State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

March 1, 2023

Sent via email

The Honorable Bernie Sanders
Chairman
Committee on Health, Education, Labor, and Pensions
United States Senate
332 Dirksen Building
Washington, D.C. 20510

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
United States House of Representatives
2462 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate
455 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
United States House of Representatives
2328 Rayburn House Office Building
Washington, D.C. 20515

Dear Senator Sanders, Senator Cassidy, Representative Foxx, and Representative Scott:

We write in opposition to the joint resolution introduced by Senator Mike Braun and Representative Andy Barr under the Congressional Review Act ("CRA") to overturn the Department of Labor's ("DOL") 2022 rule, titled *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822 (Dec. 1, 2022) ("Final Rule"), issued pursuant to the DOL's authority under the Employee Retirement Income Security Act of 1974 ("ERISA"). Congress should reject the joint resolution.

The joint resolution is just the latest in a years-long campaign to obscure these facts: climate change is real and impacts corporate operations; issues like diverse workforces and cybersecurity protections do affect the bottom line; and sound corporate governance safeguards

returns.[1] The resolution is part of a broad pattern of actions taken to limit or prohibit the consideration of environmental, social, and governance ("ESG") factors in investment decision-making. These actions have included, among other things, initiating investigations[2]; proposing and enacting legislation to circumscribe or interfere with public pension fund investment decision-making[3]; and proposing and enacting legislation and policies that prohibit state entities from transacting with companies that "boycott" certain industries.[4] The result has been increased risks and costs to retirement plan beneficiaries caught in the crossfire.[5]

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[1] *See, e.g.*, Tensie Whelan, et al., *ESG & Fin. Performance: Uncovering the Relationship by Aggregating Evid. From 1,000 Plus Studies Publ. between 2015-2020* 10 (Feb. 2021), https://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-sustainable-business/research/research-initiatives/esg-and-financial-performance ("Our analysis of more than 1,000 research papers exploring the linkage between ESG and financial performance since 2015 points to a growing consensus that good corporate management of ESG issues typically results in improved operational metrics such as [return on equity], [return on assets], or stock price."); McKinsey & Co., *Diversity Wins: How Inclusion Matters* (May 19, 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters ("The most diverse companies are now more likely than ever to outperform less diverse peers on profitability."); Nat'l Ass'n of Corp. Dirs., *Cyber-Risk Oversight 2020: Key Principles & Prac. Guidance for Corp. Bds.* 6 (2020), http://isalliance.org/wp-content/uploads/2020/02/RD-3-2020_NACD_Cyber_Handbook__WEB_022020.pdf ("A serious attack can destroy not only a company's financial health but also have systemic effects causing harm to the economy as a whole and even national security."); Grant Thornton, *Corp. Governance & Co. Perform.* 5, 10 (2019), https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/documents/corporate-governance-and-company-performance.pdf.

[2] *See, e.g.*, Will Hild, Opinion, *End Vanguard's ESG Meddling with Utils.*, Wall St. J., Dec. 1, 2022, https://www.wsj.com/articles/end-vanguards-esg-meddling-with-utilities-11669938471; Letter from Mark Brnovich, Ariz. Atty. Gen. to Laurence D. Fink, CEO, BlackRock Inc. (Aug. 4, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf.

[3] Ropes & Gray, State Initiatives (Feb. 17, 2023), https://www.ropesgray.com/en/navigating-state-regulation-of-esg/state-initiatives (chart tracking state legislation promoting and restricting use of ESG factors and targeting companies "boycotting" certain industries).

[4] *Id.*

[5] *See* Daniel G. Garrett, Ivan T. Ivanov, *Gas, Guns, & Govs.: Fin. Costs of Anti-ESG Policies* 1 (Jan. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366 ("[W]e show that governments dependent on less sustainable economic activity may impose additional costs on both financial intermediaries and taxpayers when attempting to slow ESG adoption," observing that Texas's anti-ESG laws have resulted in "higher uncertainty and higher borrowing costs in bond markets" for municipalities.); Ind. Legisl. Servs. Agency, Off. of Fiscal & Mgmt. Analysis, *Fiscal Impact Stmt. for HB 1008* (Feb. 4, 2023), https://iga.in.gov/legislative/2023/bills/house/1008#document-39a82eb7 ("Based on an estimate by the Indiana Public Retirement System (INPRS), the bill [prohibiting INPRS from working

