, Letter to IIGCC at 2, GL0006282 at -83.
[421] *Id*.
[422] *Meeting Minutes*, CA100+ (Oct. 1, 2021), at 69; (Jun. 4, 2021), at 87, CERES0062869 at -937, -955.
[423] ISS, Letter to Gary Retelny re: Net Zero Proxy Advice (Nov. 19, 2021), at 2, ISS-HJC-00242705 at-06; Glass Lewis, Letter to Kevin Cameron re: Net Zero Proxy Advice (Nov. 30, 2021), at 2, GL0016070 at -71.
[424] ISS, Letter to Gary Retelny re: Net Zero Proxy Advice (Nov. 19, 2021), at 4, ISS-HJC-00242705 at -08; Glass Lewis, Letter to Kevin Cameron re: Net Zero Proxy Advice (Nov. 30, 2021), at 3, GL16070 at -72.

resisted any changes to their benchmark policies that would depart from their "nuanced and case-by-case approach" to vote recommendations on climate-related shareholder proposals.[425]

b) SEC regulations

Shareholder votes must comply with SEC regulations, which govern the solicitation of votes, who may offer shareholder resolutions, the content of such resolutions, and more. For shareholder resolutions, failure to abide by the regulations could lead to the company excluding the resolution from its proxy ballot.[426] Under current regulations, if a company believes that a shareholder proposal is deficient, it must notify the SEC and the proponent that it intends to exclude the proposal from its proxy form and provide the reasons for the exclusion.[427] The SEC, after giving the proponent an opportunity to respond, sends a letter to the company and the proponent stating its agreement or disagreement that the resolution may be excluded.[428] Although the SEC's letter is not a legally binding decision, in cases where staff agrees that the company may exclude the proposal, the letter states that SEC staff "will not recommend enforcement action to the Commission.[429]

To offer a shareholder resolution at a company, a proponent must have held at least $2,000 worth of the company's stock continuously for three years (or larger amounts of stock for one or two years).[430] All resolutions must meet certain substantive requirements. The company may exclude a proposal if it "deals with a matter relating to the company's ordinary business operations" or "[i]f the company has already substantially implemented the proposal."[431] These bases for exclusion reflect the SEC's view "that shareholders should not attempt to micromanage a company."[432] The rules also prohibit duplicative proposals and resubmissions, permitting the company to exclude a proposal that "substantially duplicates" a different proposal submitted at the same meeting or that "addresses substantially the same subject matter" as a proposal submitted at least once within the preceding five years if the proposal failed to clear a certain threshold of support.[433]

Even if a shareholder resolution makes it onto a company's proxy ballot, shareholder resolutions at U.S. companies are non-binding, with a limited exception for certain governance

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[425] *See*, *e.g.*, ISS email re: IIGCC | Net Zero Proxy Advice Letter (Aug. 31, 2023), at 2–3, 5, ISS-HJC-00251764 at -65–66, -68; Glass Lewis email re: 2 follow up questions (Jul. 23, 2020), at 3, GL0000884 at -86.
[426] 17 CFR pt. 240.14a-8(f), (i).
[427] *Id*. pt. 240.14a-8(j); *see also* Fugere Testimony at 122:7-123:4; Letter from J. Lapitskaya to Office of Chief Counsel, Division of Corporate Finance, Securities and Exchange Commission (Jan. 26, 2022), AYS004732.
[428] Fugere Testimony at122:7-123:4; Letter from SEC to Yafit Cohn, The Travelers Companies, Inc. (Mar. 31, 2022), AYS004924. The SEC posts all these so-called "No Action" responses on its website. *2021-2022 No-Action Responses Issued Under Exchange Act Rule 14a-8*, SECURITIES & EXCHANGE COMMISSION, https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action (last visited June 8, 2024).
[429] Fugere Testimony at 122:7-123:4; Letter from SEC to L. Goldberg, Davis Polk & Wardwell LLP (Mar. 22, 2022), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/aflcioexxon032222-14a8.pdf.
[430] 17 CFR pt. 240.14a-8(b)
[431] *Id*. pt. 240.14a-8(i)(7), (i)(10).
[432] Fugere Testimony at 123:12-20.
[433] 17 CFR pt. 240.14a-8(i)(11), (i)(12).

proposals.[434] Thus, even if a resolution receives a majority (or even a supermajority) or shareholder votes, the company is not required to take any action.[435] Although they cannot bind a company to a particular course of action, investors view shareholder resolutions view as a way to raise the salience of issues on which they would like to see companies take action, as Danielle Fugere testified to the Committee:

> And what that does is, first of all, I think it elevates the seriousness of the request. Boards see those. So, maybe if you have an engagement, most companies talk with their boards of engagements, but not all. So this ensures that boards actually understand that shareholders have concerns. It raises them to the board level. And it also brings the issue to the attention of the wider group of shareholder that invest in that company.[436]

Proponents typically aim to achieve as high a vote share as possible, as even a proposal receiving less than a majority can send a strong message to corporate leadership.[437] Discussing strategy for shareholder resolutions, the CA100+ Steering Committee cited findings that around one third of companies will fully address a resolution that receives more than 30 percent of the vote but falls short of a majority.[438]

5. 2021 Exxon board campaign

One highly publicized example of climate action through shareholder engagement and voting was the successful 2021 campaign to elect new directors to the Exxon board. The campaign did not come out of nowhere: For years, investors had criticized the company for inadequate governance on a host of climate-related issues.[439] Specifically, investors raised concerns that Exxon was slow to set emissions reduction targets and had failed to disclose its Scope 3 emissions in line with TCFD criteria.[440] Critics also faulted Exxon's leadership for being unresponsive to shareholder requests for engagement.[441] At Exxon's 2020 AGM, BlackRock voted against the reelection of some of Exxon's directors to express dissatisfaction with the company's progress on climate governance; nevertheless, all directors were reelected.[442]

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[434] Fugere Testimony at 113:20-23.

[435] *Id*. at 113:24-114:3. By contrast, shareholder votes in director elections are binding, with the procedures varying by where the company is incorporated. Behar Testimony at 67:19-68:4.

[436] Fugere Testimony at 114:10-15.

[437] *Id*. 21:20-22:5; Behar Testimony at 111:19-112:10.

[438] *Steering Committee Meeting Minutes*, CA100+ (Jun. 4, 2021), at 87, CERES0062869 at -955.

[439] *See* Behar Testimony at 47:10-48:16; *Voting Bulletin: Exxon Mobil Corporation*, *supra* note 358, at 2, -50; *STEAM Engagement Report: Exxon Mobil Corp. (XOM)*, VANGUARD at 2, VAN_HJC_00168202 at -03; *Exxon Mobil (XOM) Proposal: Climate Lobbying Report*, CALPERS at 3, CALPERS_0027126 at -29.

[440] BlackRock email re: 2020 AGM (May 19, 2020), at 3, BLK-HJC-00002007 at -09.

[441] *STEAM Engagement Report: Exxon Mobil Corp. (XOM)*, VANGUARD, at 2, VAN_HJC-00168202 at -03 (May 27, 2020); *Engage or Divest? The Question at the Heart of Climate Impact*, SSGA (Jul. 2021), at 4, SSGA-HJC.0141642 at -45.

[442] Investment Stewardship Group, *Voting Bulletin: Exxon Mobil Corporation*, BLACKROCK (May 27, 2020), at 4–5, BLK-HJC-00005949 at -52–53; *Exxon Mobil Corporation Voting History with Results*, VANGUARD, at 21, VAN_HJC_00018369 at -89 (Dec. 10, 2021).

In late 2020, Engine No. 1 launched an activist campaign to change Exxon's business strategy. The hedge fund, which owned $40 million in Exxon stock, won early backing from a major institutional investor, the California State Teachers' Retirement System ("CalSTRS").[443] Engine No. 1 made an economic case for change, arguing that Exxon's sluggish transition to net zero was destroying shareholder value. Between 2010 and 2020, Engine No. 1 said, "ExxonMobil's stock underperformed its largest peers by 57%."[444] Over the same time period, Exxon had seen its market capitalization collapse and was removed from the Dow Jones Industrial Average.[445] The centerpiece of Engine No. 1's effort was a campaign to elect "highly qualified, independent directors who have track records of success in energy" to the Exxon board.[446] The firm presented investors with a slate of four nominees to Exxon's 12-member board.[447]

In the run-up to the 2021 AGM, Engine No. 1 aggressively courted investors to support its nominees. Each of the Big Three asset managers engaged with the firm on its director slate as they weighed how to vote.[448] Engine No. 1 also worked to recruit more institutional investors to its cause, with major investors like the New York State Common Retirement Fund and the Church of England subsequently announcing their support.[449] Meanwhile, CA100+ leadership invited Engine No. 1 to present to its signatories on the campaign.[450] Both of the leading proxy advisors also held engagements related to the dissident director slate through Engine No. 1 or CA100+.[451] In April 2021, the month before the AGM, CalPERS publicly announced its support for all four of the Engine No. 1 nominees.[452] Because Exxon was a co-lead in the CA100+ engagement group, its publicly announced support allowed CA100+ to flag the director votes under its flagging procedures.[453] Once it flagged the vote, CA100+ worked to persuade signatories with a voting stake in Exxon to announce their support for the Engine No. 1 slate in advance of the meeting.[454] While CA100+ flagged the director votes, the initiative played no

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[443] *Impact Activism at ExxonMobil: Our Work in Action*, ENGINE NO. 1 (May 7, 2021), at 3, ENGINENO1-118HJC-PROD-00029362 at -64; Engine No. 1 email re: (BN) D.E. Shaw Is Said to Push Exxon to Cut Spending, Costs (Dec. 9, 2020), at 2, ENGINENO1-118HJC-PROD-00007635 at -36.
[444] *Impact Activism at ExxonMobil: Our Work in Action*, *supra* note 443, at 2, -63.
[445] *Reenergize Exxon*, ENGINE NO. 1 at 1, ENGINENO1-118HJC-PROD-00000043.
[446] *Impact Activism at ExxonMobil: Our Work in Action*, *supra* note 443, at 3, -63.
[447] Exxon Mobil Corp., Schedule 14A at 6–9 (Proxy Statement of Engine No. 1 LLC).
[448] BlackRock email re: Quick Message (Apr. 30, 2021), at 1, BLK-HJC-00108487; SSGA, *Annual Climate Stewardship Review: 2021*, SSGA at 9, SSGA-HJC.0084563 at -71; *Exxon / Engine No. 1 Proxy Fight*, VANGUARD at 3, VAN_HJC_00091919 at -21.
[449] *Impact Activism at ExxonMobil: Out Work in Action*, ENGINE NO. 1 (May 7, 2021), at 3, ENGINENO1-118HJC-PROD-00029362 at -64; CalPERS email re: Fwd: Daily ESG Briefing: Exxon rumoured to be u-turning on climate (Jan. 28, 2021), at 1, CALPERS_0032919.
[450] CalPERS email re: Invitation to Engine #1 - Climate Action 100+ Exxon proxy preview, at 1, 3, CALPERS_0032825 at -25, -27 (Apr. 15, 2021).
[451] *Proxy Analysis & Benchmark Policy Voting Recommendations: Exxon Mobil Corporation*, ISS (May 26, 2021), at 3, ISS-HJC-00127268 at -70; Glass Lewis email re: Thank You So Much! (Apr. 7, 2021), at 1, GL0003726.
[452] CalPERS email re: CalPERS to back activist's four director nominees in Exxon board fight - CONFIDENTIAL DRAFT (Apr. 28, 2021), at 10, CALPERS_0050205 at -14.
[453] CalPERS email re: Exxon AGM - votes ahead (May 20, 2021), at 1, CALPERS_0032989; CA100+, Steering Committee Meeting (Mar. 18/19, 2021), at 3, CERES0001316 at -18.
[454] Aviva email re: Exxon AGM - votes ahead (May 19, 2021), at 1, AV00073686.

formal role in devising or waging the campaign, and several CA100+ leaders expressed concern about media coverage that described the Exxon vote as a "CA100+ campaign."[455]

Despite the momentum that Engine No. 1 built for its director slate, its campaign was only a qualified success. ISS issued favorable recommendations for three of the four nominees, while Glass Lewis recommended in favor of two.[456] The Big Three also split in their voting: BlackRock voted for three of the nominees, while State Street and Vanguard each voted for two.[457] The May 26 AGM was dramatic, with Exxon recessing the meeting in an attempt to convince holdout investors to back its slate.[458] In the end, three of the four Engine No. 1 nominees were elected to the board.[459] While the result was hailed by CA100+ and other climate activists, the proxy advisors who recommended the Engine No. 1 candidates, and the asset managers who voted for them, all offered detailed rationales for their decision explaining how Exxon's climate inaction had hurt the company's financial performance.[460] From the start, Engine No. 1 made shareholder value central to its campaign, and since the election of its nominees, the firm notes that Exxon has taken new steps to reduce its carbon emissions while its stock has outperformed its competitors.[461]

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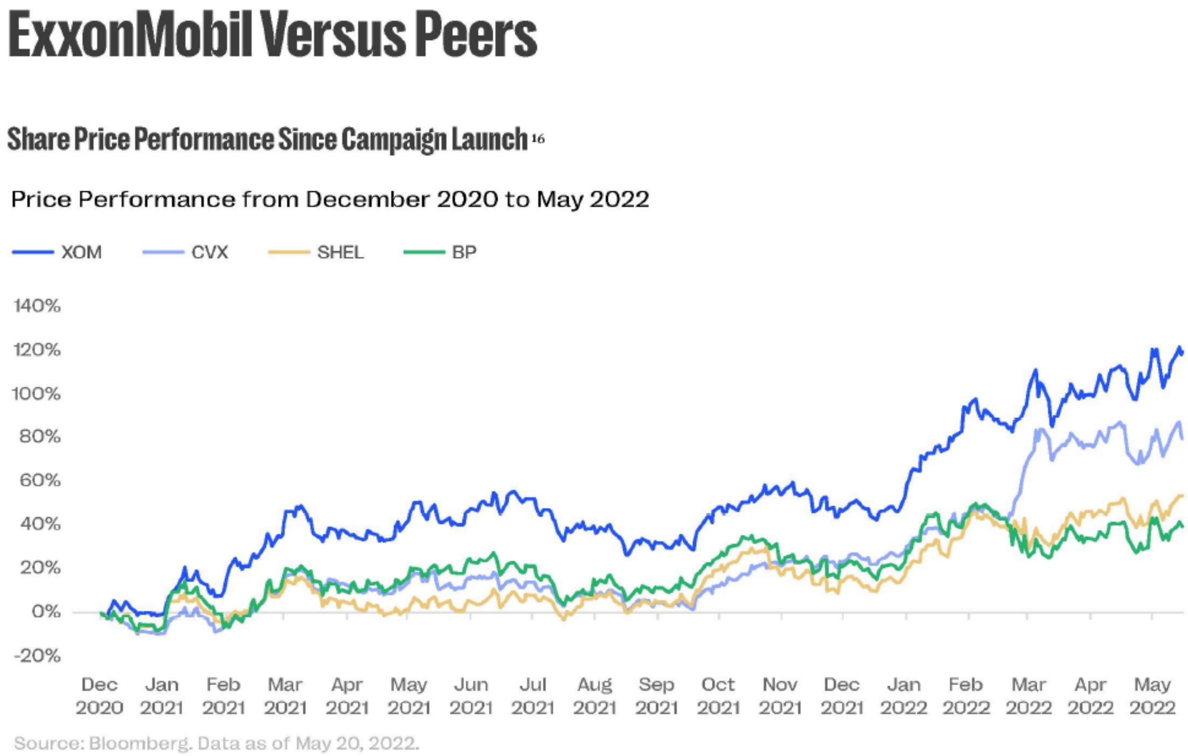
[455] Ceres email re: CA100+ - LAPFF (May 14, 2021), at 1–2, CERES0012249 at -49–50.
[456] *Proxy Analysis & Benchmark Policy Voting Recommendations: Exxon Mobil Corporation*, ISS (May 26, 2021), at 2, ISS-HJC-00127268 at -69; *Proxy Paper: Exxon Mobil Corporation*, GLASS LEWIS (May 26, 2021), at 2, GL0012147 at -48.
[457] BlackRock email re: BlackRock Investment Stewardship Vote Decision 2021 AGM (May 24, 2021), at 1, BLK-HJC-00002586; *Annual Climate Stewardship Review: 2021*, SSGA at 10, SSGA-HJC.0084563 at -72; *Investment Stewardship, 2021 Annual Report*, VANGUARD at 19, VAN_HJC_00027681 at -99.
[458] CalPERS email re: Exxon - One hour recess? (May 26, 2021), at 4–5, CALPERS_0039897 at -900–01.
[459] *ExxonMobil: One Year Later*, ENGINE NO. 1 at 1, ENGINENO1-118HJC-PROD-00021711.
[460] BlackRock email re: BlackRock Investment Stewardship Vote Decision 2021 AGM (May 24, 2021), at 1, BLK-HJC-00002586; *Annual Climate Stewardship Review: 2021*, *supra* note 448, at 9–10, -71–72; *Investment Stewardship, 2021 Annual Report*, *supra* note 457, at 19–20, -99–700; *Proxy Analysis & Benchmark Policy Voting Recommendations: Exxon Mobil Corporation*, *supra* note 451, at 24–37, -91–304; *Proxy Paper: Exxon Mobil Corporation*, GLASS LEWIS (May 26, 2021), at 16–39, GL0012147 at -62–85.
[461] *Reenergize ExxonMobil // Presentation to Climate Action 100+*, ENGINE NO. 1 (Apr. 14, 2021), at 13–14; ENGINENO1-118HJC-PROD-00000023 at -35–36; *ExxonMobil: Two Years Later*, ENGINE NO. 1, at 3–4, ENGINENO1-118HJC-PROD-00000016 at -18–19.



Source: ENGINENO1-118HJC-PROD-00021711

III. ANTITRUST ANALYSIS

The evidence produced in this investigation fails to support—and, to a great extent, flatly contradicts—the Majority's theories of antitrust harm under the Sherman Act. Section 1 of the Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[462] Thus, to prove a Section 1 claim, a plaintiff must show (1) an agreement; (2) affecting interstate commerce; and (3) resulting in an unreasonable restraint on trade.[463]

The investor-led ESG initiatives at issue in this investigation fail to meet the elements listed above. First, CA100+ and NZAM participants have not entered into "agreements" because they act independently, and the initiatives lack the power to compel any activities by their members. Second, even if participation in CA100+ or NZAM did constitute an agreement, it would be subject to the rule of reason because it does not fix prices or restrict output among horizontal competitors. Finally, the initiatives easily survive a rule-of-reason analysis because the evidence shows that they promote competition among financial institutions for investor clients with little, if any, countervailing harm in any properly defined relevant market.

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[462] 15 U.S.C. § 1.
[463] *Hobart-Mayfield, Inc. v. Nat'l Operating Committee on Standards for Athletic Equipment*, 48 F.4th 656, 663 (6th Cir. 2022).

A. Participants in investor-led ESG initiatives have not reached agreements as required by Section 1 because their commitments are voluntary and non-binding.

The agreement requirement is foundational to any antitrust conspiracy; indeed, the Supreme Court has termed it the "crucial question" in a Section 1 case.[464] The law "treat[s] concerted behavior more strictly than unilateral behavior" in recognition that the former "inherently is fraught with anticompetitive risk."[465] Thus, a firm "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."[466] By contrast, an antitrust conspiracy involves "two or more entities that previously pursued their own interests separately. . . combining to act as one for their common benefit."[467] While an agreement may be "tacit or express,"[468] it must in all cases demonstrate the meeting of the minds necessary to form a conspiracy; that is, "a conscious commitment to a common scheme designed to achieve an unlawful objective."[469]

A plaintiff may demonstrate an antitrust conspiracy by direct or circumstantial evidence.[470] Direct evidence, of course, would include express agreements, like "a recorded phone call in which two competitors agreed to fix prices at a certain level."[471] Circumstantial evidence can include factors like a common motive or a significant level of communications between competitors, or even single-firm conduct like a manufacturer terminating its relationship with a distributor following the distributor's complaints. [472] However, courts require a heightened showing to establish a conspiracy by circumstantial facts alone, as "antitrust law limits the range of permissible inferences from ambiguous evidence."[473] The Supreme Court elaborated on the required evidentiary showing in two seminal cases, *Monsanto Co. v. Spray-Rite Service Corporation*[474] and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*.[475] To meet the standard, the plaintiff must present "evidence that tends to exclude the possibility that the [parties] were acting independently."[476] Put another way, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference

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[464] *Theatre Enterprises, Inc. v. Paramount Film Distributing*, 346 U.S. 537, 540 (1954).
[465] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984).
[466] *Monsanto Co. v. Spray-Rite Service Corp*., 465 U.S. 752, 761 (1984) (citing *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919)).
[467] *Copperweld*, 467 U.S. at 769.
[468] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007).
[469] *Monsanto*, 465 U.S. at 764.
[470] *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015).
[471] *Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013); *see also Macquarie Group Ltd. v. Pacific Corporate Group, LLC*, No. 08cv2113, 2009 WL 539928 at *5 (S.D. Cal. Mar. 2, 2009) (pleading "an explicit agreement, evidenced by an admission by one of the co-conspirators and supported by circumstantial proof").
[472] *American Contractors Supply, LLC v. HD Supply Construction Supply, Ltd*., 989 F.3d 1224, 1233 (11th Cir. 2021); *Citigroup*, 709 F.3d at 136.
[473] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 588 (1986).
[474] 465 U.S. 752 (1984).
[475] 475 U.S. 574 (1988).
[476] *Monsanto*, 465 U.S. at 764.

of antitrust conspiracy."[477] When the evidence is in "[m]ere equipoise," an agreement has not been established.[478]

Evidence of parallel or interdependent firm conduct is admissible as circumstantial evidence of an illegal price-fixing agreement, but is insufficient to establish a conspiracy standing alone.[479] Indeed, even "conscious parallelism," common in highly concentrated markets and sometimes called "tacit collusion," does not, on its own, constitute an illegal agreement.[480] Accordingly, when a plaintiff offers parallel conduct as circumstantial evidence of an agreement, courts require additional evidence from which to infer a conspiracy, sometimes called "plus factors."[481] Courts consider a range of circumstantial evidence as "plus factors," including: (1) uniform prices "despite variables that would ordinarily result in divergent pricing;"[482] (2) evidence that parallel behavior went "against the apparent individual economic self-interest of the alleged conspirators;"[483] (3) a common motive; or (4) "the opportunity to exchange information relative to the alleged conspiracy."[484] Whatever its form, evidence offered as a plus factor must "raise[ ] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[485]

In cases where "the factual context renders [the] claim implausible" or "one that simply makes no economic sense," the evidence must be "more persuasive. . . than would otherwise be necessary."[486] For an alleged conspiracy to be plausible, co-conspirators must have a "rational motive to conspire"; that is, they must stand to reap some sort of foreseeable economic benefit from their participation.[487] A conspiracy that would not benefit the conspirators and would leave them worse off is unlikely to be viewed as plausible.[488] The more speculative the plaintiff's theory of economic reward to defendants, the less likely courts are to find an agreement.[489] Additionally, courts are less likely to find a conspiracy plausible when it turns on "procompetitive conduct" like cutting prices, rather than an agreement to raise them.[490]

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[477] *Matsushita*, 475 U.S. at 588.
[478] *American Contractors*, 989 F.3d at 1233 (11th Cir. 2021); *see also American News, LLC v. American Media, Inc.*, 899 F.3d 87, 98 (2d Cir. 2018).
[479] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007).
[480] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 227 (1993).
[481] See, e.g., *Quality Auto Painting Center of Roselle, Inc. v. State Farm Indemnity Co*., 917 F.3d 1249, 1261–62 (11th Cir. 2019); *Citigroup*, 709 F.3d at 136; *Jones v. Micron Technology Inc.*, 400 F. Supp. 3d 897, 915 (N.D. Cal. 2019).
[482] *Quality Auto Painting*, 917 F.3d at 1263 (11th Cir. 2019) (internal quotations omitted).
[483] *Citigroup, Inc.*, 709 F.3d at 136.
[484] *Hobart-Mayfield, Inc. v. Nat'l Operating Committee on Standards for Athletic Equipment*, 48 F.4th 656, 666 (6th Cir. 2022).
[485] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).
[486] *Matsushita*, 475 U.S. at 587.
[487] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992); *see also AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 235 (2d Cir. 1999) (defendants must have a "rational economic motive to join the alleged conspiracies").
[488] *Anderson News, LLC v. American Media, Inc*., 899 F.3d 87, 100 (2d Cir. 2018).
[489] *Id*. at 101.
[490] *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 162 (3d Cir. 2003).

