[INITIAL BRIEF]

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1149/1150 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MONICA J. LINDEEN, MONTANA STATE AUDITOR, *EX OFFICIO* MONTANA COMMISSIONER OF SECURITIES AND INSURANCE and WILLIAM F. GALVIN, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On petitions for review of a final rule of the Securities and Exchange Commission

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

In addition to the parties and amici identified by petitioners, amici include eight current and former Members of Congress and William Michael Cunningham (appearing pro se).

B. Rulings under Review

Petitioners seek review of a rule adopted by the Securities and Exchange Commission on March 25, 2015. *Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Final Rule*, Rel. No. 33-9741, 80 Fed. Reg. 21806 (April 20, 2015). The Commission adopted the rule pursuant to the Securities Act of 1933, as amended by the Jumpstart Our Business Startups Act of 2014.

C. Related Cases

These consolidated cases have not previously been before this Court. Counsel is not aware of any other related cases currently pending in this Court.

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GLOSSARY

APA	Administrative Procedure Act
CFTC	Commodity Futures Trading Commission
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FLRA	Federal Labor Relations Authority
FTC	Federal Trade Commission
GAO	Government Accountability Office
HHS	Department of Health and Human Services
JOBS Act	Jumpstart Our Business Startups Act
NASAA	North American Securities Administrators Association, Inc.
NSMIA	National Securities Markets Improvement Act
SEC	Securities and Exchange Commission
USDA	Department of Agriculture

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

JURISDICTIONAL STATEMENT

Petitioners challenge a rule that the Commission adopted on March 25, 2015 pursuant to the Securities Act of 1933. The petitions for review were timely filed on May 22, 2015. This Court has jurisdiction pursuant to Section 9(a) of the Securities Act. 15 U.S.C. 77i(a); *see N.Y. Republican State Comm. v. SEC*, 2015 U.S. App. Lexis 14936 (Aug. 25, 2015).

COUNTERSTATEMENT OF THE ISSUES

Regulation A is an exemption from the registration requirements of the Securities Act of 1933 intended to help small businesses obtain access to the capital markets. To revitalize Regulation A, Congress enacted Title IV of the Jumpstart Our Business Startups Act (JOBS Act) in 2012. In Title IV, Congress ordered the Commission to add a class of exempt securities that would be "covered securities," for which state registration and qualification laws are preempted, when they are offered and sold to "qualified purchasers." Congress expressly authorized the Commission to define the term "qualified purchaser" and to define it differently for different securities. In the rule challenged here, the Commission defined "qualified purchaser" by reference to a subset of Regulation A offerings—called Tier 2 offerings—which effectively preempts state registration and qualification laws for those offerings. The requirements for Tier 2 offerings protect investors in several ways but do not restrict sales to investors having a certain level of sophistication, wealth (net worth), or revenue. The issues are:

1. Whether, under *Chevron* step one, Congress unambiguously foreclosed the Commission's definition of "qualified purchaser" because it does not test for investor sophistication, wealth, or revenue when the Securities Act expressly delegates definitional authority to the Commission without requiring that its definition incorporate such tests.

2. Whether, under *Chevron* step two, the Commission's definition is assigned controlling weight because it is consistent with the statute and the Commission reasonably explained how its definition is in the public interest, protects investors, and encourages capital formation in furtherance of Congress's objectives.

3. Whether the Commission satisfied its statutory obligation to consider the effect of its definition on competition, efficiency, and capital formation through an analysis that explains why limited preemption of state law for Tier 2 offerings would facilitate small businesses' access to capital while protecting investors.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in an addendum to petitioners' brief.

COUNTERSTATEMENT OF THE CASE

A. Regulation A is an exemption from the registration provisions of the Securities Act for smaller issuers.

Under Section 5 of the Securities Act, issuers must register an offering of securities with the Commission unless an exemption, such as those in Sections 3 and 4, is available. 15 U.S.C. 77c–77h. Section 3(b)(1) authorizes the Commission to exempt "any class of securities" if it finds that registration is "not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering." 15 U.S.C. 77c(b)(1). Congress authorized the Commission to create this exemption because the Section 5 registration process is expensive and small firms may not be able to raise enough funds to justify its costs. *Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)*, 80 Fed. Reg. 21806, 21866–72 (April 20, 2015) (*Adopting Release*); *Small Business Initiatives*, 57 Fed. Reg. 9768, 9770 (Mar. 20, 1992); 3 Louis Loss, Joel Seligman, & Troy Paredes, SECURITIES REGULATION 240 (5th ed. 2014) ("[T]here is no question that when small firms issue new securities they pay a proportionately higher price for underwriting compensation (the primary expense), accounting, legal, and filing costs than larger businesses.").

Pursuant to this authority, the Commission adopted Regulation A in 1936. Regulation A allows issuers to make smaller public offerings through a less expensive process that still requires disclosure of a substantial amount of information to investors. 1 Thomas L. Hazen, THE LAW OF SECURITIES REGULATION 496–97, 509 (6th ed. 2009). Section 3(b) and Regulation A have evolved over time, and before the amendments challenged here, the Commission last significantly revised Regulation A in 1992. 3 Loss et al., SECURITIES REGULATION at 240–66, 271–78; *Small Business Initiatives*, 57 Fed. Reg. 36442, 36443–44 (Aug. 13, 1992).

Regulation A offers advantages for issuers and investors. Issuers do not incur the costs of preparing a registration statement and may sell their securities publicly to a broad range of investors, subject to limitations imposed by the rule challenged here. *Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)*, 79 Fed. Reg. 3926, 3928 (Jan. 23, 2014) (*Proposing Release*). Investors, in turn, enjoy more opportunity to participate in the capital markets with limited restrictions on resale, which enhances liquidity. *Id.*

To use Regulation A, issuers must satisfy many requirements, including disclosure of material information in an offering statement filed with the Commission and in an offering circular distributed to investors. 17 C.F.R. 230.252–253; *see also*

Proposing Release, 79 Fed. Reg. at 3927 ("The core of the offering statement is the offering circular, a disclosure document much like an abbreviated version of the prospectus in a registered offering."); 1 Hazen, THE LAW OF SECURITIES REGULATION at 509 ("The Regulation A disclosure statements contain much of the information that would be included in a full-blown registration statement."). Commission staff review these documents; they provide comments to issuers and qualify the offering materials only if and when any problems are resolved. *Proposing Release*, 79 Fed. Reg. at 3927 & n.23. While issuers are permitted to solicit interest from potential investors before qualification, written offers can only be made using an offering circular that has been filed with the Commission, or through another communication accompanied by the offering circular. 17 C.F.R. 230.251(d)(1), 230.254, 230.255. No sale of securities can occur until the offering statement is qualified by the Commission and the offering circular is delivered to the investor. 17 C.F.R. 230.251(d)(2).

Regulation A offerings are *not* "exempt from federal protection," as petitioners incorrectly state. Pet. Br. 1. In addition to the requirements described above, the antifraud provisions of the federal securities laws apply to the offer and sale of Regulation A securities. 15 U.S.C. 77q; 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. And any person who offers or sells such a security is also subject to civil liability under Section 12(a)(2) of the Securities Act for false or misleading statements. 15 U.S.C. 77c(b)(2)(D), referring to 15 U.S.C. 77l(a)(2).

Regulation A is one of several exemptions from registration that small businesses use to raise capital. *Adopting Release,* 80 Fed. Reg. at 21867. Others include Rule 506(b) of Regulation D, which provides a safe harbor for private offerings under Section 4(a)(2). 17 C.F.R. 230.501.506(b); *see also generally* 17 C.F.R. 230.501–508. Rule 506(b) has become the primary capital formation tool for small issuers, supplanting Regulation A, which is rarely used. *Adopting Release*, 80 Fed. Reg. at 21865–66, 21869–71.[2] Indeed, among offerings of up to $5 million (the former Regulation A limit), there were only 19 Regulation A offerings between 2009 and 2012 totaling approximately $73 million versus about 27,500 Regulation D offerings totaling approximately $25 billion. *Proposing Release*, 79 Fed. Reg. at 3928, 3974–75.

B. States have their own registration and qualification laws, which Congress preempted in 1996 for certain "covered securities."

Alongside the Securities Act, state "blue sky" laws govern securities offerings. While federal law mandates full disclosure of material information to investors, many states, in addition to requiring disclosure, "impose[] a substantive scrutiny" on a proposed offering. 2 Hazen, THE LAW OF SECURITIES REGULATION at 423–24. In these merit-review states, regulators may refuse to qualify an offering for a variety of reasons related to the issuer or the offering. 1 Hazen, THE LAW OF SECURITIES REGULATION at 33. Massachusetts and Montana each engage in some form of merit

[2] *See also* Vladimir Ivanov & Scott Bauguess*, Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption,* at 4–10 (Jul. 2013), https://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

review. Pet. Br. 6, 28; *see* MASS. GEN. LAWS ch. 110A, §§ 303, 305; MONT. CODE ANN. §§ 30-10-204, 205, 207. While dozens of jurisdictions have merit-review statutes, no other regulators have petitioned for review of the Commission's rule.

State review adds an extra layer of investor protection, but also raises the cost of accessing the capital markets. Issuers must comply with the registration provisions for each state in which the securities are offered and sold. Rutheford B. Campbell, *Regulation A: Small Business' Search for "A Moderate Capital,"* 31 DEL. J. CORP. L. 77, 106–10 (2006). And issuers seeking to sell securities in merit-review states must satisfy the differing substantive standards for each state—or risk being unable to sell in that state, which affects issuers' ability to raise capital and investors' ability to access the capital markets. 1 Loss et al., SECURITIES REGULATION at 212–214.