The Final Rule amends two rules that were also part of this broader anti-ESG movement, which the DOL rushed through in the waning months of the Trump administration.[6] Conducting stakeholder outreach following the change in presidential administrations, the DOL learned that the prior rules "may have inadvertently caused more confusion than clarity," and had, in fact, chilled investment managers from considering ESG factors in their investment decision-making.[7] Following a sixty-day comment period, with more than 97% of comments in support of the proposed changes,[8] and more than a year of consideration, the DOL issued the Final Rule on December 1, 2022.[9]

As the overwhelming commenter support underscores, the Final Rule corrects flaws in the 2020 rules and should remain in place.[10] Consistent with ERISA, the Final Rule prohibits fiduciaries from "subordinat[ing] the interests" of participants "to other objectives," or from "sacrific[ing] investment return or tak[ing] on additional investment risk to promote benefits or goals unrelated to" participants' interests.[11] In contrast to the 2020 rules, which sought to effectively prevent consideration of ESG factors by imposing overly onerous standards, the Final Rule acknowledges that such factors can be relevant to investment decision-making and, where relevant, should be part of that evaluation.[12]

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with investment managers that use ESG factors] could result in reduced aggregated investment returns for defined benefit and defined contribution funds managed by INPRS by $5.7B over the next 10 years.").

[6] Fiduciary Duties Regarding Proxy Voting & S'holder Rts., 85 Fed. Reg. 81,658 (Dec. 16, 2020) (rule finalized three months after proposal); Fin. Factors in Selecting Plan Invs., 85 Fed. Reg. 72,846 (Nov. 13, 2020) (rule finalized five months after proposal).

[7] Prudence & Loyalty in Selecting Plan Invs. & Exercising S'holder Rights, 86 Fed. Reg. 57,272, 57,284-285, 57,288 (proposed Oct. 14, 2021) ("2021 Proposed Rule").

[8] Eric Pitt, et al, *Pub. Comments Overwhelmingly Support the U.S. Labor Dep't Proposed Rule Addressing the Inclusion of ESG Criteria & Proxy Voting in ERISA-Governed Ret. Plans* 1 (Jan. 25, 2022), https://www.ussif.org/Files/Public_Policy/DOL_Comment_Analysis_1.25.22.pdf

[9] Prudence & Loyalty in Selecting Plan Inv. & Exercising S'holder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022).

[10] *See, e.g.*, Letter from Cal. Atty. Gen. Rob Bonta, et al to U.S. Dep't of Labor, Off. of Regs. & Interpretations, Emp. Benefits Sec. Admin. (Dec. 13, 2021), https://www.regulations.gov/comment/EBSA-2021-0013-0715.

[11] 87 Fed. Reg. at 73,885.

[12] *Id.*; *see also* Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good?* 21-22 (Mar. 20, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3557432 ("Should institutional investors be using ESG related information in making investment decisions? The answer is a simple yes, if it [is] assumed that they have reason to believe they can increase risk adjusted expected returns by doing so.").

The Final Rule's recognition of the potential relevance of ESG factors to investment evaluations is amply supported by data.[13] Perhaps the most obvious example is climate change, an accelerating crisis that is already significantly affecting and will continue to affect corporate operations. Businesses will continue to endure both physical impacts, like severe hurricanes and brutal droughts, and policy changes, such as restrictions on carbon emissions and investments in low-carbon industries.[14] Companies are also facing increasing regulation and scrutiny for their cybersecurity and privacy practices, as well as their labor relations.[15] And studies show connections between sound governance practices and higher corporate performance.[16] In short, the consideration of ESG factors may be essential to the risk-return analysis of an investment, and the Final Rule acknowledges that fact.

The arguments against the Final Rule cannot survive even the barest of scrutiny. Opponents of the rule resort to scaremongering by mischaracterizing what the Final Rule does. Despite claims to the contrary, the Final Rule provides no "free pass" for ERISA fiduciaries to forego financial returns[17]: consistent with ERISA, the Final Rule maintains as its lodestar the primacy of the financial interests of retirement plan beneficiaries.[18] The Final Rule merely clarifies what the 2020 rules tried to obscure: that ESG factors can and often do affect the bottom

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[13] *See, e.g.*, Whelan, *supra* note 1, at 10.

