

INVESTOR CLIMATE ALLIANCES

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ABSTRACT

Climate change causes systemic financial risk, compelling long-term institutional investors to act. Its impacts extend beyond financial harms, aligning institutional investors with socially responsible investors, NGOs, and international organizations that seek to mitigate environmental crises. Addressing climate change requires collaboration among these diverse and transnational actors. But sustained collaboration requires institutional support. Investor climate alliances (ICAs) provide the infrastructure for effective climate stewardship by creating a system for communication and collaboration. ICAs are large transnational alliances of public and private actors that use shareholder stewardship to minimize the financial impacts of climate risk on investors' portfolios.

Despite their novelty, ICAs have shown their promise by persuading some of the highest emitting companies to commit to reduce their carbon emissions. Their scale is impressive—Climate Action 100+ includes over 600 global investors and over \$55 trillion of assets across 33 markets. ICAs are one of the most consequential recent developments in corporate law. Yet their complexities remain unexplored, leading to hasty policy interventions. Indeed, the fate of ICAs is increasingly perilous. The largest asset managers are leaving these alliances because of partisan pressure and legal uncertainty at precisely the moment we need urgent action.

The status quo fails to recognize that ICAs are an innovative tool for advancing the traditional ends of corporate law. They are in harmony with antitrust law because they benefit consumer welfare; with securities law because they protect investors by increasing disclosure of climate risk; and with fiduciary duty law because they empower shareholders to monitor corporate boards. Corporate law must forge a path toward collaborative climate stewardship. This Article provides a policy roadmap for doing so.

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INTRODUCTION

On February 15, 2024, three financial industry giants stepped back from their climate commitments.¹ State Street and JP Morgan announced their withdrawal from Climate Action 100+, the world's largest alliance of investors aimed at mitigating climate risk.² On the same day, BlackRock announced that it would curtail its involvement with the alliance and transfer its membership to an international affiliate.³ Increasing threats from Republican lawmakers are driving more investor departures, with Goldman Sachs and Nuveen being among the latest to leave Climate Action 100+.⁴ This reality highlights an untenable tension between what climate risk *demands*—unprecedented levels of investor collaboration—and a lack of clarity about the scope of collaboration that corporate law *allows*. This Article provides an in-depth and timely analysis of investor climate alliances (ICAs) and offers a way out of this impasse.

ICAs are large transnational alliances of public and private actors that use shareholder stewardship to minimize the financial impacts of climate risk on investors' portfolios.⁵ The scale of these ICAs is significant. Climate Action 100+, launched in 2017, is the first ICA and includes over 600 global investors and over \$55 trillion of assets under management across 33 markets.⁶ Its investor members include sovereign wealth funds, pension funds, private asset managers, socially responsible investors, and faith investors.⁷ Many other groups played prominent roles in launching the initiative, including climate-focused NGOs, the United Nations, civil

1. David Gelles, *More Wall Street Firms Are Flip-Flopping on Climate. Here's Why*, N.Y. TIMES (Feb. 19, 2024), <https://www.nytimes.com/2024/02/19/business/climate-blackrock-state-street-jpmorgan-pimco.html> [<https://perma.cc/AT59-89AQ>]; Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024, 5:07 PM), <https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15/> [<https://perma.cc/GJ75-3MMZ>].

2. Jessop & Kerber, *supra* note 1.

3. *Id.*

4. See Gelles, *supra* note 1; Iain Withers & Simon Jessop, *Goldman Sachs' Fund Division to Leave Climate Investor Group*, REUTERS (Aug. 9, 2024, 10:52 AM), <https://www.reuters.com/business/finance/goldman-sachs-asset-management-leave-ca100-investor-group-2024-08-09/> [<https://perma.cc/H9KR-XEJV>]; Gina Gambetta & Dominic Webb, *Trillion-Dollar US Asset Manager Exits Climate Action 100+*, RESPONSIBLE INV. (Aug. 16, 2024), <https://www.responsible-investor.com/trillion-dollar-us-asset-manager-exits-climate-action-100/> [<https://perma.cc/5JK5-F9NJ>].

5. This Article introduces the term Investor Climate Alliances (ICAs). See *infra* Section I.C.

6. See *About Climate Action 100+*, CLIMATE ACTION 100+, <https://www.climateaction100.org/about/> [<https://perma.cc/3VED-PLG5>]. Of course, this number is fluctuating, as many investors are currently leaving the alliance, and new investors are also joining. See *New Joiners Global Story*, CLIMATE ACTION 100+ (Oct. 17, 2024), <https://www.climateaction100.org/news/new-joiners-global-story/> [<https://perma.cc/6LRE-3MUX>].

7. *About Climate Action 100+*, *supra* note 6.

society groups, think tanks, and academics.⁸ Climate Action 100+ helps ensure compliance with an expanding set of global regulations that are consistent with the Paris Agreement's mandate to keep global warming under 1.5 degrees.⁹ Thus, it reflects an attempt to adhere to law, and not a private regulatory regime that "crowds out" or usurps regulation.¹⁰

Indeed, ICAs are a recent development, and their motives and mechanics remain obscure.¹¹ But two things are clear: ICAs provide an effective and unique forum for mitigating climate risk, and their fate hangs in the balance. Thus, this Article provides descriptive, theoretical, normative, and policy contributions at a pivotal juncture. In doing so, it sharpens scholarly debates encompassing portfolio primacy,¹² the interplay between shareholder collaboration and externality regulation on ESG issues,¹³ the constraints set by antitrust and securities law on shareholder collaboration,¹⁴ and whether

8. *Id.* CA100+'s founding members include non-profits and civil society organizations. Such as Ceres, a non-profit, and PRI, a United Nations supported network of investors. See *About Us*, CERES, https://www.ceres.org/about?gad_source=1&gclid=CjwKCAiAmMC6BhA6EiwAdN5iLR358XXJgLj12DQrb6DPi6b4QiMeNxT-UST3ms7498eu8KNbPFh2RxoCMpMQAvD_BwE [https://perma.cc/Z4M2-3LRF]; *About the PRI*, UNPRI, <https://www.unpri.org/about-us/about-the-pri> [https://perma.cc/W3AP-85J9]; see also CLIMATE ACTION 100+, 2019 PROGRESS REPORT 1 (2020), <https://www.climateaction100.org/wp-content/uploads/2020/10/English-Progress-Report-2019.pdf> [https://perma.cc/9ARH-RXW8].

9. *The Three Goals*, CLIMATE ACTION 100+, <https://www.climateaction100.org/the-three-goals/> [https://perma.cc/9CRQ-QK76].

10. A long-standing critique of voluntary efforts is that they reduce pressure on governments to enact stricter regulation. See Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 311–17 (2021); Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 124 (2004).

11. See *infra* Part I.

12. Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627 (2022); CALPERS, CALPERS' INVESTMENT STRATEGY ON CLIMATE CHANGE: FIRST REPORT IN RESPONSE TO THE TASKFORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURE (2020); Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511 (2023); Amanda M. Rose, *A Hard Look at Portfolio-Focused Stewardship*, 2024 COLUM. BUS. L. REV. 313.

13. For a comprehensive account of the term ESG, see Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024) ("ESG as an acronym for 'environmental, social, governance' is a common denominator of the discourse using the term, but a deeper examination reveals that little beyond that understanding is fixed."). For scholarly discussions of the interplay between shareholder collaboration and externality regulation on ESG issues, see Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77 (2023); Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693 (2023); Rose, *supra* note 12; Tallarita, *supra* note 12; Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019); and Haejin Kim, Joshua Macey & Kristen Underhill, *Does ESG Crowd Out Support for Government Regulation?*, (Univ. Chi. Coase-Sandor Inst. L. & Econ. Research Paper No. 983, 2023), <https://ssrn.com/abstract=4521781> [https://perma.cc/SVP8-F9QE].

14. See Amelia Miazad, *From Zero-Sum to Net-Zero Antitrust*, 56 U.C. DAVIS L. REV. 2067 (2023); Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863 (2020); Robert B. Thompson, *The New Unocal*, 65 ARIZ. L. REV. 695 (2023); Dan W. Puchniak & Umakanth Varottil, *Climate-Related Shareholder Activism as Corporate Democracy: A Call to Reform "Acting in Concert" Rules*, 50 J. CORP. L. (forthcoming 2025).

investors' fiduciary duties permit or even require shareholder collaboration on climate risk.¹⁵

Although shareholder collaboration on ESG issues is a central focus of these scholarly and policy debates, the precise role that ICAs play in facilitating and systematizing such collaboration remains unexplored. Indeed, commentators have thus far either viewed ICAs as a new type of private regulation,¹⁶ or grouped them with less structured modes of investor collaboration, like stewardship codes or principles.¹⁷ Thus, Part I provides an original descriptive account of Climate Action 100+, the first and largest transnational investor alliance addressing climate change.¹⁸ It explains that the convergence of two developments has set the stage for ICAs: the unique nature of climate change risk and the increase of institutional investors with highly diversified investment portfolios. These “universal owners” are incentivized to address climate change in hopes of sustaining the long-term value of their investment portfolios.¹⁹ Accordingly, they first began to form collaborative governance regimes, such as stewardship codes or principals.²⁰ ICAs evolved from these past efforts and are more sophisticated.

This descriptive account of Climate Action 100+ reveals that investors and other key players have switched from a competitive game to a

15. See Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020).

16. See generally Lund, *supra* note 13.

17. See Tim Bowley & Jennifer G. Hill, *The Global ESG Stewardship Ecosystem*, 25 EUR. BUS. ORG. L. REV. 229, 230–31 (2024); Michael MacLeod & Jacob Park, *Financial Activism and Global Climate Change: The Rise of Investor-Driven Governance Networks*, 11 GLOB. ENV'T POL. 54 (2011); Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance* (Eur. Corp. Gov. Inst., Working Paper No. 615/2021, 2021), <https://ssrn.com/abstract=3958960> [<https://perma.cc/KMF2-6X9Y>].

18. See *infra* Part I. This Article relies on Climate Action 100+ as a case study for ICAs because it is the first and most developed. It is, however, not the only ICA. In April 2021, the UN announced the Glasgow Financial Alliance for Net Zero (GFANZ), a coalition of eight separate net-zero initiatives that span the financial industry. GFANZ includes the Net Zero Asset Owner Alliance (NZAOA), Net Zero Asset Managers Initiative (NZAM), Paris Aligned Asset Owners (PAAO), Net-Zero Banking Alliance (NZBA), Net Zero Export Credit Agencies Alliance (NZECA), Net Zero Financial Services Providers Alliance (NZFSPA), Net Zero Investment Consultants Initiative (NZICI) and The Venture Climate Alliance (VCA). See *The Alliances and GFANZ*, GFANZ, <https://www.gfanzero.com/membership/> [<https://perma.cc/RMC6-PW2C>]; see also Matteo Gasparini, Knut Haanaes & Peter Tufano, *When Climate Collaboration Is Treated as an Antitrust Violation*, HARV. BUS. REV. (Oct. 17, 2022), <https://hbr.org/2022/10/when-climate-collaboration-is-treated-as-an-antitrust-violation?ab=hero-subleft> [<https://perma.cc/4H6S-93QU>] (identifying “more than 150 business climate collaborations ranging from common carbon accounting frameworks and principles for responsible investments to shared net zero objectives”).

19. See *infra* Section I.A. Universal owners are defined as “diversified asset owners, such as pension funds, university endowments, and sovereign wealth funds that have an interest in the longterm health of the financial system as a whole because their own returns and duties are largely tied to overall market movements.” See Ellen Quigley, *Universal Ownership in Practice: A Practical Investment Framework for Asset Owners*, CAMBRIDGE UNIV. PRESS (forthcoming 2025) (footnote omitted).

20. See *infra* Section I.B.

collaborative one for the sole aim of reducing climate risk.²¹ Part II sheds light on the theoretical motivations for this switch to collaborative governance.²² Corporate law theories, such as agency theory, are rooted in a competitive paradigm.²³ This Article looks outside of corporate law to Elinor Ostrom's foundational theory of collaborative governance.²⁴ Ostrom recognized that market players are often, but not always, engaged in a competitive game. As Ostrom observed, when risks impact an entire ecosystem, such as pollution affecting a shared fishery, the users of that fishery can no longer manage and measure their activities individually.²⁵ As Ostrom demonstrated, if such individuals can communicate, they will develop collaborative governance regimes to serve their end of securing the highest individual yield for the maximum number of years.²⁶ Thus, Garrett Hardin's "tragedy of the commons" is not an inevitable outcome. This is entirely rational, and self-serving; players engage in collaborative games precisely because they know they will fare better.²⁷ These governance regimes require information sharing. Such information sharing and

21. As Part IV explains, collaboration aimed at reducing climate risk is permissible under antitrust law because it ultimately benefits consumers and is thus procompetitive. Crucially, while investors have rationally decided to collaborate to reduce systemic climate risk, they continue to compete on reducing idiosyncratic risks outside of the alliances.

22. See *infra* Part II.

23. See Fisch & Sepe, *supra* note 14.

24. Her insights offer "an expansion of thinking beyond the usual policy approaches of regulatory command and control, government intervention in market pricing systems, and formal agreements among national sovereigns." Paul C. Stern, *Design Principles for Global Commons: Natural Resources and Emerging Technologies*, 5 INT'L J. COMMONS 213, 229 (2011). Ostrom and those in her stead have applied the theory of collaborative governance to natural resource management, intellectual property, and the administration of public services, among other areas. See, e.g., Michael Mattioli, *Empirical Studies of Patent Pools*, in 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 236 (Peter S. Menell & David L. Schwartz eds., 2019); Yochai Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, 80 U. CHI. L. REV. 1499 (2013) (reviewing BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* (2012)) (applying Ostrom's theory of the commons to efforts to markets); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339, 343 (2012) (applying Ostrom's IAD framework to the firm and arguing for stakeholder governance).

25. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (Canto Classics ed. 2015) [hereinafter OSTROM, *GOVERNING THE COMMONS*]; Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010) [hereinafter Ostrom, *Beyond Markets*].

26. See *infra* Section II.B.

27. Critics concede that diversified investors' efforts to maximize portfolio-wide returns instead of single-firm returns "proceed[] from a clearly correct premise." Rose, *supra* note 12, at 320. Instead, their claim is that systematic stewardship is infeasible because it ignores the real-world obstacles that prevent portfolio managers from behaving in this ideal and economically rational way. These obstacles are familiar: agency costs, imperfect information, and market dynamism. Rather than remedying these agency costs, these critics point to a familiar antidote—externality regulation. *Id.* at 322–24 (synthesizing recent scholarship addressing the limitations on portfolio primacy). For another critique of portfolio primacy focused on the conflicting fiduciary duties between asset owners and managers, see Roberto Tallarita, Essay, *Fiduciary Deadlock*, 171 U. PA. L. REV. ONLINE 1, 1 (2023).

collaboration further requires intangible “infrastructure” to be efficient.²⁸ Climate risk—a systemic risk with portfolio-wide, economy-wide, and society-wide impacts—is analogous to the pollution in Ostrom’s fishery. Thus, investors and other key players, such as NGOs, academics, and governments must collaborate, and build “infrastructure” to do so.²⁹

Part III fleshes out the promise of ICAs as intangible infrastructure for collaboration.³⁰ ICAs strengthen collective stewardship of climate change risk by increasing investors’ capacity for monitoring, voting, and engagement, upending the conventional view that institutional investors lack the capacity for stewardship. Moreover, climate risk information suffers from problems of information scarcity and abundance. But, by aligning heterogeneous investor preferences, ICAs increase the quantity and quality of climate risk information in the public domain. ICAs also make it easier for investors to assess, comprehend, and utilize large amounts of climate risk information.³¹ This information is useful to investors, and produces public benefits.³² ICAs also enable investors to resolve their persistent collective action problem by reducing the cost of, and increasing the incentives for, collaboration.³³

Though ICAs have vast promise to mitigate climate risk, a partisan focus on so-called “woke” corporations and investors has prompted a regulatory backlash. Lawmakers and attorneys general have capitalized on the ambiguities of corporate law to mischaracterize ICAs as associations of private firms.³⁴ The recent departures of major financial players have

28. See BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 227–28 (2012).

29. See OSTROM, *GOVERNING THE COMMONS*, *supra* note 25; Ostrom, *Beyond Markets*, *supra* note 25.

30. See *infra* Part III.

31. See Press Release, Climate Action 100+, Climate Action 100+ Net Zero Company Benchmark Shows an Increase in Company Net Zero Commitments, but Much More Urgent Action Is Needed to Align with a 1.5°C Future (Mar. 30, 2022), <https://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-an-increase-in-company-net-zero-commitments-but-much-more-urgent-action-is-needed-to-align-with-a-1-5c-future/> [<https://perma.cc/W9MA-C4PF>].

32. The lack of a clearinghouse for reliable data remains one of the biggest barriers to addressing climate change. See Madison Condon, *Market Myopia’s Climate Bubble*, 1 UTAH L. REV. 63, 79 (2022) (“Shareholders and analysts currently lack the fine-grained asset-level data they need in order to make climate-risk assessments.”).

33. See *infra* Part III.

34. For instance, House Republicans have accused Climate Action 100+ of acting as a “woke ESG cartel.” @JudiciaryGOP, TWITTER (July 30, 2024, 3:13 PM), <https://x.com/JudiciaryGOP/status/1818379444202959278> [<https://perma.cc/4UVH-CW5U>]; see also Letter from Republican Members, House Judiciary Comm., to Climate Action 100+ Steering Comm. (Dec. 6, 2022), <https://nsjonline.com/wp-content/uploads/2022/12/2022-12-06-612712009-House-Republican-letter-to-Climate-Action-100.pdf> [<https://perma.cc/7QCX-5A23>]; Dominic Webb, *‘We Are Not a Cabal’ - Anne Simpson on Climate Action 100+*, RESPONSIBLE INV. (Dec. 20, 2022), <https://www.responsible-investor.com/we-are-not-a-cabal-anne-simpson-on-climate-action-100/> [<https://perma.cc/4V36-Z7FZ>]. Arizona AG Mark

handed these critics a victory.³⁵ Part IV, however, argues that ICAs *further* rather than *impede* the longstanding objectives of corporate law. A major critique of ICAs is that they facilitate anticompetitive investor collaboration, in violation of antitrust law.³⁶ However, antitrust law recognizes that collaboration among competitors can be procompetitive if it increases consumer welfare. ICAs increase consumer welfare by addressing climate change, which, if left unmitigated, will increase the cost and availability of a wide range of consumer goods and services.³⁷

ICAs also further the overarching goal of securities law, which is to provide accurate and decision-useful information to the public markets in order to protect value for shareholders. As Part IV details, ICAs do this by providing tools for investors to help companies generate, verify, and disclose more information about climate change.³⁸ ICAs also advance the ends of corporate law, which imposes on investors fiduciary duties to assess risks and returns at the portfolio level.³⁹ ICAs, by facilitating collaboration among investors, provide the infrastructure and incentives for investors to

Brnovich's description of Climate Action 100+ illustrates this misconception. See Mark Brnovich, Opinion, *ESG May Be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022, 4:40 PM), <https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807> [https://perma.cc/U6A5-XRW5] ("The biggest banks and money managers seek to implement a political agenda, such as compliance with the Paris Climate Accord. Then a group mobilizes: Climate Action 100+, for example, comprised of hundreds of big banks and money managers that together manage \$60 trillion.").

35. Jessop & Kerber, *supra* note 1.

36. See Danielle A. Chaim, *Investor Coalitions Through an Antitrust Lens*, U.C. IRVINE L. REV. (forthcoming 2025) (arguing that investor coalitions against dual class stock structures have anticompetitive effects in violation of antitrust law). Other scholars have argued that investors with "common ownership" violates antitrust law. See, e.g., Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1316–17 (2016) (concluding that institutional investors' horizontal holdings violate current antitrust law); see also José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1521–51 (2018); Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, 83 ANTITRUST L.J. 201, 201–03 (2020). But see Menesh S. Patel, *Common Ownership, Institutional Investors, and Antitrust*, 82 ANTITRUST L.J. 279, 325 (2018) (arguing that an empirical analysis of common ownership finding that "the extent to which common ownership actually results in competitive harm" is highly context-specific and "depends on numerous factors").

37. There are two perspectives on the goals of antitrust. The Chicago school focuses on increasing economic consumer welfare, while the Neo-Brandeisian movement argues that antitrust law should address concentrated corporate power to protect democracy. See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405–06 (2013). Despite the recent ascendance of the Neo-Brandeis movement, and the historical inclusion of other social objectives in antitrust, the consumer welfare standard remains dominant. See John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501 (2019). Therefore, this Article assumes that the goals of antitrust remain tethered to economic consumer welfare. For an argument that antitrust law should adopt a "universal consumer" standard, see Amelia Miaad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1645 (2022).

38. See John H. Matheson & Brent A. Olson, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313, 1326 (1992) (positing that the goal of corporate law is "to maximize corporate—and thus shareholder—welfare").

39. See *infra* Section IV.C.

meet their fiduciary duty to assess climate risks. Part IV details several ways that antitrust, securities law, and investor fiduciary duties can be reformed and clarified to prevent the chilling effects that are impeding ICAs. The existing corporate law tools, designed to address entirely different harms, lack precision. We must stop fishing with dynamite.