Congress initially established a system of concurrent state and federal regulation in Section 18 of the Securities Act but it subsequently "limited the role of state law in securities regulation" by enacting a "massive preemption of state law registration requirements." 1 Hazen, THE LAW OF SECURITIES REGULATION at 33, 49–50, 445–46, 530. In the National Securities Market Improvement Act of 1996 (NSMIA), Congress amended Section 18 to preempt state laws that require "registration or qualification" of a "covered security" or prohibit the offer or sale of "a covered security" based on its merits. Pub. L. No. 104-290, 110 Stat. 3416, 3417–18, codified at 15 U.S.C. 77r(a)(1)–(2). While Congress displaced registration and qualification laws, it preserved state authority "to investigate and bring enforcement actions with respect to fraud or deceit" and to require "the filing of any document filed with the Commission" for "notice purposes and the assessment of any fee." 15 U.S.C. 77r(c)(1)–(2).

Preemption in NSMIA turns on the meaning of "covered security." Congress itself defined "covered security" to include certain types of securities, such as those listed on the New York Stock Exchange. 15 U.S.C. 77r(b)(1)(A). Congress also gave the Commission express authority to designate other securities as falling within the definition of "covered security." In particular, Section 18(b)(3) states that "[a] security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule." 15 U.S.C. 77r(b)(3). Congress specified that "[i]n prescribing such rule, the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and protection of investors." *Id.*

C. The JOBS Act mandated that the Commission adopt rules revitalizing Regulation A, including raising the offering limit to $50 million.

Congress enacted the JOBS Act in 2012 to facilitate capital formation for small businesses. Preamble, Pub. L. No. 112-106, 126 Stat. 306, 306 (2012) ("An Act To increase American job creation and economic growth by improving access to the public capital markets * * * ."). Title IV aims to revitalize Regulation A. It replicates the Small Company Capital Formation Act of 2011 (H.R. 1070), which would have increased the offering limit to $50 million in order to "help small issuers, such as venture-capital backed companies, gain access to funding without the costs and delays associated with the full-scale securities registration process." H.R. REP. NO. 112-206, at 7 (Sept. 14, 2011)

Title IV creates Section 3(b)(2), which orders the Commission to adopt rules adding a class of exempt securities "in accordance" with several "terms and conditions." These include: (1) an "aggregate offering amount" that does "not exceed $50 [million]"; (2) "[t]he securities may be offered and sold publicly" and "shall not be restricted"; (3) "[t]he issuer may solicit interest in the offering prior to filing any offering statement"; (4) "[t]he civil liability provision in Section 12(a)(2) shall apply to any person offering or selling such securities"; and (5) "[s]uch other terms, conditions, or requirements as the Commission may determine necessary in the public interest and for the protection of investors." 15 U.S.C. 77c(b)(2)(A)–(G).

Title IV also expanded the definition of "covered security"—and the preemptive scope of Section 18—by amending Section 18(b)(4). Subparagraph (D) adds to the list of "covered securities" a security "that is exempt from registration under this title pursuant to * * * a rule or regulation adopted pursuant to Section 3(b)(2)" when "such security is (i) offered or sold on a national securities exchange; or (ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale." 15 U.S.C. 77r(b)(4)(D).

Congress requested more information about how state laws affected the use of Regulation A. It ordered the Comptroller General to conduct "a study on the impact of State laws regulating securities offerings, or 'Blue Sky laws', on Regulation A offerings." JOBS Act, Section 402, 126 Stat. at 325. The GAO issued its report in July 2012, and found that one central reason for the relative disuse of Regulation A was the cost of complying with state law. *Factors that May Affect Trends in Regulation A Offerings*, GAO-12-839, at 17 (Jul. 2012), *available at* http://www.gao.gov/assets/600/592113.pdf (*GAO Report*).

D. The Commission proposed and adopted the rules challenged here to implement its JOBS Act mandate.

The Commission proposed rules revising Regulation A in December 2013. The Commission proposed creating two tiers of offerings: Tier 1, for offerings up to $5 million, and Tier 2, for offerings up to $50 million. *Proposing Release*, 79 Fed. Reg. at 3927. Basic requirements, such as review of offering materials by the Commission and disqualification of "bad actors," would apply to both tiers, but Tier 2 offerings would be subject to significant additional restrictions. *Id.* at 3927–30.

The proposing release discussed the concerns that state registration and qualification laws would impede Congress's goal of revitalizing Regulation A. The Commission cited (*Proposing Release*, 79 Fed. Reg. at 3928–29, 3968–69) the GAO's findings that (1) issuers did not use Regulation A, in part, because of the costs of state-law compliance and (2) even with a $50 million limit, "blue sky requirements may still dampen small business' interest in Regulation A." *GAO Report*, at 12, 20. Numerous commenters, who were invited to share their views before the

Commission proposed its amendments, agreed that the costs of complying with state law would discourage use of a revised Regulation A. *Proposing Release*, 79 Fed. Reg. at 3967– 68 & n.475. In light of these concerns, the Commission proposed to exercise its authority under Section 18(b)(3) to define "qualified purchaser" and preempt state law in a way that "would protect offerees and investors in Regulation A securities, while streamlining compliance and reducing transaction costs." *Id.* at 3969.

This part of the proposed rule "received an extensive amount of public commentary." *Adopting Release*, 80 Fed. Reg. at 21857. Some objected to any preemption of state law while others questioned the scope of the proposed preemption, arguing that "qualified purchaser" should depend on an investor's sophistication, wealth, or revenue. *Id.* Many supported some preemption, however, contending that state laws impede use of Regulation A and that investors would be sufficiently protected by the proposed rules even without state review. *Id.* at 21857–58. Other commenters urged the Commission to completely preempt state registration and qualification laws for all Regulation A offerings. *Id.* at 21858.

The Commission unanimously adopted a final rule "to implement the JOBS Act mandate" in March 2015. *Adopting Release*, 80 Fed. Reg. at 21807. Taking into account the "sharply divided" commentary about preemption, the Commission chose a definition that preempted state registration and qualification requirements for Tier 2 offerings but not for Tier 1 offerings (the limit for which was increased to $20 million). *Id.* at 21857–58. The final rules define "qualified purchaser" to mean "any person to whom securities are offered and sold pursuant to a Tier 2 offering of this Regulation A." *Id.* at 21899; 17 C.F.R. 230.256. A Tier 2 security is thus a "covered security" under Section 18, which prohibits states from requiring registration and qualification of such offerings, or engaging in merit review, but preserves their antifraud, notice-filing, and fee authority. *Adopting Release*, 80 Fed. Reg. at 21860.

The Commission tied its "qualified purchaser" definition to the requirements for Tier 2 offerings because of the investor protections they create. *Adopting Release*, 80 Fed. Reg. at 21858–62. Unlike Tier 1 issuers, Tier 2 issuers must include audited financial statements in their offering circulars and must file annual audited financial statements with the Commission. *Id.* at 21861. Whereas Regulation A did not previously impose ongoing reporting requirements, Tier 2 issuers must file annual and semiannual reports, along with other disclosures. *Id.* at 21845–50, 21899–900; 17 C.F.R. 230.257. And in a change from the prior version of Regulation A, which allowed investors to purchase an unlimited amount of securities, purchasers must either be "accredited investors" (as defined by rule) or be subject to purchase limitations—the aggregate purchase price cannot exceed 10% of the greater of a purchaser's annual income or net worth. *Adopting Release*, 80 Fed. Reg. at 21815, 21817, 21877, 21896–97; 17 C.F.R. 230.251(d)(2)(C). These Tier 2 requirements are layered upon the protections that apply to Tier 1 offerings, including review and qualification by Commission staff and disqualification for "bad actors." *Adopting Release* , 80 Fed. Reg. at 21895, 21901–02; 17 C.F.R. 230.251(d)(1)–(2), 230.262.

As required by Section 2(b) of the Securities Act, the Commission analyzed whether its rule would "promote efficiency, competition, and capital formation." 15 U.S.C. 77b(b). Citing the GAO report, comment letters, and other data, the Commission noted that issuers "rarely rely on existing Regulation A to raise capital," in part because of the costs of state-law compliance. *Adopting Release*, 80 Fed. Reg. at 21868–69. Starting from this baseline, the Commission assessed "the likely costs and benefits of the final rule provisions" in light of Congress's objective to "expand the capital raising options available to smaller and emerging companies." *Id.* at 21865–72.

The Commission analyzed how preemption would reduce costs for issuers and make Regulation A more attractive, while acknowledging that preemption may affect "investor protection by eliminating one level of government review." *Adopting Release*, 80 Fed. Reg. at 21886. The Commission explained that "several factors could mitigate" the potential effect on investor protection, including the "substantial protections" for purchasers in Tier 2 offerings. *Id.* at 21887. The Commission concluded that its "qualified purchaser" definition provided "an additional layer of investor protection, thus reducing the need for, and the expected benefits of, state review" while lowering "the compliance burdens" for issuers, which would partly offset the increased costs of the new requirements for Tier 2 offerings. *Id.* at 21887.

