

## COMPELLED CLIMATE SPEECH

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### ABSTRACT

*Climate change threatens nearly every corner of human life and may structurally change the global financial system. Investors increasingly demand information about how climate change may impact their investments. In response, the U.S. Securities and Exchange Commission issued a proposed rule that would require registered companies to disclose certain climate-related information in their registration statements and annual reports. But some critics argue that this proposed rule is unconstitutional under the Supreme Court's current doctrine on compelled and commercial speech.*

*This doctrine misunderstands the First Amendment. When corporations engage in speech that possesses commercial and non-commercial characteristics, the Court's binary, categorical conception of the compelled speech doctrine divorces from the constitutional values that the First Amendment protects. This paper identifies those values, analyzes the Court's current doctrine through the lens of compelled climate speech, and proposes an alternative doctrine that better understands of corporations, the natural persons with whom they interact, and the constitutional rights shaped by those interactions.*

### INTRODUCTION

On March 15, 2021, Allison Herren Lee, acting chair of the U.S. Securities and Exchange Commission, announced that the agency intended to solicit public comments on potential future regulations that would compel registered companies to disclose certain information about environmental, social, and governance issues.<sup>1</sup> A year later, the SEC issued a proposed rule that would require publicly traded companies to disclose certain information related to their climate risk.<sup>2</sup> Registrants would be compelled to disclose, among other things, greenhouse-gas emissions from sources that the

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<sup>1</sup> Press Release, Allison Herren Lee, Acting Chair, U.S. Sec. & Exch. Comm'n, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (Mar. 15, 2021), <https://www.sec.gov/news/speech/lee-climate-change> [perma.cc/B866-ZQZM].

<sup>2</sup> See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. 210, 229, 232, 239, 249) (“The proposed rules would require information about a registrant’s climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition.”).

company owns or controls or from the generation of electricity that the company purchases, as well as any “material” indirect emissions.<sup>3</sup>

Some critics of the SEC’s initiative to increase registrants’ ESG disclosures argue that these proposed rules violate the First Amendment. For example, West Virginia Attorney General Patrick Morrisey threatened to sue the SEC if it acted on Chair Lee’s remarks.<sup>4</sup> Morrisey asserted that “the Supreme Court issued decisions that have the effect of requiring federal securities regulations that compel speech to withstand strict scrutiny under the First Amendment.”<sup>5</sup> Reality is much different and much more complicated. This article argues that the First Amendment is best understood to allow the federal government to compel corporations to disclose climate-related information.

The First Amendment protects “the right to speak freely and the right to refrain from speaking at all.”<sup>6</sup> In general, speech regulations that “compel[] individuals to speak a particular message” are subject to strict scrutiny.<sup>7</sup> Commercial speech, however, may receive less constitutional protection because “[t]he First Amendment’s concern for commercial speech is based on [its] informational function.”<sup>8</sup> When “the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed.”<sup>9</sup> Instead of strict scrutiny, the government “must assert a substantial interest” that is “directly advance[d]” by the speech regulation, which is “not more extensive than is necessary to serve that interest.”<sup>10</sup>

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<sup>3</sup> *Id.* at 21,344–45. These three categories are known as Scope 1, Scope 2, and Scope 3, respectively. *See id.*; *infra* notes 95–104 and accompanying text.

<sup>4</sup> *See* Letter from Patrick Morrisey, W. Va. Att’y Gen., to Allison Herren Lee, Acting Chair, U.S. Sec. & Exch. Comm’n (Mar. 25, 2021).

<sup>5</sup> *Id.*

<sup>6</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also* *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (“[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”) (emphasis in original).

<sup>7</sup> *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>8</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980); *see also* *First Nat’l Bank of Bos. v. Belotti*, 435 U.S. 765, 783 (1978) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)) (explaining that the First Amendment protects commercial speech “not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information’”).

<sup>9</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

<sup>10</sup> *Id.* at 564–66.

In certain contexts, the Supreme Court has applied even lower levels of scrutiny to compulsions of commercial speech. In *Zauderer v. Office of Disciplinary Counsel*, for example, the Court held that the government may compel speakers to produce commercial speech that is “purely factual and uncontroversial” and “reasonably related to the State’s interest in preventing the deception of customers.”<sup>11</sup>

But in the last decade, the Supreme Court has appeared willing to apply more demanding standards of review to commercial speech regulation. In *Reed v. Town of Gilbert*, the Court held that a municipal code that restricted where and how certain types of signs could be displayed was an impermissible content-based speech regulation that failed strict scrutiny.<sup>12</sup> Three years later in *National Institute of Family and Life Advocates v. Becerra*, the Court applied the same reasoning to strike down a California law that required crisis pregnancy centers to display notices about the availability of abortion services.<sup>13</sup> And the Court in *Barr v. American Association of Political Consultants* reiterated its intent to subject all content-based speech regulation to strict scrutiny, holding unconstitutional a federal law that excepted debt-collection calls from the federal prohibition on robocalls because the law “impermissibly favored debt-collection speech” over other speech.<sup>14</sup> In general, then, the Supreme Court subjects government action compelling expressive speech to strict scrutiny,<sup>15</sup> or the slightly-less-demanding “exacting scrutiny.”<sup>16</sup> But if the compelled speech is “commercial,” it may receive less protection.<sup>17</sup>

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<sup>11</sup> 471 U.S. 626, 628 (1985).

<sup>12</sup> 576 U.S. 155, 171–72 (2015).

<sup>13</sup> 138 S. Ct. 2361, 2371–72, 2375 (2018).

