STATEMENT OF

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TRANSPARENCY IN GLOBAL GOVERNANCE

Biographical Statement

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Chairman Barr, Ranking Member Foster, and members of the Subcommittee on Financial Institutions and Monetary Policy, thank you for asking me to discuss the issue of transparency in the global governance regime for financial regulation and supervision. Although these institutions serve an important purpose in facilitating cross-border dialogue on financial risk and establishing minimum standards for banking regulation, they operate with a degree of opacity that is anachronistic in U.S. administrative law and anathema to American values surrounding the rule of law. These bodies are not accountable to Congress and the American people.

To elaborate on this point, my testimony will address and explain two main issues. First, several of these global governance bodies—including, in particular, the Financial Stability Board ("FSB"), the Basel Committee on Banking Supervision ("BCBS"), and the Network for Greening the Financial System ("NGFS") make decisions opaquely in the absence of any monitoring or checks by democratic institutions; their governance and structure perpetuates this status quo.[1] Second, decisionmakers at these global governance institutions have incentives to increase their remit by addressing an indeterminate category of financial stability risks; but when translated into U.S. banking supervision, such novel supervisory initiatives may clash with U.S. law and preexisting political choices.

The bulk of my testimony will focus on the implications of this "regime complex"[2] for the Federal Reserve and its bank supervision function. Big picture, I will explain how the soft-law (purportedly non-binding) rules and recommendations that are fashioned in these international organizations often become transposed into U.S. supervisory practice and why this poses legal and legitimacy problems.

I. How Soft-Law Global Governance Standards can become Hardened into U.S. Practice and Law

These international groups are usually characterized as "soft-law" bodies. They exist because regulators agreed to form these networks and cross-border associations. This means that the existence of these global governance bodies has not been authorized or agreed upon by national legislatures. Consequently, in theory, their work—which consists of a variety of rulemaking and standard-setting in the field of bank regulation and supervision—is often styled as "non-binding" or to be taken as mere "recommendations" for its members to implement in their respective jurisdictions.

At the same time, however, these organizations' members have agreed that implementation is an important part of participation. For example, under the BCBS charter, its members agree "to

[1] The NGFS has been described by one of its members as "a coalition of 125 central banks and financial regulators from over 90 jurisdictions." Ravi Menon, Managing Dir. Monetary Auth. Sing. and Chairman, NGFS, Opening remarks at the NGFS Workshop in Singapore: The Work of the NGFS in Four Emerging Issues in Climate Change (Apr. 26, 2023), https://www.bis.org/review/r230509e.pdf.

[2] *See* Karen J. Atler & Kal Raustiala, The Rise of International Regime Complexity, 14 ANN. REV. L. & SOC. SCI. 329 (2018) ("A regime complex is an array of partially overlapping and nonhierarchical institutions that includes more than one international agreement or authority.").

implement fully Basel standards for their internationally active banks. These standards constitute minimum requirements and BCBS members may decide to go beyond them."[3] Specifically, pursuant to Article 5 of the Basel Committee Charter, members agree to (1) "implement and apply BCBS standards in their domestic jurisdictions within the pre-defined timeframe established by the Committee," (2) "undergo and participate in BCBS reviews to assess the consistency and effectiveness of domestic rules and supervisory practices in relation to BCBS standards;" and (3) "promote the interests of global financial stability and not solely national interests, while participating in BCBS work and decision making."[4]

In the spirit of international regulatory comity, the U.S. has mostly done this. The Fed often "gold plates" the Basel standards and, likely for this reason, agreed to participate as an observer at the NGFS despite having no mandate to engage in sustainability or climate related policy work.[5] Aware of this regulatory dynamic, the market no doubt takes its cues from what happens at Basel and the FSB, and banks accordingly will adjust their behavior to these global standards in the expectation that U.S. supervisors will generally want to heed them, too.

II. Opacity and Lack of Accountability in the Global Governance of Financial Regulation and Supervision

A conveyor belt that carries global supervisory standards into U.S supervisory practice is problematic for both transparency and accountability reasons.

