19-2886-ag(L), 19-2893-ag(CON)

United States Court of Appeals
for the
Second Circuit

XY PLANNING NETWORK, LLC, FORD FINANCIAL SOLUTIONS, LLC, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF MAINE, DISTRICT OF COLUMBIA, STATE OF NEW MEXICO and STATE OF OREGON,

Petitioners,

– v. –

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, WALTER CLAYTON, in his official capacity as Chairman of the United States Securities and Exchange Commission,

Respondents.

PETITION FOR REVIEW OF A FINAL RULE OF THE SECURITIES AND EXCHANGE COMMISSION

BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF AMICI CURIAE[1]

Amici curiae—Representatives Ann Wagner of Missouri, Andy Barr of Kentucky, J. French Hill of Arkansas, Blaine Luetkemeyer of Missouri, and Senator Tom Cotton of Arkansas—are current members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and serve on committees with jurisdiction over federal financial regulatory agencies. As members of Congress, amici are well positioned to explain that Congress, in passing statutes, does not enact legislators' floor statements, witness testimony from congressional hearings, committee reports, comments to the press, or statements made years after the passage of a statute. Instead, amici understand that the only law Congress enacts is embodied in the text of the statute, and thus amici have a strong interest in ensuring that administrative agencies and courts enforce statutes as written. Petitioners and the congressional amici supporting them ask this Court to interpret section 913 of the Dodd-Frank Act based not on what its text commands, but based on their current policy views and the support they purport to find for those views in selected snippets of legislative history. In this brief, amici explain why the Court should reject that invitation and apply section 913 as written.

[1] No person or entity other than amici and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

INTRODUCTION

Does section 913 of the Dodd-Frank Act contain a circuit breaker or a dimmer switch? That is the question this case presents. The answer is straightforward. As with almost all delegations of lawmaking power to regulatory agencies, in section 913 Congress granted the SEC broad authority to use its expertise to craft a rule that balances many competing considerations. In a subsection entitled "Rulemaking," Congress directed: "The Commission may commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to such retail customers." § 913(f), 124 Stat. at 1827. This is classic discretion-granting language. *See Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) ("We have approved delegations to various agencies to regulate in the 'public interest.'"). Thus, contrary to Petitioners' contention, section 913 does not restrict the SEC's authority to a binary choice between imposing either a single duty on all investment professionals or doing nothing at all. Indeed, subsection 913(f) speaks of "*standards*," not "one standard." It is a dimmer switch, not a circuit breaker.

Petitioners and their amici—including the eponymous sponsors of the Dodd-Frank Act—would have this Court excise subsection 913(f)'s grant of authority from the law. They rest their case entirely on two points. First, they claim that "commence a rulemaking" in subsection 913(f) is merely a procedural authorization—permission from Congress to begin a regulatory process that the SEC can only complete by resorting to subsection 913(g). If this is subsection 913(f)'s only effect, it is (to say the least) a novel statutory creature roaming alone among the pages of the U.S. Code. Interpreting subsections 913(f) and (g) in this way, in contravention of their plain text, would lead to a host of problems, including conflicts with other portions of section 913 and incongruity with rulemaking provisions found throughout the U.S. Code.

Second, Petitioners and their congressional amici contend that the SEC's reading of subsection 913(f) renders subsection 913(g) superfluous. But that contention ignores the fact that subsection 913(g) is an amendment to preexisting statutes with a particular regulatory and interpretive history. As was recognized during the hearings on the Dodd-Frank Act, there was a question whether the "broker-dealer exemption" in the Investment Advisers Act of 1940 erected a barrier to the SEC's imposition of a uniform standard of care on broker-dealers and investment advisers. In order to ensure that the SEC possessed authority to impose such a standard if—in the exercise of its discretion, it found it to be "necessary or appropriate in the public interest"—subsection 913(g) amends those laws to ensure that the SEC could do so. Subsection 913(g) thus sets a new outer bound on the SEC's authority, but it is part of a broader statutory scheme, not a standalone directive to adopt a particular substantive rule. That is why subsection 913(g) states that the SEC "may," rather than "shall," impose a uniform standard.

Though the plain text of section 913 thus resolves this case, Petitioners and their congressional amici resort to the selective use of legislative history to frame a revisionist narrative of what actually happened in Congress. True, some members of Congress favored the imposition of a fiduciary duty on broker-dealers, just like the one imposed on investment advisers. In fact, the bill that the House passed would have done just that. But that bill did not become law, largely because of concerns that imposition of a single standard would hamper investor access and lead to other negative consequences. Instead, the House and Senate reached a compromise requiring the SEC to carefully study the issue and then promulgate rules that advance the public interest and protect retail customers—rules that could, but did not have to, impose a uniform standard. Petitioners and their congressional amici essentially ignore this compromise, contending that the elaborate study Congress called for simply delayed the ultimate realization of the House's failed bill. But the history confirms the SEC's discretion, not Congressional prescription. As then-Chairman Frank is said to have described the compromise when he presented it to the conference committee, section 913 does not "mandate any particular duty or outcome." 156 Cong. Rec. 5889 (daily ed. July 15, 2010).