<sup>14</sup> 140 S. Ct. 2335, 2343 (2020); *see also id.* at 2347 (explaining that since the “government-debt exception” was content-based, it was subject to strict scrutiny, but did not satisfy strict scrutiny).

<sup>15</sup> *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (“It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.”); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (“[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”).

<sup>16</sup> *See, e.g.,* *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2465 (2018) (describing exacting scrutiny as “more permissive” than strict scrutiny); *United States v. Alvarez*, 567 U.S. 709, 715 (2012).

<sup>17</sup> *See Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 650–51 (1985).

This doctrine misunderstands why the First Amendment protects certain speech by corporations. In most situations, the First Amendment restricts the government's power to compel an individual's speech because it protects the autonomy of the speaker.<sup>18</sup> For commercial speech, autonomy interests are secondary to the government's interest in promoting the flow of information that educates the public.<sup>19</sup> When corporations engage in speech that possesses commercial and non-commercial characteristics, the Court's binary, categorical conception of the compelled-speech doctrine divorces from the constitutional values that the First Amendment protects. This disconnect may occur in the context of corporate speech because the doctrine reflects a mistaken understanding of corporations, the natural persons with whom they interact, and the constitutional rights shaped by those interactions.

The Supreme Court does not grant constitutional rights to corporations in their own right but only when necessary to protect the rights of natural persons outside the corporation or purportedly represented by it.<sup>20</sup> Corporate constitutional rights are best conceived as derivative rights, which

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<sup>18</sup> See, e.g., *Barnette*, 319 U.S. at 637 (“To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.”); *Wooley*, 430 U.S. at 713, 715 (holding that the state of New Hampshire could not require individuals to display the state motto on their license plates because the “First Amendment protects the right of individuals to hold a point of view different from the majority”); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 791, 797 (1988) (listing “free and robust debate” and “individual freedom of mind” as concepts behind the First Amendment) (internal quotations omitted).

<sup>19</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”); *Zauderer*, 471 U.S. at 626 (internal citation omitted) (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . .”); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (citation omitted) (“[O]ur cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification . . . .”); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 552 (6th Cir. 2012) (internal citation omitted) (“Laws that restrict speech are fundamentally different than laws that require disclosures, and so are the legal standards governing each type of law.”). *But see Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014) (citations omitted) (“[T]he general rule, that the speaker has the right to tailor the speech, applies . . . equally to statements of fact the speaker would rather avoid.”), *overruled by Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc).

<sup>20</sup> Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1673 (2015).

the corporation holds on behalf of the natural persons whose interests the corporation purports to represent, or instrumental rights, which the corporation holds to protect the rights of natural persons outside the corporation.<sup>21</sup> The doctrine governing the compulsion of corporate speech should proceed similarly, considering both autonomy and informational interests and recognizing that one may be stronger than the other depending on the type of corporate entity whose speech has been compelled.

This article proceeds in three parts. Part I describes the Supreme Court’s doctrine on compelled and commercial speech. In Part II, I identify the Court’s recent turn from protecting informational interests to prioritizing speaker autonomy in compelled speech. In light of these doctrinal tensions, I argue in Part III that the SEC’s proposed rule on mandatory climate disclosures is best viewed through the lens of derivative rights.

## I. CONSTITUTIONAL PROTECTIONS FOR COMMERCIAL SPEECH

Commercial speech did not enjoy constitutional protection until 1976, when the Supreme Court invalidated a Virginia law that prohibited pharmacists from advertising prescription drug prices.<sup>22</sup> In the Court’s view, the First Amendment represented a binding choice that the “dangers of suppressing information” are more harmful than “the dangers of its misuse if it is freely available.”<sup>23</sup> *Virginia Pharmacy* identifies the important principle that the First Amendment protects commercial speech because the speech serves an informational function for the listener and society as a whole. This principle pervades the Court’s doctrine on commercial speech. The First Amendment protects commercial speech “not so much because it pertains to

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<sup>21</sup> *Id.* at 1731.

<sup>22</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 750, 773 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to extend constitutional protection to certain commercial advertising). In 1975, the Court held that commercial speech “is not stripped of First Amendment protection merely because it appears in that form.” *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). But the Court did not extend affirmative protection to commercial speech until the following year.

<sup>23</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 770. In a somewhat humorous display of false modesty, the Court laments that this choice “is not ours to make or the Virginia General Assembly’s” but one “that the First Amendment makes for us.” *Id.*

the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"<sup>24</sup>

A. *Central Hudson*

Four years after *Virginia Pharmacy*, the Supreme Court affirmed in *Central Hudson Gas & Electric Corporation v. Public Service Commission* that the First Amendment is primarily concerned with commercial speech's informational function. The case arose from a state electricity regulator's efforts to ban certain advertising by utility companies.<sup>25</sup> After determining that New York's electricity grid did not have adequate fuel supply for the winter, the New York Public Service Commission ordered electric utility companies operating in the state to stop all advertising that promoted the use of electricity.<sup>26</sup> When the fuel shortage ended three years later, the Commission extended the ban on promotional advertisement.<sup>27</sup>

The Court developed a four-part test to evaluate the constitutionality of regulation that limits commercial speech.

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>28</sup>

This test subjects regulation of commercial speech to intermediate scrutiny: less demanding than strict scrutiny, but "significantly stricter than

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<sup>24</sup> First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 764).

<sup>25</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 558 (1980).

<sup>26</sup> *Id.* at 559.

<sup>27</sup> *Id.* at 559–60 ("The Commission declared all promotional advertising contrary to the national policy of conserving energy . . . . The Commission's order explicitly permitted 'informational' advertising designed to encourage 'shifts of consumption' from peak demand times to periods of low electricity demand." (internal citation omitted)).