The output of these global governance bodies is tainted by a lack of transparency, which is otherwise required under U.S. law. For the most part, administrative agencies in the United States have been moving steadily toward increased transparency with the public over the last sixty years. As early as 1946, Congress recognized that agency decisionmaking should be subject to judicial review as a check against an agency's ability to impose rules or standards on regulated parties that were "arbitrary" or "capricious"—meaning, completely unreasonable and untied to essential fact.[6] By the 1960s, transparency in administrative rulemaking had become a legislative priority. Congress passed the Freedom of Information Act ("FOIA") in 1966, which allows citizens to access information pertinent to agency decisionmaking.[7] A decade later, Congress passed the Government in Sunshine Act to require, with a few limited exceptions, that federal agencies deliberate in public.[8]

Overall, this legal framework indicates a solid and longstanding commitment in U.S. law to transparency, proportionality, and procedural due process in the sphere of administrative action—this applies with no less force to the federal banking agencies including the Federal

[3] Basel Committee on Banking Supervision, Charter, Art. 5., https://www.bis.org/bcbs/charter.htm.
[4] *Id.*
[5] *See* Basel Regulatory Framework: U.S. Implementation of the Basel Accords, Bd. Governors Fed. Rsrv. Sys., https://www.federalreserve.gov/supervisionreg/basel/usimplementation.htm.
[6] Administrative Procedure Act, codified at 5 U.S.C. § 706.
[7] Freedom of Information Act, codified at 5 U.S.C. §552.
[8] Government in Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §552b).

Reserve, which agency has the statutory responsibility for regulating and supervising large, internationally active banks.[9]

In view of the U.S. legal setpoint, the opacity that characterizes the work of global governance bodies—such as the BCBS, FSB, and NGFS—seems wildly out of place. Virtually none of the decisionmaking by these bodies is subject to outside scrutiny. One cannot be sure how agenda setting, and the accompanying process to initiate a stream of action or identify an actionable problem, takes place—it would be reasonable to infer that in the absence of visible rules and discernable practice, the members of these organizations jockey for power over its contents and at times the prioritization of the agenda items is externally imposed by other members' home country politicians.

In terms of the working groups that are constituted to execute the agenda, it is equally mysterious to external observers who participates and based on what criteria. Accordingly, the public cannot verify what personal, national, or corporate interests are represented or excluded from the conversation. The source and composition of evidence considered and preparatory materials is also publicly unknown. As regards the BCBS, whose governance and structure I have studied the closest, the use of evidence to inform the group's work and the study of the impact of proposed regulation is optional and the incoming information is often riddled with error or inaccuracy. There is no corrective mechanism for relying on bad data.[10]

Likewise, although the working groups may hold hearings or invite written submissions in regard to a fledging rule or supervisory initiative, they are not required to do so. It follows that there are no set parameters for balancing viewpoints or otherwise checking against group think in the working groups (at least none to which the public is privy). It seems reasonable to assume that in the absence of evidence to the contrary, the governance of the FSB and those of the more specialized bodies that have developed (such as the NGFS) functions in more or less the same way.

Not only is such opacity in agency decisionmaking anathema in U.S. administrative law today, but ironically it is also highly inconsistent with how the Federal Reserve has worked diligently to embrace greater transparency in monetary policy since the 1990s. Although monetary policy used to operate under a cloud of mystique—and it was believed that this haziness, in fact, best served the public interest—the Fed began to take a different approach under the chairmanship of Alan Greenspan.

During that time, the Fed shifted its perspective on the matter of transparency. The Fed leadership concluded that helping the public to understand how and why monetary policy decisions were being made would increase the credibility, legitimacy, and efficacy of the central bank's work. The Fed began to focus on open and transparent communication with the public by, among other things, publishing lightly edited versions of its meeting transcripts.[11] More recently, the Fed has also attempted to broaden its communication with households—bringing clarity to its work not

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[9] *See, e.g.*, Bank Holding Company Act of 1956, codified at 12 U.S.C. §§ 1841 et seq.; International Lending Supervision Act, Pub. L. No. 98-181, 97 Stat. 1278 (1983).