Congress granted the SEC broad discretion in section 913 of Dodd-Frank. Because that legislative choice, not Petitioners' policy preferences, should govern the outcome here, the Court should affirm the SEC's authority to adopt Regulation Best Interest.

ARGUMENT

The plain text of section 913 authorizes the SEC's promulgation of Regulation Best Interest. Petitioners and their congressional amici attack this authority, but while their briefing is long on policy arguments and carefully selected snippets of congressional floor speeches, it contains little analysis of the actual text of the statute Congress passed. Indeed, the mere two pages Petitioners' congressional amici dedicate to analysis of the statutory text consists of quoting portions of the statute and offering the ipse dixit conclusion that this text "is clear." Br. of Current and Former Members of Congress ("Cong. Br.") at 12–14. These amici offer not a single citation to a statutory definition, a single comparison to other statutory schemes, a single citation to a dictionary definition, or a single citation to supporting case law. Petitioners' briefing does not fare much better. *See* States Br. at 46–50 (beginning its argument with "legislative history of the Dodd-Frank Act," dedicating about three pages of a seventy-five-page brief to analysis of text, and then turning back to "legislative history"); Investment Advisers Br. at 32–37 (dedicating six pages of a sixty-page brief to analysis of text and context of the statute before turning to "legislative history").

Petitioners' and their congressional amici's primary reliance on policy arguments and carefully curated legislative floor statements, and concomitant lack of rigorous textual exegesis, is unsurprising. They are attempting to have this Court rewrite the Dodd-Frank Act a decade after its enactment. But the actual law Congress passed is clear: it grants the SEC the authority to promulgate Regulation Best Interest.

I. SUBSECTION 913(F) IS A STANDARD GRANT OF BROAD RULEMAKING AUTHORITY.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010). And "[w]hen the words of a statute are unambiguous," it ends there, too: "this first canon is also the last." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Here, the text of subsection 913(f) expressly grants the SEC substantial discretion to set new standards of care for broker-dealers. This plain meaning is reinforced by the context of the rest of section 913. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

First, the plain text. Subsection 913(f)'s heading—"Rulemaking"—squarely identifies this provision as a grant of rulemaking authority. "Rulemaking" is a defined term in the Administrative Procedure Act (APA), and means an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). This process is set out in detail in 5 U.S.C. § 553 ("Rule Making"), which establishes the complete procedures governing how and when an agency may promulgate a substantive rule. Thus, throughout the U.S. Code, provisions entitled "Rulemaking" are often the main founts of rulemaking authority for agencies across the executive branch. *See, e.g.*, 12 U.S.C. § 5531(b); 15 U.S.C. § 1278a(f)(4)(B); 16 U.S.C. § 955; 21 U.S.C. § 1905(d); 25 U.S.C.

§ 5348(h). This is equally true of the Dodd-Frank Act. *See, e.g.*, 12 U.S.C. § 1828(z)(2); 12 U.S.C. § 5365(e)(5); 15 U.S.C. § 78*o*-8(a).

As subsection 913(f)'s heading foreshadows, the plain text that follows is a straightforward and classic grant of broad rulemaking authority. It states: the SEC "may commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers," to establish the standards governing investment professionals. 124 Stat. at 1827–28. Here again, the subsection employs the APA's defined term "rulemaking," indicating that the SEC is being given all the powers the APA sets out in its "Rule Making" provision: to notice a proposed rule, to accept public comment, and to "adopt[]" rules. 5 U.S.C. § 553(b), (c). Petitioners and their congressional amici completely ignore the fact that "rulemaking" is a statutorily defined term, but under the related-statutes canon courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988). Here, that presumption is irrefutable because, as Petitioners admit, this rulemaking is governed by the APA. *See* States Br. at 40; Investment Advisers Br. at 41.