<sup>28</sup> *Id.* at 566. *Board of Trustees of the State University of New York v. Fox* diluted this test by rejecting the least-restrictive-means element for a "reasonable fit" between the speech restriction and a legitimate state objective. 492 U.S. 469, 480 (1989).

the rational basis test.”<sup>29</sup> *Central Hudson*’s test is premised on the claim that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.”<sup>30</sup> “Misleading” commercial speech does not provide accurate information to the audience, so it does not fall within the scope of potential First Amendment protection.<sup>31</sup>

*B. Zauderer v. Office of Disciplinary Counsel*

In *Central Hudson*, the Court confirmed that the First Amendment protected speakers’ abilities to engage in commercial speech as long as that speech was not misleading. Shortly after, it confronted the reverse: whether the First Amendment granted the right *not* to engage in commercial speech.

Philip Zauderer—an attorney based in Columbus, Ohio—sought to expand his practice and began advertising in local newspapers his willingness to represent women injured by an allegedly defective intrauterine device.<sup>32</sup> This ad drew the attention of the Ohio Office of Disciplinary Counsel, which filed a complaint against Zauderer that alleged, among other things, that by failing to disclose whether his contingent-fee percentages were “computed before or after deduction of court costs and expenses,” Zauderer had engaged in “deceptive” conduct that violated the Ohio Code of Professional Responsibility.<sup>33</sup> Zauderer argued that the requirement to disclose contingent-fee calculations violated the First Amendment.<sup>34</sup>

The Supreme Court disagreed, holding that the government can compel commercial actors to disclose information that is “reasonably related to the State’s interest in preventing deception of consumers.”<sup>35</sup> Evaluating Mr. Zauderer’s interest, the Court asserted that Ohio had only attempted to compel Zauderer to include “purely factual and uncontroversial

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<sup>29</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *see also* Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 537 (2013) (characterizing *Central Hudson* as intermediate scrutiny).

<sup>30</sup> 447 U.S. at 563.

<sup>31</sup> *See id.* at 566 (“For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.”).

<sup>32</sup> *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 629–30 (1985).

<sup>33</sup> *Id.* at 633.

<sup>34</sup> *Id.* at 634.

<sup>35</sup> *Id.* at 651. The *Zauderer* Court applied the *Central Hudson* test to the claims that dealt with Ohio’s restrictions on attorney advertisements. *See id.* at 647.

information” in his advertisements.<sup>36</sup> The Court has since explained that this language is a precondition for *Zauderer*’s “reasonably related” test.<sup>37</sup> If the government compels information that is not “purely factual and uncontroversial,” that compulsion is subject to heightened First Amendment review, not the more deferential *Zauderer* standard.<sup>38</sup> Since the First Amendment protects commercial speech because that speech provides value to consumers, *Zauderer*’s “interest in *not* providing any particular factual information . . . [was] minimal.”<sup>39</sup>

*Zauderer*’s seemingly simple test has long confused lower courts. The Third Circuit declined to extend *Zauderer*’s lower scrutiny to disclosure requirements that “do[] not require disclosing anything that could reasonably remedy conceivable consumer deception.”<sup>40</sup> But the Second Circuit applied *Zauderer* to disclosures that were “not intended to prevent ‘consumer confusion or deception’ per se.”<sup>41</sup> The Sixth Circuit stated that the “argument that *Zauderer* applies to only ‘purely factual and noncontroversial’ disclosures is unpersuasive.”<sup>42</sup> But in *Entertainment Software Association v. Blagojevich*, the Seventh Circuit applied strict scrutiny, rather than *Zauderer*’s lower standard of review, to a law requiring video-game sellers to place certain stickers on sexually explicit games.<sup>43</sup> According to the court, *Zauderer* did not apply because “[t]he sticker ultimately communicate[d] a subjective and highly controversial message.”<sup>44</sup> As regulatory disclosure regimes extend beyond purely factual and uncontroversial information that prevents deception, *Zauderer*’s two fault lines threaten to rupture.

This confusion likely originates from the Supreme Court’s equally confusing attempts to clarify the test. The Court has interpreted *Zauderer* to require the government to have an interest in “preventing deception of

<sup>36</sup> *Id.* at 651.

<sup>37</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (quoting *Zauderer*, 471 U.S. at 651).

<sup>38</sup> *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer*, 471 U.S. at 651).

<sup>39</sup> *Id.* at 2387 (emphasis in original).

<sup>40</sup> *Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014).

<sup>41</sup> *Nat’l Electric Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (quoting *Zauderer*, 471 U.S. at 651).

<sup>42</sup> *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (quoting Plaintiff’s First Br. at 20).

<sup>43</sup> 469 F.3d 641, 651 (7th Cir. 2006).

<sup>44</sup> *Id.* at 652.

consumers.”<sup>45</sup> But the phrase “in preventing deception of consumers” is not conditional in the *Zauderer* test. It is merely an explanation of the state’s interest. So, the government’s compulsion of commercial speech must be reasonably related to *some* state interest in protecting “the value to consumers of the information such speech provides.”<sup>46</sup>

One can identify other purposes for disclosures that offer similar value to consumers. For example, in *American Meat Institute v. U.S. Department of Agriculture*, the en banc D.C. Circuit identified several interests to justify a USDA rule requiring country-of-origin labels for certain food products: “the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of the food-borne illness outbreak.”<sup>47</sup> Each of these interests seek to inform consumers’ purchases of food products, despite little relationship to preventing deception. But if consumer information provides the primary constitutional value in compelled commercial speech, why limit First Amendment’s protection of commercial speech regulation to that which prevents deception? While providing information can prevent deception, it does not have to. When compelled commercial speech provides consumer information, it aids consumers in making informed decisions that they otherwise could not.