[10] For an extended discussion of BCBS procedure, see David Murphy & Christina Parajon Skinner, *Sovereignty and Legitimacy in International Banking Law*, 65 VA. J. INT'L L. (forthcoming 2025).

[11] *See generally* Tim Todd, *A Corollary of Accountability: A History of FOMC Policy Communication*, FED. RSRV. BANK KANSAS CITY (Aug. 2016), https://www.kansascityfed.org/AboutUs/documents/6512/acorollaryofaccountability.pdf

just to markets but also to everyday people.[12] The rules, standards, and principles that shape bank supervision should be subject to no less discerning standards, particularly in light of the way in which supervision directly implicates the property and contract interests of affected banks.

Setting transparency issues to one side, there is also a question of whether new Basel/FSB standards are the result of unchecked mission creep. Under domestic law, all administrative agencies (including the Fed and the other two bank agencies) are governed by statutes that delineate their responsibilities and goals. The ability of both Congress and the federal courts to review agency action in light of the express terms of their mandates is critical to the legitimacy of their work—action that goes beyond what Congress has instructed is taken to be *ultra vires* (i.e., beyond their legal responsibility) and therefore impermissible.

But the BCBS, FSB, and NGFS set their own mandates; and they re-define them when and how they choose. For example, since the global financial crisis of 2008, the BCBS has amplified its goals toward the pursuit of global "financial stability." The FSB, for its part, was conceived in 2009 from a predecessor organization, the Financial Stability Forum, with a mandate for "promoting global financial stability by coordinating the development of regulatory, supervisory and other financial sector policies and conducts outreach to non-member countries."[13] The NGFS was created in 2017, and even in this short period of time has expanded its objective from climate change issues to broader considerations of sustainability and biodiversity.[14] With a self-defined mandate to mitigate "systemic risk" or monitor "financial stability" risk, these organizations' opportunity for expansion and evolution has no limit. After all, the term "financial stability" has no established or shared global meaning. Accordingly, the activities or issues that these organizations may address through supervisory rules, principles, or guidance—under the heading of an imminent or nascent financial stability threat—is completely open-ended.[15]

It is concerning that these global organizations self-define their mandate according to amorphous financial stability goals given their incentives to avoid becoming obsolete.[16] Of course, public choice theory instructs that all agencies—which are comprised of rationally acting human beings—share these sorts of motives. But at least under domestic law the impulse to continuously expand into new territory is checked through the democratic process. Congress holds hearings to ensure that agencies are staying within their statutory lane and (usually) has the carrot and stick of the appropriation process to ensure the same.[17]

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[12] Carola Conces Binder & Christina Parajon Skinner, *The Legitimacy of the Federal Reserve*, 28 STAN. J.L. BUS. & FIN. 3 (2023).

[13] FSB, Work of the FSB, https://www.fsb.org/work-of-the-fsb/#:~:text=The%20FSB%20promotes%20global%20financial,through%20a%20three%2Dstage%20process. *See* Art. 2, FSB Charter.

[14] *See generally*, NGFS, Origin and Purpose, https://www.ngfs.net/en/about-us/governance/origin-and-purpose.

[15] For a general discussion of this problem in all bank regulation, see Christina Parajon Skinner, *Financial Stability and Bank Agency Discretion*, U. OF CHI. L. REV. (forthcoming 2024).

[16] Consider the umbrella organization under which both the BCBS and the FSB exist—the Bank for International Settlements. It was created in the 1930s for the purpose of helping to settle German War reparations. It has creatively evolved its mandate and purpose in the central banking stratosphere in an effective effort to persevere once that initial goal was reached.

[17] The Federal Reserve is not subject to appropriations for longstanding historical reasons; this makes other forms of congressional oversight of the Fed even more important. For further details, see Andrew T. Levin & Christina Parajon Skinner, *Central Bank Undersight*, 77 VANDERBILT L. REV. (forthcoming 2024).