I. TRACING THE ORIGINS OF INVESTOR CLIMATE ALLIANCES

The Paris Agreement is ambitious. It seeks to prevent the global temperature from increasing more than 1.5°C from pre-industrial levels.⁴⁰ Achieving a 1.5°C limit to global warming requires a “whole economy transition” and unprecedented levels of collaboration.⁴¹ Such collaboration demands institutional infrastructure to support it. This Part argues that ICAs are supplying the infrastructure that the financial sector needs to realize its “net zero” transition. Section A summarizes the theory of universal ownership, which explains why diversified investors are uniquely motivated to reduce systemic risks like climate change. Section B discusses the history of investor collaboration, which started with loosely coordinated transnational investor coalitions. Section C details how the severity of climate risk prompted more systematized forums, such as Climate Action 100+.

A. Universal Owners & Systemic Risk

Universal owners’ relationship with systemic risk makes climate change a priority. The shift is due to the rise of index investing: “An identifiable shareholder with discrete and discernible interests in a specific company is no longer the model that fits the majority of American investors.”⁴² Instead, pension funds and individual shareholders invest in index funds managed by financial intermediaries.⁴³ As a result, the “Big Three” asset managers (BlackRock, State Street, and Vanguard) collectively hold more than 20% of the shares of companies listed in the S&P 500 index, casting almost 25%

40. Paris Agreement Under the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 54113, https://unfccc.int/sites/default/files/english_paris_agreement.pdf [<https://perma.cc/JQC4-PN5X>].

41. *Accelerating the Transition to a Net-Zero Global Economy*, GFANZ, <https://www.gfanzero.com/> [<https://perma.cc/NG7C-6UAW>].

42. Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1310 (2012).

43. *See id.* at 1312; *see also* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013); Bebchuk & Hirst, *supra* note 13.

of votes at their annual meetings.⁴⁴ The Big Three's largest clients are themselves diversified investors, such as pension funds and insurance companies; thus, today's investors are more diversified than ever.⁴⁵ A growing corporate law literature refers to these highly-diversified investors as "universal owners."⁴⁶ Universal owners do not use the same playbook as undiversified investors, who pick winners and losers in the market and are susceptible to idiosyncratic risk. Instead, universal owners maintain diversified portfolios which are exposed to "unhedgeable" systemic risks.⁴⁷

This relationship with systemic risk is out of step with corporate law's traditional single-firm focus.⁴⁸ As Madison Condon argues, a "rational owner would use its power to internalize externalities so long as its share of the costs to the externality-creating firms are lower than the benefits that accrue to the entire portfolio from the elimination of the externality."⁴⁹ This reality means that universal owners worry about portfolio-wide systemic

44. Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1599 (2022); Lund, *supra* note 13, at 82 ("From starting principles, the concentration of power in the hands of three private for-profit companies that lack democratic legitimacy and electoral accountability is seriously concerning.").

45. Pension funds and asset managers' growth are inextricably linked because asset managers' largest clients are often pension funds. For example, 67% of BlackRock's assets under management are public pension funds. See BlackRock, Annual Report (Form 10-K) 6 (Feb. 25, 2021), https://www.sec.gov/Archives/edgar/data/1364742/000156459021008796/blk-10k_20201231.htm [<https://perma.cc/3V2J-ACMP>]. The parallel growth of pension funds and asset managers has strengthened their combined voice in corporate governance. Benjamin Braun, *Asset Manager Capitalism as a Corporate Governance Regime*, in *THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER* 270 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2022); see also Gordon, *supra* note 12.

46. See James Hawley & Andrew Williams, *The Emergence of Universal Owners: Some Implications of Institutional Equity Ownership*, 43 CHALLENGE 43, 45 (2000); James Hawley & Andrew Williams, *Universal Owners: Challenges and Opportunities*, 15 CORP. GOVERNANCE 415, 415–16 (2007); Roger Urwin, *Pension Funds as Universal Owners: Opportunity Beckons and Leadership Calls*, 4 ROTMAN INT'L J. PENSION MGMT. 26, 26 (2011); see also, e.g., Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5–6 (2020) (using the term "universal owners" to refer to these types of investors); Luca Enriques & Alessandro Romano, *Rewiring Corporate Law for an Interconnected World*, 64 ARIZ. L. REV. 51 (2022).

47. See John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 54–70 (2014) (arguing for a different fiduciary duty for directors to maximize portfolio values, as opposed to firm-specific shareholder value). But see Tallarita, *supra* note 12; Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497 (2023); Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875 (2021).

48. Condon, *supra* note 46, at 6. For an overview of universal ownership, see generally Ellen Quigley, *Universal Ownership and the Polycrisis: Social Norms, Feedback Loops, and the Double Hermeneutic* (May 21, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3612928> [<https://perma.cc/3T7A-QL5W>]. For a historical account, see *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors*, PRINCIPLES FOR RESPONSIBLE INV. (Oct. 1, 2010), <https://www.unpri.org/environmental-issues/universal-ownership-why-environmental-externalities-matter-to-institutional-investors/4068.article/> [<https://perma.cc/M7KC-H6TW>]; and Frederick H. Alexander, *The Benefit Stance: Responsible Ownership in the Twenty-First Century*, 36 OXFORD REV. ECON. POL'Y 341, 356 (2020).

49. Condon, *supra* note 46, at 6.

risk—which, importantly, cannot be eliminated through diversification.⁵⁰ It is uncontroversial that universal owners are, or ought to be, rationally motivated to minimize systemic risks, but scholars have not focused on how systemic risk impacts relationships between universal owners.⁵¹ This Article argues that the portfolio-wide approach to addressing systemic risk provides strong incentives for investors to collaborate. Moreover, systemic risks are better addressed at scale—for example by changing the business practices of an entire industry or the market. This insight is not new—scholars have observed that institutional investors “are most likely to become active for process and structural issues that exhibit economies of scale” than those that are firm-specific.⁵²

B. Early Investor Collaboration & Stewardship Codes

We can trace the history of ICAs to the UN’s Principles for Responsible Investment (PRI).⁵³ PRI’s formation in 2006 marked the first time that large, diversified investors agreed that oversight of environmental and social risks is essential to securing the long-term sustainability of their investment portfolios—a turning point in sustainable finance. Today, PRI signatories represent more than \$121.3 trillion of assets under management.⁵⁴ Through

50. See Gordon, *supra* note 12, at 629 (“Risk that pertains to a particular company, so-called ‘idiosyncratic’ risk, can be diversified away; risk that will affect returns throughout the portfolio, ‘systematic risk,’ remains.”); Jim Hawley & Jon Lukomnik, *The Long and Short of It: Are We Asking the Right Questions?*, 41 SEATTLE U. L. REV. 449, 449 (2018) (“Beta, which is the systemic or non-diversifiable risk of a portfolio, is widely regarded—wrongly—as exogenous and rarely impacted by portfolio investment.”).

51. However, the relationship between activist hedge funds and diversified investors has been well-explored. See Gilson & Gordon, *supra* note 43, at 897–98; John Pound, *Raiders, Targets, and Politics: The History and Future of American Corporate Control*, 5 J. APPLIED CORP. FIN. 6, 16 (1992). For a more contemporary treatment, see Suren Gomtsian, *Different Visions of Stewardship: Understanding Interactions Between Large Investment Managers and Activist Shareholders*, 22 J. CORP. L. STUD. 151, 157 (2022) (describing how activists “assist large investment managers in identifying the firms where they need to concentrate limited stewardship resources and in deciding how to use their voting power”); and Kahan & Rock, *supra* note 47.

52. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 575, 584 (1990) (“But at current levels of ownership concentration, collective action problems are not the enormous barrier to shareholder action that the passivity story makes them out to be, especially for issues with substantial scale economies.”).

53. See Pollman, *supra* note 13, at 403 (“Although the United Nations (UN) does not typically feature in contemporary discussions of ESG, it played a critical role in bringing about the term and mobilizing its spread.”). For a comprehensive review of how international organizations have shaped international corporate law, see Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1778–1804 (2021).

54. PRINCIPLES FOR RESPONSIBLE INV., ANNUAL REPORT 2021 7 (2022), <https://www.unpri.org/annual-report-2021/> [<https://perma.cc/25CT-X89J>]; see also Virginia Harper Ho, “Enlightened Shareholder Value”: Corporate Governance Beyond the Shareholder-Stakeholder Divide, 36 J. CORP. L. 59, 87–90 (2010) (discussing the history of PRI); *New and Former Signatories*, PRINCIPLES FOR RESPONSIBLE INV., <https://www.unpri.org/annual-report-2021/how-we-work/more>

the establishment of PRI, these investors took a significant step in acknowledging their shared interest in mitigating systemic risks, thus laying a foundation for more robust collaboration. The next step was the creation of several “climate networks” organized regionally or by investor type.⁵⁵ These networks formalized collaborative stewardship; investors worked together and created a forum to share information and decide upon engagement priorities.⁵⁶

Investor stewardship codes marked another key milestone for collaborative governance.⁵⁷ The UK was the first country to adopt a stewardship code in 2010.⁵⁸ Since then, there has been a proliferation of global stewardship codes around the world.⁵⁹ In 2016, a group of U.S. asset managers, including Vanguard and BlackRock, formed the Investor Stewardship Group. It established a “framework for U.S. Stewardship and Governance comprising of a set of stewardship principles for institutional investors and corporate governance principles for U.S. listed companies.”⁶⁰ Investors also collaborate through trade associations, most prominently the Council for Institutional Investors (CII) formed by CalPERS in 1985.⁶¹

/new-and-former-signatories [https://perma.cc/U78U-H9E6] (listing information about assets under management by PRI signatories).

55. Examples include the Institutional Investors Group on Climate Change Australia / New Zealand (IIGCC), the Investor Group on Climate (IGCC), the Investor Network on Climate Risk (INCR), and UNEP FI’s Climate Change Working Group (CCWG). See PRI ASS’N & UNEP FIN. INITIATIVE, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 42 (2011), https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf [https://perma.cc/27UG-R8B5].

56. As an example of this information-sharing forum at work, PRI and the UNEP Finance Initiative commissioned a report in 2011 that urged universal owners to “[j]oin other investors and engage collaboratively with companies through platforms such as the PRI Engagement Clearinghouse to address key issues.” PRINCIPLES FOR RESPONSIBLE INV., *supra* note 48; see also *The PRI Collaboration Platform*, PRINCIPLES FOR RESPONSIBLE INV., <https://collaborate.unpri.org/> [https://perma.cc/DR8T-5ZBT]; PRINCIPLES FOR RESPONSIBLE INV., ANNUAL REPORT 2019 17–20 (2020), <https://www.unpri.org/annual-report-2019/delivering-our-blueprint-for-responsible-investment/responsible-investors/foster-a-community-of-active-owners> [https://perma.cc/6F5B-CGSS].

57. For a comprehensive history of international stewardship codes, see GLOBAL SHAREHOLDER STEWARDSHIP (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

58. See FIN. REPORTING COUNCIL, PROPOSED REVISION TO THE UK STEWARDSHIP CODE 8 (2019), https://media.frc.org.uk/documents/Consulting_on_a_revised_UK_Stewardship_Code.pdf [https://perma.cc/4Q5KC7N8].

59. See Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018).

60. *About the Investor Stewardship Group and the Framework for U.S. Stewardship and Governance*, INV. STEWARDSHIP GRP., <https://isgframework.org/> [https://perma.cc/Q345-Q3AU]. ISG describes itself as “an investor-led effort that includes some of the largest U.S.-based institutional investors and global asset managers . . . includ[ing] more than 70 U.S. and international institutional investors with combined assets in excess of US\$32 trillion in the U.S. equity markets.” *Id.*

61. See *Associate Members*, COUNCIL OF INSTITUTIONAL INVS., https://www.cii.org/associate_members [https://perma.cc/JTZ6-H8NT]; see also Robert G. Eccles, *The Evolution of Sustainable Investing at CalPERS*, FORBES (July 27, 2024, 7:05 AM), <https://www.forbes.com/sites/bobeccles/2024/07/27/the-evolution-of-sustainable-investing-at-calpers/> [https://perma.cc/NNW9-JZ46].

Playing a similar coordination role are an array of investor engagement platforms, which provide information and certain engagement facilitation services to investors.⁶² Moreover, proxy advisors in the U.S. and trade groups in the UK also help to coordinate and facilitate institutional investors' engagement activities.⁶³ In sum, various forums and initiatives support shareholder collaboration.⁶⁴ However, as the next Section explores, these collaborative efforts are not as systematic or robust as ICAs.

C. From Principles and Stewardship Codes to Investor Climate Alliances

The history of Climate Action 100+ began in 2016 when then-director of CalPERS Anne Simpson conducted a carbon audit of the pension fund's \$400 billion dollar portfolio, one of the largest pools of money in the world.⁶⁵ The audit revealed that approximately 100 companies were responsible for over 85% of the emissions in CalPERS's portfolio, leading to two key takeaways. First, CalPERS could focus its limited engagement resources on a relatively small number of companies. More importantly, CalPERS could collaborate with other diversified investors or "universal owners," because the highest-emitting companies in its portfolio were likely the same companies in the portfolios of its peers.⁶⁶ These realizations prompted Simpson to encourage other asset owners, such as pension funds and asset managers (including the "Big Three"), to conduct portfolio-wide assessments. Unsurprisingly, these audits mirrored the discoveries made in CalPERS's audit, pinning approximately 85% of the emissions in their portfolios on the same companies.⁶⁷

62. ASSOGESTIONI, <https://www.assogestioni.it/> [<https://perma.cc/4MZ9-TGDD>] (Italy); EUMEDIION, <https://en.eumedion.nl/> [<https://perma.cc/EZ9Q-DG9Z>] (Netherlands); ETHOS, <https://ethosfund.ch/en> [<https://perma.cc/78QX-Z7HB>] (Switzerland); INVESTOR FORUM, <https://www.investorforum.org.uk/> [<https://perma.cc/WZ8Z-JJZR>] (United Kingdom).

63. See Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U. L. REV. 1459, 1462 (2019) ("[P]roxy advisor Institutional Shareholder Services ("ISS") and its peers perform key roles that investor trade groups undertake in the United Kingdom . . ."); see also *id.* at 1481–87.

64. See generally Alan D. Crane, Andrew Koch & Sébastien Michenaud, *Institutional Investor Cliques and Governance*, 133 J. FIN. ECON. 175 (2019). See also Martin Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth* (Int'l Bus. Council of the World Econ. F., 2016), <https://www.wlrk.com/webdocs/wirknew/AttorneyPubs/WLRK.25.960.16.pdf> [<https://perma.cc/N75L-AN2D>].

65. Interview with Anne Simpson, Director of CalPERS, SAÏD BUS. SCH., UNIV. OF OXFORD (Dec. 8, 2019), <https://www.sbs.ox.ac.uk/news/interview-anne-simpson-director-calpers> [<https://perma.cc/4EZV-5URY>] (explaining that institutional investors came together to avert the "tragedy of the commons").

66. *Id.*

67. SIMISO NZIMA & BETH RICHTMAN, CALPERS, GLOBAL EQUITY CORPORATE GOVERNANCE PROGRAM UPDATE 6 (2018), <https://www.calpers.ca.gov/docs/corporate-governance/2018-sep-update-gecgp.pdf> [<https://perma.cc/RM66-LVKH>].

In response, this informal group of about a dozen convened a series of meetings at the United Nations, and ultimately created Climate Action 100+, the first and largest voluntary initiative of investors focused on climate change.⁶⁸ The alliance was co-founded by five global investor networks: Asia Investor Group on Climate Change; Investor Group on Climate Change (Australia and New Zealand); Institutional Investor Group on Climate Change (Europe); Ceres Investor Network in Climate Risk and Sustainability (North America); and the Principles of Responsible Investment (global).⁶⁹ It was designed to address a complex, but specific problem: reducing carbon emissions from highly-diversified investor portfolios. The alliance started with about 225 investors and has grown to over 600 investors across 33 countries.⁷⁰

Importantly, Climate Action 100+ is not a separate legal entity. Instead, it is an initiative that facilitates communication between myriad public and private constituencies, including non-governmental organizations and non-profits, international organizations, public pension funds and sovereign wealth funds, private asset owners and managers, insurance companies, and hedge funds, among others. Climate Action 100+'s members have voluntarily adopted a governance structure that disperses power throughout the global investor networks. Oversight is delegated to a global steering committee, which includes one investor network representative and two investor representatives for each global network.⁷¹ To ensure that one investor network does not have outsized power, the Steering Committee Chair and Vice Chair rotate each year.⁷²

Climate Action 100+ members have different incentives: traditional asset managers and pension funds seek risk-adjusted returns, while certain faith-driven and impact investors have committed to combatting climate change, even when it reduces returns.⁷³ Importantly, Climate Action 100+ is not a purely private initiative, as it includes public actors. Indeed, most of the

68. Another UN-prompted alliance among financial services providers is the Glasgow Financial Alliance for Net Zero (GFANZ), a 2021-formed coalition of eight separate net-zero initiatives that span the financial industry. *About Us*, GFANZ, <https://www.gfanzero.com/about/> [<https://perma.cc/TWQ8-JLDE>].

69. *The Investor Networks*, CLIMATE ACTION 100+, <https://www.climateaction100.org/whos-involved/investor-networks/> [<https://perma.cc/26PW-DWB2>].

70. *How We Got Here*, CLIMATE ACTION 100+, <https://www.climateaction100.org/approach/how-we-got-here/> [<https://perma.cc/BE74-AHNR>]; *About Climate Action 100+*, *supra* note 6; *Investor Signatories*, CLIMATE ACTION 100+, <https://www.climateaction100.org/whos-involved/investors/> [<https://perma.cc/GA46-7DUL>].

71. *About Climate Action 100+*, *supra* note 6.

72. *Id.*

73. See Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 662–68 (2016) (discussing the economic rationales for risk-related shareholder activism and the link between non-financial and financial risks).

investors in Climate Action 100+ are public pension funds.⁷⁴ Moreover, the non-profit Ceres, a founding member, plays an influential role. Another non-profit member is As You Sow, a shareholder advocacy organization with the mission to “promote environmental and social corporate responsibility through shareholder advocacy, coalition building, and innovative legal strategies.”⁷⁵

When investors sign up to the initiative, they identify certain companies with which they want to engage, and one to two investors ultimately serve as “lead investors” for each company.⁷⁶ Many investors opt to conduct all their engagements outside of the initiative. However, all member investors are asked to share engagement information with Climate Action 100+.⁷⁷ Beyond information sharing, Climate Action 100+ “flags key shareholder proposals and other votes for investors to take into consideration during proxy season.”⁷⁸ It does not weigh in on these votes, but it updates the votes on a weekly basis during proxy season, thus focusing the investors on a smaller set of proposals. But it does not “provide recommendations to investors to divest, vote in a particular way or make any other investment decision.”⁷⁹ Moreover, each year, Climate Action 100+ publishes a Net Zero Company Benchmark that assesses each company’s progress toward the initiative’s goals.⁸⁰ Each of these strategies aim to enhance the quantity and reliability of climate risk information—and empower investors to use that information to monitor climate risk.

Climate Action 100+ is best understood as a forum to facilitate collaborative climate risk governance. To provide a theoretical foundation for this new level of collaboration, we can draw inspiration from Elinor Ostrom’s commons theory of governance, as the next Part explores.

74. For an argument that the fiduciary duties of public pension funds are different from private pension funds and other asset owners, see Jill Fisch & Jeff Schwartz, *The Singular Role of Public Pension Funds in Corporate Governance* 5 (unpublished manuscript) (on file with author) (“Unlike mutual funds, public pension funds are designed to serve public goals.”).

75. *About Us, AS YOU SOW*, <https://www.asyousow.org/about-us> [https://perma.cc/L2NJ-GPL5].

76. See *infra* Part III; CLIMATE ACTION 100+, CLIMATE ACTION 100+ SIGNATORY HANDBOOK 9–10 (2023), <https://www.climateaction100.org/wp-content/uploads/2023/06/Signatory-Handbook-2023-Climate-Action-100.pdf> [https://perma.cc/FA9V-M3D6].

77. See CLIMATE ACTION 100+, *supra* note 76, at 2.

78. *2024 Proxy Season & Flagged Shareholder Votes*, CLIMATE ACTION 100+, <https://www.climateaction100.org/approach/proxy-season/> [https://perma.cc/S5DS-659T]. While CA100+ is currently flagging votes, it is unclear whether this practice will continue into the 2025 proxy season.

79. CLIMATE ACTION 100+, GLOBAL SECTOR STRATEGIES: RECOMMENDED INVESTOR EXPECTATIONS FOR FOOD AND BEVERAGE 2 (2021), <https://www.climateaction100.org/wp-content/uploads/2021/08/Global-Sector-Strategies-Food-and-Beverage-Ceres-PRI-August-2021.pdf> [https://perma.cc/6LS6-74JX].

80. *2024 Proxy Season & Flagged Shareholder Votes*, *supra* note 78.

II. INVESTORS COLLABORATE TO MANAGE SYSTEMIC CLIMATE CHANGE RISK

The collective action problem for institutional investors has long been a central issue in corporate law.⁸¹ This Part applies theories of collaborative governance to better understand why investors are forming alliances to address climate change risk. Section A explains that the members of ICAs have switched from a competitive game to a cooperative game to address a classic collective action problem—the impact of climate change on the financial system. Section B applies Ostrom’s theory of collaborative governance, which draws on game theory to explain collaborative governance of “common pool” or shared resources. While game theory helps us comprehend the motivations for collaboration (the why), Ostrom elaborates on the necessary elements to facilitate effective collaborative governance through institutional design (the how).⁸² Ostrom’s work has illuminated collaborative governance in many areas, such as natural resource management, intellectual property, and the administration of public services.⁸³ Applying Ostrom’s theory of collaborative governance to ICAs can also shed light on their promise and limitations.

