Floods, Hurricanes, Droughts, and a Free Market Economy: The Troubling Contradictions of State ESG Regulations

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ABSTRACT: This Essay argues that state laws aimed at preventing consideration of environmental, social, and governance ("ESG") issues, so-called anti-ESG regulations, are deeply problematic not only because they are riddled with troubling contradictions, but also because they are harmful to both economic and business concerns. First, state anti-ESG regulations reflect states' vigorous efforts to deny the financial repercussions of weather-related events at the very same time that states are experiencing devastating financial fallout from floods, hurricanes, droughts, and other weather-related events. This contradiction is harmful because it undermines states' ability to secure sufficient economic resources to tackle the significant financial harms associated with their own weather-related disasters. Second, anti-ESG regulations embody prohibitions against the use of state financial resources even as states rely upon federal resources because states always respond to weather-related disasters by declaring emergences enabling them to draw upon federal dollars. In so doing, this contrarian behavior inappropriately shifts the economic fallout of weather-related disasters onto citizens of other states. Third, while anti-ESG regulation proponents tout the importance of the free market, anti-ESG regulations second guess the business judgment of financial actors in a manner that is fundamentally inconsistent with traditional norms of a free market economy. As a result, state anti-ESG regulations reflect state actors' effort to substitute their own judgment around complex and consequential business matters—in this case business matters that intersect with critical weather-related issues—in a manner that is harmful to the long-term best interests of the financial sector and the environment in which that sector must operate.

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INTRODUCTION

State laws aimed at preventing consideration of environmental, social, and governance ("ESG") issues, so-called anti-ESG regulations, have become a prominent feature of the regulatory landscape.[1] The number of state anti-ESG regulations has increased dramatically in a few short years, and there is every indication that they will continue into 2025.[2]

This Essay argues that state anti-ESG regulations are concerning because they are riddled with troubling and economically harmful contradictions. First, anti-ESG regulations embody contradictions that render such regulations inconsistent with states' own weather-related realities and inconsistent with states' own economic self-interests associated with those weather-related

1. *See* CONNOR GIBSON, FRANCES SAWYER & JEREMY SIEGEL, PLEIADES STRATEGY, 2024 STATEHOUSE REPORT 4 (2024) [hereinafter PLEIADES, 2024 STATEHOUSE REPORT], https://drive.google.com/file/d/1e1PkwVGbMPb7ZhI1W3CYxNce3jJWHBmY/view [https://perma.cc/GC5V-J393]; *Navigating State Regulation of ESG*, ROPES & GRAY, https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg [https://perma.cc/53H8-FTHR]; Mana Behbin, Kelly L. Gibson & Elizabeth S. Goldberg, *ESG Investing: The US Regulatory Perspective*, MORGAN LEWIS (Mar. 12, 2024), https://www.morganlewis.com/pubs/2024/03/esg-investing-the-us-regulatory-perspective [https://perma.cc/SG4F-KQEY].

2. *See* JEREMY SIEGEL, FRANCES SAWYER & CONNOR GIBSON, PLEIADES STRATEGY, 2024 ANTI-ESG EXECUTIVE ACTIONS IN THE STATES 18 (2024) [hereinafter PLEIADES, ANTI-ESG ACTIONS], https://drive.google.com/file/d/1PXYhGCwkgI_zX5lpVI1T1xoq3cHnrzkB/view [https://perma.cc/3HN3-HGKQ] (discussing plans for 2025 anti-ESG actions).

realities.[3] State anti-ESG fervor has led to the curious juxtaposition of states declaring weather-related emergencies involving at least a billion dollars in economic harm within their state while simultaneously seeking to pass legislation aimed at denying the existence and economic impact of weather-related events.[4] A state's declaration of a weather-related emergency represents the state's clear acknowledgment of the serious economic impact of weather-related events on the state.[5] Nonetheless, states have vigorously sought to pass legislation aimed at denying the financial repercussions of weather-related events, often at the very same time that their state and its citizens are experiencing devastating financial fallout from such events.[6]

Second, the contradictions affiliated with anti-ESG regulations run afoul of the emphasis on state autonomy over financial resources on which anti-ESG laws are premised while also serving to shift the financial burden of states' weather-related disasters onto the citizens of other states.[7] The state anti-ESG effort relies on states' ability to control their own economic power and financial resources.[8] However, the very same states focused on passing anti-ESG regulations routinely draw on federal funds to ameliorate their state-related weather crises.[9] When they do so, these states demonstrate that they are perfectly willing to rely on principles of state power to curtail or eliminate the use of state funds to address weather-related crises while simultaneously relying upon the federal treasury to ameliorate their state-related weather crises. Importantly, drawing on federal resources in the context of weather-related events requires states to acknowledge that their own state resources have been overwhelmed, and thus that the state does not have sufficient financial resources to address the economic repercussions of their state's weather-related catastrophes.[10] However, anti-ESG regulations mean that the reason why states do not have sufficient resources is in part because states themselves have restricted those resources. Hence, states have affirmatively cut off their own financial resources while simultaneously drawing on resources outside of the state. In this respect, states' contradictory anti-ESG actions run afoul of their seeming preference for state economic autonomy while

3. *See infra* Part II.

4. *See infra* Part II.

5. *See* Adam B. Smith, *2023: A Historic Year of U.S. Billion-Dollar Weather and Climate Disasters* (Jan. 8, 2024), https://www.climate.gov/news-features/blogs/beyond-data/2023-historic-year-us-billion-dollar-weather-and-climate-disasters [https://perma.cc/S7WC-BWNB] (discussing definition of disaster as weather event involving one billion dollars or more in damages); *see also* FEMA, FACT SHEET: DISASTER DECLARATION PROCESS 1–2 (2011), https://www.fema.gov/pdf/media/factsheets/dad_disaster_declaration.pdf [https://perma.cc/33LN-22MW] (discussing assistance for disaster declarations).

6. *See infra* Part II.

7. *See infra* Part II.

8. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 3.

9. *See infra* Section II.C.

10. *See* FEMA, *supra* note 5, at 1.

inappropriately shifting the economic burden of the state's financial harms onto citizens outside of the state.

Third, the contradictions associated with anti-ESG regulations render such regulations incompatible with bedrock free market principles surrounding fiduciary law and good governance.[11] Thus, while anti-ESG regulation proponents tout the importance of the free market, such regulation second-guesses the business judgment of financial actors in a manner that is fundamentally inconsistent with traditional norms of business law and the free market economy.[12]

This Essay argues that these contradictions are troubling and harmful to both economic concerns and business law. First, state anti-ESG regulations are financially harmful because they run afoul of state financial interests when it comes to ensuring that states have sufficient economic resources to tackle the significant financial harms associated with weather-related events. Second, such regulations are also economically damaging because they inappropriately shift the economic fallout of weather-related disasters onto the citizens of other states. Anti-ESG regulations result in states relying on federal and outside resources to ameliorate their weather-related harm after they have affirmatively prevented their own states from dedicating financial resources to address those harms. Further, state anti-ESG regulations upend foundational free market principles in a manner that damages legitimate business interests and traditional wisdom around business actors' need to exercise responsible business judgment in carrying out their business affairs. As a result, state anti-ESG regulations reflect state actors' effort to substitute their own judgment around complex and consequential business matters—in this case business matters that intersect with critical weather-related issues—in a manner that is harmful to the long-term best interests of the financial sector and the corresponding financial repercussions of the environment in which that sector must operate.

Part I of this Essay discusses the state of state anti-ESG regulation. Part II demonstrates the ways in which those regulations are contradictory to states' own weather and corresponding financial reality. Part II also demonstrates the manner in which state anti-ESG regulations run counter to states' emphasis on their own economic autonomy while inappropriately shifting financial harm onto citizens of other states. Part III reveals how the contradictions reflected in state anti-ESG regulations fly in the face of critical free market principles. The final Part concludes.

I. THE STATE OF STATE ANTI-ESG LEGISLATION

Anti-ESG regulations have become a prominent feature of the state regulatory landscape. As of December 2024, forty-one states and the District

11. *See infra* Part III.