Subsection 913(f) then goes on to indicate the substantive scope of the rulemaking authority. The language used—"as necessary or appropriate in the public interest" and for the "protection of" retail customers—is precisely the type of language Congress has employed, time and again, to grant agencies broad authority to choose a rule among a range of potential options. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (upholding law permitting EPA to promulgate regulations "requisite to protect the public health"); *Touby v. United States*, 500 U.S. 160, 166 (1991) (upholding law permitting Attorney General to regulate in manner "necessary to avoid an imminent hazard to the public safety"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding law permitting FCC to regulate in the "public interest"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (upholding law permitting Interstate Commerce Commission to approve acquisitions "in the public interest" and "under such rules and regulations . . . as shall be found by the commission to be just and reasonable"); *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 908 (D.C. Cir. 2004) (applying law permitting FERC to make rules "necessary or appropriate to carry[ing] out" the regulation of electricity "in the public interest"); *see also Gundy*, 139 S. Ct. at 2129 (reaffirming these and other similarly broad delegations). Indeed, this is the *very same* language Congress has historically used to grant the SEC broad rulemaking authority. *See, e.g.*, 12 U.S.C. § 1426a(f)(1) (authorizing SEC rulemaking "as may be necessary or appropriate in the public interest"); 15 U.S.C. § 7202(a) (authorizing SEC rulemaking "as may be necessary or appropriate in the public interest or for the protection of investors"); 15 U.S.C. § 7218(b) (authorizing SEC rulemaking "to carry out section 77s(b) of this title as it deems necessary or appropriate in the public interest or for the protection of investors.").

That this grant of rulemaking authority is broad—permitting the SEC to choose among a range of potential options—is reinforced by the SEC's power "to address the legal or regulatory *standards* of care for brokers, dealers, investment advisers, and persons associated with investment advisers." § 913(f), 124 Stat. at 1827 (emphasis added). Not one standard—as Petitioners would have it—but standards, plural.

Accordingly, subsection 913(f)'s language is a traditional grant of broad rulemaking authority, of a piece with many rulemaking authorizations that have come before it. And when statutes like this "permit a range of alternative approaches to a particular problem, the courts must allow the agency charged with implementing the statute to choose the alternative that the agency prefers." *Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1431–32 (9th Cir. 1991).

Second, the context. The rest of section 913 reinforces what subsection 913(f) plainly authorizes, which is broad discretion for the SEC to craft a rule based on its expertise. In the subsections preceding 913(f), Congress directs the SEC to "conduct a study" regarding the standards of care that apply to investment professionals. § 913(b), 124 Stat. at 1824. The fine-grained instructions for this study span multiple pages of the Statutes at Large and include punctilious specifications of what the SEC must consider: fourteen topics, with many more subtopics nested within those. *See* § 913(c), 124 Stat. at 1824–27. The statute, among other things, requires the SEC to assess the effectiveness of the current regulatory regime; whether that regime contains "gaps, shortcomings, or overlaps"; how the existing state of affairs affects consumers; and how "potential changes in the regulatory requirements or legal standards of care affecting" investment professionals would play out in terms of "access to personalized investment advice" and other issues. *Id.* In short, the statute directs the SEC to engage its expertise.

And to what end is this painstaking inquiry to be put? That is answered in subsection 913(c)(14), which permits the SEC to consider any other issue "necessary and appropriate in determining whether *to conduct a rulemaking under subsection(f)*." 124 Stat. at 1827 (emphasis added). In other words, subsections 913(b) and (c) direct the SEC to apply its expertise through a study, and then—as explicitly noted in (c)(14)—913(f) authorizes the agency to use that expertise to "conduct a rulemaking" to set standards of care for broker-dealers. The wide-ranging nature of this inquiry, including its focus on the delicate trade-offs between heightened duties on broker-dealers and ensuring "access to" and "availability of" personalized investment advice at affordable costs, *see* § 913(c)(12)(B)–(C), (c)(13)(B), 124 Stat. at 1827, thus suggests a follow-on rulemaking with corresponding nuance. *Cf. Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016) ("As an initial matter, the text, structure, and purpose of the securities laws make clear that Congress intended the SEC's scheme of administrative review to permit the Commission to bring its expertise to bear in enforcing the securities laws.").

In sum, both statutory text and context demonstrate that Congress, in section 913, did what it has done so many times before: grant an agency the power to regulate within a broad range of policy options, in light of its expertise and experience. Congress gave the SEC a dimmer switch, and the SEC, in Regulation Best Interest, has selected a lawful position on that dial.

II. PETITIONERS' READING OF SECTION 913 IS UNTENABLE.

Petitioners and their congressional amici resist the plain meaning of section 913 by conjuring a relationship between subsections 913(f) and 913(g) that simply does not exist. First, they claim that subsection 913(f) is merely a "procedural" authorization to begin—but not conclude—a rulemaking. In other words, they contend that subsection 913(f) grants *no* substantive rulemaking authority and that the SEC's only source of such authority comes from subsection 913(g). Second, they contend that reading subsection 913(f) to grant substantive rulemaking authority renders subsection 913(g) superfluous. Both points are easily refuted.