A. Climate Change Risk Incentivizes Investor Collaboration

Garrett Hardin famously used the example of a shared pasture to argue that individuals grazing their animals on it would act in their self-interest, invariably resulting in its ruin.⁸⁴ This “tragedy of the commons,” he argued, could only be avoided through externally enforced government regulation or strong property rights.⁸⁵ Notice that both of Hardin’s solutions depend on a government-imposed approach.⁸⁶ As an ecologist primarily concerned with a growing population and resource scarcity, Hardin’s theory initially

81. See Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 453 (1991) (“Corporate law presents two related problems: the divergence of interests between managers and shareholders (the agency problem); and the problems facing dispersed shareholders in minimizing agency costs (the collective action problem).”); Bebchuk & Hirst, *supra* note 13, at 2046–57.

82. See Stern, *supra* note 24, at 229.

83. See Mattioli, *supra* note 24 (discussing collaborative governance in licensing patents); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (analyzing collaborative governance in agricultural property rights); Nicole Stelle Garnett, *Managing the Urban Commons*, 160 U. PA. L. REV. 1995 (2012) (discussing urban public places as commons); Christopher S. Yoo, *Beyond Coase: Emerging Technologies and Property Theory*, 160 U. PA. L. REV. 2189 (2012) (analyzing the electromagnetic spectrum as a common pool resource); Benkler, *supra* note 24 (discussing the commons in public utilities).

84. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968).

85. *Id.* at 1243–46.

86. Brett M. Frischmann, Alain Marciano & Giovanni Battista Ramello, *Retrospectives: Tragedy of the Commons after 50 Years*, 33 J. ECON. PERSPS. 211, 216 (2019).

did not garner much attention from economists. However, over time, the tragedy of the commons has become one of the most influential theories shaping public policy.⁸⁷ Consistent with Hardin's account, proposals to address climate change, the ultimate tragedy of the commons, are largely regulatory or based on private property rights.⁸⁸

Corporate law also tends to be constrained by this binary choice.⁸⁹ These widely held views rely on a compelling but misleading assumption—that market actors are prone to fierce competition, solely motivated by individual short-term gains, often at the expense of shared benefits. In the language of game theory, many assume that investors are playing a zero-sum or noncooperative game. One of the primary lessons of game theory is that players may make choices that result in individually rational but collectively irrational outcomes. But this unfortunate “prisoners’ dilemma” or “tragedy of the commons” is not inevitable—under certain circumstances, players choose to play a cooperative game.⁹⁰ ICAs reflect a switch from a competitive to a cooperative game.

Although infrequently, corporate law scholars have examined investor behavior using collaborative game theory.⁹¹ For instance, in 1991, John Coffee described corporations as a “series of coalitions” rather than “series of bargains.”⁹² More recently, Jill Fisch and Simone Sepe have employed game theory to elucidate communication between shareholders and directors.⁹³ As these scholars have observed, market players switch from competitive to cooperative games when it is efficient—or at least more

87. *Id.* at 217.

88. Nicholas Stern, *Towards a Carbon Neutral Economy: How Government Should Respond to Market Failures and Market Absence*, J. GOV'T & ECON., summer 2022, at 1 (discussing regulatory solutions); Sebastian Rausch & Valerie J. Karplus, *Markets Versus Regulation: The Efficiency and Distributional Impacts of U.S. Climate Policy Proposals*, 35 ENERGY J. 199 (2014) (comparing private and public climate proposals).

89. See, e.g., Tallarita, *supra* note 12, at 515–21 (“Portfolio primacy is appealing for many, as it promises to be a powerful market-based tool to bypass the political gridlock and government paralysis on climate policy. . . . The shortcomings of politics do not justify overreliance on private actors.”).

90. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 69 (rev. ed. 2006); Robert Axelrod, *The Evolution of Cooperation*, in BREAKTHROUGH: EMERGING NEW THINKING 184, 191 (Walker & Co. 2001) (1988) (ebook) (discussing the “prisoners dilemma” and explaining that “[i]n a vast range of situations, mutual cooperation can be better for both sides than mutual defection”).

91. For an early account, see MASAHIKO AOKI, *THE CO-OPERATIVE GAME THEORY OF THE FIRM* (1984); and John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 GEO. L.J. 1495, 1539 (1990). For a recent application of game theory to communication between directors and shareholders, see Fisch & Sepe, *supra* note 14, at 901 (“In the language of game theory, shareholder collaboration can be understood as a ‘cooperative’ game.”); and William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619 (2006) (applying evolutionary game theory to explain corporate federalism).

92. Coffee, *supra* note 91, at 1496 (“Arguably, the public corporation should be viewed less as a ‘series of bargains’ than as a ‘series of coalitions.’ Compared to bargains, coalitions are less stable, less enforceable, and less predictable.”).

93. Fisch & Sepe, *supra* note 14, at 901.

efficient than acting unilaterally.⁹⁴ More precisely, players are inclined to play cooperative games if two conditions are met. First, the outcomes from cooperation must exceed those from unilateral action for each individual player. Second, expanding the coalition's size should result in at least equal or greater benefits for each player.⁹⁵ ICAs meet these conditions. Even the largest and most well-resourced investors have limited time and resources. As explained below, by joining Climate Action 100+, investors gain stronger monitoring capabilities than they could achieve individually.⁹⁶ Additionally, expanding the coalition with more investors theoretically enhances the benefits for each participant, as it reduces their monitoring burden and/or increases the amount of climate change information disclosed by companies.

Of course, joining Climate Action 100+ is not a rational decision for all investors. Some investors, especially those seeking short-term gains by externalizing pollution or environmental harms, have not joined the alliance. However, for diversified investors concerned about reducing systemic risk as well as values-based or impact investors, game theory indicates that joining Climate Action 100+ is both predictable and rational. Yet, even when individual players have the incentives to cooperate, Ostrom recognized that effective collaboration requires institutional infrastructure to support it.

B. ICAs Provide Infrastructure for Climate Risk Governance

Common pool resources are resources that generate finite quantities of resource units, such that one person's use subtracts from the quantity of resource units available to others. Typical examples include fisheries, forests, and wetlands.⁹⁷ Studying the management of common pool resources, Ostrom identified the prevalence of cooperative self-governance systems, disproving Hardin's theory. As a qualitative empiricist, she conducted field research on collaborative resource management systems worldwide, observing extensive situations where individuals would cooperate to ensure the long-term sustainability of a resource. Ostrom demonstrated that communities of diverse actors successfully averted the tragedy of the commons by developing tailored, voluntary, and informal rules, customs, and norms, going beyond mandatory legal obligations or

94. See *id.*

95. In game theory terminology, these two conditions are referred to as the "superadditivity" and the "monotonicity" conditions. See, e.g., MICHAEL MASCHLER, EILON SOLAN & SHMUEL ZAMIR, *GAME THEORY* 671 (Mike Borns ed., Ziv Hellman trans., 2013); Fisch & Sepe, *supra* note 14, at 902.

96. See *infra* Sections III.A–B.

97. ELINOR OSTROM, ROY GARDNER & JAMES WALKER, *RULES, GAMES, AND COMMON-POOL RESOURCES* (1994) [hereinafter OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES*].

market sanctions.⁹⁸ As Ostrom explained, “[i]n the conventional theory of common-pool resources, participants do not undertake efforts to design their own governance arrangements. Substantial empirical evidence exists, however, that many common-pool resources are self-governed.”⁹⁹

While the portfolios of universal owners do not necessarily deplete like natural resources such as forests or fisheries, Climate Action 100+ has established a system of rules to mitigate the potential tragedy of the commons—the looming climate risks that threaten “investors’ long-term ability to sustain value and generate ongoing returns for their beneficiaries.”¹⁰⁰ Climate Action 100+’s primary focus is to mitigate the impact of climate change on their highly diversified portfolios, which essentially mirror the economy. Conceptually, we can view the combined diversified portfolios as a shared pool of resources. The fact that these diversified portfolios are heavily invested in the same index funds makes the analogy even more apt.

Indeed, the spark that led to the formation of Climate Action 100+ was the very realization that large and diversified asset managers are invested in the same companies.¹⁰¹ Accordingly, Anne Simpson said that the founding members of Climate Action 100+ realized that they could avert “the tragedy of the commons” by working together.¹⁰² Moreover, by design, these index funds are not easy to “exit,” making the impetus for collaborative governance even stronger.¹⁰³ While the analogy is imperfect, the portfolios of Climate Action 100+’s investor members resemble common pool resources that can be managed through voluntary collaboration.¹⁰⁴

98. OSTROM, GOVERNING THE COMMONS, *supra* note 25; ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005) [hereinafter OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY]; AMY R. POTEETE, MARCO A. JANSSEN & ELINOR OSTROM, WORKING TOGETHER: COLLECTIVE ACTION, THE COMMONS, AND MULTIPLE METHODS IN PRACTICE (2010); Edella Schlager & Elinor Ostrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 LAND ECON. 249 (1992).

99. Elinor Ostrom, *Common-Pool Resources and Institutions: Toward a Revised Theory*, in 2 HANDBOOK OF AGRICULTURAL ECONOMICS 1315, 1316 (Bruce L. Gardner & Gordon C. Rausser eds., 2002).

100. Press Release, Climate Action 100+, Climate Action 100+ Statement on the U.S. House Subcommittee Hearing (June 12, 2024), <https://www.climateaction100.org/news/climate-action-100-statement-on-the-u-s-house-subcommittee-hearing/> [https://perma.cc/XJA4-A2D2].

101. See *supra* Section I.C.

102. Interview with Anne Simpson, Director of CalPERS, *supra* note 65 (“In fact, when there’s a shared interest in something asset owners can speak together. It’s where they have the ability to overcome what’s sometimes called the ‘tragedy of the commons’. In other words, we all have a common interest in making sure the markets work properly, but the tragedy is that each individual investor hasn’t got the ability to influence.”).

103. See Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 494, 510 (2018); see also Frank Partnoy, *Are Index Funds Evil?*, THE ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/are-index-funds-evil/534183/> [https://perma.cc/D3TU-KPMW].

104. Press Release, Climate Action 100+, *supra* note 100.

Investor collaboration requires communication. Although this may be self-evident, corporate law often limits communication between investors.¹⁰⁵ When dispersed investors are unable to communicate, they cannot organize to overcome collective action problems.¹⁰⁶ When ownership was dispersed among millions of individual investors, collective action problems persisted. Under this paradigm, the tragedy of the commons could not be averted. Investors pursued their own rational self-interest and extracted as much financial gain from their investments as possible. This remained true even when the gains came at the expense of the long-term sustainability of their own investments. Conceptually, such self-serving behavior by individual investors is analogous to overfishing or overharvesting.

Ostrom agreed that when individuals cannot communicate, they overharvest, resulting in the tragedy of the commons: “In [common pool resource] dilemmas where individuals do not know one another, cannot communicate effectively, and thus cannot develop agreements, norms, and sanctions, aggregate predictions derived from models of rational individuals in a noncooperative game receive substantial support.”¹⁰⁷ However, Ostrom’s experiments demonstrated that simply allowing communication, or “cheap talk,” enables participants to reduce overharvesting and increase joint payoffs, contrary to game-theoretical predictions.¹⁰⁸

The concentration of capital and rise of financial intermediaries has made investor communication possible at scale.¹⁰⁹ Large asset managers and pension funds play a key role. Even before ICAs, large asset managers collaborated unofficially with asset managers, NGOs, or hedge funds.¹¹⁰ But

105. See *infra* Section III.B.

106. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 47–65 (rev. ed. 1967).

107. OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES*, *supra* note 97, at 319.

108. See Ostrom, *Beyond Markets*, *supra* note 25, at 655; see also Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1735 (2001) (finding that, as opposed to externally imposed regulation or market sanctions, market actors collaborate when they can communicate repeatedly and develop mutual trust).

109. Braun, *supra* note 45, at 270–94.

110. See, e.g., Robert G. Eccles, *Why an Activist Hedge Fund Cares Whether Apple’s Devices Are Bad for Kids*, HARV. BUS. REV. (Jan. 16, 2018), <https://hbr.org/2018/01/why-an-activist-hedge-fund-cares-whether-apples-devices-are-bad-for-kids> [<https://perma.cc/Y3QL-NRLW>]. The historic vote against Exxon’s directors, led by activist investor Engine No. 1, was an example of collaboration between hedge funds and institutional investors. Sarah McFarlane & Christopher M. Matthews, *Oil Giants Are Dealt Major Defeats on Climate Change as Pressures Intensify*, WALL ST. J. (May 26, 2021, 7:46 PM), <https://www.wsj.com/articles/oil-giants-are-dealt-devastating-blows-on-climate-change-as-pressures-intensify-11622065455> [<https://perma.cc/9UVJ-ZMV8>] (reporting that the campaign “demonstrated how dramatically the landscape is shifting for oil-and-gas companies as they face increasing pressure from environmentalists, investors, lenders, politicians and regulators to transition to cleaner forms of energy”). While the campaign has been framed as a David versus Goliath victory for Engine No. 1, Climate Action 100+ acted as a forum for aligning investor support for the vote against

these efforts were largely ad hoc. Today, ICAs are providing the necessary infrastructure for continuous communication about climate change risk. In game theory terms, Climate Action 100+ establishes a platform that enables both “pre-play” and “in-play” communication among participants.¹¹¹ Unlike other investor codes of conduct or governance frameworks, Climate Action 100+ facilitates ongoing communication among investors as they make decisions on engagement and proxy voting for the same focus companies. This “in-play” or ongoing communication has proven effective in persuading companies to develop credible and robust decarbonization strategies and to disclose their climate lobbying.¹¹² As predicted by collaborative game theorists, this in-play communication promotes increased cooperation among alliance members, as the following case study illustrates. The next Section explains how this newfound infrastructure for collaborative governance dovetails with several corporate law debates about the capacity of institutional investors for meaningful stewardship.

III. THE PROMISE OF INVESTOR CLIMATE ALLIANCES

ICAs strengthen climate risk governance by substantially reducing the cost of investor stewardship, encompassing monitoring, voting, and engaging with portfolio companies.¹¹³ Section A summarizes the conventional view, that institutional investors lack the capacity for stewardship. Section B describes how ICAs are designed to overcome this challenge, and investors’ capacity for climate risk stewardship. Section C describes another key benefit of ICAs—aligning investor preferences, prompting a greater volume of voluntary disclosure. Section D discusses how collaboration helps investors distill vast amounts of climate data so that

directors. *See, e.g.*, Press Release, Climate Action 100+, In Stunning Vote, Shareholders Elect Two New Directors Put Forth by Shareholders at ExxonMobil, Seeking Climate Expertise and Action (May 26, 2021), <https://www.climateaction100.org/news/in-stunning-vote-shareholders-elect-two-new-directors-put-forth-by-shareholders-at-exxonmobil-seeking-climate-expertise-and-action/> [<https://perma.cc/DYR7-X4SD>]. For a early account of collaboration and “coalition building” between pension funds, see Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 319 (2008) (“[R]eluctance on the part of funds to engage in visible activism has led to limited coalition-building efforts between more activist and less activist funds.”).

111. *See* Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association*, 1997, 92 AM. POL. SCI. REV. 1 (1998).

112. CLIMATE ACTION 100+, PROGRESS UPDATE 2023 4, 7 (2023), <https://www.climateaction100.org/wp-content/uploads/2024/01/CA-100-Progress-Update-2023-FINAL-2.pdf> [<https://perma.cc/BEN4-H3JE>] (noting that 77% of focus companies have committed to net zero across by 2050 and describing “engagement wins” including an agreement by Volkswagen to publish a climate lobbying report).

113. Bebchuk & Hirst, *supra* note 13, at 2045 (describing stewardship as monitoring, voting, and engaging).

it may be operationalized. Finally, Section E argues that ICAs foster compliance with international climate law.

A. ICAs Increase Investors' Capacity for Stewardship

1. The Conventional View—Institutional Investors Lack Capacity

The history of corporate law is filled with investors' unsuccessful attempts at collaborative stewardship. For example, in the 1980s, there was enthusiasm for the Shareholder Committee, a proposal to facilitate information-sharing among shareholders.¹¹⁴ But, as scholars predicted, these committees (and other attempts at collaboration) flamed out because investors had attractive alternatives: exiting, free riding, or withholding information to capture profit.¹¹⁵ Then, in the 1990s, the growth of institutional investors renewed scholarly attention in collaborative stewardship.¹¹⁶ These traditionally passive investors became "awakened to their role in corporate governance."¹¹⁷ Commentators anticipated that this would mark the end of the era of rational apathy and absentee ownership which was characteristic of the separation of ownership from control.¹¹⁸ Others cautioned against this exuberance.¹¹⁹ Some scholars, such as Coffee, were more measured, and proposed reforms to enhance the monitoring capabilities of institutional investors. Coffee, for example, emphasized that pension funds, that are in for the long haul, are more motivated to actively monitor their portfolio companies, compared to those with the ability to easily exit their investments.¹²⁰ However, he noted that these investors had capacity challenges and proposed restricted diversification.¹²¹

114. See Rock, *supra* note 81, at 450–53 (relaying the history of shareholder activism).

115. *Id.* at 461–64.

116. *Id.* at 450–51; John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991); Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992); Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 798 (1993); Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 886–88 (1991).

117. Louis Lowenstein, *Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson*, 89 COLUM. L. REV. 979, 981 (1989).

118. See Black, *supra* note 52, at 528. Merrick Dodd described dispersed shareholders as absentee owners. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932).

119. See, e.g., Rock, *supra* note 81, at 451 (referring to shareholder activism as "uneven, episodic, and trendy").

120. Coffee, *supra* note 116, at 1320–30. He argued that "public policy should encourage some institutional investors more than others to assume a monitoring role." *Id.* at 1367.

121. *Id.* at 1355 ("An even more controversial and more important step . . . would be to restrict portfolio diversification, including indexing, to a level consistent with the institution's ability to monitor.").

As institutional investors' power has increased, the debate surrounding their capacity has intensified.¹²² Lucian Bebchuk and Scott Hirst have argued that institutional investors cannot deliver on the promise of stewardship.¹²³ Under an agency-cost framework, they argue that index fund managers have strong incentives to underinvest in stewardship.¹²⁴ They note that in 2019, BlackRock's forty-five-member engagement team was responsible for engaging with 11,246 companies. State Street and Vanguard face similar constraints.¹²⁵ Thus, though the Big Three tout the virtues of private engagement, they lack capacity to engage with all their portfolio companies—and pension funds face similar constraints. In response, other scholars have argued that institutional investors mitigate these constraints by collaborating with hedge funds and proxy advisory firms to reduce costs.¹²⁶ The symbiotic relationship works like this: hedge funds invest in monitoring a specific company, identifying governance deficiencies, and initiating proposals.¹²⁷ Then, institutional investors throw their weight behind the strongest proposals.¹²⁸ Thus, passive funds “play a complementary role in the more focused engagement provided by hedge funds,” by “serving as gatekeepers for activism.”¹²⁹ For firm-specific interventions, then, hedge fund activists must serve as “governance arbitrageurs.”¹³⁰

122. Bebchuk & Hirst, *supra* note 13, at 2046–57. The meteoric rise of index investing, with its low or zero-fee model, exacerbates this concern.

123. *See id.* But see Suren Gomtsian, *Voting Engagement by Large Institutional Investors*, 45 J. CORP. L. 659, 713 (2020) (finding growing engagement by activist institutional investors).

124. Bebchuk & Hirst, *supra* note 13, at 2077.

125. *Id.* (“[A]lthough the Big Three stress the importance of stewardship, their stewardship budgets are economically insignificant . . .”). Along similar lines, Jeff Schwartz has argued that the Big Three's stewardship teams are comprised of “far too few people for the vast number of votes these asset managers tally.” Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 420 (2022). For an argument that institutional owners' business model constrains robust monitoring, see Lund, *supra* note 103, at 511–12.

126. *See* Jill Fisch, Asaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 42 (2019); *see also* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1047–48 (2007); Gomtsian, *supra* note 123, at 665 (“Hedge funds and other shareholder activists can improve corporate strategy and performance engagement by supplying large fund managers with firm-specific information through activist demands.”).

127. As Gilson and Gordon have argued, these funds act as “governance intermediaries” and corporate monitors, serving a similar role to stewardship codes in other jurisdictions. Gilson & Gordon, *supra* note 43, at 867; *see also* Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 32, 50 (Jennifer G. Hill & Randall S. Thomas eds., 2015) (arguing that institutional shareholders are “latent” monitors and cannot cast informed votes without firm-specific information supplied by other investors). For a similar argument arguing that corporate gadflies “nudge” institutional investors to act, see Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 625–27 (2021) (characterizing “gadflies or other individuals” as “governance facilitators”).

128. Gomtsian, *supra* note 51, at 157.

129. Fisch et al., *supra* note 126, at 42.

130. Gilson & Gordon, *supra* note 43, at 877.

Scholars have examined this symbiotic relationship between hedge funds and institutional investors who collaborate on climate risk, too—but the assumption remains that hedge funds lead such initiatives. As Gordon argues, institutional investors “can count on others to tee-up the proposals that would bear on climate change risk, and then figure out which proposals would, in fact, create value, that is, would reduce the risk.”¹³¹ Others emphasize that institutional investors do not have the resources to match the research might of a hedge fund.¹³² In sum, the consensus is that institutional investors lack the capacity to obtain sufficient information from individual firms to engage in firm-specific stewardship.¹³³ This Article presents a new perspective—as discussed below, Climate Action 100+ increases institutional investors’ capacity to participate in firm-specific stewardship.