## II. THE SLOW DEATH OF THE COMPELLED-SPEECH DOCTRINE

Compelled speech—when the government forces a private actor to make some expression that it otherwise would not have—may violate an actor’s freedom to choose not just what it says but whether it speaks at all.<sup>48</sup> The

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<sup>45</sup> *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

<sup>46</sup> *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985) (internal citation omitted).

<sup>47</sup> 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc).

<sup>48</sup> *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that compelled pledge of allegiance and flag salute unconstitutionally violated the “individual freedom of mind”); *Wooley v. Maynard*, 430 U.S. 705, 713, 715 (1977) (determining that the State may not compel an individual to “participate in the dissemination of an ideological message by displaying it on his

Supreme Court appears to be classifying more and more compelled corporate speech as content-based compulsion that warrants heightened scrutiny. These compulsions “exact[] a penalty on the basis of the content” of the speaker’s past speech.<sup>49</sup> Content-based speech regulation—regulation that “applies to particular speech because of the topic discussed or the idea or message expressed”<sup>50</sup>—is typically subject to strict scrutiny.<sup>51</sup> In recent years, the Supreme Court has significantly expanded what it defines as “content-based” and thus subjects to heightened scrutiny.

Seeds of this trend began in *Reed v. Town of Gilbert*. A church and its pastor placed roadside signs around town that advertised the time and location of their weekly church services.<sup>52</sup> Municipal employees cited the church for violating an ordinance that identified various categories of signs (e.g., “Construction Signs,” “Garage Sale Signs”) and subjected each category to different restrictions.<sup>53</sup> Unfortunately for the church, the municipal code imposed its harshest restrictions on “Temporary Directional Signs Relating to a Qualifying Event.”<sup>54</sup>

The Court invalidated the sign code as an impermissible content-based speech regulation that failed strict scrutiny.<sup>55</sup> The Court found that “[o]n its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.”<sup>56</sup> In other words, regulation that is facially content-based automatically triggers

private property”); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 791, 795–97 (1988) (“[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners.”); *Wallace v. Jaffree*, 472 U.S. 38, 51–52 (1985) (“[T]he individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.”).

<sup>49</sup> *Miami Herald Publ’g Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256 (1974).

<sup>50</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

<sup>51</sup> *See, e.g., id.* at 165 (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive . . . .”); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 804 (2000) (“Since § 505 is content based, it can stand only if it satisfies strict scrutiny.”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (explaining that just because the justification for regulation is content neutral does not make it exempt from strict scrutiny).

<sup>52</sup> 576 U.S. at 161.

<sup>53</sup> *Id.* at 159.

<sup>54</sup> *Id.* at 160–61.

<sup>55</sup> *Id.* at 171–72.

<sup>56</sup> *Id.* at 164–65.

heightened scrutiny. The Court has since explained that content-based regulations “single out” topics or viewpoints “for differential treatment.”<sup>57</sup>

In his concurrence in judgment, Justice Stephen Breyer sounded the alarm bells. “[B]ecause virtually all government activities involve speech . . . [r]egulatory programs almost always require content discrimination.”<sup>58</sup> Holding that facially content-based regulation always receives strict scrutiny “is to write a recipe for judicial management of ordinary government regulatory activity.”<sup>59</sup> Noting that “categories alone” were insufficient, Justice Breyer declared that “[t]he First Amendment requires greater judicial sensitivity . . . to the Amendment’s expressive objectives.”<sup>60</sup>

What are these objectives? Regulating speech based on its topic or message “may interfere with democratic self-government and the search for truth.”<sup>61</sup> These interests are strongest when the government is restricting speech or compelling it in a way that operates like a restriction. But they are weak in the context of pure speech compulsions, where information is not distorted and speakers are not suppressed. By applying strict scrutiny to all content-based speech regulation, *Reed* does not make this distinction. This can produce nonsensical and unworkable results. Most securities regulation, for example, “inevitably” involves content discrimination but does not warrant “a strong presumption against constitutionality.”<sup>62</sup> The Court imposes such presumptions to prevent the government from suppressing disfavored speech,<sup>63</sup> but securities regulation often requires that registrants provide *more* information to investors. Little suppression occurs.

After *Reed*, commercial speech appeared to be the last refuge for compelled-speech regulation to escape strict scrutiny. But the Court soon extended the *Reed* trigger to compelled speech in *National Institute of Family and Life Advocates v. Becerra*, invalidating on First Amendment grounds a California

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<sup>57</sup> See *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022) (holding that regulations that distinguish between on- and off-premises advertisements are facially content neutral).

<sup>58</sup> 576 U.S. at 177 (Breyer, J., concurring in judgment).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 175.

<sup>61</sup> *Id.* at 174 (Alito, J., concurring).

<sup>62</sup> *Id.* at 177 (Breyer, J., concurring).