STANDARD OF REVIEW

The Commission's rule, which petitioners challenge under the APA, may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This Court reviews the Commission's definition of "qualified purchaser"—the only part of the rule that petitioners challenge—"under the deferential two-step test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Council for Urological Interests v. Burwell*, 790 F.3d 212, 219 (D.C. Cir. 2015). At step one, the Court determines whether Congress has spoken to the precise question at issue such that Congress has unambiguously expressed its intent to define a term in a particular way. *Chevron,* 467 U.S. at 842–43. If Congress has not done so, the Court moves to step two, and when "there is an express delegation of authority" to define a statutory term, regulations adopted pursuant to that authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44 & n.12. The Court reviews the Commission's Section 2(b) analysis under the arbitrary and capricious standard, which is "[h]ighly deferential" and "presumes the validity of agency action." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (internal quotation marks omitted; alteration in original); *see also Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369 (D.C. Cir. 2014).

SUMMARY OF ARGUMENT

The Court should uphold the Commission's definition of "qualified purchaser," which has the effect of preempting state registration and qualification laws for Tier 2 offerings, because the Commission's interpretation satisfies both steps of the *Chevron* analysis and because the Commission reasonably analyzed the effects of its definition on competition, efficiency, and capital formation.

1. The Commission's definition of "qualified purchaser" passes *Chevron* step one because Congress did not unambiguously foreclose that definition. When Congress modified Section 18 in NSMIA, it expressly gave the Commission the authority to define the term—and to define it differently for different securities. Congress reaffirmed that authority when it enacted the JOBS Act. Petitioners erroneously presume that Congress mandated a definition of "qualified purchaser" that requires investors to have a certain level of wealth, income, or sophistication. But they identify no statutory language supporting that presumption. And the structure, purpose, and history of NSMIA and the JOBS Act demonstrate that Congress did not unambiguously preclude the Commission from defining "qualified purchaser" by reference to the requirements for Tier 2 offerings, which protects investors while revitalizing Regulation A as Congress directed.

2. The Commission's definition also satisfies *Chevron* step two. Since Congress expressly delegated definitional authority to the Commission, the Commission's definition is entitled to more than mere deference. It is given controlling weight because it is consistent with the Securities Act and because the Commission reasonably explained how its interpretation is rationally related to Congress's goal of enhancing access to capital markets. The Adopting Release thoroughly discusses how the Commission's definition encourages small issuers to

utilize Regulation A by eliminating the costs of state-law compliance and protects investors through various requirements, including a purchase limitation for non-accredited investors and enhanced disclosure. The release also explains why the Commission chose a definition of "qualified purchaser" for Tier 2 securities that was different from a definition applicable to all securities that the Commission had proposed, but never adopted, more than a decade before the JOBS Act.

3. The Commission satisfied its obligation under Section 2(b) to assess the economic consequences of its rule. Petitioners do not contest the Commission's consideration of whether its rule will promote efficiency, competition, and capital formation. Rather, they contend that the Commission failed to assess the effects of preemption on investor protection. But petitioners ignore the Commission's analysis of the costs and benefits of state registration and qualification laws from the perspective of both investors and issuers. The Commission reasonably concluded that although preemption would remove some review for Tier 2 offerings, the requirements for such offerings, as well as the presence of federal and state antifraud authority, would adequately protect investors while reducing costs for issuers. Moreover, the Commission considered a new, coordinated state review process as an alternative to preemption, but ultimately concluded that preemption for Tier 2 offerings would better accomplish the objectives of the JOBS Act because of the unproven nature of the coordinated review process for such offerings.

ARGUMENT

I. Because Congress expressly authorized the Commission to define "qualified purchaser" and did not unambiguously foreclose the definition that the Commission adopted, petitioners' *Chevron* step one argument fails.

The Commission's rule passes *Chevron* step one because Congress did not speak "to the precise question at issue"—the meaning of "qualified purchaser"—and instead authorized the Commission to define the term. *Chevron,* 467 U.S. at 843. To win at step one, petitioners cannot simply "offer a reasonable, or even the best, interpretation" of a statute; they must show that the Securities Act "*unambiguously* forecloses" the Commission's interpretation. *Vill. of Barrington v. Surface Transportation Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011). This is a "heavy burden," *id.*, which petitioners fail to satisfy because their argument that Congress required "qualified purchaser" to be defined in terms of investors' wealth, income, or sophistication is contrary to the text of the Securities Act, as well as its structure, purpose, and history.

A. The Commission's definition of "qualified purchaser" is consistent with the text of the Securities Act.

1. The statutory language grants broad definitional authority to the Commission without reference to investors' wealth, income, or sophistication.

Petitioners correctly identify the text as the starting point for the analysis, but they err in then departing from it. Pet. Br. 32. Section 18(b)(3) provides that a security is a "covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule." 15 U.S.C. 77r(b)(3); *see*

15 U.S.C. 77r(a)(1)(A) (designation as a "covered security" triggers preemption). Section 18(b)(3) further states that "[i]n prescribing such rule, the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors." 15 U.S.C. 77r(b)(3). The JOBS Act expanded the list of "covered securities" by reference to this definitional authority; it included securities offered pursuant to "a rule or regulation adopted pursuant to section 3(b)(2)" and "offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale." 15 U.S.C. 77r(b)(4)(D).

Absent from Sections 3(b)(2), 18(b)(3) or 18(b)(4) is any reference to investor sophistication, wealth, or income, which undermines the notion that Congress "clearly" required "qualified purchasers" to be sophisticated or "expressly limited" the Commission's authority to define "qualified purchaser." Pet. Br. 37, 69; NASAA Br. 20–21. The only limitation in those provisions—that the Commission act "consistent with the public interest and the protection of investors"—does not refer to sophistication or wealth. *See infra* pp. 21–22. Section 18 is thus "the antithesis of a *Chevron* step one statutory directive" because Congress declined to specify how the Commission should define "qualified purchaser." *Anna Jacques Hosp. v. Burwell*, 2015 U.S. App. Lexis 14274, at *21–22 (D.C. Cir. Aug. 14, 2015).

Petitioners erroneously assert that "it does not matter under *Chevron* step one" whether a statute authorizes an agency to define a term. Pet. Br. 42. But when

Congress grants express definitional authority to an agency, this Court usually moves to *Chevron* step two because Congress has signaled that it is leaving a specific gap that it wants the agency to fill. *E.g.*, *Pharm. Research & Mfrs. of America v. FTC*, 790 F.3d 198, 206–07 (D.C. Cir. 2015); *Wint v. Yeutter*, 902 F.2d 76, 81 (D.C. Cir. 1990); *Women Involved in Farm Economics v. USDA*, 876 F.2d 994, 1000–01 (D.C. Cir. 1989). None of the cases petitioners cite involves such a grant of authority. Pet. Br. 42–43 (citing, for example, *NRDC v. EPA*, 489 F.3d 1250, 1258 (D.C. Cir. 2007), where Congress included "a statutory definition" that was "clear and unambiguous as written"). To borrow petitioners' analogy, this is not a situation where the Commission interpreted the statutory term "yellow" to mean "purple"; this is a situation where Congress instructed the Commission to choose the color. Pet. Br. 43–44.

2. While dictionaries are not dispositive when Congress delegates definitional authority, the Commission's definition comports with the "ordinary meaning" of "qualified."

There are two problems with petitioners' reliance on dictionary definitions of "qualified." Pet. Br. 32–33. When Congress expressly authorizes an agency to define a term, the resulting definition is not improper because it may diverge from the "ordinary meaning" of the term. *Women Involved*, 876 F.2d at 1000. That is because a grant of definitional authority "necessarily suggests that Congress did *not* intend the word to be applied in its plain meaning sense." *Id.*; *see also Am. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 2015 U.S. App. Lexis 13340, at *14–*16 (D.C. Cir. Jul. 31, 2015) (disregarding dictionary definition of "fire" because "[g]eneral-usage dictionaries cannot invariably control our consideration of statutory language"). If a dictionary decides "the meaning of a term even when Congress expressly delegates authority to define the supposedly 'plain' term to an agency," it would give the statute "a new and unintended meaning" and "undermine Congress's ability to delegate the power to define terms." *Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 760 (7th Cir. 2014).

Moreover, the Commission's definition comports with the meaning of "qualified" that petitioners glean from various dictionaries—"limited, restricted, or modified." Pet. Br. 32 (internal quotation marks omitted). Under the Commission's rule, an investor's ability to purchase securities in Tier 2 offerings is "limited, restricted or modified" by, among other things, the requirement that the investor be an "accredited investor" or the aggregate purchase price not exceed 10% of the greater of the purchaser's "annual income or net worth." *Adopting Release*, 80 Fed. Reg. at 21895–96, 21899; 17 C.F.R. 230.251(d)(2)(C)(1), 230.256. Petitioners' assertion that the Commission imposed "no qualification on purchasers of particular securities" ignores this aspect of the rule. *E.g.,* Pet. Br. 43.

Petitioners also suggest that Congress unambiguously foreclosed a definition of "qualified purchaser" that refers to the characteristics of the securities being purchased. Pet. Br. 34–36, 40, 47. But this ignores how the rule functions and improperly elevates form over substance; the Commission could have repeated the requirements for Tier 2 offerings, including the purchase limitation, in its definition of "qualified purchaser" but it used a cross-reference, which effectively incorporates those requirements. In any event, the Commission's method of defining "qualified purchaser" (in Rule 256) by reference to Tier 2 offerings (in Rule 251) accords with Section 18, which authorized the Commission to define the term differently for "different categories of securities" and, more specifically, "with respect to the purchase or sale" of Section 3(b)(2) securities. 15 U.S.C. 77r(b)(3), 77r(4)(D)(ii).

3. The "public interest and the protection of investors" language in Section 18(b)(3) does not unambiguously foreclose the Commission's definition.