A. Petitioners' Reading of Subsection 913(f) Contradicts Plain Meaning, Renders Words of the Statute Superfluous, and Calls into Question Many Other Grants of Rulemaking Authority.

Petitioners and their congressional amici posit that subsections 913(f) and (g) constitute a "pair," with (f) providing the "purely procedural" authority to begin a rulemaking and (g) providing the authority to actually make the rule. *See* Investment Advisers Br. at 33–36; States Br. at 57–58; Cong. Br. at 21. This argument falters for a host of reasons.

First, Petitioners' interpretation relies on the notion that subsection 913(f) "does not provide any substantive standards governing the content of whatever rule the SEC issues." Investment Advisers Br. at 34; *see* States Br. at 57 (arguing that only subsection 913(g) provides "the substantive standards for the Commission to follow"). As explained above, this is wrong. Subsection 913(f) directs the SEC to regulate "in the public interest and for the protection of retail customers." 124 Stat. at 1827. This is *precisely* the type of language the Supreme Court repeatedly has held constitutes a substantive standard governing the content of rulemaking. *See* pp. 7–8, *supra*; *Gundy*, 139 S. Ct. at 2129.

Second, if "commence a rulemaking" really means "begin the process to adopt the standard in 913(g)," then the rulemaking the SEC is instructed to begin in subsection 913(f) does not match Petitioners' reading of subsection 913(g). As noted above, subsection 913(f) authorizes the commencement of a rulemaking "to address the . . . *standards* of care for brokers, dealers, [and] investment advisers." 124 Stat. at 1827. Yet Petitioners' theory is that the *only* rulemaking option for the SEC is to have *one*, uniform standard governing broker-dealers and investment advisers. *See* Investment Advisers Br. at 32; States Br. at 47–50; Cong. Br. at 4, 12. Accordingly, if Petitioners' theory about the link between 913(f) and (g) were correct, 913(f) would speak of "the standard," singular.

Third, Petitioners' "pairing" approach lacks textual support in subsection 913(g). Nowhere does subsection 913(g) cross-reference or indicate that it cabins, rather than expands, the SEC's otherwise broad regulatory authority under subsection 913(f). Yet Congress knew how to specifically cross-reference subsection 913(f) when it desired, *see* § 913(c)(14) (cross-referencing the "rulemaking under subsection(f)"), and how to provide modifying cross-references in the section generally, *see* § 913(c) (cross-referencing subsection (b)); § 913(d)(1) (cross-referencing subsection (b)); § 913(d)(2) (cross-referencing subsection (b)); § 913(d)(2)(A) (cross-referencing subsection (b)); § 913(e) (cross referencing subsection (d)); § 913(f) (cross referencing subsection (b)). Thus, subsections (g) and (f) are unlike the statutory provisions relied on by the State Petitioners, *see* States Br. at 57–58, because Congress did not here provide any cabining link between them. *Compare* 124 Stat. at 1827–28, *with* 29 U.S.C. § 655(c)(3) (requiring the agency to "commence a proceeding in accordance with subsection (b)"), 30 U.S.C. § 811(b) (requiring the agency to "commence a proceeding in accordance with subsection (a)"), *and* 47 U.S.C. § 340(c)(1)(B) (imposing a deadline on rulemaking ordered commenced under another section by referring to "such rulemaking").

If Congress had wanted to create the circuit-breaker mechanism favored by Petitioners—where the SEC could only flip on or off a single fiduciary standard for all investment professionals—it would have enacted language stating something like, "If the SEC engages in the rulemaking specified in subsection (f), then the standard of conduct shall be . . . ." *See, e.g.*, 15 U.S.C. § 1278a(f)(4)(B) (imposing a similar scheme). Instead, subsection 913(g)—without reference to subsection 913(f)—states that the SEC "may," rather than "shall," adopt a rule, suggesting that subsection 913(g) expands rather than limits the SEC's discretion under subsection(f). *See, e.g.*, *Jama v. ICE*, 543 U.S. 335, 346 (2005) (holding that the use of the word "may" "customarily connotes discretion"); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) ("'[M]ay' expressly recognizes substantial discretion."); *Weinstein v. Albright*, 261 F.3d 127, 137 (2d Cir. 2001). And, as explained further below, *see* Section II.B, *infra*, because it was not clear prior to 2010 whether the SEC had the authority to impose the same standard on broker-dealers and investment advisers in light of the exemption for broker-dealers created by the Investment Advisers Act of 1940, Congress had good reason to amend the Securities Exchange Act and Investment Advisers Act as it did in subsection 913(g)—to clarify that the SEC's regulatory authority included this option.