12. *See infra* Part III.

of Columbia have introduced over 373 pieces of anti-ESG bills.[13] Most states have proposed multiple anti-ESG bills, with some of the most active states advancing proposals in the double-digits, including Missouri (twenty-seven), Oklahoma (twenty-three), South Carolina (eighteen), Kentucky (thirteen), and Louisiana (twelve).[14] Moreover, twenty states have passed such bills into law.[15] This includes states like Texas and Florida that have passed several different anti-ESG laws.[16] State anti-ESG laws appear to be progressively more restrictive, with Florida standing out as enacting the most far-reaching and restrictive of all state anti-ESG laws.[17]

State anti-ESG activity has grown dramatically within a few short years. State anti-ESG bills first appeared on the state regulatory landscape in 2021 when Texas enacted the first anti-ESG regulation.[18] Thereafter, hundreds of state anti-ESG bills emerged within the span of two years.[19] In 2024, anti-ESG activity persisted.[20] As of February 2024, sixty-one state anti-ESG bills were pending.[21] By June 2024, that number had risen to 161.[22] The political popularity of anti-ESG bills strongly suggests that anti-ESG regulations will continue into 2025.[23] To be sure, even if state anti-ESG activity subsides, there remains a significant amount of anti-ESG regulations currently in place at the state level.[24]

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13. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1; *Navigating State Regulation of ESG*, *supra* note 1; Behbin et al., *supra* note 1. As of December 2024, the only states that have yet to introduce an anti-ESG bill are Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Mexico, Rhode Island, Vermont, and Washington. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1, at 3–4; *Navigating State Regulation of ESG*, *supra* note 1.

14. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1; *Navigating State Regulation of ESG*, *supra* note 1; Behbin et al., *supra* note 1.

15. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1; *Navigating State Regulation of ESG*, *supra* note 1; Behbin et al., *supra* note 1.

16. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1; *Navigating State Regulation of ESG*, *supra* note 1; Behbin et al., *supra* note 1.

17. *See* Leah Mallone & Emily B. Holland, *Florida Passes Farthest-Reaching Anti-ESG Law to Date*, HARV. L. SCH. F. CORP. GOVERNANCE (May 27, 2023), https://corpgov.law.harvard.edu/2023/05/27/florida-passes-farthest-reaching-anti-esg-law-to-date [https://perma.cc/945Z-U9QU].

18. *See, e.g.*, Daniel G. Garrett & Ivan T. Ivanov, Gas, Guns and Government: The Financial Costs of Anti-ESG Policies 7–8 (Mar. 11, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366 [https://perma.cc/JH7X-2WQY]. In 2021, Texas became the first state the pass an anti-ESG law. *Id.*

19. *See supra* note 13.

20. *See* Henry Engler, *Anti-ESG Legislation Seen Facing Uphill Struggle to Become Law*, THOMSON REUTERS (Feb. 22, 2024), https://www.thomsonreuters.com/en-us/posts/esg/anti-esg-legislation [https://perma.cc/Z272-87GX].

21. *See id.*

22. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1, at 3.

23. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 26 (discussing plan to increase state anti-ESG bills in 2025).

24. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1, at 4; *Navigating State Regulation of ESG*, *supra* note 1; Behbin et al., *supra* note 1.

State anti-ESG regulations fall into three categories: (1) Regulations prohibiting state actors, such as state-sponsored pensions, state investment plans, or state agencies engaged in construction and infrastructure projects, from considering ESG factors in carrying out their responsibilities, including responsibilities associated with voting in corporate elections.[25] Such anti-ESG regulations include restrictions on voting on particular corporate resolutions as well as restrictions on making public statements supportive of ESG and restrictions on joining organizations that promote ESG within the business and financial sphere.[26] (2) Regulations prohibiting state entities from contracting or doing business with financial institutions that have adopted policies that appear to boycott certain industries such as firearms or fossil fuels.[27] (3) Regulations prohibiting state actors from contracting or doing business with financial institutions viewed as discriminating against certain industries or entities by using ESG scores or other ESG indicators when making financial decisions.[28] These latter two categories of anti-ESG regulations have the impact of preventing state treasury or any state-sponsored project from doing business with many large banks, investment companies, or other large institutions because the vast majority of major financial entities have embraced ESG policies and practices.[29]

Anti-ESG regulations also authorize state actors to create lists of financial institutions—often termed "blacklists"—barring such institutions from contracting or doing business in the state, which often include the names of the largest banks, asset managers, and financial institutions in the country.[30] Importantly, while major financial institutions have imposed environmental requirements or goals for certain industries, no major financial institution affirmatively boycotts particular industries.[31] Nonetheless, such financial institutions find themselves on these lists because of their public commitments around social or climate matters, including net-zero commitments, even if those commitments specifically disclaim any effort at boycotting particular industries.[32] For example, financial institutions find themselves on these lists despite public statements declaring that their net-zero commitments would

25. *See* Behbin et al., *supra* note 1; *see also* 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/5CD2-YPYK] (describing anti-ESG regulations).

26. *See* Behbin et al., *supra* note 1; Behbin et al., *supra* note 25.

27. *See id.*

28. *See id.*

29. *See, e.g.*, Garrett & Ivanov, *supra* note 18, at 10–12.

30. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 18; Engler, *supra* note 20.

31. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 19.

32. *See id.* at 19, 24; Karin Rives, *Half of Anti-ESG Bills in Red States Have Failed in 2023 as Campaign Pushes On*, S&P GLOB. (June 28, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/half-of-anti-esg-bills-in-red-states-have-failed-in-2023-as-campaign-pushes-on-76276575 (on file with the *Iowa Law Review*).

not preclude continued investment in fossil fuels.[33] Of note, state financial entities that have been subjected to anti-ESG regulations have challenged these lists based on the view that the lists inappropriately include particular institutions or otherwise result in preventing states from engaging in actions that are in their financial best interests, triggering state entities to revise the lists.[34]

A. ESG and State Economic Autonomy

In proposing anti-ESG legislation, states have relied upon their economic autonomy and their significant regulatory authority and control over the state's financial resources. State regulators have tremendous power over the financial health and well-being of their state, including making investment and contracting decisions as well as overseeing the securities, banking, and insurance sectors within their state.[35] Through their power over the state treasury, state regulators also oversee the management and spending of billions of dollars in annual budgets, investment and pension plans, and infrastructure spending.[36] States have used their regulatory power over the range of financial resources within their state to restrict the use of state funds and state resources in connection with their anti-ESG battle.

B. ESG and the Financial Sector

Anti-ESG regulation affirmatively limits, or seeks to limit, the behavior of the financial community. Thus, state anti-ESG regulations operate to restrict the direct use of state treasury funds.[37] State anti-ESG regulations also prohibit actions related to state-sponsored pension and investment plans.[38] Such regulations restrict actions associated with the state municipal bond and insurance markets.[39] State anti-ESG regulations also seek to restrict financial institutions' access to state-sponsored infrastructure and construction projects.[40] In this manner, anti-ESG regulation specifically seeks to dictate financial behavior within the state.

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33. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 24.

34. *See Oklahoma State Regulations: Legislation/Guidance in Effect*, ROPES & GRAY, https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg/states/oklahoma [https://perma.cc/25ZS-EJHN]; *see also* Margarida Correia, *Oklahoma Treasurer Cuts Blacklist by More than Half*, PENSIONS & INVS. (Aug. 15, 2023, 4:43 PM), https://www.pionline.com/esg/oklahoma-treasurer-cuts-blacklist-more-half?adobe_mc=MCMID%3D17761868982141240973867125007003416992%7CMCORGID%3D138FFF2554E6E7220A4C98C6%2540AdobeOrg%7CTS%3D1692193826&CSAuthResp=1692193880416%3A0%3A479835%3A391%3A24%3Asuccess%3AA8203E2075B85C85B9DE9A46AF07F8D4 [https://perma.cc/U4QQ-JV35].

35. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 3.

36. *See id.*

37. *See id.* at 3, 6.

38. *See id.* at 3; Behbin et al., *supra* note 25.

39. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 3.

40. *See id.* at 18.