Petitioners read language into the Securities Act when they interpret the phrase "the public interest and the protection of investors" to mean a requirement that the Commission define "qualified purchaser" by reference to "wealth, income, and sophistication." Pet. Br. 38–42. If Congress had wanted to limit the Commission's definitional authority in the way petitioners prefer, it would have referred to "wealth, income, and sophistication" in Section 18(b)(3), 15 U.S.C. 77r(b)(3), or in Section 3(b)(2)(G), which authorizes the Commission to create additional "terms, conditions, or requirements" for Section 3(b)(2) securities, 15 U.S.C. 77c(b)(2)(G). Instead, it used a broader "public interest" and "protection of investors" formulation.

Petitioners' belief that the Commission's definition does "not promote investor protection" is an argument about policy—not statutory interpretation—and it disregards how amended Regulation A functions. Pet. Br. 40–41, 44. By tying the definition of "qualified purchaser" to the requirements for Tier 2 offerings, the

Commission protected investors in numerous ways, including through the purchase limitation described above and the significant reporting obligations for issuers. *Adopting Release*, 80 Fed. Reg. at 21861. These protections are in addition to those that apply to all Regulation A offerings, including qualification by Commission staff, civil liability for issuers, and "bad actor" disqualification. *Id.* Petitioners downplay or completely ignore these parts of the rule as well as the fact that ensuring consistency "with the public interest" requires the Commission to consider many factors, including Congress's intent to enhance the attractiveness of Regulation A and to give investors access to securities offered by small companies.

Petitioners' criticism of the process for verifying compliance with the investment limitation demonstrates how their argument departs from *Chevron* step one. *E.g.*, Pet. Br. 40– 41. The issue under step one is whether the text of Section 18(b)(3) speaks to a particular question, and nothing in that provision unambiguously answers the question of whether investors may self-verify their income or net worth. In any event, the Commission explained why it did not require issuers to verify income and net worth, pointing to "privacy issues and practical difficulties," the "package of investor protections" for Tier 2 offerings, and the concern that verification requirements would dissuade "issuers from selling to non-accredited investors in Tier 2 offerings." *Adopting Release*, 80 Fed. Reg. at 21817; *Proposing Release*, 79 Fed. Reg. at 3938 & n.146 (describing investors' reluctance to provide issuers with tax forms and bank statements that would be needed for verification).

B. The structure and purpose of the Securities Act confirm that Congress did not unambiguously foreclose the Commission's definition of "qualified purchaser."

Consideration of the Securities Act as a whole reinforces the conclusion that Congress did not require the Commission to define "qualified purchaser" in terms of investors' wealth, income, or sophistication. Petitioners' citation to a definition of "qualified purchaser" that Congress crafted in another part of NSMIA helps prove this point. Pet. Br. 51. Congress defined "qualified purchaser" for purposes of the Investment Company Act of 1940 to mean a natural person "who owns not less than $5 [million] in investments, as defined by the Commission." Section 209(b), 110 Stat. at 3434, codified at 15 U.S.C. 80a-2(a)(51)(A)(i). Congress could have created a comparable definition of "qualified purchaser" for Section 18(b)(3), but instead chose to leave the definitional work for the Commission.

The other provisions cited by petitioners (at 48–50) further demonstrate that Congress knows how to create tests of sophistication, wealth, or revenue when it wants to and that it did not do so here. For instance, in delegating authority to define "qualified purchaser" in Section 18(b)(3), Congress could have limited the Commission's power by including a cross-reference to the definition of "accredited investor" in Section 2(a)(15)(ii) of the Securities Act—which lists factors such as "financial sophistication, net worth, knowledge, or experience in financial matters." 15 U.S.C. 77b(a)(15)(ii); *see also* 17 C.F.R. 230.501(a)(5)–(6) (defining "accredited investor" in terms of net worth or annual income). Moreover, when Congress added

Section 28 to the Securities Act as part of NSMIA, which authorized the Commission to create Section 5 exemptions—authority that the Commission could have invoked to create Tier 2 securities even without the JOBS Act—Congress did not condition such exemptions on investors having a certain level of sophistication or wealth. Section 105(a), 110 Stat. at 3424, codified at 15 U.S.C. 77z-3 ("The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title [the Securities Act] or of any rule or regulation issued under this title, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.").

The JOBS Act is similar in this respect. Congress ordered the Commission to craft rules for Section 3(b)(2) securities "in accordance" with enumerated "terms and conditions," and it could have included tests of investor sophistication as such a condition. 15 U.S.C. 77c(b)(2)(A)–(F). Indeed, Massachusetts and NASAA urged Congress to do so. *See* Abshure Letter (Jun. 20, 2011) http://www.nasaa.org/ wp-content/ uploads/2011/11/ 0910-1-Abshure-H-R-1070-and-Comment-Letters.pdf. Or Congress could have made continued application of state law a condition for Section 3(b)(2) securities. But Congress chose a different path; it confirmed the Commission's authority to define "qualified purchaser" for Section 3(b)(2)—and thus for Section 18(a)'s preemptive application—without embedding concepts of investor sophistication into the statute or expressly preserving state laws.

Title III of the JOBS Act further undermines petitioners' contention that Congress insists on tests of investor sophistication as a prerequisite for preemption. Pet. Br. 44. In Title III, Congress created an exemption for "crowdfunding" securities that are "covered securities" for preemptive purposes and that investors can buy regardless of their sophistication, wealth, or income—albeit subject to the type of purchase limitations that the Commission adopted here. Sections 302 and 305, 112 Stat. at 315, 322, codified at 15 U.S.C. 77d(a)(6)(B)(i)–(iii), 15 U.S.C. 77r(b)(4)(C) (adding crowdfunding securities to list of "covered securities"). In deciding on the purchase limitations for non-accredited investors in Tier 2 offerings, the Commission looked to these limitations in Title III, which Congress deemed sufficient to protect crowdfunding investors without the extra layer of state registration and qualification laws. *Adopting Release*, 80 Fed. Reg. at 21817 (describing the purchase limitation as "consistent with similar maximum investment limitations placed on investors in Title III of the JOBS Act"). A comparison between Title III and the Commission's definition dispels the notion that sophistication, net worth, or income are the only congressionally approved forms of investor protection that will justify preemption. *Compare* 15 U.S.C. 77d(a)(6)(B)(i)–(ii) *with* 17 C.F.R. 230.256.[3]

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[3] The fact that Massachusetts and Montana law also employ purchase limitations in their respective exemptions from registration for crowdfunding securities undermines their argument that such limitations insufficiently protect investors. 950 MASS. CODE REGS. § 14.402(B)(13)(o); MONT. CODE ANN. § 30-10-105(22).

The Commission's rule—and its considerations of investor protection and capital formation—accords with the purpose of NSMIA and the JOBS Act. Congress enacted NSMIA to "promote efficiency and capital formation in the financial markets." H.R. CONF. REP. NO. 104-864 at 39 (Sept. 28, 1996). From the name of Title I of NSMIA—the "Capital Markets Efficiency Act of 1996"—to its mandate that the Commission consider in certain rulemaking "whether the action will promote efficiency, competition, and capital formation," it is apparent that Congress sought to "reduce the marginal cost of capital to firms" by, among other things, reallocating "regulatory responsibility between the Federal and state governments based on the nature of the securities offering." Sections 101, 106(a), 110 Stat. at 3417, 3424, codified at 15 U.S.C. 77b(b); H.R. CONF. REP. NO. 104-864 at 39. Sixteen years later, Congress enacted the JOBS Act to further help "small companies gain access to capital markets without the costs and delays associated with the full-scale securities registration process" and to revitalize Regulation A, which companies did not use due to the "imbalance between costs and benefits." H.R. REP. NO. 112-206, at 2–3.

The Commission's rule fulfills these objectives. It makes Regulation A "viable for small companies" by eliminating the costs of state-law compliance for Tier 2 offerings, which increases investment opportunities in small and emerging companies. H.R. REP. NO. 112-206, at 4. At the same time, the rule creates and leaves in place protections for investors—purchase limitations for non-accredited investors, enhanced disclosure requirements including audited financial statements, issuer eligibility requirements, "bad actor" disqualification, the Commission qualification process, and the antifraud protections of federal and state law.

Petitioners warn about disruption of the "nation's longstanding system of dual regulatory enforcement" caused by the Commission's rule, Pet. Br. 47, but Congress fundamentally modified that system in 1996. Congress further altered the balance in 2012 when it expanded the list of "covered securities" for which state registration and qualification laws are preempted. There is no doubt that Congress contemplated preemption when it enacted the JOBS Act. *See infra* pp. 31–34.

Nor is there any doubt that Congress authorized the Commission to determine the scope of preemption through rulemaking. Pet. Br. 46–47, 58 (claiming that the power to preempt is "reserved to Congress alone"). By hinging preemption on the term "covered security," and by authorizing the Commission to designate a security as a "covered security" through its definition of "qualified purchaser," Congress ensured that preemption would turn on Commission action. 15 U.S.C. 77r(b)(3). Petitioners' assertion that the Commission may not "wholly preempt state authority for a particular category of securities," Pet. Br. 58, cannot be reconciled with this statutory language, which even allows the Commission to vary its definition—and thus preemption—"with respect to different categories of securities." 15 U.S.C. 77r(b)(3). Congress reinforced this power when it expanded the list of "covered securities" in Section 18(b)(4)(D)(ii) by reference to Section 18(b)(3).

While it is enough that Congress expressly gave the power to preempt to the Commission in Section 18(b)(3), it is significant that this delegation of preemptive authority is not an outlier, as petitioners claim. Pet. Br. 9, 45 (stating that all other parts of Section 18(b) are "self-executing"). Preemption for Rule 506 offerings depends on "Commission rules or regulations issued under Section 4(2)." 15 U.S.C. 77r(b)(4)(E). Preemption for "nationally traded securities" also turns, in part, on Commission action. 15 U.S.C. 77r(b)(1)(B).