A trade association's "adoption of a binding association rule designed to prevent competition is direct evidence of concerted action" not requiring further proof.[491] Binding association rules can amount to "a horizontal restraint—an agreement among competitors on the way in which they will compete with one another."[492] But trade associations are, of course, commonplace, and "organizational decisions do not inherently constitute Section 1 concerted action."[493] In order for a rule to constitute an agreement within the meaning of the Sherman Act, it must be binding and enforceable against association members.[494] Even where a binding rule exists, a plaintiff alleging an antitrust conspiracy still must satisfy *Monsanto* and *Matsushita* by presenting evidence tending to exclude the possibility of independent action.[495] Mere participation in the association is insufficient to prove an agreement absent a showing "that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective."[496]

Moreover, binding association rules independently satisfy the agreement requirement only where the plaintiff challenges the rules "themselves—in totality—as violative of the antitrust laws." In such cases, a defendant's adoption of the rules suffices to show an agreement, and the plaintiff need not show an antecedent "agreement to agree."[497] Where "the very passage of [rules] establishes that the defendants convened and came to an agreement," additional circumstantial evidence would be "superfluous."[498] Conversely, if the rules are "in service of a plan to restrain competition," the plaintiff "must allege enough additional facts to show that agreement to such a plan exists."[499] Thus, when the plaintiff alleges that binding association rules are merely part of an overarching Section 1 conspiracy, additional "plus factors" tending to exclude the inference of independent conduct are required.[500]

1. Direct evidence of agreement is absent

There is no direct evidence of a Section 1 agreement among the parties to this investigation. The likely place to find such evidence would be in communications between

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[491] *Relevent Sports, LLC v. United States Soccer Federation, Inc.*, 61 F.4th 299, 307 (2d Cir. 2023), *cert. denied*, --- S. Ct. ----, 2024 WL 1706015 (Apr. 22, 2024).
[492] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 99 (1984); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 500 (1988) ("Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.").
[493] *North American Soccer League, LLC v. United States Soccer Federation, Inc*., 883 F.3d 32, 40 (2d Cir. 2018).
[494] *See Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 80–81 (2021) ("NCAA and its conferences enforce these [compensation] limits by punishing violations"); *Nat'l Society of Professional Engineers v. United States*, 435 U.S. 679, 686 (1978) (referring to findings that ban on competitive bidding had been enforced); *Associated Press v. United States*, 326 U.S. 1, 8 (1945) ("All members must consent to be bound by" association bylaws).
[495] *See Consolidated Metal Products Inc. v. American Petroleum Institute*, 846 F.3d 284, 294 (5th Cir. 1988).
[496] *AD/SAT*, 181 F.3d at 234.
[497] *Relevent Sports*, 61 F.4th at 307.
[498] *Robertson v. Sea Pines Real Estate Cos., Inc*., 679 F.3d 278, 289 (4th Cir. 2012).
[499] *Relevent Sports*, 61 F.4th at 307.
[500] *North American Soccer League, LLC v. United States Soccer Federation*, 883 F.3d 32, 39–40 (2d Cir. 2018).

horizontal competitors, such as the Big Three asset managers or the proxy advisory firms.[501] Yet after nearly a dozen subpoenas and months of seeking as many documents as possible, the Majority failed to uncover any substantive communications between these competitors, let alone communications that might establish an agreement. Further, the evidence the Majority has received suggests that such communications likely do not exist. Many documents show that asset managers viewed participation in ESG investment initiatives as an important means of competing *against* each other and not as a point of possible coordination. For instance, BlackRock, State Street, and Vanguard each compared their own initial net zero disclosures against their competitors' disclosures.[502] State Street and Vanguard, whose initial targets were much lower than BlackRock's, prepared talking points attacking weaknesses in BlackRock's methodology.[503] Such actions are plainly inconsistent with an agreement not to compete.

Where the Majority has uncovered interfirm communications, those contacts fail to establish an agreement. To be sure, investment firms participating in CA100+ have communicated about corporate engagements and shareholder resolutions with other firms against whom they might be said to compete. For instance, as part of its participation in the CA100+ engagement group with Rolls-Royce, SSGA corresponded with Federated Hermes, another investor signatory not a party to this investigation.[504] Relatedly, Engine No.1 discussed its nominees to Exxon's board with each member of the Big Three.[505] While an engagement group might constitute an "agreement" among its members in some sense, it does not show the requisite conduct necessary for a Section 1 agreement, namely, "a conscious commitment to a common scheme designed to achieve an unlawful objective."[506] Participation in a CA100+ engagement group amounts to, at most, an agreement by investors to seek answers to a common set of questions from a firm whose securities they individually own.[507] Even if SSGA had taken on a more active role in the engagement group, rather than participating "primarily in listening mode,"[508] nothing about the group's collective information-seeking evidences an unlawful anticompetitive objective. As to proxy vote solicitations, the case is even weaker: Since all

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[501] *Cf. Mayor and City Council of Baltimore, Md. v. Citigroup, Inc*., 709 F.3d 129, 136 (2d Cir. 2013).
[502] *Net Zero Asset Managers Competitor Analysis*, BLACKROCK at 4, BLK-HJC-00116395 at -98; *Competitor Analysis — TCFD and Net Zero Asset Managers Initiative*, SSGA (Nov. 2021), at 2, SSGA-HJC.0006743 at -44; *NZAM Press Positioning Paper*, VANGUARD at 2, VAN_HJC_00029742 at -43.
[503] *NZAM Target Setting FAQ*, SSGA (Apr. 28, 2022), at 5–6, SSGA-HJC.0020719 at -23–24; *NZAM Press Positioning Paper*, VANGUARD at 2, VAN_HJC_00029742 at -43.
[504] SSGA email re: FW: Rolls-Royce CA100+ - update and next steps (Dec. 17, 2021), at 2, SSGA-HJC.0034048 at -49.
[505] BlackRock email re: Quick Message (Apr. 30, 2021), at 1, BLK-HJC-00108487; *Annual Climate Stewardship Review: 2021*, *supra* note 448, at 9,-71; *Exxon / Engine No. 1 Proxy Fight*, *supra* note 448, at 3,-21. While Engine No. 1 is not itself a member of CA100+, the initiative organized meetings on the hedge fund's behalf during the board campaign. CalPERS email re: Invitation to Engine #1 - Climate Action 100+ Exxon proxy preview (Apr. 15, 2021), at 1, 3, CALPERS_0032825 at -25, -27.
[506] *See Monsanto Co. v. Spray-Rite Service Corp*., 465 U.S. 752, 764 (1984).
[507] *See* SSGA email re: FW: Rolls-Royce CA100+ - update and next steps (Dec. 17, 2021), at 2–3, SSGA-HJC.0034048 at -49–50 (detailing agenda for Rolls-Royce engagement).
[508] SSGA email (June 8, 2023), SSGA-HJC.0047771.

investors retain full discretion to determine their own votes,[509] a meeting with a proponent of a shareholder resolution does not constitute an agreement at all.

The theory that participation in CA100+ or NZAM constitutes an agreement in its own right also fails. While both initiatives set expectations for members, neither imposes the type of binding requirements necessary to establish an agreement.[510] CA100+ requests asset manager signatories to commit to engaging at least one company on its focus list per year.[511] NZAM requires members to commit to "support investing aligned with net zero emissions by 2050 or sooner."[512] Even these requirements are not absolute. BlackRock and SSGA conditioned their participation in CA100+ on side agreements stating that they would retain discretion to engage with companies based on their "independent exercise" of fiduciary duties to clients.[513] More importantly, neither initiative appears to actively enforce any of these requirements. We are not aware from the documents produced of any instance in which either CA100+ or NZAM removed a member for failing to comply with its membership criteria.[514] And, signatories are free to leave either initiative whenever they choose, as several institutions have done.[515]

The lack of enforcement leaves participants in CA100+ and NZAM with wide latitude to determine how they comply with the initiatives' requirements. While BlackRock, SSGA, Vanguard, Arjuna, Aviva, and Trillium all issued initial net-zero targets as part of NZAM, those targets were wildly divergent in both their topline numbers and their underlying methodologies.[516] Adherence to the CA100+ requirements has also been mixed: BlackRock never joined a CA100+ engagement group, while SSGA joined two engagement groups as a collaborating, rather than lead, investor.[517] These minimal, flexible membership requirements simply do not compare to binding association rules like NCAA bylaws restricting athlete pay or a professional association's ban on competitive bidding for engineering services.[518] The mere acceptance of these terms upon joining the initiative does not show a signatory "consciously

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[509] *2022 Investment Stewardship Annual Report*, *supra* note 27, at 90, -99; *2022 Asset Stewardship Report*, *supra* note 293, at 38–39, -93; *Vanguard's Report on Climate-related Impacts 2022*, *supra* note 354, at 27, -46.
[510] GFANZ, the other initiative implicated in this investigation, does not set its own membership criteria at all, instead deferring to its sector-specific alliances, including NZAM. Schapiro Testimony at 74:2-14.
[511] *Climate Action 100+ Signatory Handbook, Version 2.0*, *supra* note 183 at 20, -39.
[512] *Initial Target Disclosure Report*, *supra* note 220, at 6, CERES0032415 at -20.
[513] *Letter to Climate Action 100+ Steering Committee*, *supra* note 334, at 2, -02; *State Street / Climate Action 100+ Side Letter*, SSGA (Dec. 16, 2020) at 1, SSGA-HJC.0005590.
[514] To the contrary, when GFANZ believed that changes to the U.N.'s Race to Zero campaign would begin to impose mandatory requirements on NZAM members, it changed its bylaws to clarify that it would no longer follow the campaign's criteria. Schapiro Testimony at 74:19-75:14.
[515] *See* Gelles, *supra* note 30; *An update on Vanguard's engagement with the Net Zero Asset Managers initiatives (NZAM)*, VANGUARD, VAN_HJC_00000001.
[516] *Compare Initial Target Disclosure Report*, *supra* note 220, at 28, -42 (BlackRock committing 77% of AUM to net zero) *with An update on Vanguard's engagement with the Net Zero Asset Managers initiatives*, *supra* note 515, at 75, -89 (Vanguard committing 4% of AUM to net zero) *and id*. at 142, -556 (Trillium including Scope 3 emissions when greater than 40% of total) *with id*. at 91, -505 (SSGA not including Scope 3 emissions).
[517] BlackRock email re: US CA100+ focus companies (Jul. 29, 2020), at 1, BLK-HJC-00006612; SSGA email re: SSGA, PRI, and CA100+ at 1, SSGA-HJC.0033913 (Jan. 26, 2021).
[518] *See Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 86 (2021); *Nat'l Society of Professional Engineers v. United States*, 435 U.S. 679, 683–84 (1975).

committing" to an "unlawful objective."[519] As such, the CA100+ and NZAM membership rules are not independently sufficient and can only be evidence of an agreement if adopted "in service of a of a plan to restrain competition," requiring additional circumstantial evidence.[520]

2. Circumstantial evidence of agreement is insufficient

Lacking direct evidence of an agreement, the Majority's only recourse is to circumstantial facts that might raise one by inference. One way to establish an inference of agreement would be to show parallel conduct among competing firms, combined with plus factors tending to exclude independent action.[521] In this instance, the competitors' allegedly parallel activities in CA100+ and NZAM—adoption of net-zero targets, collaborative engagement with corporations, and shareholder voting—would, when combined with additional evidence, establish that the competitors committed to a common scheme, presumably to cause competitive harm to the oil and gas industry.

Importantly, such a scheme would not make economic sense for most of the parties to this investigation.[522] The Big Three, in particular, invest substantial client assets in oil and gas companies through index strategies, some of which track energy-specific indices.[523] Conspiring to harm these companies would reduce the returns to those index funds and make them less attractive to customers, with no promise of future profits to make up the shortfall.[524] Similarly, if the proxy advisory firms coordinated their vote recommendations to harm oil and gas companies, they would likely lose business from investors in those companies seeking to maximize their financial performance.[525] Because these firms would lack a "rational motive" to join such a conspiracy, the circumstantial evidence necessary to establish one must be "more persuasive. . . than would otherwise be necessary."[526]

Additionally, the parties' activities in CA100+ and NZAM likely do not suffice to even establish parallel conduct. Asset managers view ESG-related business activity as an important front in competition for clients. Thus, even where competitors may appear on the surface to act in unison, they are jostling for advantage behind the scenes. The Big Three closely track major

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519 *See AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999).
520 *See Relevent Sports, LLC v. United States Soccer Federation*, 61 F.4th 299, 308 (2d Cir. 2023).
521 *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 553–54 (2007); *Monsanto Co. v. Spray-Rite Service Corp*., 465 U.S. 752, 764 (1984).
522 *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).
523 *Initial Target Disclosure Report*, *supra* note 220, at 29, 74, CERES0032415 at -43, -88; *Vanguard's Report on Climate-related Impacts 2021*, *supra* 265, at 8, -10; *see*, *e.g.*, *iShares Global Energy ETF*, BLACKROCK, https://www.blackrock.com/us/individual/products/239741/ishares-global-energy-etf.
524 *Cf. Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 468 (1992).
525 *See Proxy Analysis & Benchmark Policy Voting Recommendations: Exxon Mobil Corporation*, ISS, at 27, ISS-HJC-00031195 at -220 (May 26, 2021) ("[Exxon] delivered negative absolute [Total Shareholder Returns] and underperformed the peer median over all three measurement periods."); Proxy Paper, *Exxon Mobil Corporation*, Glass Lewis, at 17, GL0012147 at -63 (May 26, 2021) (linking vote recommendation on Exxon director nominees to company's "underperformance versus peers in terms of long-term shareholder returns").
526 *Matsushita*, 475 U.S. at 587.

moves by their peers, including their participation in ESG investment initiatives,[527] their adoption of net-zero targets,[528] and their introduction of new proxy-voting services for clients.[529] They also work to differentiate themselves on these very metrics.[530] Boutique asset management firms with sustainability-focused missions explicitly pitch themselves to potential clients as more committed to net zero than their larger competitors.[531] As to the proxy advisers, while neither of the leading firms is a member of CA100+ or NZAM, they also track each other's ESG-focused product and service offerings, which can be an important factor in head-to-head competition between the two.[532] Viewed in this context, the parties' ESG-related activities appear to be the opposite of parallel behavior "recognizing their shared economic interests and their interdependence with respect to price and output decisions"—that is, they appear to be competing on the merits.[533]

a) Adoption of net-zero targets

The allegedly coordinated adoption of net-zero targets was arguably the Majority's first articulated theory of "collusion."[534] As discussed, however, the label "net-zero target" masks significant inconsistencies among various firms' commitments.[535] It strains logic to argue, for example, that two parties reached an agreement whereby one party agreed to align 77 percent of its assets with net zero while the other agreed to align four percent.[536] And while the Majority

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[527] *See* BlackRock email re: Quick Question (Jan. 12, 2023), BLK-HJC-00083955; SSGA, "Competitor Analysis – TCFD and Net Zero Asset Manager initiative" (Nov. 2021), at 3, SSGA-HJC.0006743 at -45; Vanguard email re: Statement needed-- Climate Action 100+ (Dec. 1, 2020), at 1, VAN_HJC_00050419.
[528] *Net Zero Asset Managers Competitor Analysis*, BLACKROCK at 4, BLK-HJC-00116395 at -98; SSGA, "Competitor Analysis — TCFD and Net Zero Asset Managers Initiative" (Nov. 2021), at 2, SSGA-HJC.0006743 at -44; Vanguard, NZAM Press Positioning Paper, at 2, VAN_HJC_00029742 at -43.
[529] *See* BlackRock email re: BII and STS highlights for potential GEC use on Monday, April 17 (Apr. 16, 2023), at 22, BLK-HJC-00201484 at -505; SSGA email re: ESG Media Coverage – November 3 (Nov. 3, 2022), at 1, SSGA-HJC.0346688; Vanguard email re: BlackRock opens door for retail investors to vote in proxy battles (Nov. 3, 2022), at 1, VAN_HJC_00062410.
[530] *Net Zero Asset Managers Competitor Analysis*, BLACKROCK at 4, BLK-HJC-00116395 at -96; *NZAM Target Setting FAQ*, SSGA (Apr. 28, 2022), at 5–6, SSGA-HJC.0020719 at -23–24; *NZAM Press Positioning Paper*, VANGUARD at 2, VAN_HJC_00029742 at -43.
[531] *See*, *e.g., Arjuna Capital 2022 Impact*, ARJUNA at 4, ARJUNA000799 at -803 (comparing carbon risk of Arjuna 350 to leading indices); *40 Years of Investing for a Better World*, TRILLIUM (2022), at 4, TRILLIUM_0004019 at -22 ("Trillium's equity strategies are already aligned with emissions levels well below 2 degrees of temperature increase").
[532] See Proxy Advisor U.S. Policy Updates for 2023, ISS (Dec. 8, 2022), at 33–36, ISS-HJC-00103114 at -46–49; Glass Lewis email re: Fw: ISS climate policy and reports (Apr. 2, 2022), at 1, GL0012799.
[533] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 227 (1993).
[534] *See* Letter from Chairman Jim Jordan Rep. Thomas Massie & Rep. Dan Bishop to Larry Fink, *supra* note 79, at 1–2 ([T]hrough NZAM, BlackRock appears to collusively have agreed to with other asset managers to "[w]ork in partnership with asset owner clients on decarbonisation goals, consistent with an ambition to reach net zero emissions by 2050 or sooner across all assets under management").
[535] *Compare Initial Target Disclosure Report*, *supra* note 220, at 142, -556 (Trillium including Scope 3 emissions when greater than 40% of total) *with id.* at 91, -505 (SSGA not including Scope 3 emissions).
[536] *Id*. at 28, -42 (BlackRock); *id*. at 75, -89 (Vanguard).

believes that adoption of a net-zero target necessarily entails divestment from oil and gas, the evidence shows otherwise.[537]

Even if the asset managers' net-zero targets had shown greater uniformity, however, such parallelism would not be sufficient to infer a common plot to harm any industry, including oil and gas. Businesses and financial institutions have an obvious incentive to pursue net zero due to the Paris Agreement, under which nearly all of the world's governments have signaled that they are likely to adopt emissions-reduction policies toward that end.[538] Several participants in NZAM independently began making net zero commitments prior to joining NZAM, and Vanguard has continued offering funds aligned with net zero even after exiting.[539] Additionally, asset managers acted in their own self-interest in adopting and refining their net-zero targets[540] These facts not only lack a tendency to exclude the possibility of independent action, they make the likelihood of independent action.[541]

b) Corporate engagements

Similarly, the evidence is insufficient to raise an inference of agreement based on CA100+ engagement groups. Engagements, as noted, amount to conversations between investors and corporate management on issues material to the company's financial performance and therefore the value of investors' holdings.[542] Shareholder engagement with corporations occurs routinely, usually independent of groups like CA100+, with the largest asset managers each holding hundreds or thousands of individual engagements per year.[543] Like net-zero targets, engagements serve asset managers' economic interests: With governments committing to reduce emissions under the Paris Agreement, investors have an incentive to persuade their portfolio companies adopt policies in preparation for the transition.[544] Consistent with this incentive, asset

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[537] Letter from Chairman Jim Jordan, *supra* note 79, at 2; *but see Steering Committee Meeting Minutes*, NZAM at 2 (Jul. 27, 20223), CERES0073102 at -03 (agreeing "not to make any substantive changes to fossil fuel expectations"); *accord* Carney Testimony at 73:18-74:15 (agreeing that "there's nothing inconsistent between continuing to invest in high-emitting sectors and meeting [a] net zero target").

[538] *See*, *e.g.*, *Expectations for Real-Economy Transition Plans,* GFANZ at 2–4, GFANZ00000462 at -72–74; *Financial Institution Net-zero Transition Plans*, GFANZ at 2-4, GFANZ00001035 at -45–47 (Nov. 2022).

[539] *See*, *e.g.*, *2020 TCFD Report*, BLACKROCK at 20, BLK-HJC-00104083 at -102; *2021 Responsible Investment Review,* AVIVA at 31, AV00000365 at -95; *Vanguard's Report on Climate-related Impacts 2022*, VANGUARD at 39, VAN_HJC_00000220 at -58.

[540] Memorandum by *BlackRock's Membership in NZAMI*, at 2 (Mar. 22, 2023), BLK-HJC-002101443 at -44; SSGA email re: **urgent/important** - intel for "ESG Gap Analysis" (Mar. 13, 2023), at 3–4, SSGA-HJC.0093654 at -56–57.

[541] *Cf. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

[542] *See Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 183, at 31, -50.

[543] *See 2022 Investment Stewardship Annual Report*, *supra* note 27, at 79, -88 (3,886 engagements in 2022); *2022 Asset Stewardship Report*, *supra* note 293, at 30, -85 (956 engagements in 2022); *Vanguard's Report on Climate-related impacts*, *supra* note 265, at 35, -25 (1,074 companies engaged in 2021).

[544] *2022 Investment Stewardship Annual Report*, *supra* note 27, at 134–36, -143–45; 2*022 Asset Stewardship Report*, *supra* note 293, at 47-50, -702–05 (May 2023); *Vanguard's Report on Climate-related Impacts 2022*, *supra* note 367, at 27, at -46.

managers tend to spotlight their individual corporate engagements in their reports to investors, not their participation in joint engagement efforts.[545]

To be sure, group engagements are a key part of the CA100+ value proposition. The initiative views engagements backed by multiple investors as more likely to persuade corporate management to act, which could, in theory, supply a "common motive" for an agreement among participants.[546] Additionally, CA100+ engagement groups facilitate some amount of interfirm communications, even though, as noted, those contacts are limited in practice.[547] While these facts might establish some "plus factors" in favor of an agreement, the balance of the evidence still favors independent action. For one thing, CA100+'s policy against information sharing among engagement group participants, along with its limits on a single participant's ability to speak on behalf of others in the group, dilutes much of the potential value of any agreement.[548] Additionally, even if the largest asset managers participated as lead investors in CA100+ engagement groups—which they have not—it would provide no guarantee that the group would achieve its objective, as even the Big Three have been rebuffed by corporate leadership.[549] The evidence of independent action, combined with the absence of any plausible unlawful object, renders a potential antitrust agreement based on CA100+ engagement groups unpersuasive.

c) Shareholder voting

Finally, the evidence does not support an inference of agreement through shareholder voting. Shareholder votes, like corporate engagements, are routine investor activities that take place thousands of times per year.[550] While asset managers and institutional investors regularly discuss proposals with companies and other interested parties, all state unequivocally that their final votes reflect their independent judgment based on the fiduciary duties they owe to clients and beneficiaries.[551] The CA100+ vote-flagging process is just one of many lobbying efforts that

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[545] *See 2022 Investment Stewardship Annual Report, supra* note 27, at 138, BLK-HJC-00000010 at -147; *2022 Asset Stewardship Report*, *supra* note 293, at 51, -706 (May 2023); *Vanguard, Investment Stewardship, 2022 Annual Report*, VANGUARD, at 30–33, VAN-HJC_00027407 at -36–39; *2022 Responsible Investment Review*, AVIVA at 87–91, AV00096605 at -91–95.

[546] *See Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 183, at 11, -30 ("Global collaborative investor engagement with consistent, long-term objectives sends a powerful signal – directly to companies – that investors are asking for an expect companies to respond to climate change."); *Letter to Funders Table*, CA100+ at 1, CERES0060834 (April 2019); *cf. Hobart-Mayfield, Inc v. Nat'l Operating Committee on Standards for Athletic Equipment*, 48 F.4th 656, 666 (6th Cir. 2022).

[547] SSGA email (Jun. 8, 2023), SSGA-HJC.0047771; *but see Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 139 (2d Cir. 2013) (requiring "a high level of interfirm communications" to establish a plus factor).

[548] *See Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 183, at 28–29, 35, -47–48, -54.

[549] *See* BlackRock email re: 2020 AGM (May 20, 2020), at 1, BLK-HJC-00124851 ("The disclosures on board oversight are besides the point given the lack of action. Do we really need another hour to debate this with them?"); Vanguard, Investment Stewardship Engagement Notes: Exxon (Mar. 1, 2022), at 3, VAN_HJC_00038000 at -02 ("We are concerned that they were so defensive, this engagement felt like a step backwards.").

[550] *See 2022 Investment Stewardship Annual Report*, *supra* note 27, at 81, -90; *2022 Asset Stewardship Report*, *supra* note 293, at 33, -88 (May 2023); *Investment Stewardship, 2022 Annual Report*, *supra* note 546, at 41–43, -47–49.