Fourth, Petitioner's argument completely ignores subsection 913(c)(14)'s reference to the SEC's authority to "*conduct* a rulemaking *under subsection (f)*." 124 Stat. at 1827 (emphasis added). Even if "commence a rulemaking" could plausibly be read to be devoid of any substantive rulemaking authority, the phrase "conduct a rulemaking" cannot be so limited. "Conduct" means to "carry out" or "carry on." *See, e.g.*, *Conduct, v.*, Black's Law Dictionary (6th ed. 1990) (citing *Scholz v. Leuer*, 109 P.2d 294, 301 (Wash. 1941); *Conduct, v.*, Oxford English Dictionary Online, http://bit.ly/2TV9EG2; *Conduct*, Collins Dictionary Online, http://bit.ly/2Q1gngv. Petitioners offer no explanation as to why subsection 913(c)(14) refers to 913(f) in this way if the latter is really as limited as Petitioners contend.

Fifth, Petitioners' reading of subsection 913(g) renders subsection 913(f) entirely superfluous. Petitioners cannot account for any contribution 913(f) makes beyond the authority already provided on their reading of 913(g). Unless Petitioners contend that authority to "promulgate" a rule (the language of subsection 913(g)) does not include the authority to "commence" a rulemaking—and that every single grant of rulemaking authority is toothless unless it follows their two-step choreography—it is unclear what subsection 913(f) accomplishes that subsection 913(g) does not. Their reading thus either (i) renders void rulemaking authorities found throughout the U.S. Code[2] or (ii) turns an entire provision of section 913 into a nullity, a result that the Court should avoid if at all possible. *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1983) ("[W]e must give effect to every word Congress used in the statute."); *United States v. Halloran*, 821 F.3d 321, 333 (2d Cir. 2016).

Sixth, if Petitioners and their amici are correct that the phrase "commence a rulemaking" authorizes only the *initiation* of a rulemaking, but no further action, a whole host of federal statutes and derivative rules are in peril because Congress has often used similar phrases as the sole grant of substantive rulemaking authority. *See, e.g.*, 6 U.S.C. § 944(a)(1) ("Not later than 90 days after October 13, 2006, the Secretary shall initiate a rulemaking proceeding to establish minimum standards and procedures for securing containers in transit to the United States."); 47 U.S.C. § 1506(b)(1) ("[T]he Commission

[2] *See, e.g.*, 7 U.S.C. § 2269 ("The Secretary of Agriculture may promulgate regulations to carry out the provisions of this section."); 12 U.S.C. § 4213 ("The Attorney General may promulgate any rules, regulations, or guidelines that, in the Attorney General's judgment, are necessary and appropriate to the effective administration of this subchapter."); 12 U.S.C. § 4247 ("The Attorney General may promulgate any rules, regulations, or guidelines that, in the Attorney General's judgment, are necessary and appropriate to the effective administration of this subchapter."); 16 U.S.C. § 7006(b) ("In exercising responsibilities under this chapter, the Secretary (1) may promulgate such regulations as may be necessary to carry out the purposes and objectives of the Agreement and this chapter."); 42 U.S.C. § 300gg-92 ("The Secretary, consistent with section 104 of the Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter.").

shall initiate a rulemaking proceeding to assess whether to establish a program, or modify existing programs, under which a licensee that receives a license for the exclusive use of spectrum in a specific geographic area under section 301 of this title may partition or disaggregate the license by sale or long-term lease."); 49 U.S.C. § 30166(m)(1), (3)–(5) (requiring the Secretary to "initiate a rulemaking" in section 30166(m)(1) and later referring to a "final rule promulgated under" that same provision). Surely, the agencies administering these and other, similar statutes would be surprised to learn that their authority to begin a "rulemaking" does not include the authority to make rules.

Finally, at a more practical level, it strains credulity to conclude that Congress—which, on Petitioners' and their amici's own telling, perceived an acute need for the enhanced regulation of broker-dealers—offered the SEC only this stark choice: impose the fiduciary duty from the Investment Advisers Act of 1940 on all broker-dealers, regardless of the results of the fine-grained study required by this very same law, or make no change whatsoever. It simply does not make sense that Congress would require the SEC to study this issue in such great detail, provide it with a seemingly wide grant of rulemaking authority, and stress the pressing need for agency action, only to turn around and hamstring the agency in this way. Even at a high purposive level, therefore, Petitioners arguments fail.