There is nothing "'cryptic'" about Congress's preemptive design in this context. Pet. Br. 47, quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). The *Brown & Williamson* case cited by petitioners provides a helpful contrast. Whereas the Supreme Court held there that Congress made a "consistent judgment to deny" the Food and Drug Administration the power to regulate tobacco products over the course of 35 years, Congress here expressly gave the Commission broad power to exempt securities from registration (Section 28), ordered the Commission to adopt rules in accordance with Section 3(b)(2), and authorized the Commission to preempt state law through its definition of "qualified purchaser." *Compare* 529 U.S. at 159–60 *with* 15 U.S.C. 77c(b)(2), 77r(b)(3), 77r(b)(4)(D), 77z-3.

C. The legislative history of NSMIA and the JOBS Act does not show that Congress precluded the Commission's definition.

Even though the text does not mention investor sophistication, wealth, or income, petitioners argue that the legislative history of NSMIA and the JOBS Act reveals Congress's intent to limit the Commission's definitional power. Pet. Br. 52–55. "Snippets of legislative history do not a law make," *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002), and those cited by petitioners do not show that Congress "prescrib[ed] a precise course of conduct other than the one chosen" by the Commission or that Congress clearly intended "to foreclose the [Commission's] interpretation," *Nat'l Treasury Employees Union v. FLRA*, 754 F.3d 1031, 1042 (D.C. Cir. 2014).

1. The Committee reports accompanying NSMIA do not indicate that Congress precluded the Commission's definition.

Petitioners' reliance on references to investor sophistication in two Committee reports accompanying NSMIA is misplaced for several reasons. Pet Br. 52–54, citing H.R. REP. NO. 104-622, at 31 (Jun. 17, 1996) and S. REP. NO. 104-293, at 15 (Jun. 26, 1996). To accept this legislative history as binding, the Court "would have to abandon altogether the text of the statute," which makes no reference to sophistication, wealth, or revenue. *Shannon v. United States*, 512 U.S. 573, 583 (1994); *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity [found] in the statute's text."). Because the text delegates definitional authority with only a general requirement of consistency with "the public interest and the protection of investors," rather than a specific limitation based on investor sophistication, wealth, or revenue, this is not "the very rare situation where the legislative history of a statute is more probative of congressional intent than the plain text." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003).

But even taking the legislative history on its face, the references in the Committee reports do not appear in the Conference report, which "is the most persuasive evidence of congressional intent after [the] statutory text itself." *Moore v. District of Columbia*, 907 F.2d 165, 175 (D.C. Cir. 1990) (en banc) (citation and quotation marks omitted). The Conference Report describes an intent to alter "a dual system of regulation that, in many instances, is redundant, costly, and ineffective" and that "tends to raise the cost of capital to American issuers of securities without providing commensurate protection to investors or to our markets." H.R. CONF. REP. NO. 104-864, at 39–40. But the Conference report does not mention investor sophistication, revenue, or wealth as a limitation on the Commission's power to define "qualified purchaser" and preempt state law. *See Holly Sugar Corp. v. Johanns*, 437 F.3d 1210, 1214 (D.C. Cir. 2006) (several committee reports, "[t]aken together," fell "far short of the extraordinary circumstances in which a statute's unambiguous language might not control" because the language in those reports did not appear in "the conference report—to which we ordinarily ascribe the most weight").

Furthermore, the references in the Committee reports are equivocal at most. The House report, in the paragraph preceding the reference to investor sophistication, states that the Committee "expected" the Commission to define "qualified purchaser" to include purchasers of "mortgaged-backed, asset-backed, and other structured securities" so that these securities will "be regulated exclusively by the Federal government." H.R. REP. NO. 104-622, at 31. This implies that Congress intended preemption to turn on the characteristics of the security being sold rather than the characteristics of the purchaser. The sentence following the reference to "investor sophistication" muddies the waters further. It suggests "that the Commission consider a definition of qualified purchaser not more restrictive" than the definition it embedded in the Investment Company Act." *Id.* at 31–32; *see* 15 U.S.C. 80a-2(a)(51)(A)(i). The Committee's "guidance" for a less restrictive limit implies that the Committee wanted the definition to encompass more investors, not less. Given "the clear language of the statute, selected and arguably ambiguous snippets of the legislative history are insufficient to undermine that language." *Indep. Bankers Ass'n of Am. v. Farm Credit Admin.*, 164 F.3d 661, 668 (D.C. Cir. 1999).

A final problem with petitioners' reliance on NSMIA's legislative history is that it must be construed in light of the JOBS Act. Congress did not stop legislating in 1996. Sixteen years later, it expanded the definition of "covered securities" by referring specifically to Section 18(b)(3) without requiring the Commission to define "qualified purchaser" by reference to sophistication, wealth, or income.

2. The history of the JOBS Act underscores Congress's intent to delegate definitional authority—and the power to preempt—to the Commission.

The history of Section 18(b)(4)(D) shows that Congress did not unambiguously foreclose the Commission's definition. As introduced, the bill that eventually became

Title IV of the JOBS Act did not contain any preemptive language. H.R. 1070, 112th Cong. (Mar. 14, 2011). A preemption provision that was added during committee consideration read:

> "A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to * * * (D) a rule or regulation adopted pursuant to Section 3(b)(2) and such security is—
>
> (i) *offered or sold through a broker or dealer*;
> (ii) offered or sold on a national securities exchange; or
> (iii) sold to a qualified purchaser as defined by the Commission pursuant to paragraph (3).

H. R. REP. NO. 112-206, at 12 (emphasis added). An amendment was introduced—and defeated—that would have eliminated the "broker or dealer" language and clarified that "state securities would only be preempted if the Regulation A security is sold on an exchange or sold only to a qualified purchaser." *Id.* at 4–5, 13. When the full House voted on the bill, the broker-dealer language was removed, and the "national securities exchange" and "qualified purchaser" language remained.

The decision to excise the broker-dealer exemption while retaining the "qualified purchaser" exemption confirms that Congress intended to give the Commission the authority to preempt state registration and qualification laws for Section 3(b)(2) securities. If Congress had sought to preserve all such state laws, it would have reverted to the original version of H.R. 1070 that contained no preemptive language. But it did not. If Congress wanted to curtail the Commission's ability to define "qualified purchaser" and preempt state law, it would have excised the "qualified purchaser" exemption along with the broker-dealer exemption. But it did not. And if Congress did not contemplate preemption, it would not have ordered "a study on the impact of State laws regulating securities offerings, or 'Blue Sky laws,' on offerings made under Regulation A." JOBS Act Section 402, 126 Stat. at 325.

Petitioners and amici rely heavily on the statement of a single legislator (Rep. Peters) regarding the broker-dealer language, which they believe reflects Congress's intent not to preempt state law. Pet. Br. 16, 55; House Members Br. 7; NASAA Br. 18, citing 157 Cong. Rec. H. 7229, 7231 (Nov. 2, 2011). But the cited statement is not illuminating—it simply confirms the removal of the broker-dealer exemption from the final text. In any event, "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012).

Eight of the 422 members of Congress who voted for H.R. 1070 echo petitioners' argument, pointing to the elimination of the broker-dealer language as evidence that Congress "decisively rejected" preemption. Members Amicus Br. 7. But Congress plainly did not reject all preemption since it expanded the list of "covered securities," which necessarily preempts more state law under Section 18(a). In any event, these amici "of course do not speak for the Congress *qua* the Congress," *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 219 n.19 (D.C. Cir. 2013), *aff'd* 135 S. Ct. 2076 (2015), and to the extent their brief can be construed as "subsequent legislative history," it "provides an unreliable guide to legislative intent," *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014) (internal quotation marks and citations omitted). Such subsequent legislative history is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law," and when the enacted law delegates definitional, and thus preemptive, authority without a requirement that the Commission incorporate tests of investor sophistication. *See PBGC v. LTV Corp.,* 496 U.S. 633, 650 (1990).

II. The Commission's definition, which is owed more than mere deference in light of the express delegation of definitional authority, satisfies *Chevron* step two because it comports with the statute and because the Commission offered a reasoned explanation for its definition.

Because the Securities Act does not unambiguously foreclose the Commission's definition, the Court moves to *Chevron*'s step two. And since Section 18(b)(3) is an express delegation of definitional authority, the deference afforded to the Commission is particularly high. The Commission's definition should be given controlling weight here because it is not manifestly contrary to the statute and the Commission reasonably explained how its definition advances the objectives of the JOBS Act.

A. The Commission's definition is given more than mere deference because Congress expressly delegated definitional authority.

When "Congress has explicitly left a gap for the agency to fill"—and Section 18 could not be any more explicit—"there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 476 U.S. at 834–44 & n.12. And when Congress delegates such "definitional and prophylactic rulemaking authority to the Commission," courts "owe the Commission's judgment 'more than mere deference or weight.'" *United States v. O'Hagan*, 521 U.S. 642, 667, 673 (1997), quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977). "[L]egislative regulations" adopted pursuant to such authority "are given *controlling* weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 476 U.S. at 843–44 & n.12 (emphasis added); *see also United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) ("When Congress has explicitly left a gap for an agency to fill * * * any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.").