2. ICAs Overcome Institutional Investors’ Traditional Capacity Challenges

Collaboration among institutional investors is on the rise, especially with respect to environmental and social issues.¹³⁴ As Ostrom recognized, institutions are necessary to facilitate systematic, sustainable collaboration. She defined an institution as “the prescriptions that humans use to organize all forms of repetitive and structured interactions.”¹³⁵ Frischmann later introduced the concept of intangible “infrastructure,” which is necessary to

131. Gordon, *supra* note 12, at 661; see also John C. Coffee, Jr., *The Coming Shift in Shareholder Activism: From “Firm-Specific” to “Systematic Risk” Proxy Campaigns (and How to Enable Them)*, 16 BROOKINGS J. CORP. FIN. & COM. L. 45, 45 (2021) (“[T]here may be a strong demand for systematic risk activism among diversified investors, but potential campaigns could remain headless, as diversified investors will themselves be reluctant to lead such a campaign.”).

132. See Condon, *supra* note 32, at 79–80.

133. See Gordon, *supra* note 12, at 661–63. But see Elroy Dimson, Oğuzhan Karakaş & Xi Li, *Coordinated Engagements* 13 (Eur. Corp. Gov. Inst., Fin. Working Paper No. 721/2021, 2023).

134. A small but growing literature has begun to emphasize these collaborative efforts to reduce monitoring costs for institutional investors. See Craig Doidge, Alexander Dyck, Hamed Mahmudi & Aazam Virani, *Collective Action and Governance Activism*, 23 REV. FIN. 893 (2019); Crane et al., *supra* note 64. For a historical view that institutional investors have the incentive to collaborate to increase their influence, see Black, *supra* note 52, at 524 (“An institution that owns stakes in a number of companies enjoys economies of scale when it presses common issues at those companies. These economies can offset the incentives for passivity created by partial ownership of any one company.”); Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, 14 OHIO ST. BUS. L.J. 135, 135 (2020) (“[C]oordinated engagement by non-activist institutions can be a promising lever . . .”). One notable example is a recent empirical study on PRI’s Collaboration Platform, which found that collaboration strengthens investors’ voice and reduces monitoring costs. See Dimson et al., *supra* note 133, at 22.

135. Ostrom, UNDERSTANDING INSTITUTIONAL DIVERSITY, *supra* note 98, at 3.

facilitate cooperation.¹³⁶ This infrastructure enables investors to overcome capacity constraints in numerous ways, described below.

i. Focuses investor attention on 171 companies: Monitoring, engagement, and voting rely on bespoke information which is costly to gather. Climate Action 100+ streamlines the cost of stewardship by focusing investor attention on the 171 companies that emit the most greenhouse gases.¹³⁷ The focus list allows investors to concentrate on the companies that externalize the most climate change risk.

ii. Identifies lead investors for each focus company: Though concentrating on 171 companies lessens the stewardship burden, obtaining and utilizing climate risk information to monitor, engage, and vote at each company remains burdensome. Not all investors can afford to engage at the same level. Climate Action 100+ helps investors divide their stewardship burden by creating a process for “lead investors” to volunteer for engaging with specific companies.¹³⁸ This collaborative, burden-sharing solution resolves institutional investors’ traditional inability to initiate stewardship activities, such as filing shareholder proposals. A closer examination of these roles sheds additional light on the practice.

There are three types of participants in Climate Action 100+: asset owners, asset managers, and service providers. Asset owners can be “investor supporters” or “investor participants,” while asset managers and engagement service providers can only be “investor participants.” Investor participants must engage with focus companies, while investor supporters are encouraged to request their investment managers or service providers to join the initiative. These designations define the roles for each participant, within legal and contractual constraints.

Investor participants are responsible for engaging directly with designated companies. There are three types of investor participation: 1) lead company investors, 2) contributing company investors, and 3) individual participants. Lead company investors act as the primary point of contact between focus companies and other investors in Climate Action

136. Brett Frischmann defined infrastructure as the “set of resources that are at least partially shareable and whose primary value is as an input to a diverse set of productive actions, not all of which are private goods.” Yochai Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, 80 U. CHI. L. REV. 1499, 1530 (2013) (reviewing FRISCHMANN, *supra* note 28).

137. As discussed previously, in 2017, Climate Action 100+ used MSCI and CDP reported data to identify 100 companies with the highest combined greenhouse gas emissions. Since then, based on consultation with investors around the world, Climate Action 100+ increased the number of companies on the focus list to 165 as of December 2024. *Methodologies: Net Zero Company Benchmark*, CLIMATE ACTION 100+, <https://www.climateaction100.org/net-zero-company-benchmark/methodology/> [https://perma.cc/HS5W-9ZSR].

138. CLIMATE ACTION 100+, CLIMATE ACTION 100+ SIGNATORY HANDBOOK 8 (2023), <https://www.climateaction100.org/wp-content/uploads/2023/06/Signatory-Handbook-2023-Climat-Action-100.pdf> [https://perma.cc/GGJ6-3JRL].

100+. Contributing company investors support the lead investors, while individual engagers choose to engage with companies individually. All three types of participants share information about the focus company with other alliance members. While this information is either publicly available or non-proprietary, it would still be challenging for each individual investor to elicit the information from each corporation unilaterally.¹³⁹

Lead investors elicit and communicate information on each of the 171 companies. Each focus company is assigned one to two lead investors—a role that investors choose to take on voluntarily.¹⁴⁰ The lead investors’ first task is to develop the yearly engagement plan, shared with alliance members. The plan includes engagement objectives, a schedule of planned engagements, and escalation options if companies fall short. The lead investor provides an engagement progress review, evaluating company performance and recommending tactics like shareholder proposals or voting against directors. The guidelines emphasize lead investors’ obligation to “[d]evelop[] deep knowledge”¹⁴¹ about the focus company through regular engagements and share that information keeping “relevant networks and other stakeholders . . . fully informed of their engagement plans, with sufficient advanced notice.”¹⁴² By taking on the information-gathering burden, the lead investor reduces the cost of monitoring, engagement, and voting.

iii. Develops the Net Zero Company Benchmark to lower monitoring costs: To alleviate the monitoring burden on investors, Climate Action 100+ introduced the Net Zero Company Benchmark in 2020.¹⁴³ It incorporates publicly available and self-disclosed data to track the focus companies’ progress. It comprises two assessments: the Disclosure Framework, which evaluates disclosure quality, and Alignment Assessments, which examine if a given company’s actions align with their net-zero commitment.¹⁴⁴ It was developed in collaboration with external NGOs, academics, and technical experts to ensure data validity.¹⁴⁵ Moreover, the process of updating the benchmark is continuous and incorporates feedback from public comments.¹⁴⁶

139. *Id.* Climate Action 100+ has launched its second phase, which focuses investor attention on specific themes, sectors, and regions. Investors can choose to focus on areas of interest in addition to specific companies, and the initiative updates these areas annually. *Id.*

140. *Id.* at 10.

141. *Id.* at 9.

142. *Id.*

143. *Id.* at 29.

144. *Id.*

145. *Id.*; see also *supra* note 8.

146. See, e.g., *Climate Action 100+ Opens Public Consultation on Net Zero Company Benchmark for Its Next Phase*, CLIMATE ACTION 100+ (Oct. 13, 2022), <https://www.climateaction100.org/news>

B. ICAs Align Investor Preferences

Climate risk is material in some way to nearly every type of company today, encompassing physical risks like floods or fires, transition risks like new regulation, or litigation risk from climate-related lawsuits.¹⁴⁷ The companies on Climate Action 100+’s focus list possess crucially important information relating to climate risk. The investment community values such information as a tool for mitigating financial risk.¹⁴⁸ Climate risk information encompasses systemic risk affecting the entire economy.¹⁴⁹ Because such risk cannot be diversified by investors, its impacts will reverberate throughout the economy, harming shareholders as well as other stakeholders. But much of this information falls outside of the SEC’s and EU’s proposed disclosure rules. Therefore, even though mandatory disclosure obligations in the U.S. and EU are forthcoming,¹⁵⁰ stakeholders and investors must still rely on voluntary disclosure.

But companies often limit their voluntary disclosure, in part because of the variation among investor preferences.¹⁵¹ Indeed, there is empirical support that when faced with different investor preferences, companies

/climate-action-100-opens-public-consultation-on-net-zero-company-benchmark-for-its-next-phase/ [https://perma.cc/AL9Z-3986].

147. The Sustainability Accounting Standards Board’s 2022 Climate Risk Technical Bulletin found that 68 out of 77 studied industries—89% of the S&P Global 1200’s market capitalization—are “significantly affected” by at least one of the three categories of climate risk: physical, transition, or litigation risk. SUSTAINABILITY ACCT. STANDARDS BD. STANDARDS, CLIMATE RISK TECHNICAL BULLETIN 8, 12, 14–15 (2022), <https://www.sasb.org/wp-content/uploads/2022/05/Climate-Risk-Technical-Bulletin2022-050222.pdf> [https://perma.cc/SH22-TKGK].

148. Emirhan Ilhan, Philipp Krueger, Zacharias Sautner & Laura T. Starks, *Climate Risk Disclosure and Institutional Investors*, 36 REV. FIN. STUD. 2617, 2628 (2023) (finding that many institutional investors have a “strong demand for climate risk disclosure . . . and . . . are willing to actively engage firms to increase such disclosure”).

149. Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 296 (“The systemic risk to financial markets from climate change and information gaps around climate risk provides further justification for mandating ESG disclosure, as well as for a climate-first approach to these reforms.”).

150. Council Directive 2022/2464, 2022 O.J. (L 322) 15 (EU); see, e.g., Jindrich Kloub, Deirdre Carroll, Amanda N. Urquiza & Liam Boylan, *EU’s ESG Push Goes Global: Significant Expansion of Corporate Sustainability Reporting for Companies Active in the EU*, WILSON SONSINI (Mar. 9, 2023), <https://www.wsgr.com/en/insights/eus-esg-push-goes-global-significant-expansion-of-corporate-sustainability-reporting-for-companies-active-in-the-eu.html> [https://perma.cc/K634-ZXVC]; *EU’s New ESG Reporting Rules Will Apply to Many US Issuers*, COOLEY (Oct. 28, 2022), <https://www.cooley.com/news/insight/2022/2022-10-28-eus-new-esg-reporting-rules-will-apply-to-many-us-issuers> [https://perma.cc/UMW8-7LDU].

151. See George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 U.C. DAVIS L. REV. 2105, 2109–10 (2023) (“[I]nvestor preferences are heterogeneous, dynamic, and difficult to aggregate.”); see also Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 464 (2015) (finding that “a fundamental dissonance between investor heterogeneity in reality and investor homogeneity in regulation has created significant discontent in financial markets for both regulators and investors”).

decide that “silence is safest.”¹⁵² For example, Bond and Zeng found that “uncertainty [about investor preferences] can lead firms to stay silent about carbon emissions and climate risks.”¹⁵³ Counterintuitively, their study found that mandatory disclosure imposed by regulators does not completely eliminate this chilling effect of investor heterogeneity—in other words, companies will still opt for silence within the bounds of the regulation.¹⁵⁴ More promisingly, their study suggested that as investor preferences become more uniform, disclosure increases.¹⁵⁵

While most empirical studies focus on one type of investor, a burgeoning finance literature examines how differences in investor preferences for climate risk information impact disclosure.¹⁵⁶ Flammer, Toffel, and Viswanathan compared firms’ responses to various types of investors’ demands for climate risk information.¹⁵⁷ The study found that in the absence of mandated disclosure, “environmental shareholder activism increases the voluntary disclosure of climate change risks, especially if initiated by institutional investors, and even more so if initiated by long-term institutional investors.”¹⁵⁸

ICAs help overcome these hurdles. First, as discussed above, they are a mechanism for aligning investor preferences and reducing heterogeneity. Second, ICAs also bring asset managers and asset owners together in the same forum to align their disclosure preferences.¹⁵⁹ Beyond fostering collaboration among investors, Climate Action 100+ promotes collaboration between investors and management. It helps them avoid costly proxy battles, while encouraging companies to make voluntary climate commitments.¹⁶⁰ Indeed, Ceres, one of Climate Action 100+’s founding members, has credited the increase in shareholder engagement for the

152. For a literature review, see Philip Bond & Yao Zeng, *Silence Is Safest: Information Disclosure When the Audience’s Preferences Are Uncertain*, 145 J. FIN. ECON. 178 (2022).

153. *Id.* at 187.

154. *Id.* at 178 (“Our model explains why some firms do not disclose earnings breakdowns, executive compensation, or Environmental, Social, and Governance (ESG) performance when they face diverse audiences . . .”).

155. *Id.* at 187 (“Moreover, to the extent to which investor concern about climate change and ESG performance more generally has increasingly become the norm, thereby reducing uncertainty about investor preferences, our analysis explains the increasing disclosure of carbon emissions and ESG performance.”).

156. See, e.g., Caroline Flammer, Michael W. Toffel & Kala Viswanathan, *Shareholder Activism and Firms’ Voluntary Disclosure of Climate Change Risks*, 42 STRATEGIC MGMT. J. 1850 (2021).

157. See *id.* at 1859–60.

158. *Id.* at 1850.

159. As a result, these alliances not only foster the alignment of investor preferences but also facilitate asset owners’ monitoring of their asset managers.

160. See generally Fisch & Sepe, *supra* note 14; Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuck-Strine Debate*, 12 N.Y.U. J.L. & BUS. 385, 392 (2016) (“Engaging with boards and firm executives . . . can bring about change through incremental, non-confrontational means.”).

“record-smashing number of agreements reached on climate-related shareholder resolutions” in the 2022 proxy seasons.¹⁶¹

C. ICAs Empower Investors to Assess and Utilize Climate Information

When investors speak with one voice, companies are likely to disclose more information.¹⁶² But more information, without the capacity to assess it, is not necessarily a good thing. Information also faces problems of *abundance*.¹⁶³ Investor letters in support of the SEC’s climate risk disclosure rule agree that climate information is suffering from a Goldilocks syndrome: though there is too little information about climate risk, there is also too much immaterial disclosure.¹⁶⁴

But it is not just that investors are facing a deluge of immaterial information—they also don’t have the resources to assess material climate risk information. This information overload is inefficient for investors.¹⁶⁵

161. Press Release, Ceres, Record Number of Negotiated Agreements Between Investors and Companies in 2022 Proxy Season (Aug. 1, 2022), <https://www.ceres.org/news-center/press-releases/record-number-negotiated-agreements-between-investors-and-companies-2022> [https://perma.cc/BYQ2-LS8A] (noting that 110 climate-related commitments were reached in exchange for withdrawals of shareholder proposals, up from 75 the previous year). Moreover, according to a recent report, the overwhelming majority of these corporate commitments were ultimately implemented by companies. Press Release, Ceres, New Ceres Analysis Reveals Strong Corporate Climate Action Resulting From Shareholder Proposals (July 24, 2024), <https://www.ceres.org/resources/news/new-ceres-analysis-reveals-strong-corporate-climate-action-resulting-from-shareholder-proposals> [https://perma.cc/T2Y7-ZSSC] (finding that, of the 66 corporate commitments tracked in the report, 73% were fully or mostly implemented, 23% were partially implemented, and only 3% did not meet their commitment at all).

162. See Bond & Zeng, *supra* note 152, at 187 (“[T]o the extent to which firms have a clearer idea of institutional investors’ preferences . . . greater institutional ownership is associated with more disclosure . . .”).

163. As Carol Rose memorably put it, abundance is no tragedy, but a “comedy of the commons.” Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 768 (1986); see also Michael J. Madison, Brett M. Frischmann, Madelyn R. Sanfilippo & Katherine J. Strandburg, *Too Much of a Good Thing? A Governing Knowledge Commons Review of Abundance in Context*, FRONTIERS RSCH. METRICS & ANALYTICS, July 13, 2022, at 1; Michael J. Madison, *Tools for Data Governance*, 2020 TECH. & REGUL. 29.

164. See, e.g., Karen Bradshaw Schulz, *Information Flooding*, 48 IND. L. REV. 755, 756 (2015). But see Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 74 (2020) (“The findings here confirm that concerns about investors’ disclosure overload are overblown . . .”). Harper Ho does, however, agree that investors seek information that is more reliable, financially material, and standardized. *Id.*; see also Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 949 (2019) (“The absence of standardization impedes the market’s ability to compare issuer sustainability practices, even among similar companies.”).

165. It also imposes a burden on companies. See Keir D. Gumbs, Vice President, Deputy Gen. Couns. & Deputy Corp. Sec’y, Uber Techs., Inc., Comment Letter on Climate Change Disclosures (Apr. 27, 2021), <https://www.sec.gov/comments/climate-disclosure/cl112-8731000-237041b.pdf> [https://perma.cc/2MT5-9X8E] (supporting a required climate disclosure framework because the current “ecosystem [of voluntary reporting frameworks] . . . has created a myriad of cumbersome and time-consuming commitments for companies”).

The SEC has emphasized its concern with information overload.¹⁶⁶ Such abundance of information “creates demands for intermediary systems to provide education and other capabilities to enable individuals to access and use that information.”¹⁶⁷

In response, ICAs are serving as a knowledge hub or intermediaries for climate risk information.¹⁶⁸ As discussed above, one notable effort to synthesize climate data and disclosure is the Net Zero Company Benchmark.¹⁶⁹ It is not a database, but an “assessment tool” that assesses companies’ data against ten indicators, including net-zero reduction targets, capital allocation, climate policy engagement, and transition planning.¹⁷⁰ The Benchmark takes data from a variety of public sources and relies on technical advisors, including climate data experts, to assess and standardize the data. Investors use the Benchmark to engage with companies on key indicators, such as setting greenhouse gas reduction targets, allocating capital for climate transition, and the quality of climate disclosures. Investors make unilateral decisions on how and whether to use the information in the Benchmark, such as filing shareholder proposals or voting against directors, but the Benchmark offers a useful language and methodology. Crucially, corporate TCFD reports and the Benchmark are available not only for investors, but also for policy makers and other stakeholders to use.

D. ICAs Facilitate Compliance with Global Environmental Regulation

ICAs facilitate increased compliance with global regulation, including the Paris Agreement.¹⁷¹ The Paris Agreement contemplates a significant role for the financial sector in its implementation: one of its three long-term goals is “making finance flows consistent with a pathway toward low

166. Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23919 (Apr. 22, 2016) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

167. Madison et al., *supra* note 163, at 8.

168. The “Climate Knowledge Brokers” initiative was launched in 2015. See Anne Hammill, Blane Harvey & Daniella Echeverria, *Knowledge for Action: An Analysis of the Use of Online Climate Knowledge Brokering Platforms*, 9 KNOWLEDGE MGMT. FOR DEV. J. 72 (2013) (discussing online climate knowledge brokering platforms).

169. *Net Zero Company Benchmark*, CLIMATE ACTION 100+, <https://www.climateaction100.org/net-zero-company-benchmark/> [<https://perma.cc/E2W3-7TKT>].

170. CLIMATE ACTION 100+, *supra* note 138.

171. Twenty-four U.S. states have passed legislation to mandating a cap for carbon emissions consistent with the Paris Agreement. See *States United for Climate Action*, U.S. CLIMATE ALL., <https://www.usclimatealliance.org/> [<https://perma.cc/ZA2N-TGQR>]. Emerging mandates across the globe require asset managers and owners to consider climate risk in their stewardship activities. See Bowley & Hill, *supra* note 17; see also, e.g., David E. Bond et al., *Four Things to Know When Preparing for EU Carbon Border Adjustment Mechanism Reporting*, WHITE & CASE (June 23, 2023), <https://www.whitecase.com/insight-alert/four-things-know-when-preparing-eu-carbon-border-adjustment-mechanism-reporting> [<https://perma.cc/B396-PWFR>].

greenhouse gas (GHG) emissions and climate-resilient development.”¹⁷² Additionally, Climate Action 100+ encourages more climate regulation, as evident in its emphasis on closing the gap between corporate climate lobbying and commitments. Furthermore, ICA initiatives can act as trial runs for regulation.¹⁷³

However, critics of ICAs argue that they lack democratic legitimacy. This is not too surprising—private regulatory efforts have long been viewed with suspicion in the United States. As Mark Roe has highlighted, there is a “widespread attitude that large institutions and accumulations of centralized economic power are inherently undesirable and should be reduced, even if concentration is productive.”¹⁷⁴ Against this normative backdrop, ICAs have faced an uphill battle. But the characterization of ICAs as private regulation is flawed. Climate Action 100+ was not created to advance a purpose generated solely by private ordering, but to implement a growing body of regulations that reflect the goals of the Paris Agreement.¹⁷⁵ Indeed, the stated goal of Climate Action 100+ is to help investors and companies achieve the “goals of the Paris Agreement to pursue efforts to limit warming to 1.5°C.”¹⁷⁶

Beyond the Paris Agreement, Climate Action 100+ also provides the infrastructure for companies and investors to comply with a growing body of regulation requiring climate risk disclosure. While the SEC climate disclosure rule hangs in the balance, global jurisdictions, and states like California, are requiring climate disclosure, including Scope 3.¹⁷⁷ Investors cannot monitor compliance with these regulatory developments without the institutional infrastructure to generate and share information. In sum,

172. Paris Agreement Under the United Nations Framework Convention on Climate Change, art. 2.1(c), Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 54113, https://unfccc.int/sites/default/files/english_paris_agreement.pdf [<https://perma.cc/JQC4-PN5X>]; *The Paris Agreement*, UNITED NATIONS, <https://www.un.org/en/climatechange/paris-agreement> [<https://perma.cc/AY6D-H5US>].