<sup>63</sup> See *id.* at 164 (explaining that laws adopted by the government because of disagreement with the message that the speech conveys must also satisfy strict scrutiny).

law that regulated crisis pregnancy centers.<sup>64</sup> Writing for a five-member majority, Justice Clarence Thomas—who had also authored the *Reed* opinion—held that content-based speech regulations, which “compel[] individuals to speak a particular message,” are “presumptively unconstitutional” and, to survive, must be “narrowly tailored to serve compelling state interests.”<sup>65</sup>

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) required covered clinics to provide certain notices to pregnant women who sought services.<sup>66</sup> If the facility was licensed, the FACT Act required it to disseminate a government-drafted notice that stated, “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert telephone number].”<sup>67</sup> If the facility was an “unlicensed covered facility,” the FACT Act required it to disseminate a government-drafted notice that stated, “[T]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”<sup>68</sup>

At first blush, these notices appear to be worthy candidates for *Zauderer* deference. They are posted in the context of a transaction for services and discuss material directly related to a person’s decision to obtain those services. Since the notices simply describe which services the state offers, they convey “purely factual” content. But Justice Thomas declined to apply *Zauderer* to the licensed-clinic notice, explaining that “[t]he notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an ‘uncontroversial’ topic.”<sup>69</sup>

*NIFLA*, then, requires us to confront a dystopian situation: “purely factual” information that is controversial. But courts rarely define

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<sup>64</sup> Nat’l Inst. of Fam. & Life Advoc., 138 S. Ct. 2361, 2371 (2018).

<sup>65</sup> *Id.* (quoting *Reed*, 576 U.S. at 162).

<sup>66</sup> *Id.* at 2368.

<sup>67</sup> *Id.* at 2369 (alteration in original).

<sup>68</sup> *Id.* at 2370.

<sup>69</sup> *Id.* at 2372 (emphasis in original).

“controversial” in the dictionary sense.<sup>70</sup> Instead, some courts have determined that controversial disclosures are “contested, not verifiable, or likely to be ‘misinterpreted by consumers.’”<sup>71</sup> These definitions make some sense because they relate to the factual nature of the disclosure and protect the disclosure’s informational interest to the listener. A disclosure that contains unverifiable information may not be “purely factual” at all.

Other courts have defined “controversial” within the *Zauderer* test to mean that the disclosure is *related* to a controversy or “dispute, especially a public one.”<sup>72</sup> In this sense, “controversial” means “contested.”<sup>73</sup> This definition of “controversial” as “contested” undermines not only the informational function of speech but also the autonomy of the listener to make independent assessments about the credibility and weight of factual information. Further, it weakens the foundational tenet of free-speech doctrine that truth emerges from rigorous debate among competing beliefs. One would think that public controversies warrant the disclosure of *more* information, not less, to help listeners form their views on important topics and contribute to democratic self-governance.

But protecting *speaker* autonomy animates *NIFLA*’s expansive view of “controversial.” Justice Thomas lamented that the notices required facilities to provide information on “the very practice that petitioners are devoted to opposing.”<sup>74</sup> Because the notices required facilities “to inform women how they can obtain state-subsidized abortions” at the same time that they “try to dissuade women from choosing that option,” the FACT Act was content-based speech regulation and subject to heightened scrutiny.<sup>75</sup> To Justice Thomas, “[t]his stringent standard reflects the fundamental principle that

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<sup>70</sup> Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1380–81 (2019) (“[A] ‘controversial disclosure’ in the dictionary sense is a disclosure that *causes* controversy. A ‘controversial disclosure’ in the *Zauderer* sense is a disclosure *related* to a controversy.”).

<sup>71</sup> *Id.* at 1381 (footnotes omitted) (quoting *Cigar Ass’n of Am. v. FDA*, 315 F. Supp. 3d 143, 165–66 (D.D.C. 2018) (internal citations omitted)).

<sup>72</sup> *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 529 (D.C. Cir. 2015).

<sup>73</sup> *See, e.g., Am. Beverage Ass’n v. City & Cnty. of S.F.*, 871 F.3d 884, 888 (9th Cir. 2017) (describing a dispute where an ordinance requiring a disclosure for beverages with added sugar is seen as “unjustified or unduly burdensome” by the appellant); *Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 245 n.6, 251 (2d Cir. 2014) (explaining that “controversial” disclosures require the speaker to “mention” a “contested public issue”).

<sup>74</sup> *Nat’l Inst. of Fam. & Life Advocs.*, 138 S. Ct. 2361, 2371 (2018).

<sup>75</sup> *Id.*

governments have ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”<sup>76</sup> But this is not a fundamental principle so much as a question-begging statement. The real question is *why* governments have no power to restrict content-based speech. And the Court permits the government to restrict content-based speech when that speech does not serve a constitutional value.<sup>77</sup>

Despite the broad reaches of *NIFLA*’s rule, the Supreme Court doubled down on this categorical approach. In *Barr v. American Association of Political Consultants, Inc.*, Justice Brett Kavanaugh’s plurality opinion stated in no uncertain terms that “[c]ontent-based laws are subject to strict scrutiny.”<sup>78</sup> The Court then invalidated a section of the federal Communications Act of 1934 that was amended in 2015 to except debt-collection calls from the Act’s prohibition on robocalls.<sup>79</sup> In a complicated and fractured decision that addressed issues of severability and remedy, six members of the Court agreed that the amended section “impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment.”<sup>80</sup> To the plurality, this indicated that the exception was based on “content.”<sup>81</sup>

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<sup>76</sup> *Id.* (quoting *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

<sup>77</sup> *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010) (“‘From 1791 to the present,’ however, the First Amendment has ‘permitted restrictions upon the content . . . in a few limited areas,’ and has never ‘include[d] a freedom to disregard these traditional limitations.’”) (citation omitted); *Burson v. Freeman*, 504 U.S. 191, 195 (1992) (reversing the Tennessee Supreme Court’s decision that found a statute violated the First Amendment of the United States Constitution); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . .”).