In contrast, there is a complete absence of democratic monitors where this species of global governance is concerned. There is no mechanism for conducting congressional oversight of the work that goes on at the BCBS, FSB, or NGFS beyond asking U.S. banking agencies to testify about their involvement and insight (yielding an incomplete picture to say the least). Nor does Congress hold any purse strings in the global governance arena. The BCBS and FSB are funded by the Bank for International Settlements, itself autonomously funded, while the source of the NGFS' funding is not disclosed in its annual reports and nearly impossible for an outside researcher to determine.[18] It may be needless to point out that the final work product of these organizations is not subject to judicial review either.

Although another country's oversight could not substitute for that conducted by Congress, it does bear noting that democratic accountability from other jurisdictions is likely to be commensurately absent or weak. The BCBS—headquartered and hosted in Basel Switzerland—has total immunity under Swiss law for "all official acts." Presumably, so too does the FSB, which also sits in Basel, Switzerland.[19] The NGFS is formally nested within the Banque de France, itself a private central bank, and more likely than not funded by private sources—not much hope for democratic oversight there.

III. The Supervisory Discretion to Adopt Global Governance Standards

The lack of transparency and accountability of these global governance bodies comes to a head when the time comes to translate their work into U.S. practice or law. U.S bank supervisors, including the Fed when it acts in this capacity, have long enjoyed a nebulous mandate to ensure the "safety and soundness" of the financial institutions that they oversee.[20] No statute or rule narrows or further specifies what falls under the heading of "safety and soundness," implying that the Fed has the latitude to make, and update, that determination. Since 2008, the Fed has gone further to assume that it has an accompanying mandate to pursue "financial stability," even though Congress did not include an express mandate for financial stability in the Dodd-Frank Act.[21] Regardless, financial stability is similarly undefined in the Dodd-Frank Act or in any other piece of legislation and so it, like the term "safety and soundness," has been left to the Fed's discretion.

This discretion has been amplified by other structural changes the Dodd-Frank Act made to the Fed's bank supervision function. In particular, section 1108 of the Dodd-Frank Act created a new role among the Board of Governors, that of a Vice Chair for Supervision. That provision requires the Vice Chair for Supervision to set the Fed's supervisory agenda (the Vice Chair for

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[18] Some sources attribute its funding to the philanthropic arm of private sector corporations or other nonprofit special interest groups. The NGFS website does note some private partnerships in connection with its scenario analysis work. *See* https://www.ngfs.net/ngfs-scenarios-portal/about/.

[19] *See* Thore Neumann & Anne Peters, SWITZERLAND, in THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 545 (August Reinisch ed., Oxford Univ. Press 2013).

[20] For a discussion of the evolution of bank supervision in the United States, and the Fed's mandate in particular, see Christina Parajon Skinner, *The Independence of Central Bank Supervision*, working paper, *available at* https://www.hoover.org/sites/default/files/2024-04/Parajon%20Skinner_Independence%20of%20Central%20Bank%20Supervision_Hoover.pdf.

[21] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, (2010) (codified as amended 42 U.S.C. § 5365 (2012)).

Supervision "shall develop policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board") and to spearhead all of the Fed's "supervision and regulation" of the firms within its purview. Structurally, then, the Dodd-Frank Act consolidated the locus of the Fed's supervisory power and authority under one Board member—the Vice Chair for Supervision.

Notwithstanding the fact that all Board members maintain a say in supervisory policy and a vote on formal rulemaking, in the past three years, the Fed has developed a culture of deferring to the Vice Chair for Supervision. Indeed, in his 2021 confirmation hearing Chair Powell indicated in his colloquy with Senator Warren that he would give the Vice Chair for Supervision a "degree of deference" when setting a regulatory and supervisory agenda and that he "would not see [him]self as stopping" proposals that the Vice Chair for Supervision brought forward "since the law seems to indicate that that's the job of the Vice Chair for Supervision."[22]

The result of this discretion, combined with deference from the Board, has been an extremely wide berth for the Vice Chair for Supervision to adopt supervisory standards and principles that have been fashioned from the supervisory workstreams at Basel and are consistent with the viewpoint of the FSB and NGFS (both of which organizations assert that climate change is a financial stability risk for banks).