173. See generally Kovvali, *supra* note 13 (discussing how private regulatory efforts help inform public regulation).

174. MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 29 (1994).

175. The Paris Agreement is an international treaty under the United Nations Framework Convention on Climate Change (UNFCCC). In 1992, the U.S. Senate overwhelmingly approved joining the UNFCCC, making it a party to the convention. In 2015, the international community negotiated the Paris Agreement. The Paris Agreements’ 195 party jurisdictions, including the United States, have a mandatory obligation to submit a Nationally Determined Contributions (NDCs). UNITED NATIONS, *supra* note 172.

176. *The Three Goals*, *supra* note 9.

177. Thibault Meynier, Sarah H. Mishkin & Matthew Triggs, *EU Finalizes ESG Reporting Rules with International Impacts*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 30, 2023), <https://corpgov.law.harvard.edu/2023/01/30/eu-finalizes-esg-reporting-rules-with-international-impacts/> [<https://perma.cc/N4PB-BXSW>]; Council Directive 2022/2464, 2022 O.J. (L 322) 15 (EU); Christine Mai-Duc, *California Legislature Passes Sweeping Emissions Bill*, WALL ST. J. (Sept. 12, 2023, 8:11 PM), <https://www.wsj.com/politics/policy/california-legislature-passes-sweeping-emissions-bill-398b586c> [<https://perma.cc/MU3T-R384>].

Climate Action 100+ is not a second-best solution for government failure that lacks legitimacy, but an important tool that increases compliance with regulation.¹⁷⁸

E. Collective Action Hurdles Apply Less Forcefully to ICAs

Scholars continue to point to the classic impediments of collective action—exit, free riding, and withholding information—to predict that institutional shareholder collaboration will remain illusory.¹⁷⁹ Climate Action 100+ is far less threatened by these hurdles.

First, many investors in Climate Action 100+ are “universal owners,” meaning they cannot easily exit the companies they are invested in.¹⁸⁰ Even if they could, exiting the highest emitters would not be a favorable solution for highly diversified investors. The negative impact of climate change risk spans their entire portfolios and encompasses financial harms from supply chain disruptions to the potential for stranded assets due to regulatory changes. Thus, exiting would not resolve the problem, but exacerbate it by removing the investors’ ability to engage.¹⁸¹ The free-riding problem is another traditional problem with shareholder collaboration: all shareholders benefit from monitoring, because it encourages good governance, but the costs are traditionally borne by one shareholder.¹⁸² This is why shareholder activism aimed at governance has been described as a public good.¹⁸³ The risk of free-riding is largely non-existent for Climate Action 100+. The initiative permits and may even encourage individual shareholders to benefit from others’ information gathering efforts. Acknowledging varying

178. See Kahan & Rock, *supra* note 47, at 536 (describing a investors’ portfolio-wide focus on climate change risk as a second-best approach to direct governmental regulation); Dorothy S. Lund & Elizabeth Pollman, *Corporate Purpose*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (manuscript at 5) (Jeffrey N. Gordon & Wolf-Georg Rings eds., 2d ed., forthcoming) (discussing private regulatory efforts as a second-best substitute for regulation).

179. See, e.g., Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 98 (2017).

180. See *supra* Part I.

181. See David Chambers, Elroy Dimson & Ellen Quigley, *To Divest or to Engage? A Case Study of Investor Responses to Climate Activism*, J. INVESTING (ESG SPECIAL ISSUE), 2020, at 1, 8–10; see also CALPERS’ INVESTMENT STRATEGY ON CLIMATE CHANGE, CALPERS (2020), https://www.calpers.ca.gov/docs/board-agendas/202006/invest/item08c-01_a.pdf [<https://perma.cc/296D-3REH>]; Alperen A. Gözlügöl & Wolf-Georg Ringe, *Net-Zero Transition and Divestments of Carbon-Intensive Assets*, 56 U.C. DAVIS L. REV. 1963 (2023). But see Marco Becht, Anete Pajuste & Anna Toniolo, *Voice Through Divestment 2* (Eur. Corp. Gov. Inst., Fin. Working Paper No. 900/2023, 2023), <https://ssrn.com/abstract=4386469> [<https://perma.cc/7D5B-9344>].

182. For a classic account of the free riding problem, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5–16 (1971).

183. See, e.g., Stephen M. Bainbridge, *Shareholder Activism and Institutional Investors* 14 (UCLA Sch. L., L. & Econ. Rsch. Paper No. 05-20, 2005) (“In a very real sense, the gains resulting from institutional activism are a species of public goods. . . . As with any other public good, the temptation arises for shareholders to free ride on the efforts of those who produce the good.”).

capacities and resources, the lead investors take on the engagement burden, benefiting even smaller investors who did not share the costs. If the collaboration remains sufficiently resourced, free riding is less of a concern.¹⁸⁴

Another hurdle to shareholder collaboration is the theory that investors will not share information from which they can individually profit. But, as discussed in Part I, diversified investors are uniquely impacted by the systemic risk of climate change.¹⁸⁵ This understanding has led to the emergence of a new form of shareholder activism, often referred to as “beta activism.”¹⁸⁶ Unlike traditional activism, which seeks to increase returns from individual companies, beta activism aims to address economy or portfolio-wide risks. In the context of beta activism, the traditional concern that investors may withhold information to gain a competitive advantage through trading opportunities is less relevant. Large private asset managers have little incentive to exploit information asymmetries, because beta activism focuses on systemic risks that affect the entire market or economy—i.e., their entire portfolios. Collaboration among investors to address climate change risk thus becomes more meaningful and effective in this context, as the shared goal of mitigating systemic risks supersedes individual competitive interests.

IV. POLICY PROPOSAL

This Article ends with a discussion of regulatory barriers, and a policy proposal for refining corporate law’s tools toward collaborative governance. Section A addresses antitrust, Section B turns to securities regulation, and Section C discusses investor fiduciary duties.

184. Rock has argued a similar point with respect to shareholder committees. Rock, *supra* note 81, at 496 (“If large shareholders are repeat players, and know themselves to be the critical shareholders, the likelihood is low that free riding will significantly undermine the shareholders’ committees.”).

185. See *supra* Part I.

186. See Frederick Alexander, *The Final DOL Rules Confirm that Fiduciary Duty Includes ‘Beta Activism,’* RESPONSIBLE INV. (Dec. 15, 2020), <https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-betaactivism> [<https://perma.cc/YGW8-LERS>]; see also John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 614 (arguing “institutional investors are more concerned with ‘systematic risk’ than are individual investors”); STEVEN DAVIS, JON LUKMONIK & DAVID PITT-WATSON, WHAT THEY DO WITH YOUR MONEY 50 (2016); Frederick Alexander, Comment, *A Welfare Function for Shareholder Engagement: Recognizing Profit for What It Is*, 51 ENV’T L. REP. 10666, 10666 (2021) (defining beta activism). See generally JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 21 (2000).

A. Antitrust

A recent wave of scholarship has argued shareholder concentration has led to greater common ownership, which causes anticompetitive effects in certain industries, such as the airline industry.¹⁸⁷ This theory suggests that anticompetitive effects can exist even without explicit investor coordination. Danielle Chaim has recently applied this theory to investor coalitions, claiming that they cause anticompetitive effects on the pricing of initial public offerings in dual class stock companies.¹⁸⁸ Therefore, it is unsurprising that ICAs must overcome increased antitrust scrutiny.¹⁸⁹ Without weighing in on the common ownership debate more broadly, this Article argues that ICAs align with the goals of antitrust law because reducing climate risk is inherently procompetitive.

The argument that ICAs are anticompetitive hinges on the claim that net-zero commitments are a veiled group boycott of the fossil fuel industry because they result in decreased output of fossil fuels and financial products linked to fossil fuel assets—ultimately harming consumers through higher prices or reduced options.¹⁹⁰ State attorneys general are spearheading these efforts.¹⁹¹ For instance, in May 2022, Arizona Attorney General Mark Brnovich accused Climate Action 100+ of violating antitrust law by coordinating shareholders' efforts to address climate change.¹⁹² Then, in an August 2022 letter, nineteen state attorneys general warned financial industry leaders that coordinated conduct among financial institutions to

187. See generally *supra* note 36.

188. See Chaim, *supra* note 36.

189. Tristan Justice, *Exclusive: Republicans Launch Antitrust Investigation into Climate-Obsessed Corporate 'Cartel,'* THE FEDERALIST (Dec. 6, 2022), <https://thefederalist.com/2022/12/06/exclusive-republicans-launch-antitrust-investigation-into-climate-obsessed-corporate-cartel/> [<https://perma.cc/X7UR-3MVX>]; see also Kahan & Rock, *supra* note 47, at 531 (arguing that, if Climate Action 100+ took a portfolio-wide approach and an active role in facilitating the Exxon vote, it could be liable under the Sherman Act for acting as a “cartel ringmaster” or furthering a “hub and spokes” conspiracy).

190. Brent Snyder & Jindrich Kloub, *Antitrust Laws and ESG Shareholder Engagement*, WILSON SONSINI (Dec. 18, 2023), <https://www.wsgr.com/print/v2/content/49014824/Antitrust-Laws-and-ESG-Shareholder-Engagement1.pdf> [<https://perma.cc/SD9F-6WDW>] (“In our view, many of the antitrust arguments against ESG-related shareholder activism are overstated.”); Cynthia Hanawalt & Denise Hearn, *The Antitrust Theories Are Weak, but the Effects Can Be Chilling on Corporate Collaboration for Climate Action*, IMPACTALPHA (Dec. 4, 2023), <https://impactalpha.com/the-antitrust-theories-are-weak-but-the-effects-can-be-chilling-on-corporate-collaboration-for-climate-action/> [<https://perma.cc/HQS6-QADK>] (calling the ESG antitrust backlash “a strategy that is more political narrative than substance”).

191. See, e.g., Letter from Twenty-One State Att’y’s Gen. to Net Zero Fin. Serv. Providers All. (Sept. 13, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-37-letter.pdf> [<https://perma.cc/7KLU-4EGC>].

192. See Brnovich, *supra* note 34.

impose net-zero goals violate antitrust law.¹⁹³ In March 2023, state attorneys general turned their focus toward ICAs, claiming that they exert “coordinated pressure” upon companies to reduce emissions.¹⁹⁴ The pressure continues to mount, with lawmakers warning that “[a]dvancing the ESG agenda requires that the owners of capital collude to restrict the supply of certain goods and services,” which amounts to a “textbook antitrust violation.”¹⁹⁵ The House Judiciary Committee has also made this a priority, subpoenaing Ceres (a founding member of Climate Action 100+) on the grounds that the organization “appears to facilitate collusion through Climate Action 100+.”¹⁹⁶ Many legal advisors and academics dismiss these antitrust claims as baseless and partisan.¹⁹⁷ Yet, the maelstrom of antitrust accusations is weakening ICAs—and prompting the departure of the largest asset managers.¹⁹⁸ The antitrust scrutiny of shareholder collaboration reveals a partisan divide.¹⁹⁹ Unfortunately, the FTC and DOJ also remain

193. Letter from Nineteen State Att’y’s Gen. to Laurence D. Fink, Chief Exec. Officer, BlackRock Inc. (Aug. 4, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf> [https://perma.cc/3QKK-2S84].

194. Letter from Twenty-Three State Att’y’s Gen. to Net Zero Asset Managers 3 (Mar. 30, 2023), <https://attorneygeneral.utah.gov/wp-content/uploads/2023/03/2023-03-30-Asset-Manager-letter-Press-FINAL.pdf> [https://perma.cc/2X28-9CU9].

195. Letter from Republican Members, House Judiciary Comm., to Mindy S. Lubber, Chief Exec. Officer & President, Ceres, & Simiso Nzima, Managing Inv. Dir., Glob. Equity, CalPERS 4 (Dec. 6, 2022) (alteration in original), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/legacy_files/wp-content/uploads/2022/12/2022-12-06-HJC-GOP-to-Lubber-Nzima-re-ESG.pdf [https://perma.cc/8CD7-PFEP].

196. Letter from Jim Jordan, Chairman, House Judiciary Comm., to Matthew E. Miller, Counsel to Ceres 1 (June 14, 2023), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-06-14-jdj-to-miller-ceres-re-subpoena.pdf> [https://perma.cc/8FXD-UQMR].

197. On partisan antitrust rhetoric, see William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014); Jon R. Roellke, William T. McEnroe, Christina Renner, Leonidas Theodosiou & John Ceccio, *Climate Risks and Antitrust: The Policy and Politics of ESG Collaborations*, MORGAN LEWIS (July 8, 2024), <https://www.morganlewis.com/pubs/2024/07/climate-risks-and-antitrust-the-policy-and-politics-of-esg-collaborations> [https://perma.cc/RV8D-4BXU]; and *Antitrust and Sustainability: A Landscape Analysis*, COLUM. CTR. ON SUSTAINABLE INV., <https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis> [https://perma.cc/7ERF-W7YY].

198. Ross Kerber & Noor Zainab Hussain, *Vanguard Quits Net Zero Climate Effort, Citing Need for Independence*, REUTERS (Dec. 7, 2022, 3:21 PM), <https://www.reuters.com/business/sustainable-business/vanguard-quits-net-zero-climate-alliance-2022-12-07/> [https://perma.cc/7QPR-9ASC]; see also Virginia Furness et al., *Global Climate Coalitions Need Safer Harbour from Antitrust Turbulence*, REUTERS (Apr. 6, 2023, 12:51 AM), <https://www.reuters.com/business/sustainable-business/global-climate-coalitions-need-safer-harbour-antitrust-turbulence-2023-04-05/> [https://perma.cc/Q8FU-S89Z]; Jessop & Kerber, *supra* note 1.

199. See Press Release, Colum. L. Sch. Sabin Ctr. for Climate Change L., CCSI and Sabin Center Release New Report – Antitrust and Sustainability: A Landscape Analysis (July 26, 2023), <https://climate.law.columbia.edu/news/ccsi-and-sabin-center-release-new-report-antitrust-and-sustainability-landscape-analysis> [https://perma.cc/4ZSP-JM8S].

resistant to collaborative efforts to address climate change risk.²⁰⁰ The op-ed by FTC Commissioner Lina Khan titled *ESG Won't Stop the FTC* underscores the widespread resistance to industry collaboration.²⁰¹ Indeed, as discussed below, the United States is an outlier (along with China), as most countries' antitrust regimes have aligned their enforcement policies with climate goals.²⁰² At first blush, given their sheer size, ICAs raise antitrust red flags, but ICAs bear little resemblance to traditional industry collaboration and require a more tailored antitrust approach. The following provides a policy roadmap for courts, antitrust enforcement agencies, and lawmakers.

1. ICA Shareholder Stewardship Is Procompetitive Under the Prevailing Consumer Welfare Standard

Antitrust law prohibits agreements among competitors, referred to as horizontal agreements, that unreasonably restrain competition.²⁰³ Critics of ICAs claim that collaborative shareholder stewardship and net-zero commitments are horizontal agreements among competitors that harm consumers by reducing the supply and raising the cost of fossil fuels.²⁰⁴ The strongest argument in response is that ICA members make decisions unilaterally and no such "agreement" exists.²⁰⁵ However, even if such commitments *could* be characterized as an agreement, ICAs should survive

200. See Lina Khan, *ESG Won't Stop the FTC*, WALL ST. J. (Dec. 21, 2022, 5:10 PM), <https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khans-social-economic-promises-court-11671637135> [<https://perma.cc/35VZ-YEBV>].

201. See *id.*

202. INT'L CHAMBER OF COM., TAKING THE CHILL FACTOR OUT OF CLIMATE ACTION: A PROGRESS REPORT ON ALIGNING COMPETITION POLICY WITH GLOBAL SUSTAINABILITY GOALS 5 (2023), <https://iccwbo.org/wp-content/uploads/sites/3/2022/11/2023-ICC-Progress-report-on-aligning-competition-policy-with-global-sustainability-goals.pdf> [<https://perma.cc/M3WY-VTCW>] ("While there is a growing consensus in various jurisdictions around the world . . . there is still little discussion on this subject in the United States and China . . ."). In theory, Congress could pass legislation exempting ICAs from antitrust scrutiny, though this Article does not address this option because antitrust exemptions by industry or type of activity are extremely rare and disfavored. See Miazad, *supra* note 14, at 2067–68; Maurits Dolmans, Wanjie Lin & Jessica Hollis, *Sustainability and Net Zero Climate Agreements – A Transatlantic Perspective*, 8 COMPETITION L. & POL'Y DEBATE 63 (2023) (analyzing ICAs under existing American antitrust doctrine).

203. Sherman Antitrust Act of 1980 § 1, 15 U.S.C. § 1; see also Snyder & Kloub, *supra* note 190.

204. Some argue that the institutional investor members of ICAs are violating antitrust simply because they are "common owners" of companies in the same industry. See, e.g., Elhauge, *supra* note 36, at 1316–17. Others criticize the methods of empirical analysis. See, e.g., Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 229–230 (2018). In sum, the empirical evidence is woefully inconclusive. See Daniel P. O'Brien & Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less than We Think*, 81 ANTITRUST L.J. 729, 730 (2017).

205. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

antitrust scrutiny because they are procompetitive and enhance consumer welfare.

Courts use two rules to assess whether collaboration among competitors violates antitrust law—the narrow per se rule and the rule of reason.²⁰⁶ The per se rule applies to activities such as price-fixing, group boycotts, or output restraints.²⁰⁷ But ICAs are not partaking in these activities. None of Climate Action 100+’s goals call for a boycott of fossil fuel companies, as divestment would remove the investors’ power to engage. The fact that California’s largest pension funds opposed a fossil fuel divestment bill underscores this point.²⁰⁸ Another argument that critics of ICAs advance is, given their market power, investor collaborative engagement *functions* like an output restraint of fossil fuels. In support of this argument, critics focus on Climate Action 100+’s second goal: asking investors to “[t]ake action to reduce greenhouse gas emissions across the value chain” and to bring emissions into alignment with “net-zero emissions by 2050 or sooner.”²⁰⁹ While courts have significantly narrowed the application of the the per se rule, they may still apply it under a theory that net-zero commitments are a veiled boycott of fossil fuels, curtailing their output.²¹⁰ However, in practice, courts rarely use the per se rule, instead recognizing that the complexities of business merit the more searching rule of reason analysis.²¹¹

The rule of reason test is a fact-intensive conduct standard that prohibits an activity if its competitive harms outweigh the consumer benefits.²¹² The plaintiff has the burden to prove that the “challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.”²¹³ If they do so, the defendant must “show a procompetitive rationale for the restraint.”²¹⁴ If the defendant succeeds, “the burden shifts

206. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 746 (2012).

207. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

208. Arleen Jacobius, *CalPERS CEO Bracing for Return of California Fossil Fuel Divestment Bill*, PENSIONS & INVS. (July 14, 2023, 11:47 AM), <https://www.pionline.com/pension-funds/calpers-ceo-bracing-return-california-fossil-fuel-divestment-bill> [<https://perma.cc/RFAQ-Q3RM>].

209. *The Three Goals*, *supra* note 9.

210. See, e.g., *Shields v. World Aquatics*, Nos. 23-15092, 23-15156, 2024 U.S. App. LEXIS 23559, at *6 (9th Cir. Sep. 17, 2024) (“It is well established that ‘the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the per se rule without inquiry into the special characteristics of a particular industry.’” (quoting *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 100 n.21 (1984))); accord *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). But see Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018) (“[T]he domain of the per se rule has been narrowing.”).

211. See Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50 (2019).

212. *Id.* at 54 (“[T]he plaintiff . . . must demonstrate at the anticompetitive harm of the conduct out-weighs the procompetitive benefit.” (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001))).

213. *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018).

214. Carrier, *supra* note 211, at 53.

back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.”²¹⁵ Then, the court balances the anticompetitive effects and procompetitive justifications to reach a decision.²¹⁶ Crucially, the analysis does not consider the social value of any challenged practice—it remains anchored to economic impacts. What economic impacts might serve as procompetitive justifications remains, as Justice Breyer famously said, “an absolute mystery.”²¹⁷

As Newman explains, confusion arises because courts use three different approaches to assess procompetitive justifications: “market failure,” “competitive process,” and “type of effect.”²¹⁸ The market failure approach justifies a restraint if it alleviates a market failure, while the competitive process approach justifies a restraint if it improves competition. The “type of effect” approach offers a shortcut: “simply identify the effects of the challenged restraint, then ascertain whether they align with a pre-approved typology of virtuous marketplace effects (e.g., higher output, lower prices, etc.).”²¹⁹ As Newman argues, the competitive process and type of effect tests are difficult to apply and have led to incoherent results.²²⁰ The problem is particularly acute for the type of effect approach—which incorrectly equates consumer welfare with lower prices and higher output—at times emphasizing output alone.²²¹ Regardless, the “type of effect” test is gaining support. In particular, the Supreme Court’s recent decision in *Ohio v. American Express Co.* applied the type of effect test, reducing consumer welfare to just one type of effect—output.²²² Past Court decisions had appropriately recognized that even horizontal restraints that reduce output

215. *Id.*

216. *Id.* at 51.

217. Transcript of Oral Argument at 24, *Am. Express Co.*, 585 U.S. 529 (No. 16-1454).

218. Newman, *supra* note 37, at 506–17. These approaches are various ways that courts analyze or evaluate procompetitive justifications, but they do not constitute separate, distinct legal tests.