<sup>78</sup> 140 S. Ct. 2335, 2346 (2020). It appears that five Justices signed on to this claim. *See id.* at 2342 (plurality opinion of Kavanaugh, J.) (delivering opinion joined by Roberts, C.J., Alito, J., and, in relevant part, Thomas, J.); *id.* at 2364 (Gorsuch, J., concurring in judgment in part and dissenting in part) (suggesting that all content-based regulations “must satisfy” strict scrutiny).

<sup>79</sup> *Id.* at 2343 (“Applying traditional severability principles, seven Members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute.”).

<sup>80</sup> *Id.* (plurality opinion); *id.* at 2356–57 (Sotomayor, J., concurring in judgment); *id.* at 2363–64 (Gorsuch, J., concurring in judgment in part and dissenting in part).

<sup>81</sup> *Id.* at 2342 (“The Government has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, issue advocacy, and the like.”).

Once again, Justice Breyer decried the plurality's sweeping approach that "reflexively applies strict scrutiny to all content-based speech distinctions" as "divorced from First Amendment values."<sup>82</sup> He criticized a key phrase from the plurality's opinion: that its categorical approach would not "affect traditional or ordinary economic regulation of commercial activity."<sup>83</sup> Breyer claimed that because "much regulatory activity turns on speech content" the plurality's test *must* "affect traditional or ordinary economic regulation of commercial activity."<sup>84</sup> Whether that is true depends on what constitutes "traditional or ordinary economic regulation of commercial activity." The phrase contains so many adjectives that one could argue it means just about anything. Are "economic" and "commercial" synonymous? If not, what does it mean to economically regulate noncommercial activity? Unclear. Indeed, if "commercial" speech is "expression related solely to the *economic* interests of the speaker and its audience,"<sup>85</sup> is economic regulation any different? As companies, investors, and regulators embrace environmental, social, and governance initiatives, the line between "economic" interests and interests based on social issues blurs. Most importantly, what makes regulation "traditional or ordinary"?

Regulation might be "traditional or ordinary" when it conforms with historical practice. Under this approach, large deviations from historical regulatory practices would fall beyond the scope of what is traditional or ordinary and thus warrant a presumption against constitutionality. After all, "traditional" means "handed down from age to age" or "adhering to past practices or established conventions."<sup>86</sup>

But this approach misses the subtle but critical distinction between traditional and ordinary. If we take Justice Kavanaugh seriously, the disjunction—traditional *or* ordinary—narrows the *Reed* test because regulation could be traditional and not ordinary or vice versa. Traditional evinces history. Ordinary, however, needs no basis in history. It denotes

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<sup>82</sup> *Id.* at 2358 (Breyer, J., concurring in judgment with respect to severability and dissenting in part).

<sup>83</sup> *Id.* at 2360 (quoting *id.* at 2347 (plurality opinion)).

<sup>84</sup> *Id.*

<sup>85</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (emphasis added).

<sup>86</sup> *Traditional*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/traditional> [perma.cc/Q53N-HEUQ].

something that occurs “in the normal order of events.”<sup>87</sup> The universe of “ordinary” regulation is defined not so much by historical roots but by incrementalism. On this view, ordinary regulation can change incrementally over time, but traditional regulation cannot stray too far from some historical anchor. Thus, an agency could regulate in an “ordinary” way if it incrementally broadened its recent regulations, even if its regulation would be unrecognizable to the agency a hundred years ago. As investors place more importance on ESG issues, it becomes more ordinary for the SEC to regulate disclosures related to climate change, even though such regulation may not have deep traditional roots at the Commission.

Perhaps, the best approach would be to abandon any effort to categorize regulation as “traditional or ordinary.” Such an effort suffers from its reliance on a court’s ability to classify scenarios and facts. Lines often blur. Choice of state law in federal courts offers a classic example. Under the canonical framework originating in *Erie Railroad v. Tompkins*, federal courts exercising diversity jurisdiction apply federal procedural law and state substantive law.<sup>88</sup> But courts have consistently struggled with characterizing laws as substantive or procedural, and their confusion spawns “an ever more complicated flowchart.”<sup>89</sup> Similarly, then, it seems reasonable to doubt the Court’s ability to distinguish in its compelled-speech doctrine between what is commercial and what is noncommercial, economic and noneconomic, traditional and untraditional, ordinary and extraordinary, and so on.

### III. COMPELLED CLIMATE SPEECH & DERIVATIVE RIGHTS

The conventional understanding of the First Amendment’s protections of compelled speech breaks down when applied to the SEC’s proposed climate rule. Because it proposes to require registrants to disclose information related to their greenhouse-gas emissions, the rule compels speech that occupies an

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<sup>87</sup> *Ordinary*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/ordinary> [perma.cc/9JGW-GWXQ].

<sup>88</sup> 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

<sup>89</sup> See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CABA and Shady Grove*, 106 NW. L. REV. 1, 11–15 (2012) (describing difficulty of substance-procedure distinction); see also *Erie R.R.*, 304 U.S. at 92 (Reed, J., concurring in part) (“The line between procedural and substantive law is hazy . . .”).

uneasy place in the First Amendment landscape. The speech is likely “purely factual” but far from “uncontroversial.” And because the rule purports to serve investors’ informational interests, the Court’s current approach risks protecting corporations’ autonomy interests at the expense of informational rights for natural persons. In this Part, I discuss where compelled climate speech could fall under the Court’s current, flawed doctrine and offer an alternative approach that applies a more nuanced understanding of the corporate form to the First Amendment’s protection for compelled speech.