This is observable from the Fed's marked shift in position when the person occupying the role of the Vice Chair changed in 2022. Although central banks around the world began working on climate change issues in earnest around 2019, the Fed remained largely silent given its lack of mandate to address climate change or sustainability.[23] However, in the Fed's 2022 *Supervision and Regulation* report to Congress, climate change was indicated as a priority and it committed the Fed to providing interagency guidance on the financial risks of climate change and to piloting a new climate scenario analysis.[24] Incidentally, climate-related stress tests or scenario analysis had also been recommended as an important supervisory strategy by the NGFS and embraced by the FSB.[25] The Fed conducted its first climate scenario analysis in 2023.[26]

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[22] Press Release, Elizabeth Warren, At Hearing, Warren Presses Federal Reserve Chair Powell on Vice Chair for Supervision's Authority to Take Tough Regulatory Action (Nov. 30, 2021), https://www.warren.senate.gov/newsroom/press-releases/at-hearing-warren-presses-federal-reserve-chair-powell-on-vice-chair-for-supervisions-authority-to-take-tough-regulatory-action.

[23] For a discussion of the Fed's mandate in respect of climate change and sustainability issues, see *Central Banks and Climate Change*, 75 VANDERBILT L. REV. 1301 (2021). For a discussion of how the Fed's mandate for climate change and sustainability differs from those of the Bank of England and the European Central Bank, see Rosa María Lastra & Christina Parajon Skinner, *Sustainable Central Banking*, 63 V. J. OF INT'L L. 397 (2023).

[24] *See* BD. OF GOVERNORS OF THE FEDERAL RESERVE SYS., SUPERVISION AND REGULATION REPORT 14 (Nov. 2022). The report referred to a separate September 2022 announcement regarding the pilot of the scenario analysis. As early as 2020, however, the Fed's Supervision and Regulation reports had begun to indicate that the Fed would like "to better understand" climate-related financial risks. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, SUPERVISION AND REGULATION REPORT 26 (May 2020), https://www.federalreserve.gov/publications/files/quarles20200512a.pdf.

[25] *See* FIN. SUSTAINABILITY. BD., CLIMATE SCENARIO ANALYSIS BY JURISDICTIONS: INITIAL FINDINGS AND LESSONS, (2022), https://www.fsb.org/wp-content/uploads/P151122.pdf.

[26] *See Climate Scenario Analysis Exercise Results,* BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/publications/climate-scenario-analysis-exercise-results.htm.

Shortly after the launch of the climate scenario analysis, as promised, the Fed Board promulgated new supervisory guidance concerning climate risk in banks in October 2023. The guidance document, *Principles for Climate-Related Financial Risk Management for Large Financial Institutions*,[27] set out significant expectations for banks in regard to their risk-management and lending.[28] Notably, the Fed's principles followed the publication of Basel Principles on Climate Supervision issued in June 2022, which work had built upon two additional Basel reports published in April 2021. The Fed's document, like those produced by the BCBS, engaged language around physical risk and transition risk and discussed how these risks should be incorporated into assessments of market, operational, and credit risk.

This raises substantive concerns that add on to the procedural qualms noted above. In particular, tracking the BCBS/FSB/NGFS stance on climate-related financial risk may well lead to the development of a supervisory toolkit and methodology that departs from U.S. political consensus and instead imports a European view. This matters because the U.S. and EU have not converged on whether climate change and sustainability should be addressed through tools of financial regulation and banking supervision.