C. ESG AND THE ENVIRONMENT

Anti-ESG regulation places specific emphasis on restricting the use of state funds to consider or address environmental matters. The term ESG includes environmental issues, a range of social issues from human rights to workers' rights, and corporate governance concerns.[41] Thus, anti-ESG regulations can conceivably target any of the plethora of issues that fall within the umbrella of ESG. However, the vast majority of anti-ESG regulation specifically focuses on restricting consideration of environmental matters.[42] Indeed, Texas was the first state to pass an anti-ESG regulation, and while its regulation focused on firearms, the Texas law also specifically focused on the oil and gas industry, restricting state entities from doing business with financial entities with policies believed to be discriminating against that industry.[43] Texas then became the model for other states seeking to enact anti-ESG legislation. Other anti-ESG regulations, such as those passed in Florida,[44] only refer generally to the term "ESG"—but of course such reference sweeps in considerations associated with the environment. Moreover, all anti-ESG regulation either seeks to prohibit entities from considering environmental factors in their financial decision-making, or otherwise seeks to prevent state actors from doing business with entities that consider environmental factors in their financial or investment decision-making.[45] Hence, the state anti-ESG movement is intentionally designed to restrict the consideration of environmental concerns.

II. WEATHER AND ESG'S FINANCIAL STORM

State anti-ESG regulations are fundamentally contradictory in several respects. This Part highlights those contradictions with respect to states' own weather and corresponding financial reality as well as the state emphasis on economic autonomy. This Part also details the normative implications of those contradictions.

A. WEATHER AND THE ESG STORM

We have found ourselves in the curious position whereby states are experiencing the significant financial impacts of weather-related events with increasing frequency, and yet have aggressively sought to prohibit the financial sector from considering—let alone addressing—those impacts.

The growth in state anti-ESG regulation has occurred alongside the growth in the severity and frequency of weather-related disasters in the United States.

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41. *See* Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 281 (2022) [hereinafter Fairfax, *Dynamic Disclosures*].

42. In addition to generally including environmental activities, anti-ESG regulations primarily focus on activities surrounding oil and gas, fossil fuel, energy, and mining.

43. *See* Garrett & Ivanov, *supra* note 18, at 7–9.

44. *See* Mallone & Holland, *supra* note 17.

45. *See* Behbin et al., *supra* note 1.

In 2023, during one of the busiest years for anti-ESG regulatory activity, the United States set a record for weather-related "disasters."[46] Weather-related "disasters" are defined as weather-related events where the overall economic costs reaches or exceeds one billion dollars.[47] In 2023, the United States experienced twenty-eight separate weather-related disasters, eclipsing the previous record of twenty-two set in 2020.[48] Because this number only reflects the number of events where the economic costs reaches or exceeds one billion dollars, the number underrepresents the overall number of weather-related events in the United States.[49] Hence, not only has there been a stunning growth in billion-dollar weather-related events in the United States, there also has been a significant growth in weather-related events whose overall costs fall below one billion dollars, including events that impose millions of dollars of costs.[50] While 2024 did not break the 2023 record, 2024 marked the second highest number of extreme weather-related disasters.[51] Thus, in 2024, there were twenty-seven separate billion-dollar weather-related disasters in the United States, including severe storms, tornados, droughts, wildfires, and tropical cyclones.[52] Since 2015, the number of extreme weather-related disasters has more than doubled, going from ten in 2015 to twenty-seven in 2024.[53] This growth in weather-related disasters that caused one billion dollars or more in damages reflects the significant increase in the severity of weather-related disasters in the United States.

Weather-related disasters also have increased in frequency. From 1980 to 2023, the annual average billion-dollar weather-related event was 8.5 events per year.[54] By contrast, the annual average billion-dollar weather-related event for 2019 to 2023 was 20.4 events per year.[55] Hence, in recent years, the frequency of billion-dollar weather-related events has increased dramatically within a relatively short timeframe. Then too, "over the last six years," from 2018 to 2022, "there were just [eighteen] days on average between billion-dollar disasters"; by comparison, in the 1980s, there were eighty-two days

46. *See* Smith, *supra* note 5.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See Billion-Dollar Weather and Climate Disasters*, NAT'L CTRS. FOR ENV'T INFO., https://www.ncei.noaa.gov/access/billions [https://perma.cc/8MCL-8LLU] (documenting weather-related disasters as of December 31, 2024).

52. *See id.*

53. *See id.*; *U.S. Saw 10 Billion-Dollar Disasters in 2015*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 7, 2016), https://www.noaa.gov/news/us-saw-10-billion-dollar-disasters-in-2015 [https://perma.cc/WNC9-HBJK].

54. *See Summary Stats: Billion-Dollar Events to Affect the United States from 1980 to 2023 (CPI-Adjusted)*, NAT'L CTRS. FOR ENV'T INFO. (2025), https://www.ncei.noaa.gov/access/billions/summary-stats/US/1980-2023 [https://perma.cc/NY68-TR6U].

55. *See Summary Stats: Billion-Dollar Events to Affect the United States from 2019 to 2023 (CPI-Adjusted)*, NAT'L CTRS. FOR ENV'T INFO. (2025), https://www.ncei.noaa.gov/access/billions/summary-stats/US/2019-2023 [https://perma.cc/9WWP-D4AN].

between such disasters.[56] The significant reduction in time between weather-related disasters decreases the time to respond and recover from weather-related disasters, thereby adding to the increased costs and impact of such events. In other words, the increased frequency of weather-related disasters increases the severity of weather-related disasters.

When viewed through the lens of these weather-related events, anti-ESG regulations seem especially contradictory and counterintuitive. Instead of crafting legislation aimed at considering and ameliorating these extreme weather-related events, the vast majority of states have done the exact opposite in the form of anti-ESG regulation. State anti-ESG regulations are intentionally designed to prohibit states from considering and addressing environmental matters, which clearly includes weather-related events. Thus, in the same years that the United States set records for billion-dollar weather-related events,[57] the United States set records for proposing and passing laws aimed at restricting states from considering or addressing the impact of those events or otherwise using state resources to address those events.[58] This behavior appears deeply contradictory and disturbing.

This troubling contradictory behavior is particularly pronounced given that very often weather-related disasters have occurred within the very same states that have been at the forefront of proposing and enacting anti-ESG regulation. For example, while Texas was the first state to enact anti-ESG regulations,[59] Texas is also the state with the highest number of billion-dollar weather-related disasters.[60] In 2023, Texas experienced multiple severe weather-related disasters ranging from hailstorms to droughts and heat waves that not only resulted in deaths, but also in multiple billions of dollars in economic harms.[61] Not to be outdone, Florida has the second highest number of billion-dollar weather-related disasters.[62] In 2023, Florida experienced severe tropical cyclones, flooding, and hurricanes.[63] Florida also experienced multiple hurricane landfalls within the span of several weeks, reflecting the increased frequency of severe weather-related events in the state.[64] Against this backdrop, Florida has positioned itself as the "new standard-bearer in America's anti-ESG movement" by proposing and passing increasingly more restrictive anti-ESG regulations.[65] This contradictory behavior is not isolated to Texas and Florida. While weather-related disasters have increased throughout the United

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56. *See* Smith, *supra* note 5.

57. *See id.*; Janet Loehrke, *24 Disasters, Billions in Damage: Assessing 2024's Climate Catastrophes*, USA TODAY (Dec. 16, 2024, 5:11 PM), https://www.usatoday.com/story/graphics/2024/12/12/2024-weather-climate-disasters/76823795007 [https://perma.cc/G8S8-9R37].

58. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1, at 4.

59. *See* Garrett & Ivanov, *supra* note 18, at 8.

60. *See* Smith, *supra* note 5.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* Mallone & Holland, *supra* note 17.

States, the South, Central, and Southeast regions of the United States have experienced the highest numbers of billion-dollar disasters.[66] These also happen to include states with some of the highest number of proposed or enacted anti-ESG laws including Texas, Arizona, Oklahoma, Missouri, Mississippi, South Carolina, Louisiana, Tennessee, Kansas, Kentucky, Florida, Georgia, and Arkansas.[67]

The surge in anti-ESG regulation during a period in which there has been a surge in extreme weather-related disasters, particularly within states with the most severe weather-related disasters, runs counter to states' own weather-related realities. Indeed, at their core, anti-ESG regulations aim to prohibit states and state actors from focusing on or considering environmental matters, which obviously includes weather-related disasters. As a result, state anti-ESG regulations embody the contradictory concept of states seeking to pass legislation specifically designed to ignore the elephant in their own rooms, which in this case constitutes regulations specifically designed to ignore the severe cyclones, floods, hurricanes, storms and tornadoes in their own respective states.