[14] *See* Letter from Rob Bonta, Cal. Atty. Gen., et al. to Regulatory Secretariat Div., U.S. Gen. Servs. Admin. 5-8 (Feb. 13, 2023) (describing additional climate-related physical and transition risks to corporations); Letter from Rob Bonta, Cal. Atty. Gen., et al to Vanessa Countryman, Sec'y, SEC 5-15 (June 17, 2022) (describing climate-related physical and transition risks to corporations).

[15] Nat'l Assn. of Corp. Dirs., *supra* note 1, at 6; McKinsey, *supra* note 1.

[16] Grant Thornton, *supra* note 1, at 5, 10; Deloitte, *Good Governance Driving Corp. Perform.? A Meta-Analysis of Acad. Rsch. & Invitation to Engage in the Dialogue* (Dec. 2016), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/risk/deloitte-nl-risk-good-governance-driving-corporate-performance.pdf#:~:text=Deloitte%20and%20Nyenrode%20aim%20to%20contribute%20to%20the,concepts%20as%20applied%3A%20Performance%3A%20long-term%20corporate%20value%20creation.

[17] Letter from Sean D. Reyes, Utah Atty. Gen., et al. to Sen. Mitch McConnell, et al. (Feb. 14, 2023).

[18] Max M. Schanzenbach, *ESG Investing After the DOL Rule on "Prudence & Loyalty in Selecting Plan Invs. & Exercising S'holder Rights*," Harv. L.S. Forum on Corp. Governance (Feb. 2, 2023) ("[T]he 2022 Briden Rule largely reaffirms the [DOL's] longstanding position, compelled by binding Supreme Court precedent, that an ERISA fiduciary may use ESG investing *to improve risk-adjusted returns* but not to obtain *collateral benefits*. Subject to a few nuanced changes of limited practical import, the Biden Rule is largely consistent with the 2020 Trump Rule and earlier regulatory guidance.").

line.[19] Indeed, as one author has observed, "there is incontestable value in having more sustainable business practices."[20] Opponents of the Final Rule—who want to return to the 2020 rules—essentially seek to deprive Americans of these potential benefits.[21]

As such, the Final Rule also fails to qualify for the "major questions doctrine," which the Supreme Court stated was reserved only for "extraordinary cases."[22] The rule makes no "radical" or "fundamental change" to ERISA—it simply acknowledges that ESG factors may be material to the economic outcome of an investment, a fact that, as noted above, is amply supported by data. Chilling consideration of such potentially material factors, as the 2020 rules did, is the true departure from Congress's intent with ERISA.

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[19] *Id.*

[20] Terrence R. Keeley, Opinion, *Why ESG Funds Fail, and How They Could Succeed*, Wall St. J., Oct. 17, 2022 (reporting on the "incontestable value in having more sustainable business practices," and how "active investment and stewardship" could provide "multiple investment opportunities that do well and good in a verifiable way."). Notably, opponents of the Final Rule grossly mischaracterize another of Mr. Keeley's articles to support their conclusion that ESG considerations can never add value for investors. *See* Reyes Letter, *supra* note 17. But in that article, Mr. Keeley does not forsake ESG considerations as a basis for investing; he simply highlights the need for change in how funds that label themselves "ESG" operate. *See* Terrence R. Keeley, Opinion, *ESG Does Neither Very Much Good, nor Very Well*, Wall St. J., Sept. 12, 2022 (arguing against divestiture as a means for ESG funds to obtain greater returns, and in favor of those funds providing impact reports to investors).

[21] *See* Garrett, et al, *supra* note 5, at 1; Ind. Legis. Servs. Agency, *supra* note 5.