219. Miazad, *supra* note 37, at 1673; *see also* Newman, *supra* note 37, at 504.

220. Newman, *supra* note 37, at 522–26.

221. The output-welfare fallacy refers to the misconception that antitrust law equates output directly with consumer welfare. John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 617–18 (2022) (“Output cannot be the . . . ‘Holy Grail’ of antitrust law.” (citation omitted)); *see also* Herbert J. Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL’Y 705, 773 (2023) (“Output does not necessarily correspond to welfare, or even to consumer welfare.”); *see also* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 693 (2010).

222. *Am. Express Co.*, 585 U.S. at 549; *see also* Newman, *supra* note 37, at 543 (discussing the *American Express* district court’s output analysis).

or increase prices can increase consumer welfare because they correct a market failure.²²³

The “output-welfare fallacy” looms large in the attack against ICAs. Recall that the claim is that reduced output of fossil fuel or increased energy prices decreases consumer welfare. According to this theory, courts applying the type of effect test for purposes of evaluating pro-competitive justifications in a rule of reason analysis would lead to the same or higher output of fossil fuels and lower prices.²²⁴ But this approach, and the ensuing outcome, would be both too broad and too narrow. As economists recognize, output and consumer welfare (measured in economic terms) can and do diverge in the real world.²²⁵ There are many examples where greater output of a product can reduce consumer welfare, such as tobacco.²²⁶ Likewise, less output of a certain product can increase consumer welfare—this is particularly so in the case of environmentally harmful products which impose negative externalities.²²⁷ Most relevant for ICAs though, is that “conduct that affects multiple products can cause conflicting output effects and conflicting welfare effects.”²²⁸ Newman offers a straightforward example of this “push-pull” effect in attention-markets—decreasing the output of online advertisements may increase the output of search results in online platforms.²²⁹

Collaborative investor stewardship is the quintessential example of conduct that affects multiple products. Indeed, the impetus for Climate Action 100+ was to sustain the long-term value of the investors’ diversified portfolios. These diversified portfolios produce products at two levels—the members of ICAs provide financial products and services. Climate risk is already reducing the output and increasing the cost of these products.

223. See, e.g., Alan J. Meese, *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, 74 *FORDHAM L. REV.* 1775, 1803–04 (2006) (“Moreover, theory—as well as *Sylvania* and *NCAA*—teach us that some market failures produce prices that are too low, and output that is too high.”).

224. The type of effect test also incorporates factors such as innovation or better product quality. *McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015) (quoting approvingly the FTC’s decision in *McWane, Inc.*, 2014-1 Trade Cas. (CCH) 78670 (F.T.C. Jan. 30, 2014)). However, quality is difficult to measure, leading courts to focus on price and output. See generally Ariel Ezrachi & Maurice E. Stucke, *The Curious Case of Competition and Quality*, 3 *J. ANTITRUST ENF’T* 227 (2015).

225. Newman, *supra* note 37, at 517.

226. *Id.*; see also Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 *GA. L. REV.* 321, 339–41 (2005) (arguing that tobacco is a “net-harm” industry: that increasing output reduces consumer welfare).

227. See generally *ORG. FOR ECON. COOP. & DEV., POLICY ROUNDTABLES: HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT* 137 (2010), <http://www.oecd.org/competition/cartels/49139867.pdf> [<https://perma.cc/R783-LEY2>] (“Competition agencies must broaden their approach . . . beyond price and output, if they are to harmonize their objectives with those of the green growth movement.”).

228. Newman, *supra* note 221, at 581–82, 599 (discussing a case in which the Supreme Court recognized that reducing the output of advertisements benefited the consumers of newspapers).

229. *Id.* at 600–01.

Consider insurance—many consumers of insurance are facing either the inability to secure coverage or are burdened with exceptionally high costs.²³⁰ If we acknowledge that climate change resulting from greenhouse gas (GHG) emissions has increased the frequency and severity of natural disasters, rendering entire states uninsurable, it follows that the increase in GHG emissions has already reduced the output of insurance.²³¹ Thus, the market failure test should apply.

Under the market failure test, defendants in an antitrust suit must offer evidence that the restrictions or agreements between them were necessary to correct a market failure (after plaintiffs meet their initial burden). Consider the following hypothetical: fossil fuel companies bring a lawsuit against members of Climate Action 100+, alleging that imposing a net-zero commitment and specific carbon reduction targets constitutes a horizontal agreement in violation of antitrust law. Let us assume that the plaintiffs meet their burden of proving that Climate Action 100+ constitutes an “agreement,” and that it in fact harms consumers by reducing the supply and/or raising the cost of fossil fuels. Thus, the burden would shift to investor-defendants to prove that the GHG targets and net-zero commitments are necessary to correct a market failure: the mispricing of greenhouse gas emissions. The investors can meet this burden—leading economists have long recognized that the mispricing of greenhouse gas emissions, or the “GHG externality,” is a market failure.²³² Indeed, the systemic risk of climate change is the defining market failure of our time.²³³ Of course, the investor-defendants must demonstrate the market failure with precision; any full application of the market failure test is highly fact-specific. But this brief illustration demonstrates that output restraints can be justified when they are designed to address market failures—particularly where the restraint is designed to minimize the harm caused by a product

230. Jon Sindreu, *Climate Risk Is Becoming Uninsurable. Better Forecasting Can Help.*, WALL ST. J. (Oct. 30, 2023, 6:52 AM), <https://www.wsj.com/business/entrepreneurship/climate-risk-is-becoming-uninsurable-better-forecasting-can-help-b9c94ca6> [<https://perma.cc/LMR4-RDUK>].

231. Traditionally, procompetitive gains in one market (insurance) cannot be offset to rebut competitive harm in the relevant market (fossil fuel), but this Article argues that for systemic risks like climate risk, antitrust should apply a broader “universal consumer” standard. See Miazad, *supra* note 37, at 1689–92.

232. Nicholas Stern & Joseph E. Stiglitz, *The Social Cost of Carbon, Risk, Distribution, Market Failures: An Alternative Approach* 4 (Nat’l Bureau Econ. Rsch., Working Paper No. 28472, 2021), https://www.nber.org/system/files/working_papers/w28472/revisions/w28472.rev0.pdf [<https://perma.cc/WU2K-AQPA>].

233. *Id.*; Joseph E. Stiglitz, *Addressing Climate Change Through Price and Non-Price Interventions* (Roosevelt Inst., Working Paper, 2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Address-Climate-Change-Through-Price-and-Non-Price-Interventions-Working-Paper.pdf [<https://perma.cc/LKL2-PEHE>]; Nicholas Stern & Joseph E. Stiglitz, *Climate Change and Growth*, 32 INDUS. & CORP. CHANGE 277 (2023).

with a high level of negative externalities, such as fossil fuels.²³⁴ While GHG emissions are a market failure, courts may be unwilling to characterize attempts to address such mispricing through collaboration as a procompetitive justification. Given this reality and the political pressure on investor collaboration, this Article advocates for a legislative solution, outlined in the next section.

2. ICAs Should Be Exempt from Antitrust Scrutiny Under the State Action Doctrine

Investors face conflicting international antitrust, risk assessment, and disclosure standards on climate risk. They also face a dizzying array of divergent state legislation.²³⁵ Over half of U.S. states have passed legislation forbidding their state pension funds from investing in entities that consider climate risk.²³⁶ Texas now prevents its funds from doing business with 348 investment firms that incorporate ESG factors (including climate risk) into their decision-making process.²³⁷

Though the wave of anti-ESG legislation by Republican-led legislatures arrived first, progressive states are also enacting legislation requiring their pension funds to consider climate risk or to divest from fossil fuels completely.²³⁸ In 2021, Maine was the first state to enact legislation requiring its pension funds to divest from all fossil fuel holdings by 2026.²³⁹ California has also passed legislation requiring its pension funds to divest from thermal coal companies, as well as expansive climate disclosure

234. See Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 859 (2000).

235. See generally Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135 (2024) (discussing increasing conflicting interstate conflicts in several areas, including ESG investing).

236. Brenna Goth, *Blue States Counter Anti-ESG Laws With Pension, Climate Measures*, BLOOMBERG L. (June 28, 2023, 4:00 AM), <https://news.bloomberglaw.com/in-house-counsel/blue-states-counter-anti-esg-laws-with-pension-climate-measures> [https://perma.cc/TU9N-A6BC] (“A schism is widening between how Democratic and Republican states direct their pension plans to approach ESG investing.”). For an updated tracker of anti-ESG legislation, see *Navigating State Regulation of ESG*, ROPES & GRAY, <https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg> [https://perma.cc/VBU2-XLBX].

237. Shivaram Rajgopal, Anup Srivastava & Rong Zhao, *Economic Substance Behind Texas Political Anti-ESG Sanctions* (Mar. 5, 2024) (unpublished manuscript) (accessible at <https://ssrn.com/abstract=4386268> [https://perma.cc/PE8Z-TWKT]).

238. See generally Mana Behbin, Elizabeth S. Goldberg & Rachel Mann, *ESG Investing Regulations Across the 50 States*, MORGAN LEWIS (July 21, 2023), <https://www.morganlewis.com/pubs/2023/07/esg-investing-regulations-across-the-50-states> [https://perma.cc/GQ3K-4NEQ].

239. Robert Steyer, *New Maine Law Requires State Pension Fund to Divest Fossil-Fuel Companies*, PENSIONS & INVS. (June 17, 2021, 6:30 PM), <https://www.pionline.com/esg/new-maine-law-requires-state-pension-fund-divest-fossil-fuel-companies> [https://perma.cc/46B5-9RLM].

bills.²⁴⁰ We can expect to see a growing “red and blue” divide on whether pension funds can consider climate risk, with seventy-five additional bills pending.²⁴¹

This surge in legislative activity prompts a new question, which this Article is the first to pose: is it possible for ICAs to be immune from antitrust scrutiny under the state action doctrine? The doctrine protects certain anticompetitive conduct from federal antitrust scrutiny when the “conduct (1) is in conformity with a ‘clearly articulated’ state policy, and (2) has been ‘actively supervised’ by the state.”²⁴² It was first recognized by the Supreme Court in *Parker v. Brown*.²⁴³ *Parker* involved a challenge to the California Agricultural Prorate Act, which imposed price and output restrictions on raisins. The Court explained that California’s legislation did not violate the Sherman Act because, unlike “a contract, combination or conspiracy of private persons,” it “derived its authority and its efficacy from the legislative command of the state.”²⁴⁴ Thus, the Court held that acts of a sovereign state outweigh the importance of a freely competitive marketplace. *Parker* instructs us that state legislatures and courts receive automatic state action immunity for the anticompetitive actions they authorize. Other state actors, such as municipalities and school boards, can also receive state action immunity if the anticompetitive conduct is pursuant to a clearly articulated state policy. The threshold is higher for private parties, which can also receive state action immunity if their anticompetitive actions are pursuant to a clearly articulated state policy *and* are actively supervised by the state.²⁴⁵

Importantly, U.S. pension funds participate in ICAs to further state emission-reduction policies and, increasingly, state legislation aimed at compliance with the Paris Accord. Twenty-four U.S. states have passed

240. CAL. GOV’T CODE §§ 16642, 7513.75 (West 2024); CAL. HEALTH & SAFETY CODE § 38532 (West 2024).

241. See Leah Malone, Emily Holland & Carolyn Houston, *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), <https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/> [<https://perma.cc/U3RV-BER3>].

242. OFF. OF POL’Y PLAN., FED. TRADE COMM’N, REPORT OF THE STATE ACTION TASK FORCE 1 (2003), https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport_0.pdf [<https://perma.cc/N3EJ-QR9G>].

243. 317 U.S. 341 (1943). For an in-depth analysis of the state action doctrine, see generally William H. Page & John E. Lopatka, *Parker v. Brown, The Eleventh Amendment, and Anticompetitive State Regulation*, 60 WM. & MARY L. REV. 1465 (2019).

244. *Parker*, 317 U.S. at 350.

245. Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 747 (2012) (discussing the application of the state action immunity doctrine to state licensing boards).

legislation creating specific emission reduction targets.²⁴⁶ For example, California's pension fund, CalPERS, the largest in the United States, has committed to decarbonize its portfolio in alignment with California's Climate Action Plan.²⁴⁷ This Article argues that California's commitment to net zero is a "clearly articulated" policy; thus, the California pension funds participating in ICAs are state actors that should receive immunity under the state action doctrine.

Critics might argue that California's Climate Action Plan lacks the necessary precision in aligning with its pension fund's actions. However, this perceived shortcoming is readily addressable. The California legislature has the capacity, and indeed the responsibility, to direct its pension funds to engage in ICAs explicitly for advancing the state's well-defined net-zero objectives and adherence to the Paris Agreement. Other states with pension funds participating in ICAs could enact similar legislation. In essence, given the current trend of states and municipalities enacting laws focused on emissions reduction, mandating their pension funds to collaborate through ICAs brings these activities closer to state action immunity.

Of course, pension funds are not the only participants in ICAs. And some may contend that pension funds are not acting in their capacity as state actors, but as market actors, when they participate in ICAs. According to the state action doctrine, when the state itself is not the actor, and has delegated its authority to private parties (such as standards boards) the anticompetitive action may still be protected if 1) the challenged restraint has been clearly articulated and affirmatively expressed by state policy and 2) the policy is actively supervised by the state.

The second prong, active supervision by the state, undoubtedly faces implementation challenges. Notwithstanding, states that have committed to reducing emissions could establish a supervisory body to oversee their respective pension fund's participation in ICAs. In Massachusetts, for example, the State Treasurer recommended the creation of an advisory committee for MassPRIM, its pension fund, "to assist the Board overseeing issues related to the development of a Stewardship Framework [for climate risk] and related engagement activities, including proxy voting."²⁴⁸ Drawing inspiration from this example, this Article proposes that a coalition of states

246. *State Climate Policy Maps*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/state-climate-policy/> [https://perma.cc/9FSC-KYTB].

247. *See \$100 Billion Climate Action Plan*, CALPERS (July 22, 2024), <https://www.calpers.ca.gov/page/investments/sustainable-investments-program/net-zero> [https://perma.cc/YUP5-UCMC]; *California Releases World's First Plan to Achieve Net Zero Carbon Pollution*, OFF. OF CAL. GOVERNOR GAVIN NEWSOM (Nov. 16, 2022), <https://www.gov.ca.gov/2022/11/16/california-releases-worlds-first-plan-to-achieve-net-zero-carbon-pollution/> [https://perma.cc/HX2V-SC3S].

248. *MassPRIM Has Created a Unique Advisory Committee*, MASSPRIM, <https://www.mapension.com/our-approach/advisory-committee/> [https://perma.cc/7URT-8F86].

could form a Climate Risk Advisory Committee to actively supervise their respective fund's participation in ICAs.²⁴⁹ The committee, consisting of representatives from states with pension funds that are members of Climate Action 100+, could function as a supervisory advisory committee, responsible for overseeing ICAs' adherence to the net zero legislation in each state. Any private asset manager that wanted to do business with state pension funds could likewise be directed by the states to participate in Climate Action 100+. In sum, enacting legislation and establishing a multi-state monitoring committee would protect ICAs under the state action doctrine.

3. *U.S. Antitrust Agencies Should Publish Guidance for ICAs*

By rejoining the Paris Agreement, enacting the Inflation Reduction Act, and urging an “all agenc[y]” approach to combatting climate change, the Biden administration has focused on addressing climate risk.²⁵⁰ But although the DOJ and FTC (the “U.S. Agencies”) have focused considerable resources on investigating and prosecuting corporate wrongdoing that harms the environment,²⁵¹ they remain a global outlier in their unwillingness to clarify the permissible scope of collaborative industry efforts to address climate change.²⁵²

The current Assistant Attorney General Jonathan Kanter has emphasized that antitrust law should “continually adapt . . . to address today’s market realities.”²⁵³ The unique nature of climate risk certainly merits a tailored antitrust approach. But the U.S. Agencies last updated their Competitor Collaboration Guidelines over two decades ago.²⁵⁴ Much has changed since

249. *Id.*

250. See Exec. Order No. 14008, 86 Fed. Reg. 7619, 7622 (Jan. 27, 2021).

251. See, e.g., Press Release, EPA, EPA and Justice Department File Complaint Alleging Environmental Violations by eBay (Sep. 27, 2023), <https://www.epa.gov/newsreleases/epa-and-justice-department-file-complaint-alleging-environmental-violations-ebay> [<https://perma.cc/V4NL-K4NT>].

252. See INT’L CHAMBER OF COM., *supra* note 202, at 15; see also *Environmental Sustainability Agreements: Final UK Guidance to Cooperating Competitors*, A&O SHEARMAN (Oct. 19, 2023), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/environmental-sustainability-agreements-final-uk-guidance-to-cooperating-competitors> [<https://perma.cc/HB6D-CRD4>] (“By contrast, and as a notable outlier, U.S. regulators have been keen to emphasise that there is no ‘ESG exemption’ from the antitrust rules.”); Cynthia Hanawalt, Denise Hearn & Chloe Field, *Recommendations to Update the Antitrust Guidelines for Competitor Collaborations*, COLUM. UNIV. CTR. ON SUSTAINABLE INV. (May 15, 2024), <https://ccsi.columbia.edu/news/recommendations-update-antitrust-guidelines-competitor-collaborations> [<https://perma.cc/SUG8-DAFU>] (discussing efforts in other jurisdictions).

253. Jonathan Kanter, Assistant Att’y Gen., Remarks at New York City Bar Association’s Milton Handler Lecture (May 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association> [<https://perma.cc/95NH-6AFF>].

254. FED. TRADE COMM’N & U.S. DEP’T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) [hereinafter U.S. AGENCIES’ ANTITRUST GUIDELINES].

2000—including awareness of climate risk, and the rise of highly diversified investors who are uniquely susceptible to such systemic risk. Given the first Trump Administration’s departure from the Paris Accord, it is highly unlikely that the DOJ and FTC under the second Trump Administration will incorporate climate risk into their antitrust enforcement policy.

This risks creating an even wider gap with global antitrust enforcement agencies, which recognize that, under certain circumstances, collaborative efforts to address climate risk are procompetitive.²⁵⁵ These agencies have also recognized that the fear of antitrust enforcement is chilling industry collaboration and forestalling efforts to comply with the Paris Agreement.²⁵⁶ In response, many have issued updated guidance, provided safe harbors, or implemented a fast-tracked process for seeking approval from enforcement agencies. Examples include the European Commission, Germany, Greece, the United Kingdom, Japan, Singapore, and Brazil, to name a few. Two major jurisdictions that are notably absent are the United States and China.²⁵⁷

The UK’s Competition and Markets Authority (CMA), which has issued its Green Agreements Guidance, is particularly noteworthy.²⁵⁸ The guidance unambiguously states,

the CMA is keen to help businesses take action on climate change and environmental sustainability, without undue fear of breaching competition law. This is particularly important for climate change because industry collaboration is likely to make an important contribution to meeting the UK’s binding international commitments and domestic legislative obligations to achieve a net zero economy²⁵⁹

255. Miazad, *supra* note 14; Kate Beioley & Camilla Hodgson, *UK Competition Watchdog to Ease Rules on Climate Change Action*, FIN. TIMES (Jan. 24, 2023), <https://www.ft.com/content/6513aef6-2347-409c-9be1-eee673d9447f> [<https://perma.cc/QT6D-FQ7H>]. Similarly, the Dutch Authority for Consumers and Markets (ACM) has clarified that, in the antitrust analysis of certain “environmental-damage agreements,” consideration of social benefits is warranted. Jacquelyn MacLennan & Peter Citron, *Recent Guidance on Sustainability Cooperation from the Dutch Competition Authority*, WHITE & CASE (Nov. 1, 2022), <https://www.whitecase.com/insight-alert/recent-guidance-sustainability-cooperation-dutch-competition-authority> [<https://perma.cc/X2R3-MUFY>] (noting examples of allowed collaboration for Dutch companies, such as allowing garden stores to cooperate on pesticide standards).

256. Cynthia Hanawalt, *Are Collective Net Zero Targets Anticompetitive?*, CLIMATE L. (Nov. 4, 2022), <https://blogs.law.columbia.edu/climatechange/2022/11/04/are-collective-net-zero-targets-anticompetitive/> [<https://perma.cc/9FVA-BJ3C>].

257. INT’L CHAMBER OF COM., *supra* note 202, at 15.

258. U.K. COMPETITION & MKTS. AUTH., CMA 185, GREEN AGREEMENTS GUIDANCE: GUIDANCE ON THE APPLICATION OF THE CHAPTER I PROHIBITION IN THE COMPETITION ACT 1998 TO ENVIRONMENTAL SUSTAINABILITY AGREEMENTS (2023).

259. *Id.* at 4 (footnotes omitted).

The UK Guidance is also notable because it creates a more permissive standard for “climate change agreements.” Whereas the traditional “fair share” test considers the benefits for only the purchasers of the specific product at issue, the UK will now consider how climate change agreements impact *all* UK consumers.²⁶⁰ Most pertinent for ICAs, the UK Guidance notes that shareholder collaboration to address climate risk deserves this more lenient approach and clarifies that agreements by shareholders to “vote in support of corporate policies that pursue climate change or environmental sustainability agreements or against policies that do not . . . will be unlikely to infringe competition law.”²⁶¹ Moreover, the guidance focuses on the financial sector in particular and clarifies that “an agreement between financial service providers not to provide support such as financing or insurance to fossil fuel projects”²⁶² will not face antitrust scrutiny. This flexibility toward climate risk agreements broadly aligns with the approaches of authorities in the Netherlands and Austria, among other jurisdictions.