Of course it is entirely possible that some may not see any contradiction between a state's weather-related reality and its anti-ESG regulations. First, some anti-ESG proponents have characterized ESG as a form of empty rhetoric or political posturing not intended to alter behavior in any meaningful respect.[68] Thus, it has been common for anti-ESG proponents to refer to ESG legislation as "woke" in an effort to suggest that ESG is being used to curry favor within progressive arenas.[69] This characterization is designed to suggest that ESG is not intended to have any real-world impacts, including any impacts with respect to weather concerns within a state.[70] To the extent ESG is merely a political or rhetorical tool that is not designed to genuinely impact environmental matters, it makes sense that state anti-ESG regulation would not be viewed as inconsistent with state's clear need to acknowledge or address the troubling weather patterns within the state.

However, even if some actors embrace ESG for political or symbolic reasons, dismissing the contradiction between anti-ESG regulation and a state's

66. *See* Smith, *supra* note 5.

67. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1, at 3.

68. *See* Lisa M. Fairfax, *The O.G.: Unmasking Why Governance Is the* Most *Important Component of ESG*, 14 HARV. BUS. L. REV. 153, 169–70 (2023) [hereinafter Fairfax, *The O.G.*]; *see also* Lisa M. Fairfax, *The Perils and Promise of Shareholders of Stakeholder Advocates*, *in* BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 219–20 (Luca Enriques & Giovanni Strampelli eds., 2024) [hereinafter Fairfax, *Perils and Promise*] (discussing ESG as a mere rhetorical tool with no impact on corporate behavior).

69. *See, e.g.*, Kevin Schmidt, *Profits Over Politics: The Case for Anti-ESG ETFs*, CNBC (Oct. 6, 2022, 10:49 AM), https://www.cnbc.com/2022/10/05/profits-over-politics-the-case-for-anti-esg-etfs.html [https://perma.cc/8WVP-FH94]; Michael Smith, Danielle Moran, Nic Querulo & Bloomberg, *Up Next in Ron DeSantis' War Against the 'Woke Agenda': No ESG Criteria in Municipal Bonds*, FORTUNE (Feb. 13, 2023, 3:13 PM), https://fortune.com/2023/02/13/ron-desantis-esg-municipal-bonds-woke-agenda-florida [https://perma.cc/KKE9-NCD8].

70. *See* Fairfax, *The O.G.*, *supra* note 68, at 169–70.

own weather realities based on the notion that ESG activity is merely a political ploy with no environmental consequences is misguided. The characterization of ESG as merely a political ploy not only ignores the fact that financial institutions spent decades encouraging the adoption and consideration of ESG,[71] but also ignores the manner in which those institutions have managed to systematically integrate those factors into their financial decision-making.[72] It further ignores that these financial institutions are engaging in activities that are intended to have, and in fact do have, consequences for the environment.[73] Hence, any examination of the genesis of ESG clearly reveals that ESG was intentionally designed to encourage the consideration and integration of environmental matters within the financial sector.[74] Moreover, considerable research reveals that the enhanced focus on ESG has directly led to increased consideration of environmental matters in the financial arena.[75] The fact that so many of the traditional financial institutions are on the so-called anti-ESG "blacklist" is a testament to the fact the vast majority of major financial institutions have embedded environmental concerns into their decision-making in a manner that seeks to account for weather-related events. The origins of ESG, along with the behavior of entities embracing ESG, reveal that ESG is not merely about political posturing and instead reflects at least some effort on the part of large entities to consider the impact of environmental and weather concerns.

This is true even if the ESG movement involves some political posturing and even if there is uncertainty surrounding the ultimate impact of the actions taken by those supporting the ESG effort. Importantly, this Essay does not seek to deny the possibility—or even strong probability—of political posturing. This Essay also does not take a position with respect to whether the actions taken by the financial community will positively impact an entity's long-term financial prospects, or otherwise ameliorate significant weather-related events. In both cases it may be too soon to tell, and in both cases it may be that no one really knows the best strategy for producing long-term positive outcomes. However, this Essay does assert that at least some actions supportive of ESG

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71. *Id.* at 162–64, 168; Fairfax, *Dynamic Disclosure*, *supra* note 41, at 322–23.

72. *See* Fairfax, *The O.G.*, *supra* note 68, at 168–70; Fairfax, *Dynamic Disclosure*, *supra* note 41, at 287–89; Fairfax, *Perils and Promise*, *supra* note 68, at 222–34.

73. *See* Fairfax, *Perils and Promise*, *supra* note 68, at 222–34 (discussing impact of institutional actions on disclosure and the rise in environmentally-related commitments); Fairfax, *The O.G.*, *supra* note 68, at 175–80.

74. *See* THE GLOB. COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD, at i (2004), https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf [https://perma.cc/85CT-ZHSR]; *see also* Fairfax, *The O.G.*, *supra* note 68, at 168 ("The report [that coined the term ESG] is replete with references to its core theme of integrating environmental and social issues into the financial and investment arena.").

75. *See, e.g.*, Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 378–79 (2022) (discussing significant increase in board oversight of environmental matters associated with ESG as well as increased focus on environmental commitments); Fairfax, *Perils and Promise*, *supra* note 68, at 222–34.

are both intended to, and do, have important impacts, particularly on the effort to focus greater attention on the need to consider the repercussions of weather-related events.[76] As a result, the potential for political posturing associated with ESG does not undermine the contradictory nature of anti-ESG regulation. To be sure, states may disagree with the manner in which entities have considered environmental matters, or states may otherwise have concerns with the potential impact of that consideration on particular industries within their state. However, this disagreement and concern confirms that ESG actions have real-world impacts beyond mere political posturing. It also confirms that states have intentionally aimed to restrict entities from considering those impacts, which should be viewed as problematic in light of the fact that environmental disasters have significant impacts on the states experiencing those disasters and such states should not be in a position of insisting that actors ignore those impacts.

A second potential rationale for the disconnect between anti-ESG regulation and states' own weather-related reality may be rooted in disagreements around the legitimacy of climate change. Indeed, some anti-ESG proponents appear to view ESG as synonymous with support for climate change. State regulators who support anti-ESG regulations have praised institutions for pulling back on their climate-related commitments or for discontinuing their affiliation with organizations aimed at addressing climate change.[77] Moreover, it is relatively clear that anti-ESG regulations related to public statements are specifically designed to prohibit entities from joining or participating in organizations focused on addressing climate change such as Climate Action 100+ or the Net Zero Asset Management Initiative.[78] There is serious disagreement about the legitimacy of climate change and the extent to which the growth in extreme weather-related events results from climate change. There is also considerable disagreement about the connection between on the one hand, the burning of fossil fuels, and on the other hand, the acceleration of changes in weather patterns and the increase in the frequency and severity of weather-related disasters. Regulators who view ESG as synonymous with climate change, and who remain unconvinced about the legitimacy of climate change, may not see a connection between anti-ESG activities and the weather-related events within their state.

However, even if one does not believe that there is a connection between climate change and weather-related events, the contrarian nature of anti-ESG regulations cannot be so easily dismissed. This is because anti-ESG regulation

76. *See, e.g.*, Fairfax, *The O.G.*, *supra* note 68, at 175–80.

77. *See, e.g.*, Correia, *supra* note 34 (discussing praise for withdrawal from various climate groups); *Tennessee: State Regulations*, ROPES & GRAY [hereinafter ROPES & GRAY, *Tennessee*], https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg/states/Tennessee [https://perma.cc/9WC2-QA6X] (discussing complaints around climate initiatives); *Oklahoma: State Regulations*, ROPES & GRAY [hereinafter ROPES & GRAY, *Oklahoma*], https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg/states/oklahoma [https://perma.cc/4A7L-DE9S].