Applying this "quite narrow" scope of review, this Court has afforded such "controlling weight" to definitions adopted pursuant to definitional authority. *TRAC v. FCC*, 801 F.2d 501, 510 (D.C. Cir. 1986). It has upheld regulations issued under a statute that gave an agency "great discretion to define statutory terms" where the petitioner failed to identify "any statutory language that unambiguously limits" that discretion. *Pharm. Research*, 790 F.3d at 205. And it has upheld regulations where a statute explicitly delegated "the authority to define, not merely to apply, the terms in question," which "signaled judicial deference." *Wint*, 902 F.2d at 81. Such "definitional regulations, because they implement expressly delegated standard-setting power, carry legislative effect," and are "controlling." *Id.*, citing *Chevron*, 467 U.S. at 844.[4]

Like the statutes in those cases, the Securities Act expressly delegates definitional authority. Moreover, that delegation of power resides in the midst of another express delegation: filling the gaps in the JOBS Act left by Congress when it mandated in Section 3(b)(2) that the Commission adopt rules adding a class of securities that would be exempt from Section 5. Thus, the Commission's definition of "qualified purchaser" is afforded "more than mere deference or weight"; it is "controlling" because it is not arbitrary, capricious, or manifestly contrary to the statute. *O'Hagan*, 521 U.S. at 673.

B. The Commission's definition is given controlling weight because it is not arbitrary, capricious, or manifestly contrary to the statute.

Petitioners disregard this high level of deference, and they contend that the Commission's definition was based on an impermissible construction of the statute and that the Commission did not explain why it defined "qualified purchaser" to

[4] *Accord Buongiorno v. Sullivan*, 912 F.2d 504, 508–09 (D.C. Cir. 1990) ("[W]hen Congress expressly delegates the authority to fill a gap in a statute, Congress speaks, in effect, directly, and says, succinctly, that it wants the agency to annotate its words"); *Women Involved,* 876 F.2d at 1000–02 (upholding definitional regulation where Congress explicitly authorized the agency to define terms); *Rush Univ. Med. Ctr.*, 763 F.3d at 760 ("When a statute specifically authorizes an agency to define a term, there is no need to consider whether the term is ambiguous and thus left to agency delegation. The logical assumption is that Congress thought there was work for the agency to do—namely, to define the covered time and activities."); *Henry Ford Health Sys. v. HHS*, 654 F.3d 660, 665 (6th Cir. 2011) ("An agency is at the apex of its administrative authority when Congress not only gives the agency general authority to implement a statute but also expressly asks the agency to define a specific phrase.").

mean investors to whom Tier 2 securities are offered or sold. Pet. Br. 58–63. Neither argument is persuasive—and the Commission satisfies *Chevron* step two—because the Commission's interpretation is based "on a permissible construction of the statute," *Chevron*, 467 U.S. at 843, and the Commission "reasonably explained how the permissible interpretation it chose is rationally related to the goals of the statute." *Vill. of Barrington*, 636 F.3d at 665 (internal quotation marks omitted). Similarly, the Commission offered "a reasoned explanation for why it chose" a definition of "qualified purchaser" that differs from one it proposed but never adopted more than a decade before Congress enacted the JOBS Act. *Id.* at 660.

1. *The Commission's definition is consistent with the Securities Act.*

Petitioners' contention that the Commission's rule is "'manifestly contrary to the statute,'" closely tracks their *Chevron* step one argument and fails for the same reasons. Pet. Br. 57, quoting *Chevron*, 467 U.S. at 843. Petitioners again argue that the statute requires the Commission to define qualified purchaser by reference to "purchasers' wealth, income, or sophistication." Pet. Br. 57. And petitioners again fail to identify any part of the statutory text—let alone its structure or purpose—that imposes such a requirement. *See supra* pp. 17–34.

Petitioners incorrectly assert that the Commission's definition is owed no deference because it preempts state law. Pet. Br. 29–30, 56–57. This Court has "rejected the argument that whenever a federal agency's exercise of authority will preempt state power, *Chevron* deference is inappropriate." *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1074 (D.C. Cir. 2008) (internal quotation marks omitted). Petitioners also rely on the "presumption against preemption." Pet. Br. 57; *see also* NASAA Br. 14, 19–20. But whatever the presumption's remaining vitality, it is overcome when a statute expressly preempts state law and authorizes an agency to decide the scope of the preemption. *New York v. FERC*, 535 U.S. 1, 18 (2002); *Wyeth v. Levine*, 555 U.S. 555, 575–76 & n.9 (2009). That describes Section 18, which is a "'clear and manifest'" statement of preemption of state registration and qualification laws—as well a "'clear and manifest'" statement of delegated authority to define "qualified purchaser," which has preemptive effect. Pet. Br. 57, quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).

2. *The Commission explained in detail why its definition advances Congress's objectives of promoting capital formation while protecting investors.*

Even though the Adopting Release discusses at length the rationale underlying the "qualified purchaser" definition, petitioners assert that "the Commission failed to provide a reasoned explanation" for its interpretation. Pet. Br. 59. Petitioners' contention is baseless because the Commission explained how its "final rules for Regulation A will provide a meaningful addition to the existing capital formation options of smaller companies while maintaining important investor protections." *Adopting Release*, 80 Fed. Reg. at 21813.

With specific regard to "qualified purchaser," the Commission thoroughly discussed why it adopted a definition "that reflects the particular characteristics of transactions exempt from registration pursuant to Section 3(b)(2)." *Adopting Release*, 80 Fed. Reg. at 21859. It explained that linking the definition to the requirements for Tier 2 offerings creates investor protections, such as (1) audited financial statements in offering circulars and the filing of annual audited statements with the Commission; (2) annual and semiannual reporting with additional requirements for interim updates, which assures a continuous flow of information; (3) the requirement that investors be accredited investors or subject to the 10% purchase limitation. *Id.* at 21858, 21861. And the Commission explained how these protections are layered atop those applicable to all Regulation A offerings, such as the Commission's qualification process, issuer liability under Section 12(a)(2), issuer eligibility requirements, "bad actor" disqualification, federal antifraud statutes, and the states' power "to investigate and bring enforcement actions respect to fraudulent transactions." *Id.* at 21860–62.

The Commission further explained how its definition advances Congress's goal of revitalizing Regulation A. The Commission described how Regulation A is rarely used and how the GAO study, as well as myriad comments, pointed to the costs and uncertainty of the state qualification process as a central reason why issuers preferred other exemptions. *Adopting Release*, 80 Fed. Reg. at 21858–59. The Commission described its concern that absent preemption, the costs of complying with state law "may deter issuers from using amended Regulation A, which could significantly limit the impact of the exemption as a tool for capital formation." *Id.* at 21861.

The Adopting Release's discussion of the different treatment of Tier 1 and Tier 2 offerings illustrates the Commission's reasoned approach in this rulemaking. The

Commission addressed why it chose not to define "qualified purchaser" so as to preempt state law for Tier 1 offerings—even though several commenters urged that outcome. *Adopting Release*, 80 Fed. Reg. at 21858, 21863. The Commission explained that "the requirements for Tier 1 issuers create a category of securities that is more local in character—*i.e.*, they are likely to be smaller companies whose businesses revolve around products, services, and a customer base that will more likely be located within a single state or region." *Id.* at 21861. Tier 2 offerings, by contrast, are more likely to be "national in character" because the higher costs associated with the federal requirements for those offerings "will necessitate that such offerings be offered and sold on a larger and more national scale," which in turn raises the costs of complying with a greater number of state laws. *Id.* at 21861. The Commission concluded that issuers would ultimately have a "meaningful choice": no state-law preemption with reduced federal compliance costs (Tier 1) or limited preemption plus additional costs of complying with enhanced federal requirements (Tier 2). *Id.*

This and other explanations of how the Commission accounted for investor protection and capital formation while advancing the objectives of the JOBS Act (and NSMIA) is all that is needed for *Chevron* step two. Petitioners disagree with the Commission's policy choice; they believe it is more important for states to conduct a merit review, even though the costs of doing so have been—and may continue to be—a deterrent for issuers contemplating use of Regulation A. But a difference of opinion about policy does not mean that an interpretation fails *Chevron* step two. To uphold a rule, Court "need not conclude that the [Commission's] interpretation of the [s]tatute is 'the only one it permissibly could have adopted,' *Chevron*, 467 U.S. at 843 n.11, or 'even the interpretation deemed *most* reasonable by the courts,' *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)." *Nat'l Treasury Employees Union*, 754 F.3d at 1042. Rather, the Court must should defer here to the Commission's explanation of its "qualified purchaser" definition because it is reasonable.

3. The Commission explained why it did not adopt the same definition of "qualified purchaser" that it had proposed in 2001 but never adopted.

Petitioners' focus on a definition of "qualified purchaser" that the Commission never adopted is misplaced. In 2001, the Commission proposed defining "qualified purchaser" to mean "accredited investor," which would have inserted concepts of "financial sophistication" into the "qualified purchaser" definition. *Defining the Term "Qualified Purchaser*, 66 Fed. Reg. 66839, 66840–45 (Dec. 27, 2001). The Commission never acted on the proposal, which Massachusetts and NASAA, among others, opposed. *See* Comment Letters, http://www.sec.gov/rules/proposed/s72301.shtml.

Petitioners' argument about the Commission's supposedly unexplained departure from its initial interpretation rests on a faulty premise since there was no "initial agency interpretation" to begin with. Pet. Br. 59–62 (internal quotation marks omitted). "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations it considers most sound." *CFTC v. Schor*, 478 U.S.