This Article argues that the U.S. Agencies must update their competitor collaboration guidelines to address climate risk. The widening gulf between the U.S. Agencies and their global counterparts is particularly problematic in the context of antitrust, which is applied extraterritorially.²⁶³ Indeed, this disparate treatment “creates a world in which the most stringent antitrust system may produce the global standard.”²⁶⁴ The status quo is untenable—the harm caused by the climate crisis to consumers, including U.S. consumers, is already evident. Just consider the growing number of regions in the United States where homeowners cannot purchase insurance.²⁶⁵ Additionally, the erosion of biodiversity due to climate change is impacting the availability and cost of food products.²⁶⁶ To protect the long-term (or even short-term) sustainability of many of the products in diversified investors’ portfolios, investors must collaborate.²⁶⁷

260. *Id.*

261. *Id.* at 20.

262. *Id.* at 11, 22.

263. See generally ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020).

264. D. Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 MICH. L. REV. 955, 956 (2017); see also Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2531–32 (2013).

265. Andrew Freedman & Nathan Bomey, *Uninsurable America: Climate Change Hits the Insurance Industry*, AXIOS (June 6, 2023), <https://www.axios.com/2023/06/06/climate-change-homeowners-insurance-state-farm-california-florida> [<https://perma.cc/28HY-JQFC>].

266. See Chad de Guzman, *Climate Crisis Is Driving Food Nationalism and Changing Global Trade*, TIME (July 12, 2022, 5:37 AM), <https://time.com/6195984/climate-change-food-security-trade/> [<https://perma.cc/RW6V-ESXJ>].

267. See Miazad, *supra* note 37, at 1645.

While admittedly unlikely under the second Trump Administration, the U.S. Agencies should clarify that collaborative climate risk mitigation is procompetitive, even under the current articulation of the consumer welfare standard.²⁶⁸ Additionally, given the distinctive nature of ICAs compared to industry collaboration, they warrant bespoke guidance. As the U.S. Agencies expressed in their existing competitor collaboration guidelines, “[b]ecause competitor collaborations are often procompetitive, the Agencies believe that ‘safety zones’ are useful in order to encourage such activity.”²⁶⁹ The updated guidelines should likewise specify the scope of ICA activities that fall within “safety zones.”

The U.S. Agencies should begin by eliciting public comment and feedback from a range of stakeholders including NGOs, consumer advocacy groups, academics, economists, and other experts. The full scope of potential issues will become apparent after a public comment period, but the following areas provide a starting point:

1. Whether shareholder collaboration on climate risk, in which shareholders agree to ask certain companies to “reduce greenhouse gas emissions” to a level that is consistent with the Paris Agreement (1.5), constitutes a horizontal agreement.
2. What types of shareholder collaboration on ESG issues fall in a “safety zone.”
3. What types of shareholder collaboration on climate risk could raise antitrust concerns (with specific examples).
4. Whether shareholder collaboration is akin to “efficiency enhancing integrations” and hence procompetitive.

The U.S. Agencies should also clarify that they will always apply the rule of reason test to agreements by members of ICAs. Moreover, while the U.S. Agencies cannot prevent antitrust enforcement by individual states or private parties, they can and should clarify that, absent evidence to the

268. Indeed, many antitrust practitioners agree that shareholder collaboration on ESG issues is procompetitive and does not raise antitrust concerns. *See, e.g.,* Snyder & Kloub, *supra* note 190. Moreover, while outside the scope of this Article, the claim that common ownership leads to competitive harms (higher prices or less supply), though it may have intuitive appeal, has been largely disproved by several empirical studies. *See generally* Edward B. Rock & Daniel L. Rubinfeld, *Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance* 2 (N.Y.U. Sch. of L., Law & Econ. Rsch. Paper Series Working Paper No. 17-05, 2017), <https://ssrn.com/abstract=2925855> [<https://perma.cc/2WP2-UZ4F>]. *But see* Azar et al., *supra* note 36.

269. U.S. AGENCIES’ ANTITRUST GUIDELINES, *supra* note 254, at 25.

contrary, investigating shareholder collaboration on addressing climate risk will not be an enforcement priority.²⁷⁰

B. Securities Regulation & “Acting-in-Concert”

1. Recent Amendments to the Williams Act Do Not Go Far Enough

Congress enacted the Williams Act in 1968 in response to hostile takeovers.²⁷¹ Unlike proxy battles, these all-cash tender offers allowed the acquirer to operate behind the scenes, leaving shareholders with limited information and time to respond.²⁷² The Act also sought to prevent so-called wolf-pack activism, in which investors make formal or informal arrangements to work collectively or in parallel to take control of a target company.²⁷³ Thus, in response, section 13(d) of the Act required any person or group acquiring more than 5% of a company’s equity to file a disclosure statement within ten days.²⁷⁴ But, as scholars recognized long before ESG shareholder collaboration emerged, 13(d)—designed to protect individual investors from wolf pack activists who seek to take over the firm—has had the unintended consequence of obstructing collaborative stewardship by institutional investors.²⁷⁵

The dilemma partly arises from the shift in the composition of shareholders. In the 1960s, individual shareholders held about 80% of public company shares, while institutions held roughly 20%. Today, these numbers have effectively reversed, granting institutional investors immense

270. This is consistent with the CMA, which clarified that it “does not expect to take enforcement action against environmental sustainability agreements, including climate change agreements.” U.K. COMPETITION & MKTS. AUTH., *supra* note 258, at 7.

271. As emphasized by Senator Williams, the cash tender offer had “become an increasingly favored method of acquiring corporate control.” 113 CONG. REC. 9339 (1967).

272. See *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982).

273. See Carmen X.W. Lu, Comment, *Unpacking Wolf Packs*, 125 YALE L.J. 773, 775 (2016); William R. Tevlin, *The Conscious Parallelism of Wolf Packs: Applying the Antitrust Conspiracy Framework to Section 13(D) Activist Group Formation*, 84 FORDHAM L. REV. 2335, 2341–42 (2016).

274. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, § 929R, 124 Stat. 1376, 1866 (amending section 13(d)(1) of the Securities Exchange Act of 1934 to require disclosure “within ten days after such acquisition”). The time has since been shortened to five days. 17 C.F.R. § 240.13d-1(a) (2024).

275. For a comprehensive account of the chilling effect 13(d) has on stewardship by institutional investors, see John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1423–30 (2019); Tuch, *supra* note 63, at 1497 (“[Of] the web of U.S. rules that stymie institutional investors’ capacity to coordinate in monitoring portfolio companies, the most notable is section 13(d) . . .”); Rose, *supra* note 12, at 31–53 (explaining that § 13(d) reflects a uniquely American political economy that is focused on diffusing shareholder power); and Colleen D. Ball, Comment, *Regulations 14A and 13D: Impediments to Pension Fund Participation in Corporate Governance*, 1991 WIS. L. REV. 175, 190 (discussing pension funds and describing 13(d) as “legal weaponry that corporate management may brandish to hush communications among shareholders”).

power in the market.²⁷⁶ But it is not just the power of institutional investors that has changed—their aims have as well. Institutional investors now use activist strategies to advance ESG issues. In short, “activism and ESG interact in meaningful ways,” fueling a renewed focus on the scope of 13(d).²⁷⁷

Thus, the SEC has amended the rules governing beneficial ownership, including 13(d).²⁷⁸ The initial proposal broadened the definition of “group,” essentially removing the requirement of an agreement.²⁷⁹ Most troublingly for ICAs, the amended 13(d) treats investors as a group if they merely “act as” one. Group formation could be inferred from “pooling arrangements, whether formal or informal, written or unwritten.”²⁸⁰ The proposed rule was clearly aimed at preventing change of control situations by wolf-pack activists, but it (perhaps inadvertently) implicated ESG shareholder collaboration by institutional investors.²⁸¹ Investors accordingly expressed concerns, emphasizing that institutional investor communication occurs “with great regularity,” and that the rule would prevent shareholders from working together to focus corporate boards “on matters of importance to shareholders.”²⁸² On the other hand, critics argued that collaborative ESG

276. See Jan Fichtner, *The Rise of Institutional Investors*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF FINANCIALIZATION 265, 267 (Philip Mader, Daniel Mertens & Natascha van der Zwan eds., 2020).

277. Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHI. BUS. L. REV. 417, 423 (2022).

278. Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13846 (Mar. 10, 2022) (to be codified at 17 C.F.R. pts. 232, 240). For a brief overview of the proposed changes, see U.S. SEC. & EXCH. COMM’N, FACT SHEET: MODERNIZATION OF BENEFICIAL OWNERSHIP REPORTING (2023), <https://www.sec.gov/files/33-11030-fact-sheet.pdf> [<https://perma.cc/NG4A-XN8A>].

279. See Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. at 13867. For a comparative perspective of how acting in concert rules across jurisdictions chills investor collaboration on ESG issues, see Ringe, *supra* note 17, at 40 (“European and other jurisdictions’ rules on ‘acting in concert’ limit the possibility of coalition-building . . .”); and Puchniak & Varottil, *supra* note 14.

280. Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. at 13868.

281. Jeffrey N. Gordon, *Why the SEC’s Proposal for “Modernization of Beneficial Ownership Reporting” Is Flawed*, CLS BLUE SKY BLOG (June 28, 2022), <https://clsbluesky.law.columbia.edu/2022/06/28/why-the-secs-proposal-for-modernization-of-beneficial-ownership-reporting-is-flawed/> [<https://perma.cc/C3KU-AESC>]; see also Kahan & Rock, *supra* note 47, at 531 (arguing that Climate Action 100+ triggers 13D disclosure obligations because it amounts to a group formed for the purpose of voting).

282. Rob Collins, Council for Inv. Rts. & Corp. Accountability, Comment Letter on Modernization of Beneficial Ownership Reporting 2 (Apr. 11, 2022), <https://www.sec.gov/comments/s7-06-22/s70622-20123223-279501.pdf> [<https://perma.cc/BM5A-GWXT>]; Steven M. Rothstein, Managing Dir., Ceres Accelerator for Sustainable Cap. Mkts., Comment Letter on Modernization of Beneficial Ownership Reporting 4 (Apr. 11, 2022), <https://www.sec.gov/comments/s7-06-22/s70622-20123442-279690.pdf> [<https://perma.cc/U8TK-CV7E>].

activism, including the Exxon campaign, constitutes a violation of 13(d),²⁸³ a view with which SEC Commissioner Mark Uyeda concurs.²⁸⁴

Apparently recognizing the potential chilling effect that expanding the definition of “group” would have had on ESG collaboration, the SEC opted for a narrower approach.²⁸⁵ As a middle ground, it provided guidance to clarify when two or more persons form a “group.”²⁸⁶ Yet, the current rule and accompanying guidance still thwart the ability of ICAs to help investors escalate their engagement by using their collective voting power. This escalation is a core pillar of investment stewardship codes.²⁸⁷ The following guidance underscores this limitation:

Question: Is a group formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer’s board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management’s director candidates if the issuer does not take steps to implement the shareholders’ recommended actions?

Response: No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders “act as a . . . group” for the purpose of “holding” securities of the covered class Rather, we view this engagement as . . . not implicat[ing] the policy concerns addressed by section 13(d) or section 13(g).²⁸⁸

283. SEC Commissioner: *Big Asset Managers’ ESG Practices May Violate Exchange Act Section 13(d)*, STRIVE (Nov. 30, 2022), https://www.strive.com/article/sec_commissioner_big_asset_managers_esg_practices_may_violate_exchange_act_section_13d_white_paper [https://perma.cc/VHP5-GKEG].

284. Mark T. Uyeda, Comm’r, U.S. Sec. & Exch. Comm’n, Remarks at the 2022 Cato Summit on Financial Regulation (Nov. 17, 2022), <https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722> [https://perma.cc/4BVP-MGPA].

285. See also Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896, 76897 (Nov. 7, 2023) (“We also are not adopting proposed 17 CFR 240.13d-6(c) . . . which would have specified certain circumstances under which two or more persons may coordinate and consult with one another and engage with an issuer without being subject to regulation as a group. Instead, we are issuing guidance regarding the appropriate legal standard for determining whether a group is formed.”).

286. *Id.* at 76933.

287. *Id.* at 76934.

288. *Id.* (first alteration in original).

Applying this guidance to Climate Action 100+’s vote-flagging platform reveals the potential ambiguity. The platform highlights upcoming votes at the initiative’s focus company. Imagine that several investors publish a joint statement to declare their intention to vote for a flagged shareholder resolution. Could they be deemed a “group,” even if they independently determine how they will vote? Moreover, given that Climate Action 100+ is not an independent entity, could the process of flagging votes constitute a collective expression of intent, akin to a joint statement? These issues highlight an uncomfortable reality for ICAs: without further guidance, members find themselves navigating a legal gray area.

It is unlikely that the current SEC will bring an enforcement action against members of ICAs—but the SEC’s priorities change with administrations. Thus, we can predict that a Republican administration will attempt to limit ICAs. Moreover, as Commissioner Uyeda has noted, state attorneys general can enforce federal securities laws on behalf of their state.²⁸⁹ So can private parties: Exxon has filed a lawsuit asking a Texas court for a declaratory judgement permitting it to exclude a shareholder proposal that asks Exxon to accelerate its GHG emission goals for Scope 1, 2, and 3 emissions.²⁹⁰ The complaint alleges that the “securities laws have long recognized that multiple people who are acting as a coordinated group” may be treated as a single entity, and that shareholder plaintiffs collaborated with activist organizations by publishing reports and working “in concert” to submit and support shareholder proposals.²⁹¹

In sum, the SEC’s guidance may even be more harmful than helpful. It essentially cabins shareholder stewardship to a feeble arena: voluntary discussion aimed at information sharing.²⁹² The SEC must go much further

289. See 15 U.S.C. § 78bb(f)(1), (f)(3)(B); *SEC Commissioner: Big Asset Managers’ ESG Practices May Violate Exchange Act Section 13(d)*, *supra* note 283.

290. Complaint, *Exxon Mobil Corp. v. Arjuna Cap. LLC*, No. 24-cv-00069 (N.D. Tex. dismissed June 18, 2024); *see also* Sabrina Valle & Nate Raymond, *Exxon Files Lawsuit Against Investors’ Climate Proposal*, REUTERS (Jan. 22, 2024, 3:21 PM), <https://www.reuters.com/legal/exxon-files-lawsuit-against-investors-climate-proposal-2024-01-21/> [<https://perma.cc/WM95-CSSY>].

291. Complaint, *supra* note 290, at 14–15.

292. As a middle ground between changes of control and ESG shareholder advocacy, the German Federal Financial Supervisory Authority (BaFin) has exempted ESG advocacy that does not attempt to change the corporate direction of the company. Ulrich Korth & Sarah-Loreen Krüger, *Collaborative Engagement and Acting in Concert at Listed Companies: When Do Investors Face Consequences?*, MORGAN LEWIS (June 1, 2023), <https://www.morganlewis.com/pubs/2023/06/collaborative-engagement-and-acting-in-concert-at-listed-companies> [<https://perma.cc/6AY3-3VNC>]; *Collaborative Engagement and the Attribution of Voting Rights: When Can Things Get Tricky?*, BAFIN FED. FIN. SUPERVISORY AUTH. (Mar. 30, 2023), https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2023/fa_bj_2303_Collaborative_Engagement.html [<https://perma.cc/HU7C-L7M7>] (specifically noting that participation in collaboration platforms that provide “a formal framework for the efficient development, bundling, and transparency of collaborative engagement” is “intended to enable investors to engage ideas and agree on specific topics” and is not, on its own, sufficient to establish acting in concert).

and establish a safe harbor from the “acting in concert” rules for climate stewardship that is facilitated by ICAs.

2. *Proposing a Safe Harbor for ICAs*

The SEC’s recent amendments to 13(d) fall short for several reasons. First, they do not differentiate between activist investors seeking control and institutional investors seeking enhanced monitoring. These investors differ in their goals and methods. Activists deprive other shareholders and the board of time and information, whereas members of ICAs turn to collective stewardship as a last resort after years of “soft engagement.” Additionally, stewardship codes in several jurisdictions call for investors to escalate their engagements by “expressing their concern collectively with other investors.”²⁹³ Particularly pertinent to ICAs, the Global Stewardship Principles recommend investors “form or join investor associations to promote collective engagement.”²⁹⁴

Scholars have long advocated for drawing a distinction between active institutional investors and activist investors for the purpose of triggering 13(d) obligations—and a growing number are focusing on ESG activism in particular.²⁹⁵ Moreover, financial regulators in Europe, Japan, Australia, and elsewhere have issued guidance differentiating ESG shareholder engagement from acting in concert.²⁹⁶ This Article contributes to the debate and advocates for a safe harbor from 13(d) for stewardship activities facilitated by ICAs.²⁹⁷ The proposed safe harbor would create a rebuttable

293. INT’L CORP. GOVERNANCE NETWORK, ICGN GLOBAL GOVERNANCE PRINCIPLES 27 (2014), <https://www.fsa.go.jp/en/refer/councils/corporategovernance/reference/icgn.pdf> [<https://perma.cc/JWA9-HFPZ>]. Collective engagement is recommended in the stewardship codes in the UK, Canada, EU, Italy, Brazil, Singapore, Hong Kong, Denmark, ISG, India, Netherlands, South Africa, Japan, Taiwan, OECD, Thailand, Kenya, and Australia. INT’L CORP. GOVERNANCE NETWORK, ICGN GLOBAL STEWARDSHIP PRINCIPLES 31 (2020), <https://www.icgn.org/> [<https://perma.cc/4C9N-HM43>]. Even in the US, the Institutional Stewardship Group’s Principle F encourages collaboration. *The Principles, INV. STEWARDSHIP GRP.*, <https://isgframework.org/stewardship-principles/> [<https://perma.cc/6H37-73GA>] (“Institutional investors should work together, where appropriate, to encourage the adoption and implementation of the Corporate Governance and Stewardship Principles.”).

294. INT’L CORP. GOVERNANCE NETWORK, *supra* note 293, at 20. For a discussion of collective engagement in stewardship codes, see Balp & Strampelli, *supra* note 134, at 175–78.

295. See Balp & Strampelli, *supra* note 134, at 175–80; Puchniak & Varottil, *supra* note 14.

296. Khalid Azizuddin, *Japan Reviews Acting in Concert Rules to Boost Shareholder Engagement*, RESPONSIBLE INV. (Feb. 22, 2023), <https://www.responsible-investor.com/japan-reviews-acting-in-concert-rules-to-boost-shareholder-engagement/> [<https://perma.cc/YU8Y-85J7>]; Kei Okamura & Neuberger Berman, *Unlocking Hidden Value Through Engagement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 5, 2023), <https://corpgov.law.harvard.edu/2023/11/05/unlocking-hidden-value-through-engagement/#14> [<https://perma.cc/8AUV-FMYT>].

297. This is consistent with several recent proposals from scholars who argue for a safe harbor from “acting-in-concert” rules for ESG activists. See Puchniak & Varottil, *supra* note 14 (manuscript at 33) (“Accordingly, we argue for a safe harbor for intermediary-led climate-related activism, which ought not to fall within the constraints of the acting in concert rules.”).

presumption that shareholders are not “acting-in-concert” and do not trigger 13(d) obligations if they: Collaborate or issue a joint statement with other Climate Action 100+ investors announcing their collective intention to vote in favor of a shareholder proposal flagged by Climate Action 100+. The shareholder proposal must align with at least one of Climate Action 100+’s goals: 1) implementing board oversight of climate change risk; 2) reducing greenhouse gas emissions; or 3) providing enhanced disclosure.

Some jurisdictions maintain a list of activities that do not constitute acting in concert. For example, the European Securities and Markets Authority (ESMA) identifies exempt activities, including shareholder proposals on “the environment or any other matter relating to social responsibility or compliance with recognised standards or codes of conduct.”²⁹⁸ Others have advocated for a safe harbor for shareholder collaboration on ESG.²⁹⁹ But, given the capacious and fluid definition of ESG, such a broad exemption could be challenging to implement, and fall prey to abuse by shareholders who seek to use ESG as a guise for change of control. In contrast, the safe harbor proposed here is tailored to a specific risk—climate risk—and to three specific action areas. The proposed safe harbor also applies exclusively to stewardship facilitated by Climate Action 100+. Although it is not a distinct entity, the alliance provides more monitoring and transparency compared to initiatives organized outside of the initiative.³⁰⁰

But what if institutional investors work collectively to replace directors? Shouldn’t this trigger 13(d) obligations? Not necessarily. Even when members of ICAs deploy so-called “activist stewardship,” they still do not aim to gain control of the target firm; they only seek better monitoring of climate change risk.³⁰¹ The lines are certainly blurred in this context, warranting a surgical approach for director nominations. But this is not an insurmountable problem. As Balp and Strampelli have argued, coordinated engagements on director votes facilitated by third-party investor associations differ in objectives from activist campaigns for which 13(d) is designed.³⁰² They point to Assogestioni, an association of Italian investment managers, which identifies, selects, and vets director candidates. To be sure, Italy’s corporate governance code departs considerably from the United

298. EUR. SEC. & MKTS. AUTH., INFORMATION ON SHAREHOLDER COOPERATION AND ACTING IN CONCERT UNDER THE TAKEOVER BIDS DIRECTIVE 5–6 (2014), https://www.esma.europa.eu/sites/default/files/library/esma-2014-677-rev_public_statement_concerning_shareholder_cooperation_and_acting_in_concert.pdf [https://perma.cc/7XMZ-R4E2].