78. *See, e.g.*, ROPES & GRAY, *Oklahoma*, *supra* note 77; ROPES & GRAY, *Tennessee*, *supra* note 77; Behbin et al., *supra* note 1 (discussing Indiana Law).

sweeps much more broadly than restrictions focused solely on climate or limiting climate targets and goals. Indeed, most anti-ESG laws do not even mention the word climate.[79] Instead, anti-ESG regulations are written broadly to encompass *all* environmental factors, which of course includes weather.[80] Moreover, anti-ESG regulations prohibit the *consideration* of all environmental factors.[81] As a result, anti-ESG regulations prohibit entities from taking into account the impacts of weather on their activities, or to take actions in reliance on weather-related impacts. In this respect, anti-ESG regulations place entities in the awkward position of having to ignore the impact of weather-related disasters occurring related to the state projects that they are developing, or the businesses in which they are seeking to make investments. For example, weather-related disasters in Florida have devastated its infrastructure and yet Florida has passed legislation banning its transportation department from incorporating environmental concerns into their planning around infrastructure projects.[82] Florida also has enacted legislation prohibiting insurance companies and lending institutions from considering environmental factors when assessing insurance needs and lending risks even as those institutions are the primary institutions responsible for ameliorating the negative economic impacts of the weather-related disasters that hit Florida with increasing regularity and frequency.[83] These prohibitions defy good business judgment by restricting entities from taking into account weather-related concerns that intersect with their business activities. It simply does not make good business sense to require business entities to ignore weather-related disasters and their potential impact, nor does it make good business sense to prohibit business entities from supporting measures that they believe to be important for addressing those impacts. Even if you do not believe that weather-related disasters are caused by climate-related concerns, it is undeniable that weather-related disasters have impacts. Regulations that prohibit the consideration of those impacts, particularly in the very states with the most severe impacts, appear especially counterproductive and problematic.

B. The Financial Repercussions of Weather-Related Events

Another reason why anti-ESG regulations appear especially contradictory when viewed alongside the increased frequency in weather-related disasters is that such regulations seek to deny the economic impact of environmental matters even as states grapple with those economic impacts. On the one hand, proponents of anti-ESG regulation strenuously contend that environmental issues embedded in ESG have no connection to financial matters.[84] Consistent

79. *See Navigating State Regulation of ESG*, *supra* note 1.

80. *See id.*

81. *See id.*

82. *See* PLEIADES, ANTI-ESG ACTIONS, *supra* note 2, at 4 (citing H.B. 1301, 2024 Leg., Reg. Sess. (Fla. 2024)).

83. *See id.*

84. *See id.*

with this contention, many anti-ESG bills focus on ensuring that state actors and entities cannot consider "nonpecuniary interests."[85] The effort to characterize the consideration of environmental factors as non-pecuniary highlights the belief that these issues are not connected to "pecuniary" financial matters. On the other hand, the contention that environmental matters have no relationship to financial matters is diametrically opposed to the billion-dollar weather-related events that are occurring with such frequency in the very states seeking to deny the economic impact of those events.

Indeed, there is simply no doubt that weather-related events have significant short-term economic impacts. In 2023, weather-related disasters totaled at least $92.9 billion.[86] Over the last seven years, such disasters have cost over one trillion dollars.[87] Weather-related disasters have significant short-term economic impacts including damage to real and personal property, damage to infrastructure and transport routes, disruptions and displacement in labor supply, reduced productivity, reduced capital, reduced access to capital, increased costs of capital, supply chain disruptions, and an overall slowdown in economic activity.[88] A comprehensive meta-analysis of economic studies assessing the economic impact of weather-related events reveals a universal consensus and concludes that weather-related disasters impose negative direct and indirect short-term costs on businesses and the economy.[89]

Importantly one needs only examine the economic repercussions of the weather-related events in the states with some of the most significant anti-ESG regulations to gain a clear picture of the economic toll of such events. Texas has experienced a multitude of hailstorms, rainstorms, severe flooding, droughts and heat waves resulting in billions of dollars in economic costs.[90] In addition to multiple hurricanes, Florida has been hit with several severe tropical cyclones that have resulted in billions of dollars in economic damage.[91] States in Central and Southern America have experienced an increased number of tornado outbreaks and severe storms that have resulted in billions of dollars of economic costs.[92] The economic damages inflicted by these severe weather events include the economic costs related to damage to physical buildings and homes; the economic loss associated with business interruptions including

85. *See* Mallone & Holland, *supra* note 17; Behbin et al., *supra* note 25.

86. Smith, *supra* note 5.

87. *Id.*

88. *See* W.J. Wouter Botzen, Olivier Deschenes & Mark Sanders, *The Economic Impacts of Natural Disasters: A Review of Models and Empirical Studies*, 13 REV. ENV'T & ECON. POL'Y 167,177 (2019); DONTA COUNCIL, GRACE MEAGHER & LEAH CABRERA, FED. RSRV. BANK OF ATLANTA, RISK AND RESILIENCE: HOW WEATHER-RELATED DISASTERS IMPACT ECONOMICALLY MARGINALIZED COMMUNITIES 24 (2024), https://www.atlantafed.org/community-development/publications/discussion-papers/2024/06/18/02-risk-and-resilience-how-weather-related-disasters-impact-economically-marginalized-communities [https://perma.cc/CTZ8-95BN].

89. *See* Botzen et. al., *supra* note 88, at 177; COUNCIL ET AL., *supra* note 88, at 25.

90. *See* Botzen et. al., *supra* note 88, at 173–74, 177; COUNCIL ET AL., *supra* note 88, at 16.

91. *See* Botzen et. al., *supra* note 88, at 177; COUNCIL ET AL., *supra* note 88, at 7.

92. *See Billion-Dollar Weather and Climate Disasters*, *supra* note 51.

lost wages, profits, and revenues; the destruction of agricultural assets such as crops, livestock and timber; along with the economic costs associated with destroyed infrastructure such as roads and transportation systems.[93] The financial repercussions of these weather events are indisputable.[94] In fact, state actors acknowledge the financial harms associated with weather-related events when they affirmatively declare a weather disaster as such declaration is an acknowledgment that the weather-related event has caused economic damage beyond the financial resources of the state.[95] The notion, embedded in anti-ESG regulations, that states and other entities should be restricted from considering these financial costs when carrying out their business seems inapposite.

To be sure, there is disagreement around the long-term economic impacts of weather-related events. Experts contend that the economic damage of a weather event can have at least three potential long-term effects.[96] The first is a return to preexisting economic growth trends—a "rebound" scenario.[97] The second is an increase in economic growth—referred to as "build back better."[98] The third is a decrease in economic growth.[99] In theory, the first pathway is most likely when severe weather events are one-off events.[100] The second pathway is compatible with situations in which significant funds from federal aid and insurance stimulate economic growth.[101] This is because while labor may be temporarily displaced, the disaster and resulting infusion of funds enables economies to innovate and enhance their economic ecosystem.[102] The third pathway is more plausible when weather-related events increase in frequency, severity and duration because of the insufficient time to recover and rebuild.[103]

The empirical evidence supporting each pathway is both mixed and potentially unreliable. On the one hand, there are empirical studies supporting the second pathway, thereby suggesting that there are no long-term negative economic effects of weather-related events.[104] On the other hand, these studies

93. *See id.*

94. *See* Botzen et al., *supra* note 88, at 177; COUNCIL ET AL., *supra* note 88, at 7–9.

95. *See* COUNCIL ET AL., *supra* note 88, at 7–9; FEMA, *supra* note 5.

96. *See* Solomon M. Hsiang & Amir S. Jina, *The Causal Effect of Environmental Catastrophe on Long-Run Economic Growth: Evidence from 6,700 Cyclones* 5–8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20352, 2014), https://www.nber.org/system/files/working_papers/w20352/w20352.pdf [https://perma.cc/7YSF-KB34].

97. *See id.* at 6–7.

98. *See id.*; *see also* Brigitte Roth Tran & Daniel J. Wilson, *The Local Economic Impact of Natural Disasters* 1–5, 28–29 (Fed. Rsrv. Bank of S.F., Working Paper No. 2020-34, 2024), https://www.frbsf.org/wp-content/uploads/wp2020-34.pdf [https://perma.cc/GB8T-Z6W2] (discussing "build back better").

99. *See* Hsiang & Jina, *supra* note 96 at 7–8.

100. *See id.* at 49–51.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See generally* Tran & Wilson, *supra* note 98 (finding an increase in economic growth in counties where FEMA declared a natural disaster).

may be unreliable, especially because they focus on historical periods pursuant to which weather-related events were less frequent and less severe, and they focus on isolated weather events and thus do not account for the cascading effect of multiple different events, and events outside of the United States.[105] Indeed, even authors who conclude that weather-related events may have long-term positive impacts caution against relying on their results.[106] In addition, there is evidence that weather-related events have negative long-lasting economic effects.[107] Here too such evidence may be contestable because of methodological limitations.