833, 845 (1986). Courts may not "tax an agency with 'inconsistency'" simply because "it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment." *Id.*

Even if the 2001 proposal reflected the Commission's initial interpretation and even if the definition challenged here could be construed as a change, "courts have long recognized that '[a]n initial agency interpretation is not instantly carved in stone.'" *Anna Jacques Hosp.*, 2015 U.S. App. Lexis 14274, at *37, quoting *Chevron*, 467 U.S. at 863–64. A change is "not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statue with the implementing agency." *Nat'l Cable &Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks omitted). An agency can depart from a past interpretation so long as it offers a reasoned explanation for doing so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009).

The Commission explained itself here, stating that "[t]he enactment of the JOBS Act in 2012, and in particular its addition of Section 18(b)(4)(D)(ii) to the Securities Act, has caused us to consider the definition of qualified purchaser within the context of transactions under the new Section 3(b)(2) exemption." *Adopting Release*, 80 Fed. Reg. at 21860. Whereas the 2001 proposal "contemplated that state securities review and qualification requirements would be preempted" for *all* securities and transactions, the Commission's "rules to implement Title IV of the JOBS Act provide for preemption in the more limited circumstances in which the requirements of Section 3(b)(2) and the rules adopted thereunder are satisfied." *Id.* at 21859.

In light of this "new and different context," the Commission explained that "[w]hile it may have been appropriate to focus on attributes of the purchaser when crafting a 'qualified purchaser' definition that would have applied in a broad set of possible transactions, as in the 2001 Proposing Release, the definition being adopted today serves a different purpose because it applies only in Regulation A offerings." *Adopting Release*, 80 Fed. Reg. at 21859–60. Petitioners label this "a non sequitur," Pet. Br. 63, but the Commission's conclusion follows from its premise. For the 2001 proposal, "the nature of the investor rather than the investment [was] the critical feature" because the definition "would be the same regardless of the nature of the security being offered or sold." 66 Fed. Reg. at 66845. But when the Commission defined "qualified purchaser" for Tier 2 offerings, it referred to "the requirements applicable to Tier 2 offerings." *Adopting Release*, 80 Fed. Reg. at 21860. The Commission's decision to define "qualified purchaser" by reference to Tier 2 offerings when its definition would only apply to those offerings is logical—and is consistent with its power to define the term "differently with respect to different categories of securities." 15 U.S.C. 77r(b)(3).

The difference in context also explains the difference in the method of investor protection. The universality of the 2001 definition meant that it would cover some securities for which there were minimal disclosure requirements, no Commission qualification process, and significant restrictions on resale. In those circumstances, "a qualified purchaser definition should include investors that are sophisticated and capable of protecting themselves." *Adopting Release*, 80 Fed. Reg. at 21859. For Tier 2 securities, by contrast, issuers must disclose a significant amount of information, including audited financial statements, in an offering circular that must be qualified by Commission staff. And investors are free to resell the securities aided by a continuous flow of information from the annual and semi-annual reporting requirements. *Id.* at 21860. In light of Congress's objective to facilitate access to the capital markets—for issuers *and* investors—the Commission provided a reasonable explanation for why it decided to move away from a universal definition of "qualified purchaser" to a Tier 2-specific definition that protects a broad range of investors while still permitting them to engage in the market for Regulation A securities. *Id.*; *see also id.* at 21816–17.

III. The Commission satisfied its obligation under Section 2(b) to consider the effects of its rule on efficiency, competition, and capital formation, as well as the impact of its rule on investors.

Petitioners misunderstand the Commission's obligation under Section 2(b) of the Securities Act, erroneously labeling it as a "cost-benefit analysis" requirement and downplaying efficiency, competition, and capital formation as mere "other factors" the Commission must consider. Pet. Br. 31, 63–68. Section 2(b) states that when "the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. 77b(b), cited in *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369. The text contemplates that the Commission, as part of its public interest analysis, will "determine as best it can the economic implications of the rule" by considering whether it will promote efficiency, competition, and capital formation. *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).

The Commission's economic analysis here should be upheld under the "highly deferential" arbitrary-and-capricious standard, *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260 (D.C. Cir. 2004), because the Commission articulated "a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).[5] Petitioners do not fault the Commission's analysis of the rule's effects on efficiency, competition, and capital formation, but rather focus solely on the Commission's analysis of how its "qualified purchaser" definition will affect investors. But the supposed deficiencies in the Commission's analysis do not exist because the Commission explained in depth why its definition of "qualified purchaser" protects investors while fulfilling Congress's objectives.

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[5] Petitioners refer to Section 2(b) as a "procedural" requirement, Pet. Br. 28, 63–64, but they do not contend that the Commission violated the APA's provisions for notice-and-comment rulemaking or any other procedural standards. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012), citing 5 U.S.C. 553.

A. Petitioners do not object to the Commission's analysis of the rule's effect on efficiency, competition, and capital formation.

Petitioners pay scant attention to the Commission's overall analysis of the economic factors mandated by Section 2(b). The Commission considered "the broader impact of amended Regulation A on capital formation" against the backdrop of (1) the JOBS Act, which mandated that the Commission adopt rules "to expand the capital raising options available to smaller and emerging companies," and (2) a market where few issuers utilized Regulation A due to its costs. *Adopting Release*, 80 Fed. Reg. at 21865, 21867–71. Starting from this baseline, the Commission assessed whether its rule would encourage issuers to choose Regulation A over other options (such as Regulation D) and analyzed how each aspect of its rule would affect competition, efficiency, and capital formation. *Id.* at 21865–66, 21872–88.

Petitioners focus on what they believe is the Commission's inadequate consideration of the costs to investors of preemption, implying that investor protection and capital formation are opposites. Pet. Br. 64; *accord* NASAA Br. 29–31. But they are closely linked, as the Commission explained, because "the level of investor protection resulting from the final rules is an important consideration that could affect the ultimate use and success of amended Regulation A." *Adopting Release*, 80 Fed. Reg. at 21865. If preemption for Tier 2 offerings "leads to undisclosed risks or misconduct in the offering process, then investors may be unwilling to participate in those types of Regulation A offerings" and if "investors require higher returns because of a perceived increase in the risk of fraud as a result of preemption, issuers may face a higher cost of capital," which may discourage them from using Regulation A. *Id.* at 21865, 21867.

In essence, petitioners contend that the Commission violated Section 2(b)—which compels it to pay attention to competition, efficiency, and capital formation—by paying too much attention to competition, efficiency, and capital formation and not enough to investor protection. But the Commission considered all of these factors as part of its analysis—paying particular attention to the impact of its "qualified purchaser" definition on investors—and petitioners' reliance on prior cases applying Section 2(b) and parallel securities law provisions is misplaced. Pet. Br. 66–68. In those cases, the Court found fault not in the Commission's assessment of investor protection by itself, but in its overall analyses of efficiency, competition, and capital formation. *E.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177–78 (D.C. Cir. 2010); *Business Roundtable*, 647 F.3d at 1149–50.

B. The Commission properly considered the effects of preemption on investors as part of its overall economic analysis.

Contrary to petitioners' assertion that the Commission "provided no reasoned analysis" of the effect of preemption on investors, Pet. Br. 64, the Commission thoroughly evaluated the rule from their perspective, in accordance with the statutory directive that it adopt rules that are consistent "with the public interest and the protection of investors." 15 U.S.C. 77c(b)(2)(G); 15 U.S.C. 77r(b)(3). But unlike petitioners, the Commission assessed the benefits to investors of state registration and qualification laws along with the benefits to issuers—and investors—of preempting those laws. The result is an analysis of how "the final rules strike appropriate balance between mitigating cost and time demands on issuers and providing investor protections." *Adopting Release*, 80 Fed. Reg. at 21886–87.

The Commission recognized the benefits of state merit review. Such review, the Commission stated, "may aid in detecting fraud and facilitating issuer compliance" and provides a different type of protection from the disclosure-based regime of the federal securities laws. *Adopting Release*, 80 Fed. Reg. at 21886-87. The Commission explained that it could not quantify the benefits of state review—petitioners do not attempt to do so either—and could not predict how preemption would "affect the incidence of fraud that may arise in Regulation A offerings." *Id.* The Commission nevertheless observed that "state qualification is more likely to have incremental investor protection benefits in Tier 1 offerings relative to Tier 2 offerings" because Tier 1 offerings are more likely to be "concentrated in fewer states and to benefit from the geographic-specific information of state regulators." *Id.* at 21887.

The Commission then described how state laws impose costs on issuers, particularly for Tier 2 offerings that likely will have a higher offering amount and be sold in a larger number of states, which means that they must proceed through and comply with a greater number of state merit-review processes. *Adopting Release*, 80 Fed. Reg. at 21868, 21886. Citing the GAO report, the Commission noted that costs of "compliance with state securities review and qualification requirements was one of the factors that appeared to have influenced the infrequent use of Regulation A by small businesses." *Id.* at 21886. Preemption, the Commission explained, "will likely reduce issuers' costs," a conclusion that petitioners do not dispute. *Id.* NASAA asserts that the increase in the offering limit obviates the need for preemption, citing the uptick in Regulation A offerings following the 1992 increase in the offering limit. NASAA Br. 28. But the Commission explained that preemption was necessary despite the increase in the offering amount because of the current state of the market, in which there were only 26 qualified Regulation A offerings from 2012 to 2014, and the assertions in the GAO Report and in several comment letters that state laws would continue to be a barrier even for those businesses seeking to raise up to $50 million. *Adopting Release*, 80 Fed. Reg. at 21861–62, 21868.