B. Subsection 913(f)'s Grant of Rulemaking Authority Does Not Render Subsection 913(g) Superfluous.

Petitioners next argue that if subsection 913(f) contains a general grant of rulemaking authority, then subsection 913(g)'s more specific authorization is necessarily subsumed by that provision and rendered superfluous. Not so. Even equipped with subsection 913(f)'s broad grant of rulemaking authority, subsection 913(g) still plays an important role for the SEC. It establishes that the Investment Advisers Act of 1940's exemption for broker-dealers is not a barrier to imposing on broker-dealers the standards of conduct that govern investment-advisers and sets important limits on the SEC's discretion should it choose to do so.

As Petitioners and their congressional amici outline, Congress was indeed concerned that broker-dealers were under-regulated. *See, e.g.*, Cong. Br. at 14–17. Of course, so is the SEC. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318, 33319–20 (July 12, 2019). Some members of the House and Senate even felt that the high standard imposed on investment advisers should be applied to broker-dealers. *See* Cong. Br. at 14–17. But when the House's bill reached the Senate, it became clear that there were not enough votes to impose that standard outright. *Id.* at 15. As a result, the ultimate compromise that Congress reached essentially granted the SEC discretion to decide what standard to apply to broker-dealers, after studying the issue, producing a report, and engaging in notice-and-comment rulemaking. *See* Section III, *infra*.

But one more problem remained. Under the Investment Advisers Act of 1940, broker-dealers are specifically exempted from the standards that govern investment advisers more broadly. *See* 15 U.S.C. § 80b-2(a)(11)(C). Without specific language permitting the SEC to impose the fiduciary standard favored by some members of Congress, it was possible that the Commission would have lacked authority to subject broker-dealers to the same standards governing investment advisers. Thus, even with broad, but general, rulemaking power under subsection 913(f), the SEC's authority to reach the House's preferred result might have been vulnerable to judicial challenge.

Indeed, this very point was raised at the Senate hearings leading up to the passage of the Dodd-Frank Act. A witness from the AFL-CIO noted that "part of what must be done in this area is to determine whether the proper regulatory approach will require Congressional action in light of [a] D.C. Circuit opinion" that had struck down an SEC broker-dealer rule. *Enhancing Investor Protection and the Regulation of Securities Markets: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 136 (2009) (statement of Damon A. Silvers, Associate General Counsel, AFL-CIO) (citing *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007), which invalidated, as conflicting with the Investment Advisers Act, a rule altering the broker-dealer exemption).

The Senate's awareness that the Commission's authority under then-existing statutes might be limited can be seen in the bill it passed, which directed the SEC "to commence a rulemaking . . . to address such regulatory gaps and overlap *that can be* *addressed by rule*, using its authority under the Securities Exchange Act of 1934 . . . and the Investment Advisers Act of 1940." Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 913 (f)(1)(A) (as amended by the Senate, May 20, 2010) (emphasis added). The House bill likewise recognized that then-existing statutes needed to be addressed. That is why it stated, "Notwithstanding any other provision of this Act or the Investment Advisers Act of 1940, the Commission shall promulgate rules . . . ." Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7103(a)(1) (as passed by the House, Dec. 11, 2009); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012) ("A dependent phrase that begins with notwithstanding indicates that the main clause that introduces or follows derogates from the provision to which it refers."). Thus, Congress knew that, had it left section 913 at subsection (f) without further elaboration, the SEC may have been challenged if it imposed a fiduciary duty on broker-dealers. *Cf. Chamber of Commerce of the U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360, 385 (5th Cir. 2018).

To address this potential problem, subsection 913(g) thus clarifies that "[n]otwithstanding any other provision of this Act or the Investment Advisers Act of 1940," the SEC "*may*" impose the investment-adviser standard on broker-dealers. 124 Stat. at 1828 (emphasis added). This ensures that the broker-dealer exemption, even if it conflicts with such a rule, is no barrier to the validity of the SEC's potential rulemaking on this front. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (The use of "notwithstanding" demonstrates "which provision prevails in the event of a clash."); Scalia & Garner, *supra*, at 126. It also, as Respondents note, sets important guardrails on the nature of any regulation attempting to impose a fiduciary duty on broker-dealers. *See* § 913(g), 124 Stat. at 1828 (forbidding a rule rendering the receipt of commissions, on its own, a violation of such a duty).

Accordingly, far from being superfluous in light of subsection 913(f)'s broad grant of rulemaking authority, subsection 913(g) is thus core to the bargain struck in conference. The House bill originally *required* the SEC to impose a fiduciary duty on broker-dealers, and could do so only by amending prior statutes. *See* H.R. 4173, § 7103(a)(1) (as passed by the House, Dec. 11, 2009). The Senate bill did not, authorizing the SEC only to use its existing authority. *See* H.R. 4173, § 913(f)(1)(A) (as amended by the Senate, May 20, 2010). The compromise provision grants rulemaking authority that *could* include the House's preferred substantive rule—thanks to subsection 913(g)—but also authorized the adoption of other standards of care, "as necessary or appropriate in the public interest and for the protection of retail customers." § 913(f), 124 Stat. at 1827. Respondents' reading thus gives meaning to all of section 913 and ought to be affirmed.