Of course, the equivocal nature of the empirical evidence does not negate the financial implications of weather-related events. First, there is clear consensus surrounding the short-term economic effects of weather-related events.[108] At a minimum, therefore, it is irrefutable that weather-related events have financial implications in the short-run and thus businesses should consider those implications. Hence, the suggestion that the environmental matters associated with ESG are disconnected to financial matters is without merit. Second, there is clear consensus that weather-related events have some long-term economic impact.[109] While those impacts may either be positive or negative, the reality of the financial impact seems clear. Thus, it seems clear that the financial sector should be allowed to take these realities into account. Indeed, the uncertainly surrounding the type of financial impact makes it even more important that the financial sector consider varying scenarios and how best to respond to those scenarios. Finally, it must be acknowledged that the "build back better" scenario has significant long-term financial repercussions for certain business sectors. Indeed, economists acknowledge that the fact that companies or economies may experience positive economic activity after a disaster may be due in large part to the inflow of significant federal aid and insurance.[110] These sources of aid lead to increases in local capital, which increases economic growth. This reality means that such events do in fact impose long-term costs on certain institutional sectors, particularly on those institutions financially responsible for any response to weather-related

105. *See id.* at 2 (discussing methodological challenges).

106. *See id.* at 28–29.

107. *See* Press Release, White House, The Rising Costs of Extreme Weather Events (Sept. 1, 2022), https://bidenwhitehouse.archives.gov/cea/written-materials/2022/09/01/the-rising-costs-of-extreme-weather-events [https://perma.cc/3KGV-ALGS]; Solomon M. Hsiang & Amir S. Jina, *Geography, Depreciation and Growth*, 105 AM. ECON. REV. 252, 252 (2015); Sandra Batten, *Climate Change and the Macro-Economy: A Critical Review* 4–6 (Bank of Eng., Staff Working Paper No. 706, 2018) (on file with the *Iowa Law Review*); Hsiang & Jina, *supra* note 96, at 2.

108. *See* Smith, *supra* note 5.

109. *See* Tran & Wilson, *supra* note 98, at 3–5; Chul Kyu Kim, The Effects of Natural Disasters on Long Run Economic Growth 1–3 (2010) (B.A. thesis, University of Michigan), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/79459/chulkyu.pdf?se [https://perma.cc/H9YG-5YGL].

110. *See* Tran & Wilson, *supra* note 98, at 3, 23–25; Kim, *supra* note 109, at 19–20.

disasters.[111] For example, weather-related events in 2023 resulted in eighty-billion dollars in costs to public and private insurers.[112] Importantly, insurers insist that they cannot solve climate change, and thus need private partnerships to help ameliorate the negative repercussions of weather-related events.[113]

In the context of these clear financial impacts, anti-ESG regulation is contradictory because it seeks to prohibit financial actors from considering the financial repercussions of environmental matters, even as states grapple with those repercussions in real time. Anti-ESG regulations seek to prevent insurers and financial institutions from considering the manner in which weather-related events impact their financial costs while preventing other actors from seeking to ameliorate those costs. Anti-ESG regulations also prohibit those involved with critical infrastructure projects from considering environmental matters in the context of those projects, even as critical infrastructure from bridges and to commercial buildings experiences devastating financial harm resulting from weather-related events. Anti-ESG regulations further seek to prohibit lending institutions from assessing the potential financial risks associated with lending in environmentally vulnerable areas while also prohibiting such institutions from crafting policies aimed at addressing those risks. Moreover, anti-ESG regulations seek to prohibit investment vehicles from crafting investment strategies that account for the financial risks affiliated with weather-related events that may impact their financial portfolio. Importantly, these financial risks and considerations are not abstract. Instead, they are the very financial risks that entities are already confronting as a result of the financial harm associated with current weather-related disasters. The fact that states remain intent on passing legislation aimed at prohibiting the legitimate consideration of the acknowledged financial harm associated with current weather-related events is both contradictory and deeply troubling, to say the least.

C. State Autonomy on the Backs of Federal Dollars

In another contradictory move, the growth in state anti-ESG regulations has occurred alongside the growth in states' reliance on federal dollars to address their weather-related disasters.[114] When states experience weather-related events, they almost inevitably seek to declare a federal disaster so that they may receive federal financial help in responding to those events.[115] In 2023

111. *See* AON, CLIMATE AND CATASTROPHE INSIGHT 14 (2024), https://assets.aon.com/-/media/files/aon/reports/2024/climate-and-catastrophe-insights-report.pdf [https://perma.cc/JC8A-5D2E].

112. *See id.* at 28.

113. *See id.* at 6.

114. *See supra* Part I.

115. *See How a Disaster Gets Declared*, FEMA (July 22, 2024), https://www.fema.gov/disaster/how-declared [https://perma.cc/M67K-Y9SG].

and 2024, more than one hundred fifty major federal disasters were declared.[116] Declaring such a disaster means that states do not have sufficient financial assets to cover their own weather-related emergencies. The federal government has therefore provided billions of dollars in disaster aid to states impacted by weather-related events.

The contradiction in this move is clear. On the one hand, anti-ESG regulation not only focuses on states' rights to control their own economic destiny without federal intrusion, but also reflects states' unwillingness to dedicate state resources to weather-related matters. Thus, states have used their significant regulatory control over state actors and their control over state financial resources to restrict the consideration of ESG matters in important financial decisions including retirement investments, banking, insurance, and infrastructure projects.[117] States therefore have made clear that they are unwilling to devote state dollars and resources towards these weather-related concerns. On the other hand, states are perfectly willing—if not eager—to tap into federal resources to address their weather-related disasters. Weather-related disasters very often occur within the same states that have been at the forefront of proposing and enacting regulation restricting financial spending related to the environment.[118] This means that such states have refused to use their own treasury and related financial resources to address weather-related events and have placed affirmative restrictions on doing business with organizations seeking to address weather-related events while repeatedly relying on federal dollars to address the impacts of climate within their state.

Texas is a prime example of this phenomenon. On the one hand, Texas has received among the most money in federal aid for its weather-related disasters.[119] This should come as no surprise since Texas is a leader in disaster declarations.[120] Texas has the highest number of billion-dollar weather-related disasters in the country.[121] In 2024, Texas experienced several separate billion-dollar weather-related disasters, including extreme flooding, heat, and other environmental events.[122] As a result, Texas applied for and received billions

116. *See Disasters and Other Declarations*, FEMA, https://www.fema.gov/disaster/declarations?field_dv2_declaration_date_value%5Bmin%5D=2023&field_dv2_declaration_date_value%5Bmax%5D=2024&field_dv2_declaration_type_value=DR&field_dv2_incident_type_target_id_selective=All [https://perma.cc/85KJ-P6JY].

117. *See supra* note 13.

118. *See supra* notes 3–10 and accompanying text.

119. *See* Smith, *supra* note 5; Shafaq Patel & Alex Fitzpatrick, *Where FEMA's Direct Relief Money Is Going*, AXIOS (Oct. 8, 2024), https://www.axios.com/2024/10/08/fema-direct-payments-state-recipients [https://perma.cc/Q6PD-LKCR].

120. *See Texas: Region 6*, FEMA, https://www.fema.gov/locations/texas#declared-disasters [https://perma.cc/T36R-D3VC] (cataloguing 376 disaster declarations from Texas); REBUILD BY DESIGN, ATLAS OF ACCOUNTABILITY (2024), https://rebuildbydesign.org/wp-content/uploads/2024/07/Atlas-of-Accountability-Fact-Sheet.pdf [https://perma.cc/VW7M-C2MV] (analyzing disaster declarations by state from 2011–2023).

121. *See* Smith, *supra* note 5.

122. *See id.*

of dollars in federal funding.[123] On the other hand, Texas was the first state to enact an anti-ESG regulation.[124] The legislation restricts the state's engagement with financial institutions that consider or address environmental matters that such institutions believe contribute to the severity and frequency of weather-related disasters.[125]

Texas is not alone. Many other states have experienced weather-related disasters and sought financial federal aid while being on the forefront of proposing and enacting legislation prohibiting the use of state funds to consider and help address these disasters.[126] In 2024 states such as South Carolina, Georgia, Florida, Texas, Louisiana, Arkansas, Missouri, Oklahoma, Mississippi, Kansas, and West Virginia have all received federal funds to help ameliorate the impact of weather-related disasters.[127] These states also have been very active in the anti-ESG regulatory space, with many of them passing multiple anti-ESG regulations.[128] Here again we see that states are only too willing to use federal funding to ameliorate the impacts of weather-related events while simultaneously restricting the use of state funds in the effort to consider or address these events.