299. See Balp & Strampelli, *supra* note 134, at 203.

300. See *supra* Section I.C.

301. Coffee, *supra* note 131, at 51 (“Nor do institutional investors want to actually control or manage the business.”).

302. See Balp & Strampelli, *supra* note 134, at 207–08.

States', requiring a mandatory slate of minority directors. Still, Assogestioni illustrates that intermediary organizations comprised of representatives of institutional investors, operate differently from activist hedge funds who seek board representation as a "toehold" for complete change of control.³⁰³

Applying these principles to ICAs, the SEC should avoid a rigid distinction based on whether the investors are voting on non-binding "ESG shareholder proposals" or director elections. Instead, the focus should be on whether the purpose of the director vote is to enhance the issuer's monitoring of climate risk. One potential way to operationalize the proposed safe harbor is to exempt shareholders from 13(d) obligations if they are: (1) engaged in a joint campaign; (2) facilitated by Climate Action 100+; (3) to vote *against* a director who has failed to meet the Net Zero Benchmark's Disclosure Indicator 8 (Climate Governance) for at least three years, and/or to vote *for* a director candidate that Climate Action 100+ has identified as having expertise in monitoring climate change risk. While highly unlikely that institutional investors could ever replace more than one or two board members, the exemption could include limitations on the number or percentage of directors that Climate Action 100+ could jointly vote on at any given company.

3. Delaware Recognizes the Prevalence of ESG Shareholder Stewardship

In a recent case, *In re Williams Companies Stockholder Litigation*, the Delaware Chancery Court invalidated a poison pill with a broad definition of "acting in concert."³⁰⁴ The company had adopted a stockholder rights plan, or "poison pill," designed to ward off an activist challenge.³⁰⁵ Unlike the classic poison pill, which seeks to ward off hostile takeovers, these "anti-activist pills" are designed to prevent shareholders from expressing discontent with management's operational or strategic decisions.³⁰⁶ Importantly, poison pills can establish their own contractual definition of

303. *Id.* at 196–97.

304. *In re Williams Cos. S'holder Litig.*, No. 2020-0707, 2021 Del. Ch. LEXIS 34, at *25, *89 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* *Williams Cos. v. Wolosky*, No. 2020-0707, 2021 Del. LEXIS 344 (Del. Nov. 3, 2021).

305. For a discussion of "crisis pills," see generally Ofer Eldar & Michael D. Wittry, *Crisis Poison Pills*, 10 REV. CORP. FIN. STUD. 204 (2021).

306. See Jeffrey N. Gordon, *The Rejected Threat of Corporate Vote Suppression: The Rise and Fall of the Anti-Activist Pill*, 2022 COLUM. BUS. L. REV. 206, 208. For critiques of the *Williams* decisions, see Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L.J. 411 (2022) (arguing that the pill is more justified against activism versus takeovers); Petrucci & Subramanian, *supra* note 277, at 430 (offering a critique of *Williams* and arguing that "'parallel-conduct' AIC provisions . . . represent an appropriate response to increasingly sophisticated activist attacks").

what constitutes a group.³⁰⁷ Some simply rely on the section 13(d) definition, while others apply a “conscious parallelism” standard to determine whether multiple shareholders are considered a group.

The poison pill in *Williams* contained a particularly capacious definition of “acting in concert,” which included acting “in parallel” as it pertains to both “changing” and “influencing control of the Company.”³⁰⁸ More troublingly, it incorporated a “daisy chain” concept, in which shareholders “separately and independently ‘acting in concert’ with the same third party” are considered a group.³⁰⁹ This definition effectively applies to most of the activity that Climate Action 100+ facilitates. Thus, the stakes of this decision were high. Had the Court allowed the anti-activist pill to stand, it would have “throttle[d] the incipient ESG activist movement that recently illustrated its potential in successful challenges at Exxon-Mobil.”³¹⁰

As Robert Thompson observed, the opinion took an expansive view of the scope and value of shareholder communication, tipping the balance of power from directors to shareholders.³¹¹ Thompson attributed this shift to a recognition by the Delaware judiciary that investors are no longer individuals, but sophisticated institutional shareholders who rely on technology to share more information than ever before.³¹² Indeed, institutional investors are active participants in corporate governance.³¹³ Thus, Thompson argued, corporate governance is “a combination of three interacting sources: (i) state law governance roles between directors and shareholders; (ii) a deeper set of federal rules that . . . provide additional levers that shareholders can pull to participate in governance; and (iii) a set of private sector intermediaries.”³¹⁴

The *Williams* case could portend a paradigm shift in Delaware: one that favors collaborative climate risk governance. The facts in *Williams* did not involve climate risk or even ESG shareholder advocacy. However, the opinion addressed ESG shareholder activism, and offered a hypothetical in which a board adopted a poison pill that prevented shareholders from communicating about an ESG shareholder proposal and then warned that

307. See *Third Point LLC v. Ruprecht*, No. 9469, 2014 Del. Ch. LEXIS 64, at *33 (Del. Ch. May 2, 2014).

308. *In re Williams Cos. S’holder Litig.*, 2021 Del. Ch. LEXIS 34, at *23.

309. *Id.* at *25.

310. Gordon, *supra* note 306.

311. Thompson, *supra* note 14, at 735 (“*Williams* illustrates this recognition of a broadened shareholder governance paradigm . . .”); see also Petrucci & Subramanian, *supra* note 277, at 423.

312. Thompson, *supra* note 14, at 729.

313. There are two reasons for this change: the identity of the shareholders and access to information.

314. Thompson, *supra* note 14, at 735.

such a pill would be “fatally flawed.”³¹⁵ In doing so, the opinion noted the prevalence of ESG activism and the increase in shareholders “pressuring corporations to adopt or modify policies to accomplish environmental, social, and governance goals.”³¹⁶

Williams also took a broader view of the timing of shareholder communication. The court explained that shareholders could communicate with investors prior to the proxy contest to “take the temperature” of the activist’s campaign. Thus, the poison pill was invalid because it “infringes on the stockholders’ ability to communicate freely in connection with the stockholder franchise, much of which occurs outside the context of proxy contests.”³¹⁷ *Williams* reflects a recognition by the Delaware courts that the role of institutional investors encompasses ongoing monitoring. Such a shift inevitably increases the burden on investors to share information. In sum, Delaware courts are far more attuned to the increased frequency and scope of investor communication, and recognize that shareholders ought to be free to communicate for many reasons, including on ESG issues. *Williams* signals the court’s willingness to acknowledge and respond to the modern realities of investor collaboration.³¹⁸

C. State and Federal Trust Law Should Specify That the Duty of Prudence Permits Systematic Stewardship

In 1992, trust law adopted the prudent investor rule.³¹⁹ The rule mandates diversification and clarifies that whether an investment is prudent is determined in the context of the total portfolio as opposed to individual investments.³²⁰ Though codified in state and federal law, the rule does not specify how the duty of prudence interacts with efforts to address systemic

315. *In re Williams Cos. S’holder Litig.*, No. 2020-0707, 2021 Del. Ch. LEXIS 34, at *63, *85–86 (Del. Ch. Feb. 26, 2021), *aff’d sub nom. Williams Cos. v. Wolosky*, No. 2020-0707, 2021 Del. LEXIS 344 (Del. Nov. 3, 2021) (“‘ESG activism’ has come to the fore, and stockholders have begun pressuring corporations to adopt or modify policies to accomplish environmental, social, and governance goals.”).

316. *Id.* at *63.

317. *Id.* at *46.

318. Robert B. Thompson, *The New Unocal*, HARV. L. SCH. F. CORP. ON GOVERNANCE (May 2, 2023), <https://corpgov.law.harvard.edu/2023/05/02/the-new-unocal/> [https://perma.cc/8NWX-F7XS] (“The courts are looking at the 21st century corporate governance landscape and seeing something different than the prevailing picture repeated over previous decades.”).

319. See RESTATEMENT (THIRD) OF TRUSTS § 227 general note on cmts. e through h (AM. L. INST. 1992) (describing the incorporation of modern portfolio theory into the Restatement). For an in-depth analysis of the prudent investor rule, see Robert J. Aalberts & Percy S. Poon, *The New Prudent Investor Rule and the Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39, 48–50 (1996) (discussing “legal lists,” or requiring investment only in government-backed securities).

320. UNIF. PRUDENT INV. ACT prefatory note (UNIF. L. COMM’N 1994); see also Jeremy Lau, *The Prudent Investor Rule and UPIA: Intro to Trustee Investing*, PRUDENT INVS. (Apr. 26, 2023), <https://www.prudentinvestors.com/blog/the-prudent-investor-rule-and-upia-intro-to-trusting-investing/> [https://perma.cc/7BGC-EJ2Z].

risk. Moreover, the differing executive orders and rules from the Trump and Biden administrations regarding trustees' consideration of ESG factors have had a chilling effect.³²¹ Yet, ICAs empower trustees to fulfill their duty of prudence by facilitating collaboration to mitigate climate risk's threat to total portfolio returns. Thus, this Article concludes with a proposal to amend the Uniform Prudent Investor Act (UPIA)³²² and the Employee Retirement Income Security Act (ERISA).³²³

Before turning to the specific amendments, it is important to distinguish this proposal from the many that advocate for fiduciaries to consider ESG factors that are *not* directly tied to the financial interests of the beneficiaries.³²⁴ This enduring debate dates back to the 1980s: John Langbein and Richard Posner argued that pension fund trustees divesting from South Africa were breaching their fiduciary duties if the divestments led to financial harm.³²⁵ The Supreme Court has reflected a similar view, holding that "the term 'benefits' in [ERISA's fiduciary provisions] must be understood to refer to . . . *financial* benefits."³²⁶ Moreover, in an influential paper, Max Schanzenbach and Robert Sitkoff distinguished between "collateral benefits ESG" and "risk-return ESG."³²⁷ They argued that only the latter, in which a fiduciary uses ESG factors to generate superior risk-adjusted returns, is permissible under ERISA.³²⁸ To be sure, this reflects a circumscribed (and controversial) notion of what trustees may consider, and is more narrow than ERISA's most recent guidance.³²⁹ Regardless, ICAs

321. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73826 (Dec. 1, 2022) (codified at 29 C.F.R. pt. 2550) ("The need for clarification comes from the chilling effect and other potential negative consequences caused by the [prior] regulation with respect to the consideration of climate change and other ESG factors . . .").

322. UNIF. PRUDENT INV. ACT (UNIF. L. COMM'N 1994); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 649–50 (1996) (discussing trustees' duty to invest in accordance with reasonable risk-return objectives at the portfolio level).

323. The members of ICAs are governed by several, sometimes overlapping, state and federal trust laws. The Employee Retirement Income Security Act of 1974 (ERISA) governs private retirement plans. State pension funds are not subject to ERISA, but rather UPIA, which has been adopted by over 44 states. Finally, the Investment Company Act of 1940 governs private asset managers. See 15 U.S.C. § 80a-8(a). For an extensive discussion of ERISA, see RONALD J. COOKE, *ERISA PRACTICE AND PROCEDURE* (2d ed. 1989). For a critical perspective, see Emma L. Russ, *The Employee Retirement Income Security Act of 1974: An Outdated Regulatory Framework for Retirement Investors*, 105 IOWA L. REV. 399 (2019); and Alon Brav & J.B. Heaton, *Brown Assets for the Prudent Investor*, HARV. BUS. L. REV. ONLINE, art. 2, 2021, at 1.

324. See generally Paul Rose, *Public Wealth Maximization: A New Framework for Fiduciary Duties in Public Funds*, 2018 U. ILL. L. REV. 891.

325. John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 88–89, 98 (1980).

326. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 421 (2014).

327. Schanzenbach & Sitkoff, *supra* note 15, at 397.

328. *Id.* at 406.

329. Rachel Roosth & William L. Troutman, *ESG Factors Remain Relevant to ERISA Fiduciaries After Biden Vetoes Resolution Targeting ERISA Investing Rule*, NORTON ROSE FULBRIGHT (Mar. 2023),

facilitate risk-return ESG by enhancing investors' ability to manage and measure financially material climate risk at the portfolio level.³³⁰

In sum, requiring fiduciaries to align their stewardship activities with their duty to account for portfolio-wide risks is not a radical departure from existing trust law. But this clarification would potentially impact the behavior of fiduciaries, particularly considering the partisan pressure. The precise statutory language is well beyond the scope of this paper, but the following provides an illustration and starting point.

1. UPIA

UPIA embraces modern portfolio theory by mandating that “[t]he standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments.”³³¹ Thus, UPIA requires trustees to consider “general economic conditions,” “inflation or deflation,” and “the role that each investment or course of action plays within the overall trust portfolio.”³³² This Article suggests adding “systemic financial impacts of portfolio company actions” to this list of mandatory considerations.

Reflecting a preference for diversification, the UPIA further states that “[a]n investment that might be imprudent standing alone can become

<https://www.nortonrosefulbright.com/en/knowledge/publications/86c565e6/esg-factors-remain-relevant-to-erisa-fiduciaries-after-biden-veto-res-resolution> [<https://perma.cc/2G9X-Y9QQ>] (“The Biden administration’s 2022 rule removes the terms ‘pecuniary’ and ‘non-pecuniary’ from the 2020 rule’s language, and requires a fiduciary to base investment decisions and courses of action on ‘factors that the fiduciary reasonably determines are relevant to a risk and return analysis. . . .’”).

330. Jeffrey N. Gordon, *Unbundling Climate Change Risk from ESG*, CLS BLUE SKY BLOG (July 26, 2023), <https://clsbluesky.law.columbia.edu/2023/07/26/unbundling-climate-change-risk-from-esg/> [<https://perma.cc/VBR4-TT8X>]. Of course, there remains concern that the breadth of ESG enables investors to engage in values-based decisions dressed up as risk-return ESG. Yet, ICAs are more immune from this threat because there is widespread consensus that climate risk is more quantifiable than other ESG risks. Indeed, pension trustees in other jurisdictions are measuring the economic impacts of climate risk on portfolio returns. See, e.g., Stéphanie Lachance & Judith C. Stroeble, *The Origins of ESG in Pensions: Strategies and Outcomes*, in PENSION FUNDS AND SUSTAINABLE INVESTMENT 58 (P. Brett Hammond, Raimond Maurer & Olivia S. Mitchell eds., 2023) (describing ESG investing initiatives by pension funds in Canada and Japan). There is also an important scholarly debate about the time horizon that trustees may consider. See Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 795 (2019) (“An investment strategy that fails to consider long-term risk or that shortchanges future beneficiaries financially may implicate the duty of impartiality.”). But see Schanzenback & Sitkoff, *supra* note 15, at 453 (“[M]andating a long-term ESG perspective for trustees or other investment fiduciaries is contrary to both prevailing law and widely accepted principles of financial economics.”).

331. UNIF. PRUDENT INV. ACT prefatory note (UNIF. L. COMM’N 1994) (“[T]he term ‘portfolio’ [in § 2(b)] embraces all the trust’s assets.”). Harry Markowitz is the seminal contributor to modern portfolio theory. See HARRY M. MARKOWITZ, *PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS* (1959); Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952).

332. UNIF. PRUDENT INV. ACT § 2(c) (UNIF. L. COMM’N 1994).

prudent if undertaken in sensible relation to other trust assets.”³³³ Here, the collaborative stewardship that ICAs facilitate is consistent with a total portfolio risk assessment. In light of climate risk and other systemic risks, the UPIA should be amended to add the following language to UPIA § 2(b):

An investment or investment strategy that might be prudent standing alone can also become imprudent if it harms other trust assets and reduces the value of the overall trust portfolio. In these cases, the duty of prudence requires fiduciaries to exercise their duty to monitor to reduce these harms.

This is a corollary of existing language, which emphasizes diversification to reduce idiosyncratic risk. That is clearly correct—but systemic risk cannot be diversified. If the duty of prudence mandates reducing idiosyncratic risk through diversification, then it should similarly require fiduciaries to attempt to reduce risks that cannot be reduced through diversification.

2. ERISA

The members of ICAs are heterogeneous—spanning private asset managers to public pension plans and religious investors. While ERISA governs employer retirement plans it does not explicitly apply to public pension plans.³³⁴ Faith-based pension plans are also exempt from ERISA.³³⁵ However, ERISA’s standards are reflected in state trust law, and thus influence the fiduciary duties of a wide range of investors.

In 2022, the U.S. Department of Labor clarified the extent to which ERISA’s fiduciary duties apply to investments that promote ESG goals. The final rule specifically states that plan fiduciaries can consider climate risk if it is financially material.³³⁶ It specifies that the duty of prudence requires beneficiaries to make investment decisions based on a “risk and return analysis” and that “[r]isk and return factors may include the economic effects of climate change and other environmental, social, or governance

333. *Id.* § 2 cmt. (discussing portfolio standards).

334. 29 U.S.C. § 1003(b)(1); EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LAB., FAQs ABOUT RETIREMENT PLANS AND ERISA, <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/faqs-retirement-plans-erisa.pdf> [https://perma.cc/7XMX-7YA5] (clarifying that government plans are not covered by ERISA). *But see* Fisch & Schwartz, *supra* note 74 (manuscript at 31–32) (explaining that, while public pension plans are not governed by ERISA, “ERISA’s exclusive benefit rule is the *de facto* legal standard” and “[s]tates have also replicated ERISA’s duty of prudence” (citing Rose, *supra* note 324, at 900)).

335. 29 U.S.C. § 1003(b)(2).

336. 29 C.F.R. § 2550.404a-1(b)(4) (2024).

factors on the particular investment or investment course of action.”³³⁷ While identifying the potential financial materiality of climate risk is a notable improvement upon the former rule, the new rule should further specify that the risk and return analysis must consider systemic portfolio impacts. In this regard, the existing language in UPIA is far clearer. Therefore, this Article proposes additional language:

These risk and return factors must consider the impact of an individual investment on the total investment returns of the portfolio. Fiduciaries may not subordinate total investment returns to any other objective, including positive economic impacts on individual investments.

Additionally, ERISA provides that, in exercising their shareholder rights, fiduciaries must:

- (A) Act solely in accordance with the economic interest of the plan and its participants and beneficiaries, in a manner consistent with paragraph (b)(4) of this section;
- (B) Consider any costs involved;
- (C) Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective;
- (D) Evaluate relevant facts that form the basis for any particular proxy vote or other exercise of shareholder rights; and
- (E) Exercise prudence and diligence in the selection and monitoring of persons, if any, selected to exercise shareholder rights.³³⁸

Considering that ICAs reduce the cost of proxy voting and shareholder engagement, subsection B could be amended to require fiduciaries to “consider any costs involved and make reasonable efforts to reduce costs through collaborative shareholder engagement.” Another section could also be inserted to state that:

Notwithstanding any other provision of this Act and in compliance with applicable legal obligations, fiduciaries may collaborate with other shareholders to exercise shareholder rights to prevent individual firms from engaging in activities that reduce the

337. *Id.*; see also *DOL's New Rule on ERISA Investment Duties and Its Relationship to ESG*, COVINGTON (Dec. 29, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/12/dols-new-rule-on-erisa-investment-duties-and-its-relationship-to-esg> [https://perma.cc/5R38-JVSY].

338 29 C.F.R. § 2550.404a-1(d)(2)(ii)(A)–(E) (2024).

portfolio's economic returns or otherwise harm the economic interest of the plan and its participants and beneficiaries.

Admittedly, another amendment to ERISA seems like a tall order. But the Department of Labor could issue guidance along similar lines to clarify that in determining the best interest of fund beneficiaries, trustees must consider the impact of a single firm's externalities on the total returns of the fund. Moreover, given the significant hurdles to enacting legislation, a soft law approach provides another avenue. In the United States, the Investor Stewardship Group could amend its stewardship principles to clarify that institutional investors ought to address systemic risks at the portfolio level.³³⁹ As noted above, ERISA permits fiduciaries to delegate their duties to asset managers. Therefore, the requirement to evaluate how systemic climate change risk affect portfolio level return must be integrated into various federal legislation, such as the Investment Company Act.³⁴⁰ In sum, trust law has adopted modern portfolio theory to minimize *idiosyncratic* risk. It is now imperative for trust law to evolve and modernize its approach to address *systemic* risk, particularly climate risk.

CONCLUSION

Climate change poses systemic financial risks, motivating investors to address it for the long-term value of their portfolios. However, climate impacts extend far beyond market effects, aligning the goals of diverse actors like institutional investors, prosocial impact investors, international organizations, and NGOs. While past collaborations between these actors have been sporadic, ICAs have ushered in a new era of sustained collaborative climate risk governance. By providing institutional frameworks and support, ICAs help investors overcome the collective action problem of addressing climate risk. Unfortunately, current corporate law tools, designed for different purposes, hinder ICAs at precisely the moment that we need climate action from investors. To fully realize the potential of ICAs, corporate law must rise to the occasion and provide the legal infrastructure for collaborative climate risk governance. This Article contributes to that task.

339. *The Principles*, *supra* note 293. Some of the members of ICAs are not subject to ERISA or UPIA. Therefore, similar updates can be made to other state and federal legislation such as the Investment Company Act of 1940, which governs mutual funds and ETFs.

340. For proposed amendments to the Investment Company Act to permit consideration of impacts to "common interests," see FREDERICK ALEXANDER, HOLLY ENSIGN-BARSTOW, LENORE PALLADINO & ANDREW KASSOY, FROM SHAREHOLDER PRIMACY TO STAKEHOLDER CAPITALISM 47 (2020), <https://www.wlrk.com/docs/From-Shareholder-Primacy-to-Stakeholder-Capitalism-TSC-and-B-Lab-White-Paper.pdf> [<https://perma.cc/4KYH-857D>].