Having described the costs and benefits of state merit review, the Commission evaluated the protections afforded to investors if those state laws were preempted for Tier 2 offerings. The Commission discussed the general protections provided by the Commission qualification process,[6] the issuer eligibility requirements, and federal and state antifraud enforcement authority. And it emphasized that Tier 2 offerings must

[6] NASAA misreads the Commission's statement that, "[c]ompared with the baseline of existing Regulation A," there may be "an increase in the burden on Commission resources." *Adopting Release*, 80 Fed. Reg. at 21887. Saying, as the Commission did, that Commission staff may spend more time reviewing a greater number of filings is not the same thing as saying (NASAA Br. 32) that "the Commission does not have the resources to adequately review" those filings.

comply with enhanced and continuing disclosure requirements that are "akin to what is required of smaller reporting companies in a prospectus for a registered offering," which benefits investors by facilitating "more informationally efficient pricing and better liquidity for amended Regulation A securities." *Adopting Release*, 80 Fed. Reg. at 21830, 21866, 21883, 21887. Moreover, the Commission evaluated the "potential investor protection benefits as well as costs from imposing investment limits in Regulation A offerings," concluding, for instance, that even though the 10% purchase limitation for non-accredited investors in Tier 2 offerings could deter capital formation and restrict potential investor gain, the limitation "is an appropriate means of protecting investors while promoting efficiency, competition, and capital formation." *Id.* at 21877. The Commission did not apply an investment limitation for Tier 1 offerings, even though doing so would "marginally enhance investor protection" in light of the "less extensive disclosure and transaction requirements" for Tier 1 offerings, because state registration and merit- review requirements would continue to govern Tier 1 offerings. *Id.* at 21877–78.

The Tier 2 requirements, the Commission concluded, "reduce the need for, and the expected benefits of, state review." *Adopting Release*, 80 Fed. Reg. at 21887. By contrast, the Commission reasoned, "state qualification is more likely to have incremental investor protection benefits" for Tier 1 offerings in large part because they are more likely to be local in character, where the knowledge of state regulators will have the greatest marginal benefit for investors. *Id.* at 21861–62, 21887. The

Commission noted the trade-offs: issuers who take advantage of the higher limits for Tier 2 offerings are required to provide more extensive and ongoing disclosures, and preemption for those offerings "should lower the compliance burdens imposed on issuers, and partly offset the costs of the increased disclosure and transactional requirements." *Id.* at 21887. Set against the backdrop of the JOBS Act, the Commission reasoned that the marginal reduction in investor protection caused by the preemption of state laws was justified by the benefit of reduced compliance costs for issuers of Tier 2 offerings. *Id.*

Given the thoroughness of this discussion, petitioners' "arbitrary-and-capricious challenge boils down to a policy disagreement" with the Commission. *Public Citizen*, 364 F.3d at 1263. But petitioners' disapproval of the Commission's policy choice does not mean that the Commission failed to reasonably explain why it made that choice. *Id.* Similarly, the fact that the Commission discussed, but disagreed with, the views of commenters about how best to protect investors while encouraging capital formation does not mean that the Commission "ignored commenter concerns." *Compare* Pet. Br. 64 *with Adopting Release*, 80 Fed. Reg. at 21886 n.1026.

Petitioners criticize the Commission for not "showing that the cited factors will actually mitigate the identified costs of preemption." Pet. Br. 67. NASAA similarly criticizes the Commission for relying on "little to no evidence" regarding the costs of state-law compliance and state-law preemption. NASAA Br. 26–27. Given the dearth of Regulation A offerings in the past decade, however, it should not be surprising that the Commission lacked "comprehensive, independent data" about costs of preemption for investors and the costs of state-law compliance for issuers. *Adopting Release*, 80 Fed. Reg. at 21886; *see also id.* at 21864 (cautioning that "[m]any of the benefits and costs discussed below are difficult to quantify when analyzing the likely effects of the final rules on efficiency, competition, and capital formation"). In any event, the Commission need not quantify all implications of preemption—Section 2(b) does not require the Commission "to measure the immeasurable." *Nat'l Assn. of Mfr.,* 748 F.3d at 369 (internal quotations omitted). When quantitative data is not available—and neither petitioners nor amici identify any that the Commission missed—the Commission's careful "discussion of unquantifiable benefits fulfills [the] statutory obligation to consider and evaluate potential costs and benefits." *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013).

Moreover, in criticizing a supposed lack of evidence, petitioners disregard that Congress ordered the Commission to adopt a rule that would revitalize Regulation A. As this Court noted in *National Association of Manufacturers*, the Commission is justified in assuming the benefit Congress intended and invoking that benefit "to justify each of its discretionary choices." 748 F.3d at 369. Petitioners seem to presume that offerings under the amended Regulation A will be fraudulent, Pet. Br. 64, but it is clear that Congress valued Regulation A since it enacted the JOBS Act to incentivize its use. Moreover, petitioners appear to ignore that investors benefit when they have access to a "broader range of investment opportunities in the Regulation A market," which may "result in a more efficient allocation of investor capital," particularly when enhanced disclosure requirements enable investors to better evaluate the issuer and the offering. *Adopting Release*, 80 Fed. Reg. at 21865, 21874–75, 21877.

Petitioners can only speculate about whether an increase in Regulation A offerings will necessarily lead to an increase in fraud, and their analogy to Rule 506(b) offerings is especially inapt because of the differences between the two exemptions. Pet Br. 63–64; NASAA Br. 30–31. While issuers of Tier 2 securities must obtain Commission qualification of an offering statement, which includes an offering circular that makes significant disclosures to investors and contains audited financial statements, Rule 506(b) issuers face no such disclosure requirements and need not obtain Commission qualification before selling securities. *Compare* 17 C.F.R. 230.252–253 *with* 17 C.F.R. 230.502(b). Moreover, issuers in Tier 2 public offerings must comply with ongoing reporting obligations, while issuers in private offerings under Rule 506(b) do not have similar obligations. 17 C.F.R. 230.257(b).

C. The Commission adequately considered NASAA's coordinated review process as an alternative to preemption.

Contrary to petitioners' and NASAA's view, the Commission closely considered "state review under NASAA's coordinated review program" as an alternative to preempting state registration and qualification laws for Tier 2 offerings, *Adopting Release*, 80 Fed. Reg. at 21887, and "reasonably explain[ed]" why it rejected this alternative, *Vill. of Barrington*, 636 F.3d at 665. The Commission recognized that coordinated review might "reduce processing time and streamline certain state requirements" for issuers, lowering the costs of an offering, but it reasoned that even a streamlined process "would add cost and complexity * * * when compared to Commission review and qualification alone." *Adopting Release*, 80 Fed. Reg. at 21887*; accord id.* at 21861 (expressing concern that even if the program functioned properly, "state securities law registration and qualification requirements would be unnecessarily duplicated for, and impose unnecessary costs on, securities issued in Tier 2 offerings," which could deter use of Regulation A). Moreover, where "disclosure or merit review" laws of "participating jurisdictions impose more extensive requirements on the issuer than Commission rules"—as is the case in Massachusetts and Montana—"some issuers may incur additional expenses or require additional time to address comments." *Id.* at 21887.

The novelty of this review process factored heavily into the Commission's decision to reject it as an alternative for Tier 2 offerings. Because few issuers had used the program when the Commission adopted the rule, little evidence existed "to evaluate the effectiveness and timeliness of coordinated review." *Adopting Release*, 80 Fed. Reg. at 21887. As the Commission explained, there was uncertainty about "whether the program will be able to address the concerns related to state securities law compliance identified by the GAO Report and commenters, and whether the program can continue, as contemplated, in the face of numerous filings by issuers that seek to participate in the streamlined process." *Id.* at 21861.

The opinion of a single Tier 1 issuer that went through the process did not assuage the Commission's concern about how the process would function for a larger number of Tier 2 offerings. Contrary to NASAA's assertion (Br. at 27–28), the Commission discussed the comment submitted by Groundfloor Finance, which is making a $545,000 Tier 1 offering in nine states, including its qualitative arguments about the process and its quantitative estimates of the compliance costs. *Adopting Release*, 80 Fed. Reg. at 21857–58 nn.772, 783, 797; *id.* at 21861 nn. 828–29; *id.* at 21886–87 & nn. 1023, 1026. But this single data point does not offer substantial evidence about whether the process will streamline costs for Tier 2 issuers that are offering a higher amount of securities in a greater number of states such that the process is a viable alternative to preemption. *Id.*

Petitioners ignore that the Commission left the door open to future consideration of the coordinated review process. The Commission observed that new data from coordinated reviews for Tier 1 offerings—including for issuers like Groundfloor—would aid the Commission's "future evaluation of whether such a program could effectively operate within the context of larger, more national Tier 2 offerings." *Adopting Release*, 80 Fed. Reg. at 21887; *accord id.* at 21809, 21813 (discussing future review of the impact of Tier 2 offerings on capital formation and investor protection). Absent such data, however, the Commission reasonably chose preemption over an unproven process. This decision accords with Congress's goal of revamping Regulation A, particularly given the concerns about the costs of state-law compliance expressed by commenters and the GAO report. *See, e.g.*, *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) (an agency need only give "some reason within its broad discretion" for rejecting a reasonable alternative).

CONCLUSION

The Court should uphold the provision of the rule amending Regulation A that defines "qualified purchaser" for purposes of Tier 2 offerings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,926 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface—Garamond, 14 point—using Microsoft Word.

/s/ *Jeffrey A. Berger*

September 25, 2015 Jeffrey A. Berger

CERTIFICATE OF SERVICE

I certify that on September 25, 2015, I electronically filed the Securities and Exchange Commission's Initial Brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, which will send notification of the filing to all counsel required to be served, including the counsel for appellants/petitioners listed below, who will also be sent courtesy copies via UPS:

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