Consider just a few illustrative examples of the division. In the EU, the European Parliament and Council have adopted a Taxonomy Regulation that requires a wide range of financial firms to engage in extensive sustainability-related disclosure regarding their investments.[29] As one market group has described it, the Taxonomy Regulation is "designed to support the transformation of the EU economy to meet its European Green Deal objectives."[30]

Similarly, one key piece of the EU's Sustainable Finance Package of April 2021 was the EU Corporate Sustainability Reporting Directive, which came into force in January 2023. It requires all large companies to regularly disclose their environmental and social impact activities.[31] Going even further into value-chain regulation, the Corporate Sustainability Due Diligence Directive (adopted in July 2024) mandates, among other things, financial firms adopt transition plans indicating how they plan to align their business with the goals articulated in the Paris Agreement.[32] Meanwhile, in the U.S., the SEC's analogous efforts to pass a greenhouse gas

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[27] Bd. of Governors of the Federal Reserve System, *Principles for Climate-Related Financial Risk Management for Large Financial Institutions,* BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Oct. 24, 2023), https://www.federalreserve.gov/supervisionreg/srletters/SR2309a1.pdf.

[28] "For the purposes of these principles, climate-related scenario analysis refers to exercises used to conduct a forward-looking assessment of the potential impact on a financial institution of changes in the economy, changes in the financial system, or the distribution of physical hazards resulting from climate-related financial risks. These exercises differ from traditional stress testing exercises that typically assess the potential impacts of transitory shocks to near term economic and financial conditions." *Id.* at 5.

[29] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance).

[30] David Henry Doyle, *A Short Guide to the EU's Taxonomy Regulation*, S&P GLOB. (May 12, 2021), https://www.spglobal.com/esg/insights/a-short-guide-to-the-eu-s-taxonomy-regulation.

[31] *See* Geneviève Helleringer & Christina Parajon Skinner, *The Hardening of Corporate ESG*, *in* EU HANDBOOK ON SUSTAINABLE FINANCE (Michele Siri, Kern Alexander & Matteo Gargantini eds., forthcoming 2024).

[32] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. *See* Eur. Comm'n, Corporate Sustainability Directive, https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en ("The aim of this Directive is to foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains.")

emission disclosure rule were considered by many as an exercise in agency overreach, resulting in a pared-down version of the rule which remains quite controversial.[33]

Importantly, the EU has embraced the concept of "double materiality" in its various requirements for sustainability reporting—meaning, it expects firms, including financial firms, to report not only the impact environmental issues have on their risk profile but additionally the impact that their business has on the environment. Essentially, the EU wishes to encourage financial firms to lessen their impact on climate change. On the other hand, whether banks and other financial market actors have that responsibility—and, more to the point, whether regulators can impose that obligation absent congressional instruction—remains a contested issue in the United States.

Beyond reporting and disclosure as a means of exacting business practice change, the EU has also adopted a much more punitive approach to banks' failure to facilitate a transition to a green economy. In May 2024, the media reported that the ECB plans to fine several large banks for failing to meet the central bank's "interim milestones" for assessing banks' exposure to climate risks and integrating such risks into their capital planning.[34] In contrast, at this point, the Fed has not gone beyond the steps of supervisory guidance and a voluntary scenario analysis likely because it is sensitive to its lack of legislative mandate and political support for engaging in more coercive requirements for banks to engage in greening.

Perhaps the most significant divergence between the U.S. and EU when it comes to central banks and greening pertains to their starkly contrasting approaches to their balance sheets—whereas the ECB has committed to a version of "green QE" (attempting to ensure that its asset purchases support the green transition by selecting an appropriate proportion/amount of green bonds), the Federal Reserve has been clear that any use of monetary policy tools to mitigate climate change lies well beyond its mandate.[35]

To underscore the point: these various differences in EU-U.S. legislative measures necessarily mean that the people in the United States have different opinions about how to transition to a greener economy than the citizens in the European Union do. Accordingly, although some U.S. policymakers, like the Vice Chair for Supervision, may believe that the EU approach is more optimal than that taken to date in United States, it is not democratically legitimate for one (or several) unelected expert(s) to leverage the global governance framework as a vehicle for bypassing Congress and instantiating an EU-styled version of climate-related banking supervision.