*A. Distinguishing Autonomy and Informational Interests*

We can better understand what speech regulation may qualify as traditional or ordinary by understanding why the First Amendment protects commercial speech at all. *Reed*, *NIFLA*, and their progeny have exacerbated the tension in First Amendment doctrine between protecting the autonomy of speakers and facilitating the provision of information to listeners. At the current Court, autonomy interests win out to the nearly complete exclusion of compelled speech’s informational function.

The Supreme Court seems increasingly willing to strike down economic regulation that it views as excessively burdensome to commercial actors.<sup>90</sup> Unless the Court refocuses its understanding of why we protect corporate speech, *Reed* and *NIFLA* could devastate regulatory disclosure regimes. The Court is willing to treat corporate disclosures as non-commercial speech, which enjoys more constitutional protection than commercial speech. It is also trending toward protecting speaker-autonomy interests over consumer-informational interests.<sup>91</sup> This undermines consumers’ informational interests by limiting their ability to obtain information about alternative services that would inform their decision. If the Court was primarily concerned with consumers’ informational interest, it would not view compelled disclosures of competing services to be a First Amendment violation. But if, on the other hand, the Court aimed to protect the autonomy of the speaker, such a limitation makes more sense. Yet, that

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<sup>90</sup> Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 224 (2021) (“The Court’s willingness to strike down the regulation and raise the bar on the ‘exacting scrutiny’ standard suggests that campaign finance regulations and other compelled disclosure regimes—even for business corporations—may be dismantled or threatened in the future.”).

<sup>91</sup> See, e.g., *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

limitation stands in odd tension with *Central Hudson*'s explanation that speech can be commercial regardless of whether it exists in a competitive market of services or information.<sup>92</sup>

*B. The SEC's Proposed Rule*

The SEC's proposed climate-disclosure rule presents difficult questions for the First Amendment. The heart of the proposed rule is the disclosure of certain greenhouse-gas emissions. The rule would amend Regulation S-K to require publicly traded companies to disclose certain information related to their climate risk.<sup>93</sup> To measure these emissions, the SEC adopts the Greenhouse Gas Protocol, a framework developed in the late 1990s by the World Resource Institute and the World Business Council for Sustainable Development.<sup>94</sup> The Protocol delineates a company's greenhouse-gas emissions into Scope 1, Scope 2, or Scope 3 emissions.<sup>95</sup> Scope 1 emissions are "direct GHG emissions that occur from sources owned or controlled by the company."<sup>96</sup> Scope 2 emissions are those produced by the generation of the electricity purchased by the company.<sup>97</sup> Scope 3 emissions "are a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company."<sup>98</sup> For example, Scope 3 emissions for an automobile manufacturer include tailpipe emissions produced by consumers driving the company's vehicles.<sup>99</sup>

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<sup>92</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566–67 (1980) (finding that a company with a monopoly on services advertisements still qualified as commercial speech).

<sup>93</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. 210, 229, 232, 239, 249).

<sup>94</sup> See *About Us*, GREENHOUSE GAS PROTOCOL, <https://ghgprotocol.org/about-us> [perma.cc/Z9PJ-CKWT] (last visited May 17, 2022); Climate-Related Disclosures, 87 Fed. Reg. at 21,374 ("We also have proposed definitions of Scope 1, Scope 2, and Scope 3 emissions that are substantially similar to the corresponding definitions provided by the [Greenhouse Gas] Protocol.").

<sup>95</sup> Climate-Related Disclosures, 87 Fed. Reg. at 21,344.

<sup>96</sup> *Id.* at 21,344.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 21,344–45.

<sup>99</sup> See *id.* at 21,345 (explaining that Scope 3 emissions include "processing or use of the registrant's products by third parties").

The SEC proposes to require registrants to disclose all Scope 1 and Scope 2 emissions.<sup>100</sup> Simple enough. Its proposed approach to Scope 3 is more complicated. Registrants would only have to disclose Scope 3 emissions “if material” or if the registrant “has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.”<sup>101</sup> The big question, then, is what makes an emissions source “material.” Say a company’s Scope 3 emissions are ten times larger than its Scope 1 and Scope 2 emissions. Does sheer magnitude make something “material”? And more relevant for our purposes, how does this materiality standard impact the disclosure’s permissibility under the First Amendment?

Historically, the Supreme Court has steered clear of addressing First Amendment protections in the context of securities regulation. It often notes in dicta that securities regulation lies beyond the scope of the First Amendment.<sup>102</sup> But as I discussed, the emerging trend in the Supreme Court’s compelled-speech cases places these off-hand statements on thin ice. If circuit-court cases like *American Meat Institute* are any indication, securities regulation and other disclosure regimes may be subject to more scrutiny on First Amendment grounds.

If that is true, how does the SEC’s climate rule fare under the categorical approach? First, we must determine whether climate disclosures are “commercial speech” at all. I have already noted the blurry boundaries of commercial speech. But consider the two common definitions: (1) “speech which ‘does no more than propose a commercial transaction’”<sup>103</sup> and (2) “expression related solely to the economic interests of the speaker and its audience.”<sup>104</sup> Climate disclosures do not fit well into either. Using the first definition, it is hard to see how climate disclosures do “no more than propose a commercial transaction.” They do not “propose” any transaction.

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<sup>100</sup> *Id.* at 21,374.

<sup>101</sup> *Id.*

<sup>102</sup> *See, e.g.,* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“[C]ommunications that are regulated without offending the First Amendment . . . [include] the exchange of information about securities.”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

<sup>103</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Hum. Rels. Comm’n.*, 413 U.S. 376, 385 (1973)).