III. PETITIONERS' AND THEIR CONGRESSIONAL AMICI'S RELIANCE ON SECTION 913'S PURPORTED LEGISLATIVE HISTORY IS MISPLACED.

Finding little support in the actual text of the law Congress passed, Petitioners and their congressional amici place much reliance on snippets of legislative history and the policy views expressed by certain legislators over the course of Dodd-Frank's long march toward enactment. *See* Investment Advisers Br. at 11–13, 37–39; States Br. at 18–21, 50–51; Cong. Br. at 14–16, 22–23.

But "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *SW Gen., Inc.*, 137 S. Ct. at 942; *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). And where the text is clear, recourse to additional legislative history is generally unnecessary, *see Germain*, 503 U.S. at 253–54; *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012), and often inappropriate, *see United States v. Sampson*, 898 F.3d 287, 302 (2d Cir. 2018) (noting the impropriety of privileging legislative history above "actual text"). Accordingly, this case begins and ends with the text of the law Congress passed.

But even assuming resort to legislative history would be appropriate here, that history is not particularly supportive of Petitioners' arguments. If anything, it cuts the other way. Petitioners and their amici focus on three types of legislative history, none of which ultimately support their arguments.

First, Petitioners and their congressional amici discuss at great length the policy views that led the House to pass its original version of section 913, which required the SEC to impose a fiduciary duty on broker-dealers. *See* H.R. 4173, § 7103(a)(1) (as passed by the House, Dec. 11, 2009). Reliance on this bill is, of course, subject to "the perils of relying on the fate of prior bills to divine the meaning of enacted legislation."

Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 422 (2012). But it does not support Petitioners in any event. Congress's ultimate *omission* of the House's original mandatory language ("the Commission *shall* promulgate rules"), and delegation of substantial discretion to the SEC ("the Commission *may* promulgate rules"), *compare* H.R. 4173, § 7103(a)(1) (as passed by the House, Dec. 11, 2009), *with* 124 Stat. at 1827–28, evidences a *rejection* of the House's proposed predetermination of the proper standard of care for broker-dealers, not a silent endorsement of it. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). The presence of a fiduciary requirement in the original House bill shows that Congress knew how to frame a law requiring a certain outcome from the SEC but instead left the final decision in the SEC's hands. Thus, the conspicuous change between the original House bill and the enacted law dovetails with the plain-text reading outlined above.

Second, contrary to the congressional amici supporting Petitioners, *see* Cong. Br. at 15–16, the conference committee report on the enacted version of Dodd-Frank in no way undermines the validity of Regulation Best Interest. The report says little about the compromise that led to section 913. *See* H.R. Rep. No. 111-517, at 870 (2010). But discussing Title IX's new "investor protections and improvements to the regulations of securities," the committee report does note that it "directs" the SEC to undertake a study of the existing standards of care for broker-dealers and investment advisers but "*authorizes* the SEC to promulgate rules imposing a fiduciary duty on broker-dealers." *Id.* (emphasis added). In other words, even the report recognizes the difference between mandatory language (directs) and permissive language (authorizes). Nor does the report suggest anything like the baroque sequencing that Petitioners' and their congressional amici argue the Act requires, in which subsection 913(f) permits only the *commencement* of a rulemaking, the result of which must be a predetermined uniform fiduciary standard for broker-dealers and investment advisers. *See* Investment Advisers Br. at 35–36; Cong. Br. at 15–16.

Third, combing through thousands of pages of hearings and floor debates, Petitioners and their congressional amici "enter[] a crowded cocktail party and look[] over the heads of the guests for [their] friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). This exercise represents precisely the kind of legislative history that courts repeatedly caution against. *See, e.g.*, *SW Gen., Inc.*, 137 S. Ct. at 942; *Oncale*, 523 U.S. at 79. Indeed, Petitioners' congressional amici go so far as to rely on a statement by a legislator made more than *eight years* after the passage of Dodd-Frank. *See* Cong. Br. at 23 (quoting Letter from Maxine Waters, Ranking Member, House Comm. on Fin. Servs., to Jay Clayton, Chairman, SEC 1–2 (Sept. 12, 2018)). "[W]hatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made after the bill in question has become law." *Barber v. Thomas*, 560 U.S. 474, 486 (2010).

But even engaging in this practice does little for Petitioners because the carefully curated narrative they cobble together does not offer much support for their position.