[551] *See*, *e.g.*, *2022 Investment Stewardship Annual Report*, *supra* note 27, at 42, -51; *2022 Asset Stewardship Report*, *supra* note 293, at 16-17, -71–72 (May 2023); *Global investment stewardship principles*, *supra* note 308, at 3, -72;

occurs ahead of high-profile shareholder votes. Of course, by raising the salience of a selected vote on which CA100+ signatories have taken a position, CA100+ vote-flagging may naturally tend to build support for that position among signatories.[552] Nonetheless, a flagged vote is still a fundamentally one-sided communication—an appeal, not an agreement.[553] Further, the evidence shows that, even on the small number of votes that CA100+ has flagged, its signatories take different positions, and the positions favored by certain CA100+ signatories often receive low vote shares—sometimes in the single digits.[554]

The Majority might instead attempt to draw an inference of agreement between the proxy advisors. Such a theory might view the incorporation of the CA100+ focus list into ISS's and Glass Lewis's benchmark voting policies in 2022 as a form of parallel business conduct, which, coupled with plus factors, could support an agreement.[555] On the surface, this argument might appear more persuasive than others, particularly if the market for proxy advisory services is oligopolistic in structure.[556] Even here, however, there is less to the theory than meets the eye. As an initial matter, ISS and Glass Lewis face increasing competition in their core proxy services business, including from upstarts who support the use of ESG factors in investment and those who oppose it.[557] More importantly, since both ISS and Glass Lewis make their benchmark voting policies available to the public, the two competitors could easily choose to follow each other's policy changes without the need for an agreement.[558] Thus, even if ISS or Glass Lewis was aware of the other's change to its benchmark policy and changed its own policies

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2022 Responsible Investment Review, *supra note* 314, 118–20, -722–24; *CalPERS Proxy Voting Guidelines*, *supra* note 368, at 1, CALPERS_0000182 at -84 (May 2022).

[552] *Climate Action 100+ Signatory Handbook Version 2.0 supra* note at 59–60, -78–79.

[553] *Cf. Copperweld Corp*, 467 U.S. at 768–69. This same principle holds true under the terms of reference for CA100+'s Phase 2, which state that lead investors are "expected to report after company AGMs on all votes flagged by Climate Action 100+ and rationale." *Climate Action 100+ Signatory Handbook Version 2.0*, CA100+, at 9 (June 2023), https://www.climateaction100.org/wp-content/uploads/2023/06/Signatory-Handbook-2023-Climate-Action-100.pdf. Investors cannot reach an agreement related to a vote that has already occurred.

[554] *See*, *e.g.*, BlackRock email re: BlackRock Vote Decision (May 24, 2021), at 1, BLK-HJC-00002851; CA100+, Proxy Season Archive, CA100+https://www.climateaction100.org/approach/proxy-season/.

[555] *United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, ISS at 16 fn. 1, ISS-HJC-00015925 at -40 (2022); Glass Lewis, Letter to IIGCC at 2, GL0006282 at -83; *see Quality Auto Painting Center of Roselle*, 917 F.3d at 1261–62.

[556] *Cf. Brooke Group*, 509 U.S. at 227. While the Majority has not found (or apparently sought) evidence on market shares, anecdotal evidence suggests that ISS and Glass Lewis are the leading firms in a concentrated market. *See*, *e.g.*, Due Diligence Questionnaire, ISS (Nov. 2020), at 8, ISS-HJC-00387182 at -89 (listing Glass Lewis and Broadridge Financial Solutions as "primary competitors for proxy voting services"); SSGA email re: CVX and XOM Voting Intentions and Rationale (May 20, 2022), at 2–4, SSGA-HJC.0209985 at -86–88 (listing ISS and Glass Lewis vote recommendations on certain measures); Fugere Testimony at 127:24-128:6 (As You Sow works with ISS and Glass Lewis).

[557] Fugere Testimony at 133:3-135:5; As You Sow, Proxy Voting Guidelines, 2023, at 2, AYS01182 at -83 (describing As You Sow and Proxy Impact); Strive Asset Management, Strive Adds Proxy Advisory Services to Financial Service Offerings (Jan. 10, 2023), https://www.strive.com/article/strive_adds_proxy_advisory_services_to_financial_service_offerings ("Strive to disrupt historic Glass Lewis/ISS duopoly").

[558] ISS 2024 U.S. Benchmark Guidelines, *supra* note 69; Glass Lewis 2024 Benchmark Guidelines, *supra* note 399.

accordingly, such conduct would be insufficient to show an agreement under Section 1 absent some additional circumstantial evidence.[559]

3. The evidence does not show a hub-and-spoke conspiracy

An alternative way of showing an agreement through circumstantial evidence is a hub-and-spoke conspiracy. Antitrust law distinguishes between horizontal agreements—those between competitors in the same market—and vertical agreements between firms at different levels of a market structure.[560] In contrast to a purely horizontal agreement, a hub-and-spoke conspiracy involves a series of vertical agreements between horizontal competitors and a common coordination point, which collectively raise an inference of agreement among the horizontal competitors.[561] In such a conspiracy, "an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'"[562] Importantly, establishing a hub-and-spoke conspiracy does not relieve the plaintiff of its burden under *Monsanto* and *Matsushita*: Conduct equally consistent with independent and concerted action fails to establish an agreement.[563]

In past cases in which courts have found hub-and-spoke conspiracies, the vertical agreements at issue have tended to involve formal contractual relationships relating to price and supply. For instance, in *Toys "R" Us v. FTC*, the court found evidence of a hub-and-spoke conspiracy based on individually negotiated agreements between the toy giant and its suppliers.[564] These agreements prohibited toy manufacturers from supplying certain products to Toys "R" Us' discount competitors.[565] Similarly, in *United States v. Apple, Inc.*, the court found a hub-and-spoke conspiracy where Apple individually negotiated agreements with publishers, which included a cap on the prices Apple paid for ebooks.[566] Other cases follow the same rule, relying on commercial contracts with restrictive terms related to price and supply to establish the vertical agreements underlying the conspiracy.[567] Even in cases where the court found that a hub-

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[559] *See Brooke Group*, 509 U.S. at 227. Given that both firms have faced pressure from customers to improve their ESG metrics, plus factors would be unlikely to meet the threshold needed to prove an agreement. *Proposed ISS Benchmark Policy Changes for 2022: Requests for Comments*, ISS at 24–25, ISS-HJC-00000079 at -102–03 (Nov. 4, 2021); Glass Lewis email re: Fw: ISS climate policy and reports (Apr. 2, 2022), at 1, GL0012799.
[560] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007); *United States v. Apple*, 791 F.3d 290, 313–14 (2d Cir. 2015).
[561] *Apple*, 791 F.3d at 314; *Toys "R" Us*, 221 F.3d at 935.
[562] *Apple*, 791 F.3d at 314.
[563] *Toys "R" Us, Inc.*, 221 F.3d at 934–35.
[564] *Id*. at 931–32.
[565] *Id*.
[566] *Apple*, 791 F.3d at 305–08.
[567] *See In re Disposable Contact Antitrust Litigation*, 215 F. Supp. 3d 1272, 1279, 1301 (M.D. Fla. 2016) (vertical agreements "impos[ing] minimum resale prices on certain contact lens lines"); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 790, 797 (S.D. Ill. 2018) (vertical agreements imposing "no-hire provisions" on franchisees).

and-spoke conspiracy had *not* been established, the alleged vertical agreements still related to price and supply.[568]

Additionally, in a hub-and-spoke conspiracy, the "hub" actively enforces its vertical agreements with the "spokes." Enforcement is important to support the inference of agreement among the horizontal competitors, who often "would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing."[569] Thus, in *Toys "R" Us*, the toy manufacturers testified that they would not have agreed Toys "R" Us' contractual requirements without assurances that their competitors had agreed to them as well.[570] Similarly, in *Apple*, the court found that "Apple offered each [ebook] publisher a proposed Contract that would be attractive only if the publishers acted collectively."[571] Where the hub's enforcement is "a fact. . .known by all" the spokes, a court can "plausibly infer participation in a horizontal conspiracy by all."[572] By contrast, where there are no facts showing that horizontal competitors had knowledge of the vertical agreements' enforcement—"[i]n other words, the 'rim' connecting the 'spokes'"—there is no showing of a hub-and-spoke conspiracy.[573]

These factors demonstrate that the hub-and-spoke conspiracy model is wholly inapposite to ESG investment initiatives. NZAM and CA100+, two supposed "hubs" of such a conspiracy, do not even purport to impose requirements on their signatories relating to their pricing or supply decisions.[574] NZAM requires signatories to release targets for managing their assets in line with net zero but does not bind them to a specific target or even require a specific methodology.[575] It does not require signatories to divest from any particular industry, such as oil and gas, and has resisted efforts to impose binding fossil fuel divestment requirements.[576] It also does not prohibit signatories from offering any specific products or services, and requires them to offer net zero-aligned investment products only "[a]s required" to meet their net-zero targets.[577] CA100+ requests signatories to participate in one engagement group per year with a focus list company, but does not require them to vote in a particular way on any proposal.[578] Thus, even if the ESG initiatives' membership requirements for signatories might in some sense be termed "vertical

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[568] *See In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186, 1189–90, 1198 (9th Cir. 2015) (agreements containing minimum-advertised price policies); *Howard Hess Dental Laboratories Inc. v. Dentsply Intern., Inc.*, 602 F.3d 237, 254–55, 257 (3d Cir. 2010) (exclusive dealing agreements between manufacturers and suppliers); *Hannah's Boutique, Inc. v. Surdej*, 112 F. Supp. 3d 758, 763–64, 769 (vertical agreements between retailer and suppliers to boycott certain boutiques).
[569] *Apple*, 791 F.3d at 314.
[570] *Toys "R" Us*, 221 F.3d at936.
[571] *Apple*, 791 F.3d at 316.
[572] *In re Disposable Contact Lens*, 215 F. Supp. 3d 1272, 1299 (M.D. Fla. 2016).
[573] *Howard Hess Dental Laboratories*, 602 F.3d at 255.
[574] *See Initial Target Disclosure Report*, NZAM, at 6–7, CERES0032415 at -20–21 (May 2022); *Climate Action 100+ Signatory Handbook Version 2.0*, CA100+ at 44, CERES0000320 at -63 (Aug. 2021).
[575] *Initial Target Disclosure Report (May 2022)*, *supra* note 219, at 6–7, CERES0032415 at -20–21.
[576] *Id*. at 15, -29; *Steering Committee Meeting Minutes*, NZAM, at 2–3, CERES0073080 at -81–82 (Sep. 27, 2022).
[577] *Initial Target Disclosure Report*, *supra* note 574, at 6, CERES0032415 at -20.
[578] *Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 182, at 33, 44, -52, -63. For completeness, GFANZ does not impose any binding requirements on its members. Schapiro Testimony at 151:3-153:6.

agreements," they are not remotely analogous to the vertical agreements at the crux of past hub-and-spoke conspiracies because they do not affect their pricing and supply choices.[579] As to the proxy advisors, while they undoubtedly provide vote recommendations and administrative services through their contractual relationships with investors and asset managers, they also do not require their clients to vote in a particular way.[580]

Moreover, because ESG investment initiatives do not enforce uniform standards of conduct among their signatories, any inference of "agreement" between the signatories is illusory. NZAM signatories' targets show significant variation in their scope, methodology, and net-zero commitments.[581] While NZAM maintains the power to accept or reject a target, the wide range of its accepted targets shows that signatories have little reason to believe that their targets will match those of other signatories.[582] Indeed, signatories view their net-zero targets as a point of competitive distinction, not coordination.[583] Similarly, CA100+ does not uniformly enforce its requirement that signatories participate in an engagement group, as some signatories continued to engage companies individually even after joining the initiative.[584] There is also no evidence that CA100+'s vote-flagging policy has coerced signatories into coordinating shareholder votes.[585] There is no reason to believe that signatories joined NZAM or CA100+ and agreed to its membership requirements based on their understanding that their competitors had done so as well.[586] Even among the Big Three, BlackRock and State Street remained in NZAM even after

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[579] *See Apple*, 791 F.3d at 313–14 (distinguishing "'horizontal' agreements to set prices" and "'vertical' agreements *on pricing*") (emphasis added). There is reason to doubt that signatories' adoption of NZAM and CA100+ membership requirements would constitute "vertical agreements" at all. *See Leegin Creative Leather Products, Inc.*, 551 U.S. at 888 (2007) (describing "vertical agreements a manufacturer makes with its distributors").

[580] *2022 Investment Stewardship Report*, *supra* note 372, at 58, -67; *2022 Responsible Investment Review*, *supra* note 314, at 118, -702; Engine No. 1, "Engine No. 1 Proxy Voting Guidelines", at 4, ENGINENO1-118HJC-PROD-00000076 at -79 (Apr. 2022).

[581] *Compare Initial Target Disclosure Report*, NZAM at 28, CERES0032415 at -42 NZAM (BlackRock committing 77% of AUM to net zero) *with id.* at 75, -89 (Vanguard committing 4 percent of AUM to net zero) *and id.* at 142, -556 (Trillium including Scope 3 emissions when greater than 40% of total) *with id.* at 91, -505 (SSGA not including Scope 3 emissions).

[582] *Net Zero Asset Managers Initiative Bi-Annual Signatories Meeting*, NZAM at 11–12, CERES0051257 at -67–68 (Oct. 18, 2022). Furthermore, there is evidence to suggest that NZAM's target approval procedures are not especially rigid. *See*, *e.g.*, BlackRock email re: NZAM target submission clarification (May 3, 2022) at 1–2, BLK-HJC-00165246 at -46–47 (BlackRock declining NZAM suggestion to add more detail to its initial net-zero target).

[583] *Net Zero Asset Managers Competitor Analysis*, *supra* note 257 at 4, BLK-HJC-00116395 at -98; *Competitor Analysis — TCFD and Net Zero Asset Managers Initiative*, SSGA at 2, SSGA-HJC.0006743 at -44 (Nov. 2021); *NZAM Press Positioning Paper*, VANGUARD at 2, VAN_HJC_00029742 at -43.

[584] Most notably, BlackRock never joined a CA100+ engagement group during its time in the initiative. BlackRock email re: US CA100+ focus companies (Jul. 29, 2020) at 1, BLK-HJC-00006612.

[585] *See*, *e.g.*, BlackRock email re: BlackRock Vote Decision, at 1, BLK-HJC-00002581 (May 24, 2021) (BlackRock voted against all shareholder proposals at Chevron in 2021 except proposal to reduce scope 3 emissions); Proxy Season Archive, CA100+, https://www.climateaction100.org/approach/proxy-season/ (CA100+ flagged 2021 shareholder proposal at Chevron to publish report on financial risks of climate change) (last visited Jun. 10, 2024).

[586] *Contra United States v. Apple*, 791 F.3d 290, 316 (2d Cir. 2015) ("So in order to receive the perceived benefit of Apple's proposed Contracts, the Publisher Defendants had to switch *Amazon* to an agency model as well—something no individual publisher had sufficient leverage to do on its own") (emphasis in original).

Vanguard departed the group in 2022.[587]

In sum, the facts provide no plausible basis for inferring the existence of a hub-and-spoke conspiracy through ESG investment initiatives. Each possible theory of harm, placing NZAM, CA100+, or the proxy advisers at the center of the supposed conspiracy, fails to show that vertical restraints facilitated a horizontal agreement among asset managers.[588] None of these vertical relationships impose binding requirements on the asset managers' pricing or supply choices or are not actively enforced.[589] The hub-and-spoke model thus provides no better means of establishing an agreement among participants in ESG investment initiatives than does a standard horizontal conspiracy or a trade association with binding rules. Faced with evidence that is equally, if not more, consistent with independent action than concerted behavior, the Majority cannot satisfy this threshold requirement of a Section 1 violation.

B. Any agreements reached through ESG initiatives would be evaluated under the rule of reason rather than the per se rule.

Even if signatories to ESG investment initiatives have reached an agreement—which, on the evidence presented, they have not—a court would assess the legality of that agreement under the rule of reason, not the per se rule. Antitrust scrutiny of agreements varies depending upon the type of restraints they entail. The Supreme Court has long held that certain practices, including price fixing and market allocation between horizontal competitors, "are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused."[590] For all other restraints, courts apply the "rule of reason," an analysis that "includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."[591]

Per se condemnation is generally only appropriate for "conduct that is manifestly anticompetitive,"[592] meaning business practices where "considerable experience" teaches that they "are naked restraints of trade with no purpose except stifling of competition."[593] Thus, all agreements between horizontal competitors to fix the price or restrict the output of goods or services are illegal regardless of any argument for pro-competitive justification.[594] Another

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[587] Memorandum by BlackRock *subject: BlackRock's membership in NZAMI*, at 5–7, BLK-HJC-00201443 at -47–49 (Mar. 22, 2023); SSGA email re: Vanguard quits net zero climate effort, citing need for independence, at 1, SSGA-HJC.0035629.
[588] *Cf. Howard Hess Dental Laboratories Inc v. Dentsply International, Inc.*, 602 F.3d 237, 254–55 (3d Cir. 2010).
[589] *Cf. Apple*, 791 F.3d at 316–19; *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935–36 (7th Cir. 2000).
[590] *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 768 (1984); *Northern Pacific Rail Co. v. United States*, 356 U.S. 1, 5 (1958).
[591] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 606–07 (1972).
[592] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).
[593] *Topco*, 405 U.S. at 607–08; *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898) ("no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract").
[594] *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 345–46 (1982); *Nat'l Collegiate Athletic Association v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100 (1984); *see also United States v. American Airlines Group*, 675 F. Supp. 3d 65, 108 (D. Mass. 2023) ("Such restraints as a class provoke harder looks than any other

"classic example[ ]" is horizontal market allocation, "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."[595] Outside of these limited categories, however, courts default to the rule of reason when construing the legality of horizontal restraints.[596] The same is true of most vertical restraints, in recognition of "the appreciated differences in economic effect between vertical and horizontal agreements."[597] Thus, agreements setting prices or allocating territories, when reached between suppliers and distributors, are not illegal per se.[598] These rules apply to hub-and-spoke conspiracies, with their mix of vertical and horizontal agreements. When "broken into its constituent parts," a hub-and-spoke conspiracy's "respective vertical and horizontal agreements can be analyzed either under the rule of reason or as violations per se."[599] While the *Apple* court applied the per se rule to the vertical agreements in that hub-and-spoke conspiracy, it did so based on its finding that "the objective of the conspiracy was a *per se* unreasonable restraint of trade," i.e., horizontal price fixing.[600]

Not every restraint fits clearly into one category. The Supreme Court has cautioned that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints."[601] Thus, in cases where it evaluated conduct closely resembling horizontal price fixing, the Court declined to apply the per se rule because it lacked experience with the type of agreement at issue or where it found the industry was one "in which horizontal restraints on competition are essential if the product is to be available at all."[602] Conversely, when reviewing conduct that fell short of price fixing but had similar effects, the Court has applied an abbreviated rule-of-reason analysis closer in practice to the per se rule. This less searching inquiry, known as "quick-look" review, is appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect."[603] Considering a professional

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arrangement — harder, even, than mergers—because they generally pose a greater threat of a market output reduction than do other classes of restraints.") (internal quotations omitted).

595 *Topco*, 405 U.S. at 608.

596 *See*, *e.g.*, *Nat'l Collegiate Athletic Association v. Alston*, 594 U.S. at 81–85 (student athlete compensation restrictions); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (joint ventures).

597 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007); *see also Ohio v. American Express Co.*, 585 U.S. 529, 541 (2018) (rule of reason applied to vertical antisteering provisions between credit card issuer and merchants).

598 *Leegin*, 551 U.S. at 907; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977).

599 *In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186, 1192 (9th Cir. 2015).

600 *United States v. Apple, Inc.*, 791 F.3d 290, 322 (2d Cir. 2015).

601 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979); *see also Texaco*, 547 U.S. at 6 (price setting by a joint venture "may be price fixing in a literal sense, but it is not price fixing in the antitrust sense").

602 *Broadcast Music*, 441 U.S. 1, 9–10 (1979); *Nat'l Collegiate Athletic Association v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 101 (1984); *see also North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 42, (2d Cir. 2018) ("Because the alleged restraints might avoid a flaw in the market, the full rule-of-reason analysis applies"); *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133, 1150 (9th Cir. 2003) ("Although price fixing is almost always a per se violation of section 1, there are 'very narrow' exceptions").

603 *California Dental Association v. FTC*, 526 U.S. 756, 769–70 (1999); *see also North Texas Specialty Physicians v.*

society's ban on competitive bidding, for instance, the Court reasoned that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[604] Similarly, in evaluating a dental trade association's refusal to provide a particular service under the rule of reason, the Court held that it was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire" with similar effects to a horizontal price-fixing agreement.[605]

The Majority attempts to shoehorn the activities of ESG investment initiatives into the per se standard, arguing that all efforts to achieve net-zero emissions "chok[e] off investment" in oil and gas and amount to "[h]orizontal output restrictions."[606] A price-fixing agreement, however, can only "be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered."[607] The parties to this investigation—investors, pension funds, nonprofits, asset managers, and proxy advisors—lack the power to set prices or output of oil, gas, or other energy commodities on their own.[608] Asset managers offer investment products like mutual funds and ETFs, as well as investment management services. Proxy advisors offer market intelligence reports, including vote recommendations, and administrative services related to proxy voting. A horizontal price-fixing agreement between asset managers would therefore need to set the price or output of the investment products or services the firms sell—or, alternatively, the price the asset managers *pay* for oil and gas securities.[609]

There is no potential agreement between asset managers that plausibly meets this requirement. The Majority's assumption that a net-zero target necessarily entails an agreement to restrict output of investment products exposed to oil and gas rests on demonstrably false premises. The Big Three's net-zero targets do not rely on their ceasing to offer their clients any investment choices; rather, they rely on the preexisting net-zero targets of their funds and portfolio companies.[610] The asset managers did not divest or agree to divest from any industry as

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FTC, 528 F.3d 346, 361 (5th Cir. 2008) ("But 'quick-look' examination is not a rigid template. It must be tailored to fit the circumstances in each case").

[604] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692–93 (1978).

[605] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

[606] Letter from Chairman Jim Jordan Rep. Thomas Massie & Rep. Dan Bishop, *supra* note 79, at 2.

[607] *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990).

[608] Indeed, in a market like oil production, where international cartels control output for a majority of global supply, the prospect of a price-fixing conspiracy organized by an entirely unrelated industry is especially far-fetched. *See* Complaint, *In re Exxon Mobil Corp.*, F.T.C. Docket No. ---- (May 1, 2024) ¶¶ 20–44, at https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneercomplaintredacted.pdf.

[609] This sort of price-fixing agreement in the buyer's market would be akin to a group boycott, analyzed *infra* § III.d.

[610] *Initial Target Disclosure Report*, NZAM, at 28, CERES0032415 at -42 (May 2022) ("at least 75% of BlackRock corporate and sovereign assets managed on behalf of clients will be invested in issuers with science-based targets or equivalent"); *id*. at 74, -88 ("We include assets from clients who have adopted net zero targets or similar climate commitments"); *id*. at 75–76, -89–90 (including assets "investing in a net zero-aligned manner" and or that "align to net zero objectives").

part of their participation in NZAM.[611] The same is true of the smaller asset managers.[612] Independent assessments of the emissions reductions necessary to achieve net zero, which the Majority cites, are far weaker evidence of the asset managers' future actions relative to their own public statements and conduct since adopting their net-zero targets.[613] Following the Majority's logic, any company that has publicly committed to net zero—a list that includes oil giants like Exxon and Chevron[614]—has announced an intention to dramatically reduce output of its emissions-generating products. A horizontal restraint justifying per se condemnation requires more than these unsupported inferences.[615]

Other possible agreements justifying per se treatment are even further afield. The Majority insinuates that CA100+ engagement groups and the proxy advisors' incorporation of the CA100+ focus list into their benchmark vote recommendations somehow constitute output reductions.[616] Even assuming any of these activities constitutes an agreement none of them entail any sort of supply restriction. An agreement by competing investors to request the same action from corporate management or vote the same way at a company's AGM would not affect the price or output of any of the investment products and services they sell or the prices they pay for securities.[617] As to the proxy advisors, their incorporation of the CA100+ focus list into their vote recommendations appears to be output-*enhancing*. ISS, in response to a survey of its customers, adopted a policy of recommending votes against or abstaining on incumbent directors at high-emitting companies without credible emissions-reduction plans.[618] Glass Lewis began providing more detailed climate-related data on companies with significant climate footprints in its vote recommendations.[619] In the market in which these two firms compete, for research and proxy vote recommendations, these changes provide customers with more detail in support of their

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[611] *Id*. at 29, -43 ("[W]e expect to remain long-term investors in carbon-intensive sectors like traditional energy, and we do not pursue broad divestment from sectors and industries as a policy"); *id*. at 74, -88 ("We will consider developing a science-based energy transition policy in the long run."); *id*. at 76, -90 ("[W]e seek to understand the actions coal-exposed companies are taking to mitigate this risk.").

[612] *See id*. at 142, -556 (Trillium commitment that "75% of the equity assets held in our larger cap equity portfolios will have science-approved targets"); *id*. at 91, -505 (no Aviva policy on divestment from oil and gas companies).