These actions reflect yet another aspect of the troubling contradictions associated with anti-ESG regulations. When states draw on federal funds to ameliorate their state-related weather crisis, it means that states are perfectly willing to rely on principles of state power to curtail or eliminate the use of state funds to address a weather-related crisis while simultaneously willing to rely upon the federal treasury to ameliorate their state-related weather crisis. In so doing, their actions inappropriately shift the economic burden of the state's financial harms onto citizens outside of the state, ensuring that other states and actors carry the burden of their refusal to devote resources towards their own weather-related issues.

D. *Normative Implications*

The contradictions identified in this Part are problematic. First, they undermine the state's ability to ameliorate weather-related disasters, or otherwise

123. Cristina Gonzales, *FEMA Has Run Out of Money in the Middle of Hurricane Season. Here's What That Means*, NBCDFW (Nov. 18, 2024, 12:51 PM), https://www.nbcdfw.com/news/national-international/fema-disaster-relief-funding-2024-hurricane-season/3622393 [https://perma.cc/Z2TY-HY8M].

124. *See* PLEIADES, 2024 STATEHOUSE REPORT, *supra* note 1, at 4; Erin Douglas, *Texas Legislature Advances Bills to Shield Oil and Gas from Climate Initiatives*, TEX. TRIB. (May 4, 2021), https://www.texastribune.org/2021/05/03/texas-house-fossil-fuel-oil-divest [https://perma.cc/3TFL-SNLG].

125. *See* Douglas, *supra* note 124.

126. *See supra* Part I.

127. *See Disaster Funding for 2017–2019 Hurricanes, California Wildfires and Other Disasters*, FEMA (Jan. 14, 2025), https://www.fema.gov/emergency-managers/national-preparedness/frameworks/national-disaster-recovery/support-functions/rsflg/charts [https://perma.cc/3KM3-VY5D].

128. *See supra* note 25 and accompanying text.

refrain from making investments that do not consider weather-related harms. These actions directly harm the weather-related and financial interests of states. Through anti-ESG regulations, states have intentionally aimed to restrict entities from considering the impacts of weather-related events despite the fact that such disasters have significant impacts on the states experiencing those disasters. These restrictions also have the impact of decreasing the likelihood that states devote appropriate attention and resources on how best to ameliorate or address the clear repercussions of weather-related events in their states. Second, the regulations inappropriately shift the economic costs of these issues onto other states and the federal government. The negative impacts of anti-ESG regulation are not confined to the states that pass such regulation. Instead, when such states simultaneously use their power to limit the financial and other resources aimed at addressing weather-related harms, while tapping into federal resources, they create a situation whereby other states and the federal government are forced to bear the economic burdens that such states have intentionally rejected. These actions can be viewed as economically unfair and inequitable.

III. ANTI-ESG REGULATION AS THE ANTITHESIS OF A FREE MARKET

Anti-ESG regulations are also antithetical to free market principles and the business deference that supports those principles. The Nobel prize-winning U.S. economist Martin Friedman describes the free market economy as one in which businesses are free to engage in activities that they believe will enhance their profits without governmental interference.[129] A free market economy is based on two bedrock principles: (1) the notion that businesses should act based on their own judgment; and (2) the notion that business should act free from government regulation and intervention, and thus governments should not second-guess business judgments or intervene in business operations.[130]

Anti-ESG regulation is antithetical to both of these foundational free market principles. First, such regulations conflict with the considerable deference that a free market economy demands be granted to business leaders. Because such deference does not depend upon, and thus is not limited by, the nature of particular topics, such deference unequivocally includes deference to business judgment around the link between business interests and seemingly non-financial matters such as environmental concerns.[131] Second, anti-ESG regulation reflects significant governmental intrusion into business affairs in a manner that is diametrically opposed to bedrock free market principles.

129. *See* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html (on file with the *Iowa Law Review*).

130. *See id.*

131. *See infra* notes 141–45 and accompanying text.

A. THE PRIMACY OF DEFERENCE

Significant deference to the business judgment of business actors is the hallmark of a free market economy. Thus, bedrock principles of corporate law make clear that while business leaders have a fiduciary responsibility to act in the best interests of the corporation, they are to be granted considerable deference in carrying out that fiduciary responsibility.[132] This deference is underscored by court application of the business judgment rule.[133] Courts determine whether business decisions violate fiduciary duties under the business judgment rule, which rule gives tremendous deference to the business judgment of directors and officers.[134] The determination of whether there has been a violation of fiduciary duty depends upon whether business actors have a *rational belief* that their actions further a legitimate business interest.[135] Importantly, if business actors profess such a belief, their belief is entitled to deference.[136] Moreover, even when business actors fail to advance a rationale for their actions, fiduciary duty principles require that we presume that their actions advance a legitimate business interest.[137] Most importantly, core fiduciary principles require deference even when others, including shareholders, prominent business leaders, legislators, and judges, vigorously disagree with a particular business decision.[138] Hence, courts have repeatedly and emphatically contended that application of the business judgment rule does not allow others to second-guess business decisions, or "substitute [their] own notions of what is or is not sound business judgment."[139]

By seeking to prevent businesses from considering ESG issues that business actors deem to be connected to legitimate business interests, anti-ESG regulations run counter to this principle of deference that undergirds the free market economy. The term ESG was coined by a group of leading financial institutions.[140] The financial institutions that coined the term ESG professed a belief that integrating ESG factors, including environmental factors, into business decisions falls within the scope of the fiduciary duty of financial actors and market participants.[141] This belief rests on the view that ESG factors, including environmental factors, are linked to business and financial matters. Consistent with this belief, business leaders, including officers, directors, asset managers, and other large financial institutions, have insisted that their

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132. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

133. *See Aronson*, 473 A.2d at 812; *Sinclair Oil Corp.*, 280 A.2d at 720.

134. *See Aronson*, 473 A.2d at 812; *Sinclair Oil Corp.*, 280 A.2d at 720.

135. *See Aronson*, 473 A.2d at 812; *Sinclair Oil Corp.*, 280 A.2d at 720.

136. *See Aronson*, 473 A.2d at 812; *Sinclair Oil Corp.*, 280 A.2d at 720.

137. *See, e.g.*, *Aronson*, 473 A.2d at 812.

138. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010).

139. *Id.* at 40 (quoting *Sinclair Oil Corp.*, 280 A.2d at 720); *see also* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985).

140. *See* THE GLOB. COMPACT, *supra* note 74, at i, 3; Fairfax, *The O.G.*, *supra* note 68, at 168–69.

141. *See* THE GLOB. COMPACT, *supra* note 74, at i, 3; Fairfax, *The O.G.*, *supra* note 68, at 168–70.

focus on ESG issues animates from their belief that ESG issues are aligned with their business interests and corresponding fiduciary duties.[142] As BlackRock's CEO, Larry Fink stated: "We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients."[143] Consistent with this statement, business leaders within the states subjected to anti-ESG laws have resisted those laws based on the view that they are incompatible with their fiduciary obligations and legitimate business interests. For example, in August 2023, the board of Oklahoma's Public Employment Retirement System voted nine-to-one, with the only vote against a politically appointed treasurer, to ignore the anti-ESG mandate requiring it to cease doing business with financial institutions based on their belief that such mandate was inconsistent with their fiduciary duty to advance business and investment interests.[144] Under fundamental free market and business law principles, these beliefs must be given deference. Moreover, those principles make clear that such deference must be given even if there is legitimate disagreement with the views of the business and financial community around the link between environmental matters and financial matters.[145]

Importantly, because business leaders have an obligation to consider issues that impact their business interests, there is a legitimate argument that business leaders have a fiduciary obligation to consider how environmental factors will impact their investment decisions or business operations.[146] In fact, there has been a growing number in the financial community embracing the view that failing to focus on environmental and other ESG issues may represent a violation of fiduciary obligations.[147]

Fidelity to free market principles explicitly and emphatically rejects the kind of second-guessing or substituting of one's beliefs reflected in anti-ESG regulations. Of course, reasonable minds can differ about the propriety of particular business actions. With anti-ESG regulations, state actors have made clear that they vehemently disagree with the propriety of many business actions related to ESG. However, free market principles of business deference make clear that the fact that regulators—even if they are prominent business leaders or judges—strongly disagree with a business decision is not the relevant question. Instead, those principles emphasize deference and are expressly designed to reject such second-guessing or substitution of opinion

142. *See, e.g.*, THE GLOB. COMPACT, *supra* note 74, at i, 3; Fairfax, *The O.G.*, *supra* note 68, at 168–70.