For example, Petitioners and their congressional amici rely on a statement by Representative Frank that he "'expect[ed]' that the SEC would use the delegated authority 'to impose greater fiduciary responsibilities' on broker-dealers than existed at the time." Cong. Br. at 16 (quoting 156 Cong. Rec. H5216 (daily ed. June 30, 2010)); *see also* States Br. at 50–51 (quoting same). Nothing in that statement unquestionably supports Congress's imposition of a mandatory duty on the SEC to enact the same standard for broker-dealers and investment advisers. Instead, it can just as easily be read to suggest that Representative Frank knew Congress had given the SEC discretion but, based on his understanding of the SEC at the time, he *expected* the agency to exercise that discretion in a certain way.

And even if Petitioners can find some snippets of floor speeches that cut in favor of their view, two can play at this game. Congress received witness testimony highlighting that "[w]hile all participants must be protected from fraud, we need a flexible regulatory structure that can differentiate between the various types of market participants when it comes to mandatory prophylactic rules and requirements." *Enhancing Investor Protection and the Regulation of Securities Markets: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs* 111th Cong. 244 (2009) (Response to Written Questions of Sen. Dodd from T. Timothy Ryan, Jr, President, SIFMA).

Some members of Congress adopted this view and believed section 913 accommodated it. On the House side, Representative Bachus's remarks on the conference bill noted the "unique roles of different financial professionals, their distinct relationships with their customers, and the nature of the services and disclosures they provide." 156 Cong. Rec. H5255 (daily ed. June 30, 2010). In light of these sensitive considerations, Representative Bachus went on to laud the flexibility that section 913 would provide to the SEC in "defining the details of any such measures that might be proposed." *Id.* The bill thus described sounds little like the circuit breaker Petitioners envision. Rather, Representative Bachus thought it permitted shades and nuance, authorizing the SEC to research and then adopt whatever rule it found necessary to improve the standards governing broker-dealers and investment advisers.

Over in the Senate, Senator Johnson made similar points in describing the "compromise between the House and Senate provisions on the standard of care for brokers, dealers, and investment advisers." 156 Cong. Rec. 5889 (daily ed. July 15, 2010). Noting with approval that the SEC would conduct its investigation "without prejudging its findings, conclusions, and recommendations," Senator Johnson reported then-Chairman Frank's description of that compromise:

> As Chairman FRANK described the compromise when he presented it to the committee, section 913 does not immediately impose any new duties on brokers, dealers and investment advisers *nor does it mandate any particular duty or outcome, but it gives the SEC, subsequent to the conclusion of the study, the authority to conduct a rulemaking on the standard of care, including the authority to impose a fiduciary duty.*

Id. (emphasis added). Thus, Representative Frank's view then, as reported by a colleague and entered into the Congressional Record, contradicts the view Representative Frank now takes, as reported in his brief to this Court. *See* Cong. Br. at

1, 12 (arguing that Congress authorized *exclusively* a "uniform fiduciary standard" for broker-dealers and investment advisers).[3]

In sum, the legislative history of section 913 shows that some members of Congress wanted to impose on broker-dealers the fiduciary standard that governs investment advisers, while other members of Congress were concerned that such a policy would decrease consumer access to the investing community. The plain text of the compromise reached shows that Congress left it in the SEC's discretion to craft an appropriate policy. It is that plain text that this Court should apply.

[3] Nor was this Representative Frank's only statement on the matter around the time of enactment of his eponymous law. Within a year of Dodd-Frank's enactment, then-Ranking Member Frank wrote to the Chairman of the SEC "concerning the authority provided to the SEC in the financial reform legislation to impose a higher standard on broker-dealers that provide personalized investment advice to their customers." Letter from Barney Frank, Ranking Member, House Comm. on Fin. Servs., to Mary L. Schapiro, Chairman, SEC (May 31, 2011). Rather than suggesting that section 913 required a uniform standard of care for broker-dealers and investment advisers, then-Ranking Member Frank urged Chairman Schapiro that "[t]he new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers." *Id.* And less than six months after that, while the Department of Labor considered its own rule imposing fiduciary duties on broker-dealers, Ranking Member Frank again intervened, writing to the Secretary of Labor to emphasize that "it is important to do this in a way that does not have adverse effects on the choices available to consumers, municipalities, and pension plans, among others." Letter from Barney Frank, Ranking Member, House Comm. on Fin. Servs., to Hilda Solis, Secretary, U.S. Dep't of Labor (Sept. 15, 2011).

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court deny the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d), as modified by Local Rules 32.1(a)(4)(A) and 29.1(c), because it contains 6,970 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Garamond font.

Executed this 10th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Executed this 10th day of March, 2020.

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