[613] Letter from Chairman Jim Jordan Rep. Thomas Massie & Rep. Dan Bishop, *supra* note 79, at 2. The asset managers came under sharp criticism from activists over their NZAM targets precisely because their targets would *not* affect real-world emissions. *See Missing the Target: Why Asset Managers Have Not Committed to Net Zero*, UNIVERSAL OWNER, at 2, SSGA-HJC.0258328 at -29 (Nov. 2021).

[614] *See* BlackRock email re: ExxonMobil Announces New GHG Emissions Reduction Plans (Dec. 14, 2020), at 2, BLK-HJC-00002277 at -78.

[615] *Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979) ("Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing'").

[616] Letter from Chairman Jim Jordan, Rep. Thomas Massie & Rep. Dan Bishop, *supra* note 79, at 1–2; Retelny Letter, *supra* note 85, at 1–2; Cameron Letter, *supra* note 85, at 1–2.

[617] A coordinated engagement or vote that *resulted* in the target company restricting output of its own products would not be enough to meet the definition of price fixing. *See FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990). Moreover, any shareholder proposal detailed enough to induce a company to reduce output of a particular product would likely run afoul of SEC regulations against micromanaging a company's "ordinary business decisions." *See* 17 CFR pt. 240.14a-8(i)(7).

[618] *United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, ISS, at 16, ISS-HJC-00015925 at -40 (2022).

[619] Glass Lewis, Letter to IIGCC at 2, GL0006282 at -83.

nonbinding vote recommendations.[620] In short, the per se rule is inapplicable to all of this conduct. Additionally, because every possible hub-and-spoke conspiracy fails to raise an inference of horizontal price fixing, courts scrutinizing agreements related to CA100+ or NZAM under such a theory also would not apply the per se rule.[621]

Courts would also hesitate to condemn the ESG initiatives under a quick-look analysis. Net zero commitments have become increasingly common since the Paris Agreement, and shareholder engagement with corporate leadership is routine; neither activity is one where "a rudimentary understanding of economics" demonstrates an "anticompetitive effect."[622] None of the initiatives' activities resemble a ban on competitive bidding or a collective refusal to provide a product or service that might justify an abridged rule of reason review.[623] In fact, the apparent lack of judicial experience scrutinizing restraints akin to net-zero commitments counsels further against application of the per se rule.[624] In sum, the per se rule does not apply to ESG investment initiatives.

C. A rule of reason analysis would favor ESG initiatives because they respond to investor demand while posing little threat to competition.

ESG investment initiatives would likely survive scrutiny under the rule of reason because they provide procompetitive benefits that vastly outweigh any anticompetitive harm. Initiatives like NZAM and CA100+ promote competition, both by encouraging companies to take value-maximizing action in response to climate change and by helping investors protect the value of their assets against climate-related risk. In addition, there is scant evidence that the initiatives have impaired competition between asset managers or proxy advisors, or that they have harmed consumers in any relevant market. Accordingly, a court would likely sustain any agreements evaluated under the rule of reason.

1. The rule of reason weighs the anticompetitive effect of a restraint against procompetitive justifications within a relevant market

The rule of reason guides evaluation of most competitive restraints.[625] As Justice Brandeis described the rule: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may

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[620] *Cf. Superior Court Trial Lawyers Association*, 433 U.S. at 423 ("[T]he constriction of supply is the essence of price-fixing").
[621] *Cf. United States v. Apple*, 791 F.3d 290, 323 (2d Cir. 2015) ("the reasonableness of a restraint turns on its anticompetitive effects").
[622] *Cf. California Dental Association v. FTC*, 526 U.S. 756, 769–70 (1999).
[623] *Cf. National Society of Professional Engineers v. United States*, 435 U.S. 679, 692–93 (1979); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).
[624] *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9–10 (1979). Unlike traditional trade associations, which "have traditionally been objects of antitrust scrutiny," ESG initiatives do not give participants an ability to act on their "economic incentives to restrain competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988).
[625] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 606–07 (1972); *see Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 66 (1911).

suppress or even destroy competition."[626] The rule requires the factfinder to "weigh[ ] all the circumstances of a case,"[627] including "facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and its reasons for adoption."[628] Nevertheless, application of the rule "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason," but rather "focuses directly on the challenged restraint's impact on competitive conditions."[629] Under the modern formulation of the rule, courts evaluate business practices under a three-part burden-shifting test. At step (1), the plaintiff must show the "restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[630] If a substantial anticompetitive effect is shown, (2) "the burden shifts to the defendant to show a procompetitive rationale for the restraint."[631] If the defendant carries its burden, (3) the plaintiff must "demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[632] The Supreme Court has cautioned that these steps are not "a rote checklist, nor may they be employed as an inflexible substitute for careful analysis."[633] For any restraint, the rule of reason calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[634]

A plaintiff seeking to show a substantial anticompetitive effect at stage (1) can do so through direct or indirect evidence.[635] Direct evidence means "proof of actual detrimental effects" on competition,[636] while indirect evidence means "proof of market power plus some evidence that the challenged restraint harms competition."[637] Under either showing, the plaintiff typically must define a relevant market.[638] A relevant antitrust market identifies "any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel" could profitably raise prices above a competitive level."[639] That is, "[i]n considering what is the relevant market for determining the control of price and competition," the judicial task is to determine the set of "commodities reasonably interchangeable by consumers for the same purposes."[640] A relevant market has both a product and a geographic component.[641] A relevant market can be proven with

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[626] *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 244 (1918).
[627] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).
[628] *Topco Associates*, 405 U.S. at 607.
[629] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).
[630] *American Express*, 585 U.S. at 541.
[631] *Id*.
[632] *Id*. at 542.
[633] *National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 97 (2021).
[634] *California Dental Association v. FTC*, 526 U.S. 756, 781 (1999).
[635] *American Express*, 585 U.S. at 542.
[636] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986) (internal quotations omitted).
[637] *American Express*, 585 U.S. at 542.
[638] *Id.*; *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 983–84 (9th Cir. 2023). The Supreme Court has recognized a limited exception in cases of horizontal restraints, where an agreement not to compete can excuse the plaintiff from the requirement to define a market. *American Express*, 585 U.S. at 542 n.7. The cases the Court cited, however, were horizontal restraints analogous to price fixing, which the court has elsewhere held to be per se illegal. *See Indiana Federation of Dentists*, 476 U.S. at 460–61.
[639] *Epic Games*, 67 F.4th at 975.
[640] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).
[641] *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 24, (D.D.C. 2022).

quantitative or qualitative evidence, or some combination of the two. Quantitatively, the antitrust agencies have long employed an analytical model that has received wide acceptance in the federal courts, known as the Hypothetical Monopolist Test ("HMT").[642] The HMT asks if "a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products."[643] If the price increase would cause customers "to substitute away from the hypothetical monopolist's product to another product" such that the price increase would be unprofitable overall, the proposed market is too narrow.[644] Qualitatively, courts look to "practical indicia" to define the scope of a relevant market.[645] The so-called "*Brown Shoe* factors" include "industry or public recognition[,]. . . the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[646]

Once the relevant market has been defined, the plaintiff bears the burden of showing that the challenged restraint creates a substantial anticompetitive effect in that market.[647] If proceeding by direct evidence, the plaintiff must show an adverse effect on competition, "such as reduced output, increased prices, or decreased quality," within the relevant market.[648] While increased prices and reduced output in the relevant market undoubtedly constitute direct evidence of anticompetitive effects, neither is necessary for the plaintiff to carry its burden.[649] Non-price effects such as reduced quality of goods and a slower pace of innovation can also suffice to show competitive harm.[650] Vertical restraints can be anticompetitive under the rule of reason if they "facilitate. . . a cartel."[651] By contrast, where vertical restraints exist in a market "experience[ing] expanding output and improved quality," courts are more likely to view them as procompetitive.[652]

If proceeding by indirect evidence, "the plaintiff must prove that the defendant has market power and present 'some evidence that the challenged restraint harms competition.'"[653]

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[642] Department of Justice & Federal Trade Commission, *2023 Merger Guidelines* § 4.3.A.
[643] *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015).
[644] *Sysco*, 113 F. Supp. 3d at 33; *see also Epic Games*, 67 F.4th at 975 (quoting *Optronic Technologies, Inc. v. Ningbo Sunny Electronic Co.*, 20 F.4th 466, 482 n.1 (9th Cir. 2021) (market definition "iteratively expands. . . until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price 'SSNIP'")).
[645] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1963).
[646] *Id.*
[647] *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020) ("[A]ctual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of antitrust law").
[648] *Epic Games*, 67 F.4th at 983; *see also United States v. American Airlines Group Inc.*, 675 F. Supp. 3d 65, 110 (D. Mass. 2023) ("This showing can be made with direct proof of actual harm to the competitive process—including, though plainly not limited to, evidence that price has increased[...]").
[649] *Epic Games*, 67 F.4th at 984.
[650] *1-800 Contacts, Inc. v. FTC*, 1 F.4th 102, 118 (2d Cir. 2021); *Impax Laboratories, Inc. v. FTC*, 994 F.3d 484, 493 (5h Cir. 2021).
[651] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 892 (2007).
[652] *Ohio v. American Express Co.*, 585 U.S. 529, 549–50 (2018).
[653] *Epic Games*, 67 F.4th at 983 (quoting *American Express*, 585 U.S. at 542).

Market power means “the ability. . .to profitably raise prices by restricting output.”[654] Such power can itself be proven indirectly by showing circumstantial evidence that the defendant has “a dominant share” of the relevant market and “that there are significant barriers to entry and. . . existing competitors lack the capacity to increase their output in the short run.”[655] However it is shown, “the existence of market power is a significant finding that casts an anticompetitive shadow over a party’s practices in a rule-of-reason case.”[656] Nevertheless, mere possession of market power is not enough; the plaintiff must show that the defendant wielded its market power in the relevant market.[657] Evidence that a defendant with a high market share has the ability to influence prices in the market can show that the defendant exercised its market power.[658] Where barriers to entry in the relevant market are high, a court is more likely to conclude that a defendant’s exercise of market power has a substantial anticompetitive effect.[659] On the other hand, where a court concludes that a defendant’s pricing reflects the dynamics of a competitive market, it is less likely to find an adverse effect on competition.[660] In any case, a showing of anticompetitive effect is “no slight burden” and is frequently the ground on which Section 1 challenges fail.[661]

If the plaintiff makes the required showing of a substantial anticompetitive effect, it falls to the defendant to show at step (2) that the challenged restraint has a procompetitive rationale. In evaluating such a showing, courts do not “require businesses to use anything like the least restrictive means of achieving legitimate business purposes” and should not “second-guess degrees of reasonable necessity so that the lawfulness of the conduct turns on upon judgments of degrees of efficiency.”[662] That said, “the more significant the anticompetitive effects, the heavier the defendant’s burden to justify the restraints with evidence of procompetitive conditions.”[663] Where restraints help “avoid a flaw in the relevant market” like free riding by competitors, they can have procompetitive benefits.[664] Additionally, restraints that improve the quality of the

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[654] *Id.*; *see also Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 13–14 (1984) (market power in context of tying arrangements is ability “to force a purchaser to do something that he would not do in a competitive market”).
[655] *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).
[656] *Epic Games*, 67 F.4th at 983 (internal quotations and alterations omitted).
[657] *Id*. at 984 (9th Cir. 2023); *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018) (Indirect evidence of a substantial anticompetitive effect must include market power and “other grounds” like “price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice.”).
[658] *See Epic Games*, 67 F.4th at 985; *United States v. American Airlines Group*, 675 F. Supp. 3d 65, 118 (D. Mass. 2023).
[659] *See Epic Games*, 67 F.4th at 985; *North American Soccer League*, 883 F.3d at 43; *American Airlines*, 675 F. Supp. 3d at 119.
[660] *See American Express*, 585 U.S. at 549 (“This court will not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.”) (internal quotations omitted); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 998–1001 (9th Cir. 2020); *see also Intel Corp. v. Fortress Investment Group LLC*, 511 F. Supp. 3d, 1006, 1028 (N.D. Cal. 2021) (dismissing complaint based on insufficient evidence of supracompetitive pricing).
[661] *National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 97 (2021).
[662] *Id.* at 98.
[663] *American Airlines,* 675 F. Supp. 3d at 110.
[664] *North American Soccer League*, 883 F.3d 32, 42–43.

defendant's products and enhance the defendant's ability to compete can be procompetitive.[665] By contrast, where the justification for the restraint "substantially and unreasonably interferes with, rather than promotes, the operation of the free market," courts are less likely to find a pro-competitive rationale.[666] If the burden returns to the plaintiff to show at step (3) that less restrictive means exist for achieving the claimed pro-competitive benefits, "antitrust courts must give wide berth to business judgments before finding liability" and when fashioning a remedy.[667]

To assess how the rule-of-reason framework would apply to ESG investment initiatives in court, we first assess potential anticompetitive effects of the initiatives before analyzing pro-competitive rationales that they might invoke.

2. Potential anticompetitive effects are highly speculative, and market definition questions are unresolved

The investigation has not uncovered evidence that ESG investment initiatives cause substantial anticompetitive effects in any properly defined relevant market. A relevant market is a necessary component of a successful showing of substantial anticompetitive effects by either direct or indirect evidence.[668] The evidence produced in this investigation, however, does not resolve the question of how to define the markets in this case.

Some potential relevant markets in this investigation are relatively straightforward. Precedent certainly exists for antitrust markets in the energy sector.[669] The FTC's recent complaint against Exxon and Pioneer Natural Resources ("Pioneer"), for instance, alleges a global market for "the development, production, and sale of crude oil."[670] Separately, there is evidence that proxy advisory firms provide a distinct set of products and services related to proxy voting. The asset managers utilize ISS and Glass Lewis's services to different degrees, and the market as a whole pays close attention to their vote recommendations.[671] Even here, however, the exact boundaries of such a market are not obvious, as new entrants have emerged to compete against the incumbents.[672] In addition, the largest asset managers perform many of the same proxy services functions internally, which might act as a competitive constraint on the proxy

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[665] *Epic Games*, 67 F.4th at 986.
[666] *American Airlines*, 675 F. Supp. 3d at 120.
[667] *Alston*, 594 U.S. at 102.
[668] *Ohio v. American Express Co.*, 585 U.S. 529, 542 (2018).
[669] Because none of the firms compete in the energy sector, of course, they would not be liable for anticompetitive effects in that market absent a showing of a horizontal agreement on price or output. *See FTC v. Qualcomm, Inc.*, 969 F.3d 974, 994 (9th Cir. 2020); *see also American Express*, 585 U.S. at 542 n.7 (2018). However, a theoretical market for the *purchase* of energy sector securities could conceivably resemble an energy market. For more on a hypothetical monopsony market, *see infra* IV.D.i.
[670] Complaint, *In re Exxon Mobil Corp.*, Dkt. No. ---- (F.T.C.) ¶¶ 16, 17. Other energy-related antitrust markets in recent cases include the production and sale of natural gas in the Appalachian Basin and Southern Powder River Basin coal. *See* Complaint, *In re QEP Partners, LP, et al.*, Dkt. No. C-4799 (F.T.C. 2023) ¶¶ 21, 23; *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 901–02 (E.D. Mo. 2020).
[671] *2022 Investment Stewardship Report, supra* note 26, at 58, BLK-HJC-0000010 at -67; *2022 Asset Stewardship Report*, SSGA, at 35, SSGA-HJC.0005656 at -90 (May 2023); *see Meeting Minutes* (Oct 1, 2021), CA100+, at 87, CERES0062869 at -937, -955 (Jun. 4, 2021).
[672] Fugere Testimony at 133:3-135:5; Strive Asset Management, *supra* note 558.

advisors.[673] While a precise market definition would require further evidence, *Brown Shoe* factors like "industry and public recognition" indicate nevertheless that a market for proxy advisory services is theoretically plausible.[674]

For the investment products and asset management services at the heart of the Majority's theories of harm, however, the evidence produced is insufficient to draw any conclusions about market definition. While a relevant market in the investment management industry is theoretically plausible,[675] properly defined antitrust markets could be segmented in several ways. For instance, passive investment strategies like index funds have different attributes relative to actively managed investments, which might justify dividing the two into separate markets.[676] There is ample evidence that the industry views ESG-aligned investment products and strategies as distinct.[677] Finally, asset managers distinguish between different types of investor clients, such as institutional and retail investors, suggesting that proper antitrust markets should be defined around classes of customers.[678] Resolving these market definition questions, which is necessary to fully assess the potential anticompetitive effects of ESG investment initiatives, requires evidence of customer substitution that the Majority does not appear to have requested in its document demands.

a) Direct evidence of anticompetitive effects

The investigation has not shown ESG investment initiatives have increased prices, reduced output, or lowered product quality in any relevant market. The energy-related market has not seen a lack of output reduction; indeed oil and natural gas production are at historic highs.[679] Turning specifically to the oil industry, both Exxon and Chevron reported their biggest annual

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[673] *See*, *e.g., 2022 Investment Stewardship Annual Report*, *supra* note 26, at 49, BLK-HJC-00000010 at -58; *2022 Asset Stewardship Report*, SSGA, at 29; SSGA-HJC.0005656 at -84 (May 2023); *Global investment stewardship principles*, VANGUARD, at 3, VAN_HJC_00000270 at -72 (Nov. 2021); *cf. Sysco*, 113 F. Supp. 3d at 33 ("If enough consumers are able to substitute. . .to another product and thereby make a price increase unprofitable, then the relevant market. . .must also include the substitute goods").
[674] *See Brown Shoe*, 370 U.S. at 325.
[675] *See Macquarie Group*, No. 08-cv-2113, 2009 WL 539928 at *7 (finding plausible allegation of "United States market for investment management of public pension funds").
[676] *See*, *e.g.*, BlackRock 2024 Form 10-K at 2–8 (describing various ways to categorize firm's assets under management); *2022 Asset Stewardship Report*, *supra* note 292, at 12, SSGA-HJC.0005656 at -68 (distinguishing between "active and index capabilities"); *Vanguard's Report on Climate-related Impacts 2022*, VANGUARD at 20, VAN_HJC_00000220 at -39 (distinguishing between "index and actively managed funds").
[677] *See*, *e.g.*, *2022 TCFD Report*, *supra* note 297, at 15, BLK-HJC-00000210 at -24 (identifying sustainable ETFs as one of the fastest growing segments within the ETF market); *Arjuna 350 Equity*, AVIVA, at 2, ARJUNA005123 at -24 (Mar. 2023); Engine No. 1, Q2 2021 Letter to Investors, at 1, ENGINENO1-118HJC-PROD00002653 at -53 ("We spent a lot of time and resources investigating the ESG landscape and came away unsatisfied").
[678] *See*, *e.g.*, BlackRock 2024 Form 10-K at 2–8 (describing various ways to categorize firm's assets under management); *2022 Asset Stewardship Report*, (May 2023), (listing SSGA's institutional investor clients); *What we do. How we do it. Why it matters*, VANGUARD (Apr. 2019), VAN_HJC_00032069 at -69 (describing Vanguard as a "mutually owned investment company" of 20 million investors); *see also* Department of Justice and Federal Trade Commission, *2023 Merger Guidelines* § 4.3D.1.
[679] *Crude Oil Production,* U.S. Energy Information Admin., https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS1&f=M; *Natural Gas Gross Withdrawals and Production*, U.S. Energy Information Admin. https://www.eia.gov/dnav/ng/hist/n9010us2m.htm (last visited June 8, 2024).

products in a decade last year, while paying out billions in dividends and stock buybacks to their shareholders.[680]

And while there is no evidence that any actions by NZAM or CA100+ have led to lower output or a higher price of oil, there is credible evidence that price-fixing by the oil companies themselves has had precisely that effect.[681] In contrast to alleged anticompetitive conduct within the oil industry, the evidence in this investigation suggests that ESG-related efforts from without may have made the industry more competitive: In the two years that followed the election of Engine No. 1-nominated directors to the Exxon board, the firm leapt ahead of its competitors.[682]

Turning to investment products and services, the initiatives have not caused a substantial anticompetitive effect in any putative market. As previously discussed, NZAM participants mapped their net-zero commitments onto their existing product and service offerings and did not reduce their output as part of their participation.[683] The asset managers have not divested from fossil fuels, and the investigation has produced no evidence that ESG initiatives have reduced the choices available to investors who wish to include energy securities in their portfolios.[684] Thus, whether viewed as a horizontal restraint between competing asset managers or a vertical restraint between asset managers and the initiative's leaders, NZAM's net-zero targets have not had anticompetitive effects.[685] Similarly, there is no evidence that CA100+ engagement groups have restricted the supply of investment products or services. To the contrary, by pushing companies on the CA100+ focus list to disclose and reduce their emissions, CA100+ engagements have resulted in investors receiving more information about their portfolio companies than they would otherwise have had.[686]

Finally, turning to a potential market for proxy advisory services, direct evidence of anticompetitive effects is lacking.[687] The incorporation of the CA100+ focus list companies in the proxy advisors' benchmark voting policies resulted in those customers providing their customers with more information about the companies they invested in ahead of major votes—that is, a higher-quality product.[688]

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[680] Stanley Reed, *Oil Giants Pump Their Way to Bumper Profits*, N.Y. Times (Feb. 2, 2024), at https://www.nytimes.com/2024/02/02/business/oil-gas-companies-profits.html.
[681] Complaint, *In re Exxon Mobil Corp.*, Dkt. No. ---- (F.T.C.) ¶¶ 1–9.
[682] Engine No. 1: "ExxonMobil: Two Years Later" at 3–4, ENGINENO1-118HJC-PROD-00000016 at -18–19.
[683] *Initial Target Disclosure Report*, *supra* note 221, at 28, 74, 75–76, -42, -88, -89–90 (describing assets in scope for net-zero commitments).
[684] *Id.* at 29, 74, 76, -43, -88, -90 (describing continued investment in fossil fuels).
[685] *Ohio v. American Express Co.*, 585 U.S. 529, 549–50 (2018); *cf. National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 99–100 (2021) (finding "some of [the NCAA's] rules may have procompetitive effects") (internal quotations omitted).
[686] *See*, *e.g.*, SSGA email re: [EXT] Re: Rolls-Royce CA100+ TCFD reporting next steps (Sep. 1, 2021), at 2–3, SSGA-HJC.0033929 at -30–31 (engagement agenda for Rolls-Royce calling for enhanced TCFD reporting); Engine No. 1: "ExxonMobil: Two Years Later" at 3, ENGINENO1-118HJC-PROD-00000016 at -18 (describing new targets adopted by Exxon following election of new directors).
[687] To avoid confusion, it is worth repeating that neither ISS nor Glass Lewis is a signatory to CA100+.
[688] *See United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, ISS, at 16 (2022) ISS-HJC-00015925 at -40 (2022); Glass Lewis, Letter to IIGCC at 2, GL0006282 at -83.

b) Indirect evidence of anticompetitive effects

Proof of a substantial anticompetitive effect through indirect evidence requires a showing that the defendant has a "dominant" share in the relevant market.[689] For some of the parties to this investigation, the likelihood of any such showing is remote. Aviva's AUM is roughly $220 billion, while Trillium's is less than $5 billion.[690] Arjuna and Engine No. 1 each have an AUM of under $1 billion.[691] Within NZAM ($57 trillion AUM) or CA100+ ($68 trillion), such figures account for infinitesimally small shares.[692] Even assuming that valid relevant markets in the asset management industry would be narrower than the full scope of NZAM or CA100+ participants, it is implausible to conclude that any of those firms could have market power, which all but precludes a showing of a substantial anticompetitive effect through indirect evidence.[693]

Although the evidence in the investigation does not support any firm conclusions on the subject, we assume for the sake of our analysis that at least some parties possess market power. BlackRock, State Street and Vanguard may have market power in some relevant market for investment management services, and that ISS and Glass Lewis could have market power in a relevant market for proxy advisory services.[694] Such power, on its own, is insufficient to establish an anticompetitive effect absent a showing that one or more of these firms wielded its power in the relevant market.[695] Here, the evidence falls short. The adoption of net-zero targets by BlackRock, State Street, and Vanguard did not make it harder for other asset managers to compete for clients. In fact, the Big Three felt pressure to increase their net-zero targets to keep pace with competitive pressure from their peers.[696] Additionally, the evidence does not show that CA100+ engagement groups—where only one member of the Big Three even participated—stifled competition in the investment management industry.[697] Finally, even assuming that a valid relevant market for proxy advisory services is highly concentrated, the incorporation of the

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[689] *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d at 1421, 1434 (9th Cir. 1995).
[690] *Responsible Investment Review*, AVIVA at 53 (2022), https://www.avivainvestors.com/en-gb/about/responsible-investment/; *About Trillium*, TRILLIUM, https://www.trilliuminvest.com/about (last visited Jun. 10, 2024).
[691] Form 13F, Arjuna Capital (Dec. 31, 2023); From 13F, Engine No. 1 L.P. (Dec. 31, 2023).
[692] Net Zero Asset Managers Initiative, "Signatories," https://www.netzeroassetmanagers.org/signatories/; *Progress Update 2023*, CA100+ at 2, https://www.climateaction100.org/wp-content/uploads/2024/01/Climate-Action-100-Progress-Update-2023.pdf.
[693] The firms' small footprints affect their behavior on individual votes. For instance, Aviva declined to issue a standalone statement on its vote in favor of new directors at Exxon, citing its "immaterial equity position" in the company. Aviva email re: Exxon AGM - votes ahead (May 19, 2021) at 1, AV00073686.
[694] *See*, *e.g.*, *The Passives Problem and Paris Goals*, *supra* note 278, at 7, -19 ("Each of the Big Three now manages five percent or more of the shares in a vast number of public companies, and they collectively cast an average of about 25 percent of shareholder votes in those same companies."); *Due Diligence Questionnaire*, ISS at 8 (Nov. 2020), ISS-HJC-00387182 at -89 (ISS and Glass Lewis among three "primary competitors for proxy voting services").
[695] *See Ohio v. American Express Co.*, 585 U.S. 529, 542 (2018); *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 983 (9th Cir. 2023).
[696] *See*, *e.g.*, *Competitor Analysis*, *supra* note 503, at 2, -44 (comparing SSGA's NZAM commitment to those of competitors); Vanguard email re: For reference: Our NZAM standings by $ and % (Jun. 9, 2022), at 1, VAN_HJC_00000171 (same).
[697] SSGA email (June 8, 2023), SSGA-HJC.0047771 ("We plan to roll of [the Rolls-Royce] engagement later this year as the company has improved its disclosure").