143. *See Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/NN3F-PQ9Q].

144. *See supra* note 34 and accompanying text.

145. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

146. *See* Fairfax, *The O.G.*, *supra* note 68, at 170 (noting concerns that ignoring the impact of ESG may be inconsistent with fiduciary duties).

147. *See* Jaclyn Foroughi, *ESG Is Not Impact Investing and Impact Investing Is Not ESG*, STAN. SOC. INNOVATION REV. (Nov. 10, 2022), https://ssir.org/articles/entry/esg_is_not_impact_investing_and_impact_investing_is_not_esg [https://perma.cc/RQE6-M62X].

around business decisions reflected in anti-ESG regulations. In this regard, the fact that state regulators and their advisors disagree about the propriety of business actions related to ESG is insufficient as a rationale for counteracting those actions. Anti-ESG regulations run counter to the considerable discretion afforded to businesses when making investment and financial decisions that is inextricably rooted in core free market principles.

A particularly important aspect of such deference lies in the fact that such deference is not limited by issue type. Proponents of anti-ESG regulation are especially concerned by business leaders' focus on what they view as non-financial issues reflected in ESG. In their view, when business leaders focus on non-financial issues, they stray outside of the consideration of legitimate business interests that are consistent with their fiduciary duty. This view supports the notion that anti-ESG regulations do not run afoul of core fiduciary concepts.

However, this view is not compatible with core free market principles. Courts have made clear that it is consistent with fiduciary duty to consider issues beyond those deemed to be strictly financial in nature because such issues may be linked to legitimate business interests in a variety of ways, including impacting the ability to engage in business and economic activity, helping to attract key stakeholders, or otherwise impact long-term sustainability.[148] It is an unassailable fact that weather-related events such as extreme heat, floods, or hurricanes impact the economy and thus may lead to business closures, dislocation of workers and customers, disruptions in supply-chains, and significant destruction of property.[149] As a result, such events may have a dramatic impact on a corporation's ability to effectively engage in business as well as impact an asset manager's consideration regarding the propriety of particular investments. Based on these impacts, the majority of financial institutions have insisted that considering environmental matters is inextricably linked to considering their long-term financial interests and fiduciary

148. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 808 (1978) (White, J., dissenting); Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969); *see also* Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1618–20 (2021) (discussing corporations issuing "corporate social responsibility bonds"); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309–11 (2021) (discussing the purpose of a corporation); Robert Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 390 (2016) (discussing shareholder interests are advanced by a wide range of interests beyond profit); Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1436 (2006) ("[M]anagers who carefully attend to the firm's profits also must seek at least to some extent to further society's interests.").

149. *See* Amrith Ramkumar, *Climate Change's $150 Billion Hit to the U.S. Economy*, WALL ST. J. (Nov. 14, 2023, 5:00 AM), https://www.wsj.com/science/environment/climate-change-us-economy-c9fbda96 (on file with the *Iowa Law Review*); Patricia Cohen, *The Economic Fallout from Extreme Heat Will Rise over Time*, N.Y. TIMES (July 18, 2023), https://www.nytimes.com/2023/07/18/business/extreme-heat-economy.html (on file with the *Iowa Law Review*); Smith, *supra* note 5; Batten, *supra* note 107, at 1.

responsibilities.[150] This insistence is neatly aligned with fiduciary duties and undermines the anti-ESG regulatory push. Even Milton Friedman acknowledged that corporations can and should focus on issues that may not be strictly financial such as devoting resources to improving the community or enhancing good will, precisely because they can be justified as benefitting the corporation's long-term best interests.[151] In fact, even as Milton Friedman declared that "The Social Responsibility of Business Is to Increase Its Profits,"[152] Friedman insisted that the corporation's freedom to engage in actions related to social matters was essential to the free market economy.[153]

Anti-ESG proponents who rationalize anti-ESG regulation based on their belief that environmental and other ESG matters are unconnected to legitimate financial and business interests are embracing a rationale that runs counter to traditional free market principles in two critical respects. First, the rationale runs counter to the deference that is supposed to be granted to business leaders. Anti-ESG proponents have based such regulation on the contention *they* do not believe that environmental issues are linked to business interests. Even if you agree with this belief, free market principles require deference to the beliefs of business leaders. Second, in seeking to force business leaders to consider only those issues that regulators deem to be "pecuniary," the rationale runs counter to the wide discretion granted to business leaders in the determination around *what* constitutes a legitimate business activity.[154]

B. Market Freedom and Government Intrusion

Anti-ESG regulations also run afoul of free market principles by violating the core tenet against government intrusion in business affairs. Ensuring business operations free from governmental regulation is an unquestionable component of a free market economy. Indeed, the very definition of a free market economy is that the market is "free" from interference from regulators. Anti-ESG regulations directly interfere with the business operations of a range of market participants, not only dictating with whom they can have relationships, but also dictating the types of issues that they have the freedom to consider when making financial decisions. In a true free market economy, these business actors would be free to make their own judgments rather than being beholden to the judgments of state regulators. In this respect, anti-ESG regulations fly in the face of free market principles.

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150. *See* Fairfax, *Perils and Promise*, *supra* note 68, 217–19; Fairfax, *The O.G.*, *supra* note 68, at 168–71 (emphasizing corporation's contention that environmental issues impact the economic bottom line).

151. *See* Friedman, *supra* note 129.

152. *See id.*

153. *See* MILTON FREIDMAN & ROSE FRIEDMAN, FREEDOM TO CHOOSE: A PERSONAL STATEMENT 226 (1980).

154. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1746 (2006) (discussing discretion under the business judgment rule).

C. Normative Implications

The fact that anti-ESG regulations run counter to business deference and free market principles is bad for business. This is true first and foremost because such regulations operate to prohibit businesses from operating in a manner that they believe to be in their economic best interests. It is also bad for business because such regulations run afoul of conventional wisdom around the importance of providing businesses with room to innovate and make their own judgments around complex business matters. It is also bad for business because such regulations supplant the judgment of business leaders who have greater expertise and knowledge around important business matters and their impacts. It is finally bad for business because it introduces considerable costs and uncertainty into the market. Indeed, it is important to note that many anti-ESG regulations have been successfully challenged by business leaders while others have been approved, but only with revisions that enable the business community to seek exceptions to pursue their legitimate business activity.[155] While these actions can be considered positive wins for the business community, they also represent a source of unnecessary and costly distraction. Then too, because there is no guarantee that the business community will be granted important exceptions, anti-ESG regulations create significant uncertainty around the extent to which businesses can operate in a manner that they believe is in their economic best interest.

Conclusion

Anti-ESG regulations are riddled with contradictions that have negative implications both with respect to economic concerns and with respect to environmental matters. First, anti-ESG regulations run counter to states' own weather-related realities and the financial harms associated with those realities. Second, anti-ESG regulations are incompatible with the emphasis on state autonomy over financial resources on which anti-ESG laws are premised, and in so doing, create a situation whereby we condone states' refusal to tap into their own resources to address weather-related matters while simultaneously and repeatedly making use of federal resources. In this respect, anti-ESG regulations result in states relying on federal and outside resources to ameliorate their weather-related harms after they have affirmatively prevented their own states from dedicating financial resources to address those harms. Third, anti-ESG regulations are antithetical to bedrock free market principles surrounding corporate fiduciary law and governance that reject regulatory intervention and the second-guessing of business judgment associated with that intervention.

Individually and collectively these contradictions are economically harmful because they undermine the ability to address the significant financial fallout from weather-related catastrophes. This contradictory behavior impedes the ability of states and private actors to help ameliorate the environmental issues

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155. *See* Engler, *supra* note 20.

that have prompted that financial fallout. Instead of utilizing their significant power and resources to address and help ameliorate the weather-related events within their state, state actors have chosen to use their resources to disrupt and delay needed progress around harmful weather patterns and the economic impacts of those patterns. Ironically, concern surrounding prioritizing politics over business judgment is one of the rationales for supporting a free market economy and business deference.[156] Unfortunately, we have not heeded this concern, which will be detrimental to the interests of business and the broader society.

156. *See* Friedman, *supra* note 129.