[22] *See* Reyes Letter, *supra* note 17. In this vein, we note that the Attorneys General who support CRA disapproval of the Final Rule on major questions grounds have invoked that doctrine nearly a dozen times in litigation in the past year and a half, suggesting they believe that an "extraordinary case" lurks behind nearly every regulatory corner. *See, e.g.*, Pet. Br., *Texas v. NHTSA*, No. 22-1144 (D.C. Cir. Nov. 17, 2022); Pet. Br., *Texas v. EPA*, No. 22-1031 (D.C. Cir. Nov. 3, 2022); Answering Br., *Brnovich v. Biden*, No. 22-15518 (9th Cir. Oct. 21, 2022); Mot. Prelim. Inj., *Nebraska v. Biden.*, No. 4:22-cv-01040-HEA (E.D. Mo. Sept. 29, 2022); Appellee Suppl. Br., *Texas v. United States of America*, No. 21-40680 (5th Cir. Sept. 1, 2022); Amicus Br. for Fla., et al., *Health Freedom Def. Fund v. Pres. of the United States*, No. 22-11287 (11th Cir. Aug. 8, 2022); Mot. Prelim. Inj., *Tennessee v. USDA*, No. 3:22-cv-00257 (E.D. Tenn. July 26, 2022); Notice of Joinder in Mot. Prelim. Inj., *Morehouse Enter., LLC v. ATF*, No. 3:22-cv-00116-PDW-ARS (D.N.D. July 29, 2022); Amicus Br. by Ala., et al., *Bradford v. DOL*, No. 22-1023 (10th Cir. Mar. 22, 2022); Appellee Br., *Georgia v. Pres. of the United States of America*, No. 21-14269 (11th Cir. Feb. 8, 2022); Mot. for Prelim. Inj., *Louisiana v. Becerra*, No. 3:12-cv-4370 (W.D. La. Dec. 21, 2021). Beyond filed cases, many of these same Attorney General have raised the major questions doctrine in ongoing rulemakings. *See, e.g.*, Letter from Daniel Cameron, Ky. Atty. Gen., et al. to Dep't of Defense, et al. (Feb. 13, 2023) (raising major questions doctrine in comment regarding federal acquisition regulation proposed rule); Letter from Patrick Morrisey, W.Va. Atty. Gen., et al. to Vanessa Countryman, Sec'y, SEC (June 15, 2022) (raising major questions doctrine in comment regarding SEC proposed rule).

Nor is the Final Rule an arbitrary or capricious exercise of the DOL's powers. The DOL conducted stakeholder outreach and used the information gleaned from that process to construct the Final Rule.[23] Indeed, contrary to the 2020 rules—which had truncated comment periods,[24] rushed roll-outs,[25] and included declarations that "specific evidence" was unnecessary[26]—commenters overwhelmingly supported the proposal, and the DOL took a year to consider those comments and finalize an effective, well-reasoned rule.

In short, there is no basis for supporting the joint resolution or applying the CRA in any way to the Final Rule. We encourage Congress to reject the joint resolution.

Sincerely,

ROB BONTA
California Attorney General

KRIS MAYES
Arizona Attorney General

[23] 87 Fed. Reg. at 73,825.

[24] Both rules had only thirty-day comment periods. *See* Fiduciary Duties Regarding Proxy Voting & S'holder Rts., 85 Fed. Reg. 55,219 (proposed Sept. 4, 2020) (comment deadline was Oct. 5, 2020); Fin. Factors in Selecting Plan Inv., 85 Fed. Reg. 39,113 (proposed June 30, 2020) (comment deadline was July 30, 2020).

[25] Fiduciary Duties Regarding Proxy Voting & S'holder Rts., 85 Fed. Reg. 81,658 (Dec. 16, 2020) (rule finalized three months after proposal); Fin. Factors in Selecting Plan Inv., 85 Fed. Reg. 72,846 (Nov. 13, 2020) (rule finalized five months after proposal).

[26] 85 Fed. Reg. 72,850 ("The Department does not believe that there needs to be specific evidence of fiduciary misbehavior or demonstrated injury to plans and plan participants in order to issue a regulation addressing the application of ERISA's fiduciary duties to the issue of investing for non-pecuniary benefits."); 85 Fed. Reg. 81,662 ("The Department does not believe that it is necessary to establish specific evidence of fiduciary misunderstandings or injury to plans or to plan participants in order to issue a regulation addressing the application of ERISA's fiduciary duties to the exercise of shareholder rights.").

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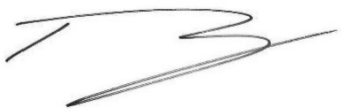

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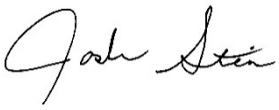

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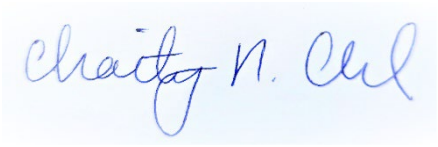

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Hon. Mitch McConnell, Senate Minority Leader
Hon. Kevin McCarthy, Speaker of the House
Hon. Hakeem Jeffries, House Minority Leader