CA100+ focus list companies into ISS' and Glass Lewis's benchmark voting policies has not threatened competition or raised barriers to entry in that market.[698] Indeed, dissatisfaction with the two firms' policies appears to have spurred new entry into the market.[699]

3. ESG initiatives serve significant procompetitive ends by providing investors with more reliable information about their investments

As the evidence does not show any anticompetitive harms rising above mere speculation, a court evaluating ESG investment initiatives under the rule of reason likely would not advance past step (1). However, in any rebuttal, participants would likely be able to establish several procompetitive rationales for the initiatives, including that they (1) create a common framework for assessing the credibility of companies' net-zero commitments; (2) increase the likelihood that corporations will respond to concerns from their own shareholders; and (3) remedy potential free riding that might inhibit an economy-wide transition to net zero.

a) Common net-zero framework

The lack of consistent reporting standards has been a persistent challenge for efforts to reduce greenhouse gas emissions. The TCFD was the first international effort by financial regulators to create uniform climate disclosure standards. In the words of one of its leaders, the TCFD sought to respond "to a question that nobody could actually answer, which was, does climate risk present system risk to the financial system[?]"[700] The TCFD recommendations for corporate climate disclosures received broad validation from investors. CalPERS, which identifies climate change as "one of the top three risks" to its investments, was an "early supporter" of the framework.[701] Large asset managers, who invest funds on behalf of clients, have also pushed companies in their portfolios to disclose data in line with the TCFD framework.[702] Even as more companies adopt the TCFD framework, however, reporting and data quality remain inconsistent, which could undermine the credibility of companies' net-zero targets.[703] NZAM aims to fill the information gap by providing a common framework for asset managers to use in disclosing their net-zero commitments, including an approved list of methodologies.[704]

Consistent net-zero reporting standards promote competition in two ways:

- First, a common net-zero framework gives clients and potential clients of the asset managers more information from which to compare the commitments of competing asset managers. Although the asset managers' initial NZAM commitments, as previously

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[698] *Cf. Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 983–84 (9th Cir. 2023).
[699] Fugere Testimony at 133:3-135:5; Strive Asset Management, *supra* note 558.
[700] Schapiro Testimony at 6-20.
[701] Sustainable Investment and the Path to Net Zero, CalPERS at 3–4 (Jan. 5, 2022), CALPERS_0001861 at -63.
[702] *See 2022 Investment Stewardship Annual Report*, *supra* note 26, at 136, BLK-HJC-00000010 at -145; *2022 Asset Stewardship Report*, SSGA at 11, SSGA-HJC.0005656 at -66 (May 2023); *Vanguard's Report on Climate-related Impacts 2022*, VANGUARD, VAN_HJC_00000220 at -46.
[703] GFANZ, *2022 Progress Report*, at 44 (2022), GFANZ00013423 at -77.
[704] *Initial Target Disclosure Report*, *supra* note 221, at 14–15, -28–29.

discussed, varied significantly, the common framework allowed investors to make apples-to-apples comparisons of different firms.[705] Without a common framework, investors would have less information at their disposal when choosing where to invest their money.[706] Indeed, NZAM appears to have fostered robust competition between asset managers to adopt more stringent targets and differentiate themselves from their rivals.[707] While the Big Three asset managers largely brushed off criticism of their targets from climate activists, they consistently expressed concern about losing business to competitors with more rigorous climate-related offerings.[708] This type of head-to-head competition on the merits is the type of business behavior the antitrust laws are designed to encourage, not condemn.[709]

- Second, given the potential for divergent mandatory reporting standards across jurisdictions, voluntary adoption of a common net-zero framework can help asset managers minimize compliance costs. Unsurprisingly, witnesses told the Committee that financial institutions prefer predictability and uniformity in climate-related regulatory standards.[710] GFANZ co-chair Mark Carney explained how common frameworks improve efficiency: "Firms are only publishing the information that's actually going to be used. And capital. . .can flow to the solutions most readily."[711] Currently, however, international firms face the prospect of different climate-reporting requirements in different countries—or even different states within the United States—that would affect the utility of their net-zero targets.[712] Additionally, SEC regulations on labeling ESG investment products present separate compliance risks for firms competing for business

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[705] *See* BlackRock email re: NZAM target submission clarification (May 3, 2022) at 1, BLK-HJC-00115970 ("We really can't make exceptions for one asset manager[.]").
[706] *See* Schapiro Testimony at 9:5-11 ("Greater disclosure using common frameworks helps regulators and investors make more informed decisions, including clearer approaches for companies to avoid charges of green washing").
[707] *Net Zero Asset Managers Competitor Analysis*, BLACKROCK at 2, BLK-HJC-00116395 at -96; *Net Zero Target Setting FAQ*, SSGA at 4–7 (Apr. 28, 2022), SSGA-HJC.0020719 at -22–25; Email from B. Thomas to CorpComm Team One re: For reference: Our NZAM standings by $ and % (Jun. 9, 2022), at 1–2, VAN_HJC_00000171 at -71–72.
[708] *See*, *e.g.*, Vanguard email re: FW: [External] Members to Net Zero Asset Managers initiative treble but US execs say goal is not viable | | The asset owners shifting to ESG benchmarks (Mar. 29, 2021) at 1, VAN_HJC_00029325 ("I actually think this supports VG's case against divestment, although I think it is meant to come as a criticism of NZAM"); SSGA email re: **urgent/important** - intel for "ESG Gap Analysis" (Mar. 13, 2023) at 2, SSGA-HJC.0093654 at -55 ("[A]ll EU Ams keep building on their ESG franchise and capabilities, while we are re-discussing our ESG assessment. In other words we pause, they move ahead – meaning a larger gap").
[709] *Cf. Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).
[710] Carney Testimony at 67:7-17; *see also* Schapiro Testimony at 8:21-23 ("GFANZ also aims to help lay the groundwork for greater consistency and global regulatory reporting obligations for financial institutions").
[711] Carney Testimony at 67:12-17.
[712] *The Enhancement and Standardization of Climate-Related Disclosures for Investors* Securities and Exchange Commission, 89 Fed. Reg. 21,668, 21,673 (Mar. 28, 2024), codified at 17 CFR pts. 210, 229, 230, 232, 239, 249; Directive (EU) 2022/2464, amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Dec. 14, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464; S.B. 253, Climate Corporate Data Accountability Act (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253; S.B. 261, Greenhouse gases: climate-related financial risk (Oct. 7, 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261.

from sustainability-minded investors.[713] Here, again, common frameworks provide investors with more information without subjecting asset managers to conflicting legal requirements.

b) Increasing corporate responsiveness to investors

For smaller investors who might otherwise struggle to gain the attention of corporate management, collaborative investment groups likely increase dialogue on the investors' issues of concern. CA100+ compiled its list of focus companies to concentrate engagement on companies where investors agreed climate risk was highest.[714] As CA100+ explains its approach, "Global collaborative investor engagement with consistent, long-term objectives sends a powerful signal—directly to companies—that investors are asking for and expect companies to respond to climate change."[715] Critically, in every corporate engagement on the CA100+ Benchmark, the two sides' incentives are aligned: An outcome that increases the company's performance also increases value for shareholders.[716] Yet even the largest investors can meet resistance from management in their individual corporate engagements.[717] Collaborative engagement groups give investors with relatively small shares in a company greater scale in their negotiations with management, thereby increasing the chances of success.[718]

The benefits of investor collaboration extend to shareholder votes. While all shareholder resolutions are nonbinding, management is more likely to pay attention to resolutions that receive larger shareholder votes, giving smaller investors an incentive to work together on the CA100+ Benchmarks.[719] Additionally, by collaborating on proposals of mutual interest, shareholders avoid expending resources on resolutions that would end up excluded as duplicative under SEC rules.[720] While information sharing among competing firms can be anticompetitive in some circumstances, particularly when the information shared pertains to pricing, CA100+ maintains strict protocols to prevent such exchanges.[721] Signatories limit the information they share in engagement groups to that which is necessary to assure the success of the engagement

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[713] Investment Company Names, 88 Fed. Reg. 70,436 (Oct. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).
[714] *Investor Briefing Pack*, *supra* note 179, at 8, CERES0049156 at -63.
[715] *Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 184, at 11, -30.
[716] *See*, *e.g.*, Letter from Climate Action 100+ Steering Committee to Darren W. Woods re: Climate Action100+ Net Zero Company Benchmark (Sep. 1, 2020), at 2, BLK-HJC-00006765 at -66 ("Such insights will help promote and inform investment decisions that create long-term value for investors' beneficiaries.").
[717] *See*, *e.g.*, BlackRock email re: US CA100+ focus companies (Jul. 29, 2020), at 1–2, BLK_HJC_00006612 at -12–13; Vanguard, Investment Stewardship Engagement Notes: Exxon (Mar. 1, 2022), at 3–4, VAN_HJC_00038000 at -02–03.
[718] *CA100+ North America Q4 Meeting engagement Updates & Priorities*, CA100+, at 13, 17, 19 (Nov. 17, 2021), CERES0000382 at -95, -99, -401; *IGCC Investor Practice Masterclass Session 3*, BlackRock, at 1 (Aug. 2021), BLK-HJKC-00065605.
[719] Fugere Testimony at 21:7-14, 100:8-18.
[720] *Id*. 124:24-125:5; 17 CFR pt. 240.14a-8(i)(11). Logically, avoiding duplicative shareholder resolutions is also more efficient for company management.
[721] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *Climate Action 100+ Signatory Handbook Version 2.0*, CA100+ at 35, CERES0000320 at -54 (August 2021).

and do not share competitively sensitive information at all.[722] In short, CA100+ collaborative engagements appear to result in significantly more communication between companies and their investors on the CA100+ than would otherwise exist.

There is also evidence showing that corporate engagement generally improves the competitiveness of the target companies. Investors frequently cite the performance of a company's competitors during engagements to make the case for management to act.[723] Such appeals spur companies to match their competitors on climate risk and other governance issues important to investors.[724] Successful collaborative efforts can result in companies that are more competitive than they were before. For instance, Exxon surged relative to its peers following the election of a dissident slate of directors nominated by Engine No. 1 in 2021.[725] Relatedly, to the extent that ESG initiatives result in the increased allocation of capital to renewable energy and other industries poised to benefit from the net-zero transition, they improve innovation and competition in those sectors of the economy.[726]

c) Preventing free riding

Absent ESG investment initiatives, it is possible that the private sector would fail to make headway toward net zero. Investors pushing their portfolio companies to adopt net-zero targets recognize the existence of a "first-mover disadvantage" holding back progress.[727] The costs associated with voluntary action can deter companies from, for instance, disclosing emissions or transitioning toward net zero-aligned energy projects.[728] Moreover, without an accountability mechanism like NZAM or CA100+, net zero-committed financial institutions have less incentive to engage companies on emissions disclosure and reductions, since they can reap the benefits of action by their peers.[729] By deterring financial institutions' free riding on their competitors' corporate engagement, CA100+ and NZAM increase the level of communication between companies and shareholders and the value-enhancing corporate policies that result from it.[730]

Given these procompetitive justifications, and the failure to show any plausible

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[722] *Climate Action 100+ Signatory Handbook Version 2.0*, *supra* note 184, at 35, -54.
[723] *See*, *e.g.*, *Vanguard, Investment Stewardship Engagement Notes: Cheniere Energy Inc.*, VANGUARD at 1–2, VAN_HJC_00008113 at -13–4 (May 4, 2020); BlackRock email re: 2020 AGM (May 19, 2020), at 2–3, BLK-HJC-00002007 at -08–09.
[724] *See*, *e.g.*, BlackRock email re: 2020 AGM (May 19, 2020), at 2, BLK-HJC-00002007 at -08 (faulting Exxon for lack of "articulated commitments" on methane reduction); BlackRock email re: ExxonMobil Supports Global Methane Pledge (Oct. 26, 2021), BLK-HJC-00003223 (announcing Exxon's support for Global Methane Pledge).
[725] ExxonMobil: Two Years Later, ENGINE NO. 1 at 3–4, ENGINENO1-118HJC-PROD-00000016 at -18–19.
[726] *See*, *e.g.*, *GFANZ Principals Group*, GFANZ at 15, GFANZ00042349 at -63 (Oct. 31, 2023) (describing workstream "[t]o accelerate capital allocation in support of a net-zero transition in [emerging markets and developing economies] through private sector leadership and public-private collaboration").
[727] *Clean Industrial Policy*, Children's Investment Fund Foundation at 2 (Mar. 2022), CERES0060890 at -91.
[728] Vanguard email re: [External] Standards Advisory Group Workshop Notes (Dec. 20, 2019) at 2–3, VAN_HJC_00146563 at -64–65; *The case for Managed Phaseout*, GFANZ at 16, GFANZ00018637 at -52 (Mar. 11, 2022).
[729] *See Climate Action 100+ Steering Committee Meeting Minutes*, CA100+ at 4, CERES0001360 at -63 (Jun. 23/24, 2022).
[730] *See For GWG: CA100+ Phase 2 governance discussion items*, CA100+ at 4, CERES0005683 at -86 (Mar. 4, 2022); *cf. Toys "R" Us*, 221 F.3d at 937–38.

anticompetitive effects, it is unlikely that a court reviewing the ESG initiatives would require them to show that "less anticompetitive means" exist for achieving these benefits to competition.[731]

D. ESG initiatives do not constitute an illegal boycott, and some of their activities are likely immune from antitrust liability.

The evidence shows that ESG investment initiatives have not facilitated an illegal boycott because they do not require participants to stop doing business with any customers or businesses. Moreover, a court would evaluate any restraints emanating from investors' net-zero commitments under the rule of reason, not a per se standard. Finally, to the extent ESG initiatives constitute a non-economic boycott, or achieve their objectives through lobbying public bodies, their conduct is likely immune from antitrust liability.

1. ESG initiatives do not constitute a group boycott

A "group boycott" refers to the category of restraints amounting to "concerted refusals by traders to deal with other traders" or "a concerted refusal to deal on particular terms."[732] Such refusals to deal can be illegal whether agreed upon by direct competitors or firms at different levels of the market structure. Thus, the Supreme Court has held that an agreement among manufacturers and suppliers not to sell their products to retailers who buy from competing manufacturers and suppliers constituted "a group boycott in the strongest sense."[733] The Court also found that a group boycott existed where members of a professional association reached purely horizontal agreement to withhold their services until they received a pay increase.[734] The refusal to deal need not be a categorical one, as a group boycott can also exist where firms agree to deal with certain counterparties only on restrictive terms. For instance, an agreement by a group of dentists not to submit dental X-rays to insurance companies constituted an illegal group boycott,[735] as did an agreement between suppliers and an appliance store that the suppliers would not sell to one of the store's competitors on the same terms offered to the store.[736]

Only certain group boycotts are illegal per se.[737] The Court has held that the per se rule is appropriate only for "cases involving horizontal agreements among direct competitors."[738] This category includes "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor."[739] Such agreements "often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete. . .

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[731] *See American Express*, 585 U.S. at 542.
[732] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Indiana Federation of Dentists*, 476 U.S. at 458.
[733] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *see Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 461–62 (1941).
[734] *Superior Court Trial Lawyers Association*, 493 U.S. at 422–23.
[735] *Indiana Federation of Dentists*, 476 U.S. at 458.
[736] *Klor's*, 359 U.S. at 212–13.
[737] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985).
[738] *NYNEX*, 525 U.S. at 135.
[739] *Indiana Federation of Dentists*, 476 U.S. at 458.

and frequently the boycotting firms possess[ ] a dominant position in the relevant market."[740] Additionally, where horizontal competitors agree to a concerted refusal to deal with the aim of raising the price of their products or services, the boycott is "unquestionably a naked restraint on price and output" that is illegal regardless of any proffered justification.[741] A group boycott can also take the form of a hub-and-spoke conspiracy; in such cases, the per se rule applies where the evidence of conspiracy is sufficient to infer an agreement among horizontal competitors.[742]

For all other group boycotts, courts apply the rule of reason.[743] This includes any boycott based solely on a vertical agreement, *i.e.*, "a restraint that takes the form of depriving a supplier of a potential customer."[744] Importantly, while a horizontal agreement is necessary for the per se rule to apply to a group boycott, it is not sufficient, as courts will apply the rule of reason to certain classes of horizontal boycotts, including "rules adopted by professional associations" or in cases "where the economic impact of certain practices is not immediately obvious."[745] Where the rule of reason applies, the analysis of a group boycott is the same as it is for other restraints: The plaintiff must show that the boycott has a substantial anticompetitive effect in a valid relevant market through either direct or indirect evidence.[746] For a horizontal agreement, "[a] refusal compete with respect to the package of services offered to customers" is sufficient to show anticompetitive effects; for a vertical agreement, a showing requires proof that the restraint causes harm "not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."[747]

The case law clearly dooms any attempt to cast ESG investment initiatives as a group boycott. The critical requirement at the heart of every group boycott—a concerted refusal to deal or to deal on specific terms—is entirely absent.[748] Although the Majority believes that a financial institution's commitment to net-zero constitutes a de facto pledge to end commercial relations with fossil fuel companies, the evidence proves that this belief is unwarranted.[749] Asset managers participating in NZAM have not divested their holdings in any industry, nor have they stopped offering any investment products and services to clients based on the industries in which they wish to invest.[750] Both NZAM and CA100+ explicitly recognize that their members are

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740 *Northwest Wholesale Stationers*, 472 U.S. at 294.
741 *Superior Court Trial Lawyers Association*, 493 U.S. at 423–24.
742 *Top Benefits Planning Agency, Inc. v. Anthem Blue Cross Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008).
743 *NYNEX*, 525 U.S. at 136; *American Steel Erectors v. Local Union No. 7, International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 815 F.3d 43, 62 (1st Cir. 2016).
744 *NYNEX*, 525 U.S. at 136.
745 *Indiana Federation of Dentists*, 476 U.S. at 458–59.
746 *Lifewatch Services Inc. v. Highmark Inc.*, 902 F.3d 323, 336 (3d Cir. 2018).
747 *Indiana Federation of Dentists*, 476 U.S. at 459; *NYNEX*, 525 U.S. at 135.
748 *Klor's*, 359 U.S. at 212; *Indiana Federation of Dentists*, 476 U.S. at 458.
749 *See*, *e.g.*, Letter from Chairman Jim Jordan, Rep. Thomas Massie, & Rep. Dan Bishop to Yie-Hsin Hung (Jul. 6, 2023), at 1–2.
750 *Initial Target Disclosure Report*, NZAM, at 29 (May 2022), CERES0032415 at -43 ("[W]e expect to remain long-term investors in carbon-intensive sectors like traditional energy, and we do not pursue broad divestment from sectors and industries as a policy"); *id*. at 74, -88 ("We will consider developing a science-based energy transition policy in the long run."); *id*. at 76, -90 ("[W]e seek to understand the actions coal-exposed companies are taking to mitigate this risk.").

independent fiduciaries, and neither initiative requires its signatories to restrict any segment of their business.[751] The Majority will likely point to statements from individuals associated with ESG initiatives about the need to shift capital away from fossil fuels to argue that the initiatives, notwithstanding their terms, have organized a group boycott through vertical agreements.[752] But aspirational statements about the need to finance a transition to renewable energy do not suffice to establish a concerted refusal to deal, especially not against the clear weight of the evidence from the initiatives' established rules and the behavior of their signatories. With no proof of a concerted refusal to deal, the Majority's group boycott theory founders at the outset.

Even if a court found that ESG investment initiatives facilitate a concerted refusal to deal on specified terms, it would almost certainly evaluate the restraint under the rule of reason. This theory of harm might posit that, even if the asset managers have not terminated their dealings with fossil fuel companies, their adoption of net-zero commitments amounts to a refusal to deal with those companies on equal terms, either as sellers of investment products and services or as buyers of securities.[753] Conceptually, such a boycott would not amount to a horizontal agreement related to prices or supply.[754] Rather, such a restraint would constitute (at most) "refusal to compete with respect to the package of services offered to customers," a mof boycott where the Supreme Court has held the rule of reason applies.[755] Application of the rule of reason in this case would entail the same market definition challenges discussed previously. Moreover, in a prospective buyer's market for the purchase of securities, it is unclear how courts would apply market definition principles.[756] While it is true that BlackRock, State Street, and Vanguard collectively own a considerable share of most public companies, their reliance on passive investment strategies means that many of their investments are not based on individual purchasing decisions.[757] For actively managed assets, they operate alongside other asset managers, institutional investors, sovereign investment funds, retail investors, and others who

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[751] *Id*. at 7, -21; *Climate Action 100+ Signatory Handbook Version 2.0*, CA100+, at 2 (Aug. 2021) CERES0000320 at -21.

[752] For instance, Ceres has discussed its objective "to spur reduced investment in oil sands," while the leaders of GFANZ released a statement in their personal capacities calling for a halt on new coal investment. Ceres, "Proposal to the Sea Change Foundation" (Mar. 8, 2018), at 6, CERES0061392 at -98; GFANZ, "Statement on 'No New Coal' from Michael Bloomberg, Mark Carney and Mary Schapiro," GFANZ00041799.

[753] There is no evidence that asset managers deal with high-emitting portfolio companies on unequal terms, so this theory of harm requires accepting the Majority's faulty proposition that net-zero targets inherently limit a firm's dealings with carbon-intensive companies.

[754] *Cf. Klor's*, 359 U.S. at 212–13; *NYNEX*, 525 U.S. at 136.

[755] *See Indiana Federation of Dentists*, 476 U.S. at 459.

[756] The 2023 Merger Guidelines refer to markets of customers as "input markets" and apply the same principles used in market definition for markets of suppliers. *2023 Merger Guidelines*, Department of Justice and Federal Trade Commission, at § 4.3.D.8; *see also United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1 (D.D.C. 2022) ("'monopsony[ ]' a market condition where a buyer with too much market power can lower prices or otherwise harm sellers"). We are unaware of precedent applying these principles to an input or buyer market made up of investors.