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[33] *See, e.g.*, Lawrence A. Cunningham et al., *The SEC's Misguided Climate Disclosure Rule Proposal*, 41 BANKING & FINANCIAL SERVS. POL'Y REPORT (Oct. 2022), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2888&context=faculty_publications (summarizing comment letters signed by 22 professors in opposition to the SEC's proposed rule).

[34] *See, e.g.*, Nicholas Comfort & Jorge Zuloaga, *ECB to Impose First-Ever Fines on Banks for Climate Failures*, BLOOMBERG, May 29, 2024, https://www.bloomberg.com/news/articles/2024-05-29/ecb-to-impose-first-ever-fines-on-banks-for-climate-failures; *Some Euro Zone Banks May be Fined After Missing ECB Climate Goal,* REUTERS, June 5, 2024, https://www.reuters.com/sustainability/sustainable-finance-reporting/some-euro-zone-banks-may-be-fined-after-missing-ecb-climate-goal-2024-06-05/. The speech that formed the basis of these reports is, Interview with Kerstin af Jochnick, Member of the Supervisory Board of the ECB, June 5, 2024, https://www.bankingsupervision.europa.eu/press/interviews/date/2024/html/ssm.in240605~f059c4f5ec.en.html.

[35] *See* Jerome H. Powell, Bd. of Governors of the Federal Reserve, Chair, *Panel on "Central Bank Independence and the Mandate—Evolving Views"*, Jan. 10, 2023, https://www.federalreserve.gov/newsevents/speech/powell20230110a.htm.

IV. The U.S. Constitution's Separation-of-Powers

The U.S. Supreme Court has recently clarified the metes and bounds of agencies' ability to pursue an agenda that departs from the wishes of Congress. In *Loper Bright Enterprises v. Raimondo*, the Court underscored that agencies are neither best-suited nor constitutionally assigned to interpret ambiguities in their statutory mandates—if there is any determination about what falls within the scope of an agency's responsibility, that question should be left only for the courts.[36] The case of Fed supervision adopting global governance supervisory principles which clearly do not align with existing political consensus would seem to be a case in direct violation of this point.

Furthermore, in *West Virginia v. EPA*, the Supreme Court was clear on another separation-of-powers principle: agency action can only be legitimately aimed at effectuating significant political, social, or economic change—that is, tackle a "major question"—if Congress has clearly instructed the agency to do so.[37] This is because all agencies, including the Fed and other bank supervisors, are part of the executive branch of government; their duty is to implement and enforce the law, not to make or change it. The Constitution gives that latter responsibility exclusively to Congress. Inasmuch as agencies cannot circumvent the Constitution's structure that separates power between the executive and legislative branches, they cannot appeal to their participation in global governance regimes and the interests of international regulatory comity to accomplish a similar result.

Conclusion

In conclusion, I have spent my career studying international institutions and advocating for international cooperation and collegiality. At the same time, I am also a staunch advocate for the rule-of-law, the maintenance of a free and democratic society, and a credible and independent central bank. These multiple principles and goals can be harmonious, to be sure. However, the current modus operandi of the global governance of banking and finance has become too vulnerable to capture by special interests and the aggrandizement of its mission, transforming U.S. participation in this framework well beyond what Congress originally understood when the BCBS was first created in the 1980s. Not only has the BCBS expanded into new territory, but new institutions, like the FSB and even more problematically the NGFS, have cropped up. The Fed's adoption of these bodies' supervisory and regulatory ideals should not be incorporated into U.S. practice without greater congressional involvement given the extent to which much of their focus is increasingly the subject of fundamental political disagreement. The goals that much of these bodies' supervisory and regulatory work pursues require subjective value judgments that only democratically elected officials should be making.

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[36] Loper Bright Enterprises v. Raimondo, No. 22-451 (decided June 28, 2024), slip op. available at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

[37] West Virginia v. EPA, 142 S. Ct. 2587 (2022).