[757] *The Passives Problem and Paris Goals: How Index Investing Trends Threaten Climate Action*, *supra* note 278, at 7, CERES0060613 at -19; *Initial Target Disclosure Report*, NZAM, at 76 (May 2022), CERES0032415 at -90; SSGANZAM Target Setting FAQ, SSGA at 4 (May 26, 2022), SSGA.HJC-006134 at -40; BlackRock Form 10-K, 2023, at 3.

could step in to purchase any securities that the Big Three were to divest.[758] Additionally, given the widespread consensus that companies with higher emissions pose greater risks, investors would be on strong footing to argue that their differential treatment of such companies serves pro-competitive purposes.[759]

2. Antitrust scrutiny might not apply to a boycott of fossil fuels based on a desire to stop climate change

Alternatively, a court might find that the Sherman Act does not apply to a boycott of fossil fuels motivated by a desire to address climate change rather than a desire to affect the price of oil or gas. The Majority has repeatedly noted during this investigation that "'social justifications proffered for [the] restraint of trade' cannot redeem anticompetitive collusion."[760] This statement of the law is accurate but incomplete. The Supreme Court has recognized that, in limited circumstances, antitrust condemnation of politically motivated boycotts can intrude on constitutional rights. In *NAACP v. Claiborne Hardware Co.*,[761] the Court held that participants in a boycott of white merchants in Mississippi in protest against racial segregation could not be held liable for economic damages sustained by the merchants because their purpose "was not to destroy legitimate competition," but rather to "vindicate the rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself."[762] By contrast, in *FTC v. Superior Court Trial Lawyers Association*,[763] the Court held that a boycott for higher attorneys' fees by public defenders was illegal because the boycotters' "immediate objective was to increase the price that they would be paid for their services."[764] Thus, a boycott meant to communicate constitutionally protected speech may fall outside the scope of antitrust law, even where the boycott has anticompetitive effects, so long as the boycotters do not benefit financially from the loss of competition.[765]

The financial institutions involved in ESG initiatives have not made the argument that the participation in ESG initiatives enjoys protection as a politically motivated boycott. This is understandable, given that ESG investment initiatives do not constitute a boycott and are based

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758 *See*, *e.g.*, GFANZ Principals Group Internal Memo (Jan. 2023), at 6–7, GFANZ00066226 at -31–32 (listing GFANZ-affiliated alliances by financial sector).
759 *See*, *e.g.*, *2022 TCFD Report*, BLACKROCK at 4, BLK-HJC-00000210 at -13; *2022 Asset Stewardship Report*, SSGA at 8 (May 2023), SSGA-HJC.0005656 at -63; *Vanguard's Report on Climate-related Impacts*, VANGUARD at 3 (2021) VAN_HJC_00000003 at -05.
760 Letter from Chairman Jim Jordan, Rep. Thomas Massie, Rep. Dan Bishop to Larry Fink (Jul. 6, 2023), at 2 (alteration in original); *see also* Letter from Chairman Jim Jordan to Andrew Herman (Nov. 1, 2023), at 1 ("'The statutory policy of the [Sherman] Act is one of competition and it precludes inquiry into the question whether competition is good or bad.'").
761 458 U.S. 886 (1982).
762 *Claiborne Hardware*, 458 U.S. at 914.
763 493 U.S. 411 (1990).
764 *Superior Court Trial Lawyers Association*, 493, U.S. at 427.
765 *See also State of Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1315 (8th Cir. 1980) (Sherman Act did not apply to activist organization's boycott of in-state conventions in protest of state's failure to ratify Equal Rights Amendment).

on material financial calculations, not politics.[766] It is worth noting, however, that an actual group boycott of fossil fuel companies motivated by a desire to end climate change could likely make a colorable argument for First Amendment protection. Climate change is obviously a subject of ongoing national debate, and a boycott of the highest-emitting companies could be "designed to force governmental and economic change."[767] Even if such a boycott "directly intended" to cause economic harm to fossil fuel companies, they would likely enjoy protection as long as they did not derive some direct economic benefit.[768] Since the Majority claims that greenhouse gas reduction targets are economically harmful to the financial institutions that have adopted them, they have undermined the case for applying the Sherman Act to such a boycott.[769]

3. Activities of ESG initiatives designed to influence government action are immune from antitrust liability

Outside of a potential boycott, activities of ESG investment initiatives designed to influence public policy are unquestionably immune from antitrust liability. The Supreme Court has long held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[770] Moreover, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition," whether "standing alone or as part of a broader scheme."[771] The Court has extended *Noerr-Pennington* immunity to private parties' conduct in the use of "the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors."[772] Furthermore, even if government action is not the source of the ultimate restraint upon trade, "the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action."[773]

Participants in ESG investment initiatives attempt to influence public policy to encourage the transition to net zero, both individually and as part of the initiatives.[774] In some cases, this takes the form of committing to a shared aspiration. NZAM signatories, for instance, agree to

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766 *Initial Target Disclosure Report*, NZAM at 29 (May 2022), CERES0032415 at -43 ("[W]e expect to remain long-term investors in carbon-intensive sectors like traditional energy, and we do not pursue broad divestment from sectors and industries as a policy"); *id*. at 74, -88 ("We will consider developing a science-based energy transition policy in the long run."); *id*. at 76, -90 ("[W]e seek to understand the actions coal-exposed companies are taking to mitigate this risk."); *see*, *e.g.*, CA100+, *Climate Action 100+ Signatory Handbook Version 2.0* (Aug. 2021), at 11, CERES0000320 at -30.

767 *Claiborne Hardware*, 458 U.S. at 914.

768 *Id.*; *cf. Superior Court Trial Lawyers*, 493 U.S. at 427.

769 *See* Letter from Ranking Member Jim Jordan, *supra* note 2, at 2.

770 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

771 *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965).

772 *California Motor Transport Co. v. Motor Unlimited*, 404 U.S. 508, 512 (1972).

773 *Allied Tube & Conduit*, 486 U.S. at 499.

774 *See*, *e.g.*, *2022 Investment Stewardship Annual Report*, BlackRock at 17, BLK-HJC-00000010 at -26; *Narrative Report to the Children's Investment Fund Foundation (CIFF): Climate Action 100+*, CERES at 19, (Jul. 29, 2022), CERES0062685 at -704 (pledging to work with companies "to accelerate positive climate lobbying" as part of CA100+ Phase 2).

align "any relevant direct and indirect policy advocacy" with net zero by 2050.[775] In other cases, institutions' cooperation on policy advocacy is more explicit. GFANZ, for instance, encourages governments around the world to adopt its voluntary guidance in their climate-related financial regulations.[776] Ceres has worked with other groups to lobby the SEC to adopt its final climate disclosure rule.[777] The Majority has not shown that any of this activity is anticompetitive. Importantly, however, even if the government policies resulting from this concerted lobbying activity could be shown to harm competition, *Noerr-Pennington* would afford that conduct complete immunity from Section 1 liability.[778]

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We conclude that no plausible antitrust violation can be proven here; indeed, on the evidence before us, we cannot even say that one could properly be pleaded. What we can say is that this entire 18-month exercise has done nothing to inform the American people about the adequacy of current antitrust enforcement or areas for potential improvement.

This is unfortunate, because companies would benefit from greater clarity on the permissible scope of collaborative efforts to address climate change and other material risks. Legal practitioners, academics, and others have noted that collaborative industry efforts create antitrust compliance risks that can stall progress—progress that might be good for society and for competition.[779] Regulators in Europe and the United Kingdom have released guidelines to help companies work together on ESG initiatives without offending competition laws.[780] Such measures might be difficult to incorporate into U.S. competition policy, however, given the primary role played by the federal courts in shaping antitrust law. Indeed, the top U.S. antitrust enforcers, FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter, have repeatedly cautioned—including in testimony before the Committee—that ESG-related objectives are not a defense to illegal business arrangements under federal law.[781] While self-regulation appears to have worked so far for ESG investment initiatives,[782] the Committee should

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775 *Initial Target Disclosure Report*, NZAM at 7 (May 2022), CERES0032416 at -21.
776 GFANZ email re: GFANZ Principals Group – Oct 19 materials (Oct. 17, 2022) at 1, GFANZ00009742; Schapiro Testimony at 106:15-25.
777 Ceres, Letter from Mindy Lubber to Vanessa Countryman (Jun. 10, 2021) at 2, CERES0040995 at -96.
778 *Noerr*, 365 U.S. at 135; *Pennington*, 381 U.S. at 670.
779 *See*, *e.g.*, Denise Hearn, Cynthia Hanawalt & Lisa Sachs, *Antitrust and Sustainability: A Landscape Analysis*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT & SABIN CENTER FOR CLIMATE CHANGE LAW; (Apr. 2, 2023), https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis; Jindrich Kloub & Brent Synder, *Antitrust Laws and ESG Shareholder Engagemen*t, WILSON SONSINI GOODRICH & ROSATI LLP (Dec. 18, 2023), https://www.wsgr.com/en/insights/antitrust-laws-and-esg-shareholder-engagement.html.
780 Green Agreements Guidance, U.K. Competition and Markets Authority (Oct. 12, 2023); Press Release, *Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines*, EUROPEAN COMMISSION (Jun. 1, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990.
781 Oversight of the Department of Justice Antitrust Division, U.S. House Judiciary Committee, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust (Nov. 14, 2023) ("In all instances we have to follow the facts and the law, and as the Supreme Court has said in other contexts, we don't engage in a balancing of credits and debits."); "Oversight of Federal Enforcement of the Antitrust Laws," U.S. Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, & Consumer Rights (Sep. 20, 2022) ("Certainly, those types of cooperation or agreement, inasmuch as they can affect competition, are always relevant to" the FTC).
782 *See*, *e.g.*, GFANZ, "Terms of Reference" (Mar. 2023) at 8, GFANZ00056809 at -16.

consider recommendations to address this zone of uncertainty.

One promising proposal is for the Department of Justice and the Federal Trade Commission to revise their jointly issued Antitrust Guidelines for Collaborations Among Competitors.[783] These Guidelines, which describe the agencies' enforcement approach to joint activity by competing firms, have not been updated since 2000.[784] Researchers at Columbia University's Sabin Center for Climate Change Law and Center on Sustainable Investment have suggested that updated Guidelines could provide a better contemporary understanding of the agencies' approach in areas that may be specifically useful to sustainability-focused collaborations, like information sharing.[785] Proceeding through policy guidance, moreover, could have several salutary effects in contrast to creating a new statutory exemption for sustainability collaborations, which might be gameable and lead to unintended consequences.

Finally, we are also mindful that this investigation took place amid a broader rethinking of U.S. antitrust policies. After decades of enforcement policy guided by the so-called "consumer welfare standard," antitrust authorities have begun advocating for a broader understanding of antitrust harms that goes beyond short-term price effects.[786] A new strain of thinking, sometimes called the Neo-Brandeisian movement, advocates for returning competition policy to its original mandate of protecting the competitive process from monopolies.[787] We do not mean to discount the power of dominant firms in the financial industry or detract from the Biden administration's robust enforcement agenda. We have evaluated the ESG initiatives at issue in this investigation under existing antitrust law, recognizing that the appropriate level of scrutiny of the firms involved might depend on the antitrust framework used. For the purposes of this investigation, however, the distinction is immaterial: The Majority's theories of harm are not based on consumer-welfare antitrust, and they are not based on Neo-Brandeisian antitrust. They are not based on antitrust at all, and they have not established any violations of the law.

IV. POLITICAL CONTEXT OF ANTI-ESG ATTACKS

The Majority's baseless antitrust claims are just one front in a coordinated political campaign against responsible investment that has crept into state capitals, courtrooms, and congressional committees. Armed with talking points and fringe legal theories from activist groups, Republican politicians have attempted to punish or ban investors' use of ESG factors—often causing collateral damage in their own states. Many of the groups behind this campaign, despite efforts to conceal their donors, have extensive financial ties to the fossil fuel industry and right-wing donor networks linked to Leonard Leo and the Koch family. The clear aim of this

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[783] Cynthia Hanawalt, Denise Hearn & Chloe Field, *Recommendations to Update the FTC & DOJ's Guidelines for Collaborations Among Competitors*, SABIN CENTER FOR CLIMATE CHANGE LAW (May 2024), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1225&context=sabin_climate_change.

[784] Federal Trade Commission & Department of Justice, "Antitrust Guidelines for Collaborations Among Competitors" (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[785] *Recommendations to Update the FTC & DOJ's Guidelines for Collaborations Among Competitors*, *supra* note 784.

[786] *See generally* Robert Bork, THE ANTITRUST PARADOX (1978).

[787] Hearn, *supra* note 779, at 21.

campaign has been to bully companies and investors into abandoning their sustainable investment efforts. Unfortunately, recent high-profile departures from the ESG initiatives suggest that this pressure campaign may be working.

A. Republican politicians around the country have leveled sweeping attacks on ESG investing.

The pace of Republican attacks on ESG investing in recent years, both in Congress and the states, has been frenetic. Legislation, lawsuits, legal threats, and investigations have cast a cloud of legal uncertainty over initiatives like CA100+ and NZAM and firms that incorporate ESG factors into their business. Ironically, policies designed to root out supposedly "political" investment decisions have resulted in a highly politicized business environment in many states and significant harm to those states' finances.

1. Congressional Republicans have used their Majority to bully firms over ESG practices, echoing trump-era tactics

Congressional Republicans' attacks on ESG investing began during the 117th Congress. Then-Ranking Member Jordan led several Committee Republicans in a letter to Ceres and CalPERS, kicking off the present investigation into alleged antitrust violations.[788] Across Capitol Hill, a group of Senate Republicans led by Sen. Tom Cotton (R-AR) sent a letter to 50 national law firms advising that they "take care to preserve relevant documents in anticipation of" congressional investigations of "institutionalized antitrust violations being committed in the name of ESG."[789] These efforts intensified after House Republicans assumed the Majority at the start of the current Congress, with the House seeing a flurry of anti-ESG activity. Most of this activity has extended beyond the realm of antitrust law. The Committees on Financial Services and Oversight and Accountability have held at least eight hearings touching on ESG issues.[790] The House Majority also used the Congressional Review Act ("CRA") to invalidate a Department of Labor rule clarifying that that retirement fund managers can consider ESG factors in their investment decisions.[791]

Congressional Republicans' use of spurious antitrust arguments to chill disfavored business activity dates back to an earlier misuse of the government's law enforcement powers by the Trump-era Justice Department. In 2019, the DOJ opened an antitrust investigation into four large automakers after they announced that they would manufacture cars that met California's air quality emissions standards, which were stronger than those proposed by the Trump

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[788] Letter from Ranking Member Jim Jordan, *supra* note 2.
[789] Letter from Sen. Tom Cotton, et al. to Law Firms (Nov. 3, 2022).
[790] *See*, *e.g.*, *ESG Part I: An Examination of Environmental, Social, and Governance Practices with Attorneys General: Hearing Before the H. Oversight and Accountability Comm.*, 118th Cong. (May 10, 2023); *How Mandates Like ESG Distort Markets and Drive Up Costs for Insurance and Housing: Hearing Before the H. Financial Services Comm.*, 118th Cong. (Jul. 14, 2023).
[791] H.J. Res. 30, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Labor relating to "Prudence and Loyalty in Selecting Plan Investment and Exercising Shareholder Rights," President Biden vetoed the CRA resolution.

administration.[792] A career DOJ trial attorney, who later testified before the Committee, filed a whistleblower complaint alleging improper interference by Trump and DOJ's political leadership in opening the investigation.[793] The Trump DOJ eventually closed its investigation without bringing charges against the automakers.[794] The existence of the investigation, however, had serious consequences for California's attempt to regulate emissions. Mercedes-Benz, one of the automakers that planned to agree to the standards, was instructed by the German government not to participate.[795] Sen. Sheldon Whitehouse (D-RI) said in 2021 that the DOJ Office of the Inspector General was investigating whether the Trump administration improperly interfered in the Department to begin the investigation.[796]

2. Republican-dominated state legislatures have passed anti-ESG legislation, which studies show have caused economic harm

The most extensive and damaging attacks on ESG investing, however, have taken place in the states. Since 2021, Republican state legislators have introduced and passed dozens of bills targeting ESG investing.[797] Some of these laws artificially limit the considerations that states can take into account when investing their own funds by prohibiting the use of ESG factors or the pursuit of ESG-related goals when making state-sponsored investments.[798] Other laws limit the investment freedom of private companies by blacklisting firms from state contracts or requiring the state to divest its funds if it determines the firm engaged in a "boycott" certain industries, such as fossil fuels or firearms.[799] Often, these laws define "boycott" so broadly as to include any firms that have taken action to reduce greenhouse gases.[800] Some states attempted to up the ante even further. In January, a committee of the New Hampshire House of Representatives considered a bill that would have made the use of ESG factors in investing state funds a felony.[801] The committee unanimously recommended against the bill.[802] As of March, 20 states

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[792] Hiroko Tabuchi and Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES (Sep. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html.
[793] Letter from John W. Elias to Michael E. Horowitz (Feb. 28, 2020) at 12-16; *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Judiciary Comm.*, 116th Cong. (Jun. 24, 2020). Notably, in its letters alleging antitrust violations by ESG investment initiatives, the Majority cited public comments from Trump's Assistant Attorney General for Antitrust defending his allegedly politically motivated investigation. Letter from Ranking Member Jim Jordan, *supra* note 2, at 3.
[794] Letter from John W. Elias, *supra* note 793, at 17.
[795] *Id*.
[796] Leah Nylen, *DOJ inspector general investigating Trump-era car emissions case*, POLITICO (Oct. 6, 2021), https://www.politico.com/news/2021/10/06/trump-car-emissions-investigation-515437.
[797] *2023 Statehouse Report: Right-Wing Attacks on the Freedom to Invest Responsibility Falter in Legislatures*, PLEIADES STRATEGY at 3, https://www.pleiadesstrategy.com/state-house-report-bill-tracker-republican-anti-esg-attacks-on-freedom-to-invest-responsibly-earns-business-labor-and-environmental-opposition.
[798] Yara Ismael & Jacob Hermansen, *ESG Investing Regulations Across the 50 States*, MORGAN LEWIS: INSIGHT (Jul. 21, 2023), https://www.morganlewis.com/pubs/2023/07/esg-investing-regulations-across-the-50-states.
[799] *Id*.
[800] *See*, *e.g.*, Texas Senate Bill 13, LegiScan (Sep. 1, 2021), https://legiscan.com/TX/text/SB13/2021.
[801] Robert Steyer, *N.H. House committee unanimous opposes bill making ESG investing a felony*, PENSIONS & INVESTMENTS (Jan. 31, 2024), https://www.pionline.com/esg/nh-bill-making-esg-investing-felony-unanimously-opposed-house-committee.
[802] Israel & Hermasen, *supra* note 798.

have enacted "anti-ESG" laws that seek to disincentivize or prohibit ESG investing, including Texas, South Dakota, West Virginia, Idaho, Tennessee, Kentucky, and Oklahoma.[803]

Multiple independent studies have shown that anti-ESG legislation in the states has imposed significant costs on taxpayers and beneficiaries of state investments. For instance, a study by the Wharton School at the University of Pennsylvania showed that Texas' anti-ESG investment law had raised the cost of borrowing to the state's municipalities by as much as half a billion dollars.[804] Another study by the Texas Association of Business estimated the state's investment policies led to $669 billion in lost economic activity and the loss of more than 3,000 full time jobs in Fiscal Years 2022 and 2023.[805] Leaders of state pension funds in Arkansas, Indiana, and Kansas warned legislators in their states that if they adopted anti-ESG investment policies, the funds would see reduced returns over a decade amounting to hundreds of millions or billions of dollars.[806] The head of the Oklahoma Public Employees Retirement System estimated that simply complying with the state's blacklist of ESG-supporting financial institutions would cost the system nearly $10 million.[807]

3. Republican state attorneys general have hounded firms over their ESG commitments based on a variety of legal grounds

Republican governors, attorneys general, and financial officers have taken a variety of actions aimed at restricting the use of ESG. For example, Texas Attorney General Ken Paxton has issued multiple legal opinions punishing financial companies over their alleged "boycott" of fossil fuels.[808] In other cases, financial officers have taken steps to implement or enforce recent legislation seeking to restrict private actors or weaponize state dollars by using their investment

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[803] *Id.*; *ESG Investing: The US Regulatory Perspective*, MORGAN LEWIS: INSIGHT (Mar. 12, 2024), https://www.morganlewis.com/pubs/2024/03/esg-investing-the-us-regulatory-perspective.

[804] Angie Basiouny, *Texas Fought Against ESG. Here's What it Cost*, KNOWLEDGE AT WHARTON (Jul. 12, 2022), https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/texas-fought-against-esg-heres-what-it-cost/.

[805] Press Release, *TABCCF Releases Study Highlighting Economic Impact of Tightening Texas' Municipal Bond Market*, TEXAS ASSOC. OF BUSINESS (Mar. 13, 2024), https://www.txbiz.org/post/tabccf-releases-study-highlighting-economic-impact-of-tightening-texas-municipal-bond-market/.

[806] *State employees retirement system could lose $40 million annually if bill passes*, ARKANSAS DEMOCRAT-GAZETTE (Mar. 7, 2023), https://ktlo.com/2023/03/07/state-employees-retirement-system-could-lose-40m-annually-if-bill-passes/; Letter from Adam Proffitt to Sen. Mike Thompson re: Fiscal Note for SB 224 by Senate Committee on Federal and State Affairs (Mar. 7, 2023), at 5, https://kslegislature.org/li/b2023_24/measures/documents/fisc_note_sb224_00_0000.pdf; Leslie Bonilla Muñiz, *Anti-ESG pension bill could drop state pension returns $6.7 billion in next decade*, INDIANA CAPITAL CHRONICLE (Feb. 6, 2023), https://indianacapitalchronicle.com/2023/02/06/anti-esg-pension-bill-could-drop-state-pension-returns-6-7-billion-in-next-decade/.

[807] Clifton Adcock, *State retirement system says Oklahoma fossil fuel blacklist could cost retirees millions*, THE FRONTIER (Jun. 2, 2023), https://www.readfrontier.org/stories/state-retirement-system-says-oklahoma-fossil-fuel-blacklist-could-cost-retirees-millions/.

[808] *See, e.g., Advisory on Texas Law Prohibiting Contracts and Investments with Entities that Discriminate against Firearm Entities or Boycott Energy Companies or Israel*, TEXAS ATTORNEY GENERAL (Oct. 18, 2023), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/OAG%20advisory%20on%20SB%2013%20and%2019%2010.18.23.pdf.

authority to move funds proactively from targeted firms.[809] Republican governors have appointed anti-ESG officials to key positions in state government, including state pension and investment boards.[810] Finally, state executives have publicly opposed Biden administration policies protecting the use of ESG factors by forming multi-state initiatives dedicated to fighting back against ESG,[811] submitting comments to federal agencies during the rulemaking process,[812] and petitioning Congress to block key political nominations.[813]

Attorneys general have also used their law enforcement authority to attack ESG investing. In June 2023, Montana Attorney General Austin Knudsen filed a lawsuit against the National Association of Attorneys General, demanding the return of Montana's dues and state funds because of its "woke" investment practices.[814] In December, Tennessee Attorney General Jonathan Skrmetti filed a fraud complaint against BlackRock, alleging that it was "misleading" investors through its ESG offerings.[815] In total, 31 separate attorneys general have been involved in 10 different lawsuits or legal filings seeking to undermine corporate responsibility.[816] Four of these lawsuits have targeted private organizations, while the remaining six suits sought to block federal rules supporting the use of ESG factors from going into effect.[817]

State attorneys general have also pressed the legal case against CA100+ and NZAM. This effort appears to have originated with former Arizona Attorney General Mark Brnovich. In November 2021, Brnovich announced that he was "looking into ESG investing practices by major firms, including their membership in" CA100+."[818] Mr. Brnovich accused these major investment firms of "intimidating and threatening companies if they do not comply with their left-wing agenda" and argued that their conduct "raises concerns about potential inappropriate

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[809] *See*, *e.g.*, Ross Kerber, *Florida pulls $2 bln from BlackRock in largest anti-ESG divestment*, REUTERS (Dec. 1, 2022), https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01/.
[810] Brad Cooper, *National ESG opponent joins retirement system board*, SUNFLOWER STATE JOURNAL (Jul. 21, 2023), https://sunflowerstatejournal.com/national-esg-opponent-joins-retirement-system-board/.
[811] Press Release, *Governor Ron DeSantis Leads Alliance of 18 States to Fight Against Biden's ESG Financial Fraud*, GOV. RON DESANTIS (Mar. 16, 2023), https://www.flgov.com/2023/03/16/governor-ron-desantis-leads-alliance-of-18-states-to-fight-against-bidens-esg-financial-fraud/.
[812] Dominic Pino, *GOP Governors Come Out against Climate Rule*, NATIONAL REVIEW (May 31, 2022), https://www.nationalreview.com/2022/05/gop-governors-come-out-against-sec-climate-rule/.
[813] Letter from John Murante, et al. to President Joe Biden (Jan. 31, 2021).
[814] Comp. for Declaratory Relief and Accounting, *State of Montana ex rel. Knudsen v. National Association of Attorneys General*, DV-25-2023-0000415-DK (Mont. 1st Jud. Dist. Ct. Jun. 7, 2023).
[815] Civil Enforcement Comp., *Tennessee ex rel. Skrmetti v. BlackRock, Inc.*, No. 23CV-618 (Williamson Cty. Cir. Ct., 21st Jud. Dist. Dec. 18, 2023).
[816] *Anti-ESG Executive Actions in the States: How State Treasurers, AGs, and Secretaries of State are Weaponizing Their Offices to Obstruct Climate Action*, PLEIADES STRATEGY at 8, https://www.pleiadesstrategy.com/state-executive-action-republican-anti-esg-attacks-on-freedom-to-invest-responsibly-from-governors-treasurers-attorneys-general.
[817] *Id*. Additionally, 25 states joined a 2023 lawsuit against the Biden administration challenging the Labor Department ESG rule. A federal district court in Texas granted summary judgment to the Labor Department. *Utah v. Walsh*, 2:23-cv-016-Z, 2023 WL 6205926 (N.D. Tex. Sep. 21, 2023).
[818] Press Release, *Attorney General Brnovich Announces Action to Stop Coercive Investment Practice*s, ARIZ. ATTORNEY GENERAL (Nov. 17, 2021), https://www.azag.gov/press-release/attorney-general-brnovich-announces-action-stop-coercive-investment-practices.

pressure and anticompetitive conduct to align with the firms' goals and not investors' best interests pursuant to well-established fiduciary duties."[819] In a *Wall Street Journal* op-ed the following March, Mr. Brnovich claimed he was investigating "potentially unlawful market manipulation."[820] He also referred to "a coordinated conspiracy that allocates markets in violation of the law."[821] The Majority's letters in this investigation cited Mr. Brnovich's op-ed as support for their antitrust claims.[822]

Other Republican attorneys general have joined in the effort. In August 2022, Mr. Brnovich and then-Nebraska Attorney General Doug Peterson led 17 of their Republican counterparts in a letter to BlackRock CEO Larry Fink claiming that the firm's participation in CA100+ and NZAM violated a host of laws, including antitrust laws.[823] In March 2023, 21 Republican state attorneys general, led by Montana, Louisiana, and Utah, wrote to a group of 50 asset managers to question their participation in ESG initiatives.[824] The March 2023 letter focused on allegations that the asset managers' had violated their fiduciary duty to their clients, but the attorneys general also stated that they were concerned about "horizontal agreements related to voting and engagement through organizations such as" CA100+ and NZAM.[825] Some attorneys general followed up on these letters with their own investigations. For instance, in April 2023, then-Louisiana Attorney General Jeff Landry announced that he was opening an investigation into CalPERS and an investment firm over their participation in CA100+.[826]

Mr. Brnovich and Mr. Peterson left office in January 2023. Mr. Brnovich's successor, Kris Mayes, announced that Arizona would stop participating in investigations of ESG investment, stating that "it is not the place of government to tell corporations and their investors that they cannot invest in sustainable technologies and practices or improve their governance practices."[827] Before Mr. Peterson departed, his office released a report on ESG investment initiatives that sought to provide a roadmap of potential legal action against participants.[828]

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[819] *Id*.
[820] Mark Brnovich, *ESG May be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022), https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807.
[821] *Id*.
[822] Letter from Ranking Member Jim Jordan, et al., *supra* note 2, at 2.
[823] Letter from Mark Brnovich, Doug Peterson et al. to Laurence D. Fink (Aug. 4, 2022).
[824] Letter from Austin Knudsen, Jeff Landry, Sean Reyes, et al. to Asset Managers (Mar. 30, 2023).
[825] *Id*. at 6. The March 2023 letter cites only public sources to support its allegation of unlawful coordination by CA100+. On the other side of the aisle, a group of 17 state attorneys general led by then-District of Columbia Attorney General Karl Racine sent letters to the chairs and ranking members of a pair of congressional committees that refuted the legal claims against ESG initiatives, including the alleged antitrust violations. Letter from Karl Racine et al. to Chairman Sherrod Brown et al. (Nov. 21, 2022).
[826] Ramsey Touchberry, *Louisiana launches ESG probe into major climate fund pushing green investments*, WASH. TIMES (Apr. 25, 2023), https://www.washingtontimes.com/news/2023/apr/25/louisiana-launches-esg-probe-major-climate-fund-pu/.
[827] Press Release, *Arizona Attorney General Kris Mayes Announces Exit from Investigation into ESG Investment Practices*," ARIZ. ATTORNEY GENERAL (Feb. 13, 2023), https://www.azag.gov/press-release/arizona-attorney-general-kris-mayes-announces-exit-investigation-esg-investment.
[828] *The Endgame of ESG: Why it Matters to Policymakers and Enforcers*, Neb. DEP'T OF JUSTICE (Dec. 6, 2022), https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/ESG%20Report%2012-06-2022_0.pdf.

Relying entirely on public information from CA100+'s website, the report called the organization's methods "highly coordinated and openly coercive."[829] For all the attorney generals' bluster, however, it appears that no state law enforcer has brought an antitrust case in court related to a firm's participation in CA100+ or NZAM. This might suggest that discovery in the state investigations, as it did in the Majority's congressional investigation, undermined the factual predicate for such a case.

B. An extensive network of dark money groups and fossil fuel interests support the anti-ESG campaign and appear to have influenced the majority's investigation.

Organizations throughout the conservative ecosystem have played a central role in the recent attacks on ESG investing. Right-wing advocacy groups, including Consumers' Research, the Heritage Foundation, the American Legislative Exchange Council ("ALEC"), the Texas Public Policy Foundation ("TPPF"), the Foundation for Government Accountability ("FGA"), the State Financial Officers Foundation ("SFOF"), and the Republican Attorneys General Association ("RAGA"), and groups affiliated with the Conservative Partnership Institute ("CPI"), have promoted anti-ESG messaging and helped coordinate actions taken by Republican elected officials throughout the country. Many of these advocacy groups are being aided by business entities that are connected to the Republican party and the fossil fuel industry, including Leonard Leo's CRC Advisors. Some of these organizations appear to have close ties to the Majority's investigation.

1. The anti-ESG campaign draws on support from a vast network of dark money groups

At both the federal and state level, the anti-ESG campaign has been a coordinated effort by some of the most powerful conservative groups the country, along with lesser-known entities that receive funding from prominent conservative donors.

a) Texas Public Policy Foundation

TPPF is a 501(c)(3) organization that was founded in 1989 by James Leininger, a conservative donor who bankrolled Rick Perry's 2000 bid for governor.[830] Today, TPPF is led by CEO Greg Sindelar and Chairman Kyle Stallings. According to TPPF's website, the organization's mission is "to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach."[831] TPPF has extensive ties to the fossil fuel industry. Although TPPF is not required to disclose its donors, *The New York Times* reported last year that the group has received money from fossil fuel companies, including Exxon and Chevron.[832] TPPF has also received funding from Charles G. Koch and David H.

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[829] *Id*. at 32.
[830] David Gelles, *The Texas Group Waging a National Crusade Against Climate Action*, N.Y. TIMES (Jun. 20, 2023), https://www.nytimes.com/2022/12/04/climate/texas-public-policy-foundation-climate-change.html.
[831] *Home*, TEXAS PUBLIC POLICY FOUND., https://www.texaspolicy.com/ (last visited June 8, 2024).
[832] Gelles, *supra* note 830.

Koch. Moreover, TPPF's Chairman, Kyle Stallings, is the CEO and founder of Desert Royalty Company,[833] an oil and gas investment company specializing in the acquisition of minerals and royalties.[834]

TPPF's ties to the fossil fuel industry have clearly influenced the organization's advocacy efforts. In 2018, TPPF campaigned to stop the closure of the Navajo Generating Station, a coal-fired power plant in Arizona that purchased coal from Peabody Energy, one of TPPF's major donors.[835] The group has also called for looser restrictions on hydraulic fracturing in Colorado and opposed the use of wind power in Texas and New England.[836] In 2021, TPPF leaders, including former Texas State Representative Jason Isaac, drafted legislation that directs the state to cease doing business with financial institutions that divest from fossil fuel companies.[837] The law, known S.B. 13, was ultimately signed by Governor Greg Abbott and inspired other Republican-led states to pass similar legislation.[838] TPPF also published a white paper by conservative attorney C. Boyden Gray that "examines causes of action that can be brought by federal or state enforcers or private parties to combat inappropriate attempts to defund businesses that do not align with progressive environmental policies."[839] As noted, the Majority appears to have pulled its antitrust theories in this investigation straight from the white paper.[840]

b) American Legislative Exchange Council

ALEC claims to be as "America's largest nonpartisan coalition of state legislators dedicated to principles of limited government, free markers, and federalism."[841] In reality, ALEC more closely resembles a membership association that connects conservative lawmakers with corporate lobbyists and facilitates the development of model legislation that is introduced in state legislatures throughout the country. The group has also been described as a "corporate bill mill" because of its cozy relationship with corporate interests. Research has shown that the vast majority of ALEC's funding comes from corporations and special interest groups. In exchange for their financial support, these corporations and special interest groups are given the opportunity to develop and vote on pieces of model legislation that are circulated amongst elected officials and often introduced in state legislatures.

ALEC has played a pivotal role in the crafting of anti-ESG legislation that is being promoted by Republican lawmakers throughout the country. During a July 2021 meeting in Salt Lake City that was held in conjunction with the SFOF, ALEC introduced its first anti-ESG model bill: the Energy Discrimination Elimination Act, which aims to punish financial institutions that

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[833] *MPM Board Members, Kyle L. Stallings*, MARKET PLACE MIDLAND, http://www.marketplacemidland.com/board-members/kyle-stallings (last visited June 8, 2024).
[834] *Desert Royalty Company: A Long-Term Perspective,* DESERT ROYALTY CO., https://www.desertroyalty.com/ (last visited June 8, 2024).
[835] Gelles, *supra* note 830.
[836] *Id.*
[837] *Id.*
[838] *Id.*
[839] Gray, *supra*, note 90.
[840] *See supra* § I.b.i.
[841] Home, AMER. LEG. EXCHANGE COUNCIL, https://alec.org/ (last visited June 8, 2024).

penalize or refuse to do business with fossil fuel companies.[842] In 2022, ALEC introduced its State Government Employee Retirement Protection Act, which prohibits anyone managing state, local, or university public pensions from considering the climate emergency or other social or political factors when investing pension funds, and its Eliminate Political Boycotts Act, which bars companies with 10 or more employees from considering social, political, or ideological interests when engaging with fossil fuel, logging, mining, and agriculture businesses.[843]

c) Heritage Foundation

The Heritage Foundation is a conservative nonprofit based in Washington, D.C. that formulates and promotes public policies based on "the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."[844] In 2010, the organization founded Heritage Action, a 501(c)(4) organization that serves as the group's advocacy arm.[845] According to its website, the group's lobbyists on Capitol Hill work with lawmakers and their staff "to implement conservative solutions […] drawn from our partners at The Heritage Foundation."[846] In 2022, Heritage Action launched the Sentinel Action Fund, a new super PAC that advocates for the election of conservative candidates nationwide.[847]

The Heritage Foundation and its associated entities are virulently opposed to ESG investing. Andrew Olivastro, an executive at the Heritage Foundation, called ESG "a direct assault on the heart and soul of the free market economy" and claimed that it "has zero to do with advancing human progress around individuals and families."[848] In August 2022, Heritage Action launched the ESG Hurts campaign, which aims to expose "the radical agenda of the 'Environmental, Social, and Governance' movement" by "providing background information on the dangers of ESG" and "model state legislation for state lawmakers looking to protect state pensions, investments, and contracts."[849] Moreover, during an ALEC-led strategy session on ESG investing, Heritage Action lobbyist Catherine Gunsalus informed conservative lawmakers about various Heritage resources and offered to help lawmakers craft friendly media hits and

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842 SFOF Exposed: State Financial Officers Foundation, *American Legislative Exchange Council*, CTR. FOR MEDIA & DEMOCRACY, https://sfofexposed.org/american-legislative-exchange-council (last visited June 8, 2024).
843 *Id.*
844 *About Heritage*, THE HERITAGE FOUND., https://www.heritage.org/about-heritage/mission (last visited June 8, 2024).
845 Heritage Action for America, (2011-2023), https://www.loc.gov/item/lcwaN0007959/ (last visited June 10, 2024); Ed Fulner, *Morning Bell: Heritage Action for America*, THE DAILY SIGNAL (Apr. 9, 2010), https://www.dailysignal.com/2010/04/09/morning-bell-heritage-action-for-america/.
846 About, HERITAGE ACTION FOR AMER., https://heritageaction.com/about (last visited June 8, 2024).
847 Press Release, *Heritage Action Announces Launch of New Super PAC: Sentinel Action Fund*, HERITAGE ACTION FOR AMER., (Apr. 18, 2022), https:/heritageaction.com/press/heritage-action-announces-launch-of-super-pac-sentinel-action-fund.
848 David Gelles, *How Environmentally Conscious Investing Became a Target of Conservatives*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/28/climate/esg-climate-backlash.html.
849 Press Release, *Heritage Foundation and Heritage Action Launch 'ESG Hurts' National Campaign*, HERITAGE (Aug. 31, 2022), https://www.heritage.org/press/heritage-foundation-and-heritage-action-launch-esg-hurts-national-campaign.

opinion pieces.[850]

d) Foundation for Government Accountability

The FGA is a Florida group that works to "formulate and promote public policies based on the principles of transparency, the free market, individual freedom, and limited constitutional government."[851] To support these efforts, FGA and its 501(c)(4) arm, the Opportunity Solutions Project, employ at least 65 lobbyists in 25 states who lobby and testify on behalf of FGA's policies.[852] FGA also works closely with Leonard Leo's CRC Advisors has also paid the consulting firm $640,000 since 2020.

Materials obtained by *Documented* reveal that FGA provided model legislative text, helped draft regulations, and provided expert testimony supporting attacks on ESG in multiple states, with many of the FGA-supported measures codified into law.[853] According to Pleiades Strategy, legislators in Arkansas, Arizona, Iowa, Idaho, Kansas, Louisiana, North Dakota, Oklahoma, Utah and Wyoming "introduced a total of 16 bills based on FGA's model legislation during the 2022-2023 legislative session."[854] Of the 16 bills introduced, three laws and one resolution based on FGA's model legislation passed: Arkansas' HB 1307, Idaho's H 190, Louisiana's HCR 70, and Utah's HB 449.[855] Representatives of the Opportunity Solutions Project testified in support of 12 anti-ESG bills in Indiana, Arizona, Kansas, Montana, Missouri, and Texas and disclosed lobbying on anti-ESG legislation in Florida and Iowa.[856]

In states where anti-ESG bills failed in the legislature, FGA pushed secretaries of state to adopt anti-ESG rules.[857] After Republican lawmakers in Missouri failed to pass legislation restricting the use of ESG investing, Missouri's Republican secretary of state, John "Jay" Ashcroft, issued a rule that "requires broker-dealers to obtain consent from customers to purchase or sell an investment product based on social or other nonfinancial objectives, such as combating climate change."[858] FGA later took credit for drafting Missouri's rule and cited it as a model in a draft memo titled "What Secretaries of State Can Do to Challenge the Threat of ESG."[859]

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850 Scott Tong, Jill Ryan, Catherine Welch, *Audio recording reveals coordinated push against ESG investing*, WBUR (Mar. 22, 2023), https://www.wbur.org/hereandnow/2023/03/22/esg-investing-fossil-fuels.
851 Foundation for Government Accountability, Tax Filing for Dec. 2022 (May 24, 2024), https://projects.propublica.org/nonprofits/organizations/452637507/202313199349321146/full.
852 *The Foundation for Government Accountability's Hidden Role in Attacks on ESG*, DOCUMENTED (Mar. 18, 2024), https://documented.net/investigations/the-foundation-for-government-accountabilitys-hidden-role-in-attacks-on-esg.
853 *Id.*
854 *Id.*; Pleiades Strategy, *supra* note 797, at 18.
855 Documented, *supra* note 852.
856 *Id.*
857 *Id.*
858 Ross Kerber, *New anti-ESG rule in Missouri offers US Republicans another path away from 'wokeness*,' REUTERS (Jul. 10, 2023), https://www.reuters.com/sustainability/sustainable-finance-reporting/new-anti-esg-rule-missouri-offers-us-republicans-another-path-away-wokeness-2023-07-10/.
859 *Foundation for Government Accountability Sends Mississippi Secretary of State March 2023 Draft ESG Rule*, DOCUMENTED (Jan. 5, 2024), https://documented.net/media/foundation-for-government-accountability-puts-together-march-2023-draft-esg-rule-for-mississippi-secretary-of-state.

e) Consumers' Research

Consumers' Research was founded in 1929 with "the mission to educate and protect consumers from harmful products" and "quickly became a top resource for consumer advocacy and product testing."[860] The organization was mostly dormant by the early 2000s, but it was brought back from the dead in 2013 through a series of donations totaling $1.4 million.[861] These funds allowed the group to launch the Center for Energy Innovation and Independence ("CEII"), which served as a vehicle for amicus briefs tied to GOP attorneys general.[862]

In March 2020, Consumers' Research hired Will Hild as its new executive director. Under Hild's leadership, the group has emerged as a leading conservative watchdog fighting back against liberal causes such as ESG, which it argues harms consumers, reduces investment returns, and contributes to inflation.[863] Hild is a Leonard Leo protégé who worked for Philanthropy Roundtable and the Federalist Society before joining Consumers Research.[864] Mr. Hild's relationship with Mr. Leo has played a significant role in Consumers' Research emergence as a leading voice in the anti-ESG movement. Although Mr. Leo does not have a formal role with the group, Mr. Hild has referred to him as "a good friend and adviser to Consumers' Research."

Following Mr. Hild's appointment as executive director, Consumers' Research annual revenue increased significantly, rising from $835,306 in 2020[865] to $10,423,274 in 2022.[866] Much of this funding came from Donors Trust, a donor-advised fund that has been described as the "dark-money ATM of the conservative movement."[867] Public tax filings show that Donors Trust anonymously funneled $5,984,000 to Consumers' Research in 2021[868] and $9,010,000 in 2022.[869] Reporting from the *Wall Street Journal* identifies Marble Freedom Trust, a nonprofit organization that is overseen by Mr. Leo, as the primary source of these funds.[870] Marble Freedom Trust's donations to Consumers' Research are likely the result of a $1.6 billion gift from Barre Seid, "a longtime conservative donor who made a fortune as the chairman and chief

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[860] *History*, CONSUMERSRESEARCH.ORG, https://consumersresearch.org/history (last visited June 8, 2024).
[861] Evan Vorpahl, *The New Anti-"Woke" Advertiser is a Dark Money Group Made from an Old Brand and Fueled by Secret Cash*, TRUE NORTH RESEARCH (Jul. 9, 2021), https://truenorthresearch.org/2021/07/the-new-anti-woke-advertiser-is-a-dark-money-group-made-from-an-old-brand-and-fueled-by-secret-cash/.
[862] *Id*.
[863] Stevenson Mufson, *This group is sharpening the GOP attack on 'woke' Wall Street*, WASH. POST (Jan. 30, 2023), https://www.washingtonpost.com/climate-environment/2023/01/30/climate-change-sustainable-investing/.
[864] Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He's Aiming at American Society*, N.Y. TIMES (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-courts-dark-money.html.
[865] Consumers Research Inc, Tax Filings for Dec. 2020 (May 23, 2024), https://projects.propublica.org/nonprofits/organizations/221500498/202123199349301217/full.
[866] Consumers Research Inc, Tax Filings for Dec. 2022 (May 23, 2024), https://projects.propublica.org/nonprofits/organizations/221500498/202303199349326020/full.
[867] Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/.
[868] Donor's Trust Inc. Form 990 Schedule I filing for Dec. 2021 (May 23, 2024), https://projects.propublica.org/nonprofits/organizations/522166327/202243199349308799/IRS990ScheduleI.
[869] Donor's Trust Inc. Form 990 Schedule I filing for Dec. 2022 (May 23, 2024), https://projects.propublica.org/nonprofits/organizations/522166327/202323049349300742/IRS990ScheduleI.
[870] Julie Bykowicz, *Conservatives Have a New Rallying Cry: Down With ESG*, WALL ST. J. (Feb. 26, 2023), https://www.wsj.com/articles/conservatives-have-a-new-rallying-cry-down-with-esg-2ef98725.

executive of an electrical device manufacturing company in Chicago now known as Tripp Lite."[871] Moreover, public tax filings reveal that Consumers' Research has paid CRC Advisors $1,336,370 for "legal" and "public relations" services since 2020. Mr. Leo has also publicly praised Consumers' Research work on multiple occasions. In 2022, Mr. Leo said that "Consumers' Research and its leader Will Hild are executing the most impactful pushback I know against ESG and other aspects of woke corporate culture […] It's time that businesses that are out of step with the sentiments of most Americans pay a price for their standing up for woke special interest instead of consumers."[872] In 2023, Mr. Leo told the *Washington Post* that "the woke capitalism battle is a very high priority for me, and I am very excited about what Consumers' Research is doing."[873]

To strike out against ESG investing, Consumers' Research has worked with Republican politicians throughout the country launched campaigns targeting major financial institutions. On December 1, 2022, Consumers' Research joined 13 state attorneys general in a complaint against Vanguard at the Federal Energy Regulatory Commission.[874] In this complaint, Consumers' Research accused Vanguard of "meddling with [the] energy industry to achieve progressive political goals at the expense of market efficiency."[875] Consumers' Research has also attacked Blackrock and Bank of America[876] and published a 31-page report titled "Defeating the ESG Attack on the American Free Enterprise System."[877] Consumers' Research has also emerged as the top funder of the SFOF, another key member of the anti-ESG movement.[878]

f) State Financial Officers Foundation

SFOF is a 501(c)(3) organization that seeks to "drive fiscally sound public policy, by partnering with key stakeholders, and educating Americans on the role of responsible financial management in a free market economy." Although SFOF is registered as a nonpartisan nonprofit and claims that it is not involved "in issue advocacy on behalf of elected officials," the organization's members are exclusively Republican state financial officers, most of whom serve in elected positions. Since President Biden took office, SFOF has been pushing Republican state treasurers to use their power to promote oil and gas interests and stymie the Biden

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[871] Kenneth P. Vogel, Shane Golmacher, *An Unusual $1.6 Billion Donation Bolsters Conservatives*, N.Y. TIMES (Aug. 22, 2022), https://www.nytimes.com/2022/08/22/us/politics/republican-dark-money.html.
[872] Mufson, *supra* note 863.
[873] *Id.*
[874] Mot. To Intervene and Protest by Consumers' Research, Inc., https://consumersresearch.org/FERCfiling/; Will Hild, *End Vanguard's ESG Meddling With Utilities*, WALL ST. J. (Dec. 1, 2022), https://www.wsj.com/articles/end-vanguards-esg-meddling-with-utilities-11669938471.
[875] *Id*.
[876] Saijel Kishan, *The Little Known Group That's Battling Wall Street Over ESG*, BLOOMBERG (Jun. 7, 2023), https://www.bloomberg.com/news/articles/2023-06-07/bank-of-america-is-latest-target-for-anti-esg-group-that-battled-blackrock.
[877] *Defeating the ESG Attack on the American Free Enterprise System*, CONSUMERS' RESEARCH, https://consumersresearch.org/documents/defeating-esg/ (last visited June 8, 2024); Hans Nichols, *Scoop: GOP's 'existential' attack plan on ESG*, AXIOS (Mar. 8, 2023), https://www.axios.com/2023/03/08/republicans-esg-hearings-questions.
[878] *Dark Money Group Weaponizes State Treasurers in Attacks on Climate Policy*, DOCUMENTED (Aug. 5, 2022), https://documented.net/investigations/dark-money-group-weaponizes-state-treasurers-in-attacks-on-climate-policy.

administration's climate agenda. The group has also coordinated State Treasurers' attacks on ESG investing and established the Center for Fiduciary Excellence, which envisions "a future where zero public funds go to ESG investments."

SFOF has deep ties to other members of the anti-ESG movement, ALEC and the Heritage Foundation. ALEC CEO Lisa Nelson is a member of SFOF's board of directors, and Jonathan Williams, ALEC's chief economist and Executive Vice President of Policy, is a member of SFOF's National Advisory Committee. In July 2021, SFOF held its national meeting "in conjunction with ALEC."[879] According to *The New York Times*, the two groups "even shared blocks of discounted hotel rooms for their event."[880] In 2022, SFOF endorsed ALEC's Eliminate Political Boycotts Act and worked with Mr. Williams to draft model legislation designed to "protect pensioners from politically driven investment strategies."[881] That same year, the Heritage Foundation awarded SFOF with a $100,000 innovation grant for its efforts to combat ESG[882] and hosted SFOF's Fall National meeting, which featured a three-part session on the fight against ESG and a keynote address by Vivek Ramaswamy.[883] SFOF has also worked with the Heritage Foundation to respond to proposals from the Financial Stability Oversight Council, a government panel assigned to minimize risk in the financial sector, on ways to reduce the threats posed by climate change.[884]

SFOF also works closely with members of the fossil fuel industry and Leonard Leo's dark money network. SFOF is a client of CRC Advisors and is funded by Consumers' Research. In May 2022, SFOF organized a call with Republican state treasurers to discuss the SEC's proposed climate disclosure rule. The call featured a representative from the American Petroleum Institute, a trade association that represents members of the oil and natural gas industry. A month after this call, SFOF sent a 20-page letter signed by more than a dozen GOP state treasurers calling the SEC's proposed rule "irrational climate exceptionalism" that elevates climate-related issues to "a place of prominence in disclosures that they do not deserve."[885] As detailed above, SFOF is funded by Consumers' Research and is a client of CRC Advisors.[886]

g) Republican Attorney Generals Association

The Republican Attorneys General Association (RAGA) is a tax-exempt political organization that works to elect Republicans as state attorneys general. RAGA is also affiliated with two nonprofit organizations: the Rule of Law Defense Fund and the Center for Law and

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[879] David Gelles, *How Republicans are 'Weaponizing' Public Office Against Climate Action*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html.
[880] *Id*.
[881] American Legislative Exchange Council, *supra* note 842.
[882] Press Release, *Heritage Foundation Announces Winners of New Innovation Prize*," HERITAGE FOUND. (Jun. 1, 2022), https://www.heritage.org/press/heritage-foundation-announces-winners-new-innovation-prize.
[883] David Armiak, *Republican State Financial Officers Bring ESG Fight to Washington*, EXPOSED BY CMD (Nov. 3, 2022), https://www.exposedbycmd.org/2022/11/03/republican-state-financial-officers-bring-esg-fight-to-washington/.
[884] Gelles, *supra* note 879.
[885] *Id*.
[886] Documented, *supra* note 878.

Policy. Together, RAGA and its affiliates run a cash-for-influence operation that coordinates the official actions of Republican state attorneys general and provides donors with access to Republican AGs and members of their staff.[887]

Members of the fossil fuel industry, which have donated millions to RAGA and its affiliates,[888] have benefitted handsomely from the group's "pay-to-play" scheme. In 2014, the *New York Times* reported that RAGA played a key role in the formation of a secretive alliance between energy firms and Republican state attorneys general. Less than two years later, the Center for Media and Democracy published documents showing that fossil fuel companies participated in private meetings with Republican attorneys general and members of their staff to discuss the Obama administration's regulation of power plants during RAGA's 2015 Summer National Meeting, which took place less than two weeks before Republican AGs filed a federal lawsuit to block the Clean Power Plan.[889]

RAGA also has close ties to Leonard Leo and his network of dark money groups. The Concord Fund, which is a member of Leo's dark money network, is RAGA's top funder, having donated $16.8 million since 2014.[890] RAGA also works with CRC Advisors, a Virginia-based consulting and public relations firm that is led by Leo and two of his longtime associates. Since 2020, RAGA has paid CRC Advisors $7,500 per month for consulting services.[891] Leo has benefitted handsomely from this relationship with RAGA. Republican attorneys general have played a critical role in the advancement of Leo's conservative agenda through the federal courts and have been intimately involved in recent high-profile Supreme Court cases like *Dobbs v. Jackson Women's Health Organization* and *West Virginia v. EPA.*[892] Moreover, after news outlets reported that D.C. Attorney General Brian Schwalb was investigating whether the Concord Fund and other Leo-aligned groups violated tax laws governing nonprofit organizations, Republican

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[887] SFOF Exposed, *Republican Attorneys General Association*, CTR. FOR MEDIA & DEMOCRACY, https://sfofexposed.org/republican-attorneys-general-association (last visited June 8, 2024); Arn H. Pearson, *States Attorneys General Are For Sale to the Highest Bidder*, NEWSWEEK (Sep. 10, 2016), https://www.newsweek.com/states-attorney-generals-are-sale-highest-bidder-496673.

[888] Fossil fuel companies and trade associations that have donated to RAGA include Koch Industries, Peabody Energy, Noble Energy, American Fuel and Petrochemical Manufacturers, the American Petroleum Institute, Chevron, and ExxonMobil.

[889] Jennifer A Dlouhy, *Battered Coal Companies Courted State AGs to Fight Climate Rules*, BLOOMBERG (Sep. 7, 2016), https://www.bloomberg.com/politics/articles/2016-09-07/battered-coal-companies-courted-state-ags-to-fight-climate-rules; *RAGA Summer National Meeting 2015 Agenda*, EXPOSED BY CMD (Jul. 27, 2015), https://www.exposedbycmd.org/RAGA-Clean-Power-Plan.

[890] David Armiak, *Gearing Up for 2024 Elections, Big Tobacco Leads Top Donors to Republican AG Group*, EXPOSED BY CMD (Feb. 1, 2024), https://www.exposedbycmd.org/2024/02/01/gearing-up-for-2024-elections-bg-tobacco-leads-top-donors-to-republican-ag-group/.

[891] *Id*.

[892] *See* Dahlia Lithwick, *The Low-Key Republican Officials Quietly Dismantling All of Our Rights*, SLATE (Apr. 1, 2024), https://slate.com/news-and-politics/2024/04/raga-republican-officials-leonard-leo-supreme-court-mess.html; *see also* Ansev Demirhan, *Meet the Republican Attorneys General Wreaking Havoc on Abortion Access*, MS. MAGAZINE (Apr. 9, 2024), https://msmagazine.com/2024/04/09/republican-attorney-general-abortion/; Andy Kroll, Andrea Bernstein, Ilya Marritz, *We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority*, PROPUBLICA (Oct. 11, 2023), https://www.propublica.org/article/we-dont-talk-about-leonard-leo-supreme-court-supermajority; Andrew Perez, *Leonard Leo's Dark Money Against Consumer Protection*, JACOBIN (Nov. 7, 2022), https://jacobin.com/2022/11/leonard-leo-concord-fund-iowa-attorney-general-race-2022.

attorneys general sprang into action to protect Leo and his network.[893] On September 12, 2023, Virginia Attorney General Jason Miyares sent a letter to Schwalb warning him that the subjects of his investigation are "subject to the exclusive oversight of my office."[894] Eight days later, Schwalb's peers in a dozen GOP-led states sent their own letter, which challenged Schwalb's jurisdiction to investigate Leo's nonprofits and warned him that conservative AGs might come under pressure to investigate progressive-oriented nonprofits: "Once the dam breaks, we and our successors will be under intense pressure to investigate the inner workings of every abortion advocacy group, every immigration advocacy group, every environmental advocacy group […] We can only stop it if each of us conscientiously stays in his or her lane."[895]

2. There appear to be direct connections between the right-wing anti-ESG campaign and the majority's investigation

While the anti-ESG campaign has funded efforts nationally to restrict responsible investing, it also appears to have contributed to the Majority's investigation. In particular, the Majority appears to have borrowed its questionable legal theories and its investigative tactics fossil fuel-tied activist groups.

a) Dark money groups

The majority's antitrust investigation follows a strategy that was first laid out in a TPPF white paper titled "Corporate Collusion: Liability Risks For The ESG Agenda To Charge Higher Fees And Rig The Market."[896] TPPF's white paper, which was written by C. Boyden Gray, the late conservative attorney who has worked on behalf of fossil fuel companies and other dark money groups named in this report,[897] specifically argues that "ESG pressure campaigns may violate antitrust laws."[898] TPPF and ALEC also appear to have played a role in devising an investigative strategy for state-level antitrust attacks on ESG initiatives. At a July 2022 ALEC conference, according to a report by the investigative journalism site *Documented*, Jason Isaac of TPPF laid out a strategy for states to follow. In his presentation to a conference session, Mr. Issac explained that TPPF and a Texas State Senate committee were coordinating "to subpoena 'truckloads' of documents from financial institutions in the hope of finding material that might support the antitrust theories posited in" the Gray white paper.[899] Once the committee received the documents, Mr. Isaac explained, TPPF would comb through them "meticulously" in search of evidence to support antitrust violations.[900] He also explained the role that state attorneys general

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[893] Heidi Przybyla, *What happens when an AG dares to investigate Leonard Leo's network*, POLITICO (Mar. 23, 2024), https://www.politico.com/news/2024/03/23/brian-schwalb-leonard-leo-investigation-00148385.
[894] *Id*.
[895] *Id*.
[896] Gray, *supra* note 90, at 4.
[897] C. Boyden Gray, *The Misguided ExxonMobil Climate Change Inquisition*, FORBES (Feb. 12, 2016), https://www.forbes.com/sites/realspin/2016/02/11/misguided-exxonmobil-climate-change-inquisition/.
[898] Gray, *supra* note 90, at 4.
[899] *State Attorneys General Join Anti-ESG Effort, Amid Growing Backlash*, DOCUMENTED (Jul. 7, 2023), https://documented.net/investigations/state-ags-join-anti-esg-effort-amid-growing-backlash.
[900] *Id*.

would play in the effort:

> But this is really kind of geared towards our attorneys general to lay the foundation for antitrust violations on this corporate collusion, find out the connections with the global client or the Glasgow Financial Alliance for Net Zero. . . It's all rooted in decarbonization, which is net zero. So I hope our committee gets a ton of paper back from these large financial institutions and they get hammered in the courts. And our attorneys general around the country file antitrust violations.[901]

The strategy that Mr. Isaac laid out in 2022—the use legislative subpoena power to sweep in as much internal documentary material as possible, then turn it over to law enforcement to find a basis for a predetermined legal conclusion—appears to have served as the playbook for attacks on ESG investment initiatives across multiple states and, under Chairman Jordan's leadership, in the House Judiciary Committee.

Finally, the Majority appears to have borrowed the questions in posed to parties in this investigation from the Leo-tied Consumers' Research. In March 2023, Consumers' Research published its own report, "Defeating the ESG Attack on the American Free Enterprise System," which provides "an overview of the corporate proxy system for oversight and litigation efforts."[902] Specifically, this report includes "explanation of the ESG movement in the proxy system, the applicable laws that govern it, and the potential application of those laws by reasoned analogy to established precedent."[903] Moreover, the appendix of the report provides a lengthy list of sample questions for asset managers, proxy advisors, businesses, and activists.[904] These sample questions bear a remarkable resemblance to the majority's subpoenas.

3. The majority cited an op-ed by Sean Fieler, a hedge fund owner who stands to gain from attacks on ESG

The majority repeatedly cites a June 2022 *Wall Street Journal* op-ed written by Sean Fieler titled "The ESG Movement Is A Ripe Target For Antitrust Action."[905] In this piece, Fieler argues that "environmental, social and governance movement's policy centerpiece: restricting oil and gas investment […] is potentially a violation of American antitrust law."[906] According to Mr. Fieler, "[a]dvancing the ESG agenda requires that the owners of capital collude to restrict the supply of certain goods and services" which is a "textbook antitrust violation."[907]

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[901] *Id.*
[902] Consumers' Research, *supra* note 877.
[903] *Id*. at 4.
[904] *Id*. at 23–27.
[905] Tristan Justice, *EXCLUSIVE: Republicans Launch Antitrust Investigation Into Climate-Obsessed Corporate 'Cartel*,' THE FEDERALIST (Dec. 6, 2022), https://thefederalist.com/2022/12/06/exclusive-republicans-launch-antitrust-investigation-into-climate-obsessed-corporate-cartel/; Letter from Ranking Member Jim Jordan, *supra* note 2, at 2-4.
[906] Sean Fieler, *The ESG Movement Is a Ripe Target for Antitrust Action*, WALL ST. J. (Jun. 2, 2022), https://www.wsj.com/articles/antitrust-enivornment-social-governance-oil-gas-equity-exxon-mobil-collusion-11654184723.
[907] *Id*.

Mr. Fieler is not an attorney, nor does he have any other academic or professional credentials that distinguish him as an expert in antitrust law.[908] He has spent his entire career working for investment funds and is currently the managing member and majority owner of Connecticut-based hedge fund Equinox Partners.[909] Mr. Fieler also stands to benefit from efforts to restrict ESG investing, as restrictions on permissible investment factors could benefit the mining and oil and gas sectors, in which Equinox Partners invests heavily.[910] An analysis of the firm's most recent SEC filings shows that metals and mining equities comprise 74.68 percent of the firm's portfolio, while investments in the oil and gas sector comprise the remaining 25.32 percent of the firm's investments.[911]

According to a 2023 report from S&P, the mining sector "generally faces significantly greater environmental and social risks" than other industries.[912] Specifically, mining activities result in significant environmental contamination, land and water use, and greenhouse gas (GHG) emissions.[913] In fact, mining companies, which make up the vast majority of Equinox Partners' investments, are among the world's heaviest polluters.[914] Metals and mining operations also present significant health and safety risks for employees.[915] According to the International Labor Organization, "mining remains the most hazardous occupation when the number of people exposed to risk is taken into account."[916] Finally, mining companies often "operate in remote areas, conflict zones, and jurisdictions with lower social or governance standards," which creates additional social risks.[917] Companies in the oil and gas sector have "a well-above-average exposure to environmental risks" and "above average" exposure to social risks when compared to other industries.[918] According to S&P, "uncertainties about the pace and pattern of the energy transition imply meaningful risks for oil and gas-related activities."[919] Furthermore, severe oil spills and refinery accidents create serious environmental risks and may result in "material

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[908] LinkedIn profile: Sean Fieler, https://www.linkedin.com/in/seanfieler/ (last visited June 8, 2024).
[909] *Id*.
[910] X Profile: Equinox Partners, https://x.com/PartnersEquinox (last visited June 8, 2024); LinkedIn Profile, Equinox Partners, https://www.linkedin.com/company/equinox-partners-l-p-/ (last visited June 8, 2024).
[911] *Equinox Partners Investment Management Reporting,* WHALE WISDOM, https://whalewisdom.com/filer/mason-hill-asset-management-incet-al (last visited June 8, 2024).
[912] Donald Marleau, *ESG Credit Indicator Report Card: Metals And Mining*, S&P GLOBAL (Aug. 6, 2023), at 3, https://www.spglobal.com/_assets/documents/ratings/research/esg-credit-indicator-report-cards/esg-rc-for-public-site-metals-and-mining.pdf.
[913] *Id*.
[914] *EPA: Metal Mining Industry Is Nation's Top Toxic Polluter*, EARTHWORKS (Jan. 16, 2023), https://earthworks.org/releases/epa_metal_mining_industry_is_nations_top_toxic_polluter/; Sammy Witchalls, *The Environmental Problems Caused by Mining*, EARTH.ORG (Apr. 3, 2022), https://earth.org/environmental-problems-caused-by-mining/; Roberth Orihuela, *U.S. mining companies leave lasting trail of contamination across Peru*, MONGABAY (Jan. 10, 2024), https://news.mongabay.com/2024/01/u-s-mining-companies-leave-lasting-trail-of-contamination-across-peru/.
[915] Marleau, *supra* note 912, at 8.
[916] *Id*.
[917] *Id*. at 7.
[918] Thomas A Watters, *ESG Credit Indicator Report Card: Oil And Gas Upstream And Refining*, S&P GLOBAL (Aug. 29, 2023), at 5, https://www.spglobal.com/_assets/documents/ratings/research/esg-credit-indicator-report-cards/esg-rc-for-public-site-metals-and-mining.pdf.
[919] *Id*.

financial and reputational damage" for companies.[920] S&P also notes that many employees in the oil and gas industry "are exposed to harsh operating environments or are, by the inherent nature of hydrocarbons, at risk of explosions and fires," which can increase social and reputational risk.[921]

To the extent that he stands to reap financial benefits from his participation in the anti-ESG campaign, Mr. Fieler is hardly alone. The entrepreneur Vivek Ramaswamy started his own firm, Strive Asset Management, dedicated to criticizing ESG, which he then parlayed into media appearances and an eventual campaign for the Republican presidential nomination.[922] Mr. Ramaswamy's anti-ESG crusade paid off. In November 2022, the Indiana Public Retirement System ("INPRS") signed a contract with Strive, the first state pension fund in the country to do so.[923] The contract stipulated that Mr. Ramaswamy, the lead consultant on the account, would earn $4,000 per hour for his services.[924] Indiana state Rep. Greg Porter, the top Democrat on the chamber's finance committee, said of the contract: "One has to wonder whether the hysteria over ESG—in no small part manufactured and fanned by Strive Asset Management and Vivek Ramaswamy—is nothing more than a pretense to grift public retirement systems like ours."[925]

Mr. Ramaswamy also joined Mr. Fieler in an October 2022 panel discussion hosted by Philanthropy Roundtable, "ESG: An Insidious Threat to Free Society and Philanthropy." Mr. Fieler is also a prominent conservative donor who has been described as the "little-known ATM of the fundamentalist Christian, anti-choice movement."[926] During this panel discussion, Mr. Fieler connected his opposition to ESG to corporate efforts to promote LGBTQ+ rights and discussed the antitrust case against ESG, telling the audience:

> What I find really interesting about the movement is they're not doing in isolation right when you're talking about the climate stuff or the carbon stuff they're doing it in coordination with Climate Action 100. They're operating in a coordination fashion. […] If producers of a particular product coordinate together to suppress the supply of that product in this case they say to save the world to save the planet from climate change but the reality is they're also getting a higher price for the product that they're selling in this coordinated fashion uh that that would be a classic antitrust violation and I think we're going to need the AGs I think we're going to need the red State Pension funds I think we're going to need politicians in

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920 *Id*.
921 *Id*. at 3.
922 Jeff Benjamin, *Strive Asset Management fills leadership vacuum created by CEO's run for president*, INVESTMENTNEWS (May 4, 2023), https://www.investmentnews.com/esg/news/strive-asset-management-fills-leadership-vacuum-created-by-ceos-run-for-president-237188.
923 Leslie Bonilla Muñoz, *Indiana pension system contracts with conservative anti-ESG firm*, INDIANA CAPITAL CHRONICLE (Mar. 20, 2023), https://indianacapitalchronicle.com/2023/03/20/indiana-pension-system-hires-conservative-anti-esg-presidential-candidate/.
924 *Id.*
925 *Id*.
926 Sharona Coutts, *Sean Fieler, the Little-Known ATM of the Fundamentalist Christian, Anti-Choice Movement*, REWIRE NEWS GROUP (Sep. 23, 2014), https://rewirenewsgroup.com/2014/09/23/sean-fieler-little-known-atm-fundamentalist-christian-anti-choice-movement/.

addition to shareholders all working in the same direction to try to disrupt the [ESG] movement.[927]

That same month, Mr. Fieler joined S&P Global's Commodity Insights podcast "Capitol Crude," where he discussed "how geopolitics and domestic policies, including the growing ESG movement, are impacting the investment outlook for the oil industry."[928]

Mr. Fieler is also affiliated with dark money groups opposing ESG. Since 2019, Mr. Fieler has served on the board of directors of Heritage Action for America, one of the primary groups advocating for anti-ESG policies. Mr. Fieler has also donated $150,000 to Sentinel Action Fund, a super PAC launched by Heritage Action ahead of the 2022 midterm elections, and $55,000 to Club for Growth Action, a super PAC launched by Club for Growth, a free-enterprise advocacy group that has publicly opposed ESG investing.[929]

C. The aim of the anti-ESG political campaign is to force companies to change their business practices, and it has seen some success

While the coordinated anti-ESG campaign has not seen much success in court, it nevertheless has had an undeniable impact on companies' private business decisions. In this investigation alone, multiple witnesses told the Committee that the political campaign against ESG investing has threatened the rights of shareholders to raise material concerns with corporate leadership, which in turn threatens the private sector's ability to meet the goals of the Paris Agreement.[930] To be clear, this chilling effect is not some unintended byproduct of the anti-ESG campaign; it is its sole purpose.

We need not speculate as to Chairman Jordan's motives—in this case, as in so many others, he has been his skeptics' most effective witness. In February, after State Street and JPMorgan announced their departures from CA100+, the Chairman immediately took credit for the move on X and wrote that "we hope more financial institutions follow suit in abandoning collusive ESG actions."[931] When BlackRock announced that it was scaling back its involvement in the initiative, the Majority's official X account declared it "ANOTHER WIN."[932] Of course, neither BlackRock nor State Street cited the Majority's antitrust claims in explaining their retreat from CA100+, though both firms said that the initiative's new terms for its second phase raised

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[927] Philanthropy Roundtable, *ESG: An Insidious Threat to Free Society and Philanthropy*, YOUTUBE (Jan. 4, 2023), https://www.youtube.com/watch?v=c67yl9YOxXI&t=3s.
[928] Capitol Crude: The US Energy Policy Podcast, *Oil market fundamentals could make E&P companies a good equity investment*, S&P GLOBAL (Oct. 10, 2022), https://www.spglobal.com/commodityinsights/en/market-insights/podcasts/crude/221010-fieler-equinox-opec-oil-market-fundamentals-production-equity-investor.
[929] Press Release, *Club for Growth Members Send Over 400 Comments to SEC Opposing Woke ESG Climate Agenda,* THE CLUB FOR GROWTH (Jun. 16, 2022), https://www.clubforgrowth.org/club-for-growth-members-send-over-120-comments-to-sec-opposing-woke-esg-climate-agenda/; David McIntosh, *Holding ESG Investing Perpetrators Accountable*, WASH. TIMES (Aug. 14, 2023), https://www.washingtontimes.com/news/2023/aug/14/holding-esg-investing-perpetrators-accountable/.
[930] Schapiro Testimony at 165:11-25; Fugere Testimony at 181:6-182:24.
[931] Jim Jordan (@Jim_Jordan), X (Feb. 15, 2024), https://x.com/Jim_Jordan/status/1758156354538131807?s=20.
[932] Judiciary GOP (@Judiciary GOP), X (Feb. 15, 2024), https://x.com/JudiciaryGOP/status/1758173788552704232. Notably, both the Chairman and the Committee used the occasion to boost Mr. Hild.

new compliance concerns.[933] Nonetheless, their actions show that claims of antitrust conspiracies need not be credible to affect business behavior: When even the largest companies determine the reputational and financial costs of responding to the Majority are too high to justify their continued involvement in CA100+, the chilling effect on small businesses and nonprofits is likely even greater. Imposing the burdens of the congressional investigative process on companies to bully them out of activity that offends the Majority's politics seems like a textbook definition of weaponizing the federal government.

The fallout from the anti-ESG campaign extends beyond the Majority's investigation. As noted, Vanguard already terminated its involvement in NZAM, citing "confusion about the views of individual investment firms."[934] Additionally, at least seven members of the Net Zero Insurance Alliance ("NZIA"), including five of its eight founding members, have withdrawn from the NZIA over the past year.[935] Notably, at least three of those departures took place the same month that 23 Republican state attorneys general sent a letter to members of the NZIA accusing members of violating state insurance laws.[936] In April, NZIA disbanded altogether in favor of a new initiative with a "new structure" called the Forum for Insurance Transition to Net Zero.[937] The demise of NZIA is directly traceable to the coordinated anti-ESG campaign: Since insurance is largely regulated by states, state attorneys general hostile to ESG have significant authority to wield against the insurers.[938] Unfortunately, it also serves as a potential preview of what firms in other sectors might face under an administration willing to turn the Majority's bad-faith theories into action.

V. CONCLUSION

So much of the Committee's business under this Majority has felt like a waste of time—chasing down fringe conspiracy theories and pursuing partisan vendettas.[939] The routine abuses of the public trust on favors for Donald Trump and his ilk are bad enough. But it is even more egregious for the Committee Majority to waste our time *when we are running out of time*. The planet faces an existential emergency. Keeping alive the goals that the Paris Agreement set for the end of this century requires public and private actors alike to make the right choices *today*. And while there are undeniable glimmers of hope to celebrate, every roadblock thrown in the

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933 Letter from BlackRock to ClimateAction100+ Steering Committee, BLACKROCK (Feb. 2, 2024), https://www.blackrock.com/corporate/literature/publication/2024-our-participation-in-climate-action-100.pdf; Andrew Ross Sorkin, et al., *Wall Street's Climate Retreat*, N.Y. TIMES DEALBOOK (Feb. 16, 2024), https://www.nytimes.com/2024/02/16/business/dealbook/wall-streets-climate-retreat.html.
934 An update on Vanguard's engagement with the Net Zero Asset Managers initiative (NZAM), VAN_HJC_00000001.
935 Tommy Wilkes, Alexander Hübner & Tom Sims, *Insurers flee climate alliance after ESG backlash in the U.S.*, REUTERS (May 26, 2023), https://www.reuters.com/business/allianz-decides-leave-net-zero-insurance-alliance-2023-05-25/.
936 *Id.*; Letter from Sean Reyes, Jeff Landry, et al. to Net-Zero Insurance Alliance (May 15, 2023).
937 Simon Jessop, *Insurers' climate alliance relaunches after member exodus*, REUTERS (Apr. 25, 2024), https://www.reuters.com/sustainability/climate-energy/insurers-climate-alliance-relaunches-after-member-exodus-2024-04-25/.
938 *Id.*
939 *See generally* Select Subcommittee on the Weaponization of the Federal Government, 118th Cong. (2023–24).

way by those who still refuse to accept the scientific consensus on climate change is one too many.

If there is any good to come out of this investigation, it is what it reveals about the true motivations of those attacking sustainable investment. The attacks on ESG investment practices have never been about the rule of law, but rather about substituting the politics of the few for the principled investment choices of businesses and their shareholders. It comes as no surprise, then, that the litany of legal theories devised to justify this deceitful campaign—especially those based on bad faith readings of antitrust law—have always been more bark than bite. Anyone can allege an antitrust conspiracy. It is quite another thing to assemble the facts necessary to sustain a challenge under current U.S. law. That has not been done here. We hope this Committee will return to its historic mandate of faithful vigilance over the antitrust laws, "our Magna Carta of free enterprise,"[940] before long.

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[940] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).