<sup>104</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

Neither do the disclosures relate *solely* to the economic interests of a company and its potential investors. The climate disclosures implicate concerns about environmental health which might, for some investors, be separate from their economic interests. The SEC sidesteps this concern. It is careful to frame the climate disclosure requirements as protecting the *financial* interests of investors.<sup>105</sup> Perhaps that is the exclusive purpose for Scope 1 and Scope 2 emissions, since their potential effects on a company's financial health are more easily calculated and attributable to the company's activities. But "material" Scope 3 emissions are more difficult to connect to a company's financial risk. They are produced by third parties, each of whom presumably has its own economic interest. Scope 3 emissions that are material to the registrant are likely material to the emitter as well. So how can Scope 3 emissions be related solely to the *disclosing registrant's* economic interest? Any significant Scope 3 emissions would relate to the economic interest of *both* the registrant and the emitter.

Even if the requirements do not meet a common definition of "commercial," they still might satisfy *Zauderer*. Recall that *NIFLA's* dicta stated that *Zauderer* applied to "purely factual and uncontroversial disclosures about commercial products."<sup>106</sup> In a narrow reading, the climate rule could satisfy *Zauderer* if securities are "commercial products." Since the rule would compel the disclosure of emissions information to inform current and potential investors of risks related to a company's securities,<sup>107</sup> a skeptical court could determine that the securities themselves must be "commercial products" to satisfy *Zauderer*. But a broader reading might determine that the proposed rule could satisfy *Zauderer* if the underlying business on which the securities is based deals in "commercial products." This latter reading seems more reasonable.

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<sup>105</sup> See, e.g., Climate-Related Disclosures, 87 Fed. Reg. at 21,335 ("We have considered this statutory standard and determined that disclosure of information about climate-related risks and metrics would be in the public interest and would protect investors."); *id.* at 21,424 ("Investors have expressed a need for information on climate-related risks as they relate to companies' operations and financial condition."); *id.* at 21,435 ("Investors would need information about the registrants' full GHG emissions footprint and intensity to determine and compare how exposed a registrant is to the financial risks associated with a transition to lower-carbon economy.").

<sup>106</sup> Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2376 (2018).

<sup>107</sup> See *infra* notes 112–16 and accompanying text.

Assuming, then, that the climate rule can be characterized as compelled commercial speech, the information it discloses must be “purely factual and uncontroversial” before *Zauderer* deference is available.<sup>108</sup> Here, it seems likely that we again face the post-truth First Amendment.<sup>109</sup> Emissions information is purely factual, but is it uncontroversial? If “controversial” means “subject to misinterpretation by consumers,”<sup>110</sup> the emissions information may very well survive First Amendment scrutiny. There is nothing misleading, deceptive, or ambiguous about the disclosures.<sup>111</sup> They will describe in excruciating detail a panoply of climate-related information, including corporate board-level governance structures for monitoring of climate risks,<sup>112</sup> physical, transitional, and short-, medium-, and long-term climate risks,<sup>113</sup> corporate processes for identifying and managing risk,<sup>114</sup> greenhouse-gas metrics and attestations,<sup>115</sup> and the company’s emissions targets.<sup>116</sup> Again, though, Scope 3 emissions could prove fatal, since they are difficult to verify. If one cannot verify a fact, it may well mean that the fact is subject to misinterpretation. Is an unverifiable “fact” a fact at all?

Many courts, though, define “controversial” as “contested.”<sup>117</sup> And in an opinion joined by four current members of the Supreme Court, Justice Samuel Alito listed climate change as a “controversial subject[.]”<sup>118</sup> For a Supreme Court already eager to increase protections for compelled corporate speech, this does not bode well for the disclosure rules to survive under *Zauderer*.

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<sup>108</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (citations omitted).

<sup>109</sup> See generally Haan, *supra* note 70.

<sup>110</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled on other grounds by Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 36 (D.C. Cir. 2014).

<sup>111</sup> Of course, companies that stray from the requirements could issue misleading or ambiguous disclosures. But that is an issue of regulatory compliance, not of the First Amendment.

<sup>112</sup> *Climate-Related Disclosures*, 87 Fed. Reg. at 21,345.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 21,345–46.

<sup>116</sup> *Id.* at 21,345.

<sup>117</sup> See *supra* note 73 and accompanying text.

<sup>118</sup> *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018); see also *Nat’l Rev., Inc. v. Mann*, 140 S. Ct. 334, 346 (2019) (mem.) (Alito, J., dissenting) (describing “the controversial nature of the whole subject of climate change”).

But the Court may not apply *Zauderer* at all. If it determines that the climate rules are content-based speech regulation, the Court will likely subject the rule to exacting or strict scrutiny.<sup>119</sup> Very little survives. Perhaps, then, we can hang our hat on Justice Kavanaugh’s assurances that this trigger will not “affect traditional or ordinary economic regulation of commercial activity.”<sup>120</sup> I am skeptical. If the regulation in question regulates “commercial activity,” the *Reed* trigger should not apply at all—we should have applied the *Central Hudson* test. And yet the Court has applied *Reed* to plainly commercial speech. In *NIFLA*, for example, the speech in question concerned alternative services to crisis pregnancy centers.<sup>121</sup>

Assuming still that the climate rules compel “commercial” speech, we could move to *Central Hudson* if the compelled climate speech is not “purely factual or uncontroversial” and *Zauderer* does not apply. If the SEC’s interest in protecting investors is substantial, *Central Hudson* demands that the Commission offer substantial evidence showing that the climate disclosures “directly advance[] the governmental interest asserted”<sup>122</sup> to a “material degree.”<sup>123</sup> It’s plausible that they do. The SEC documented growing investor demand for climate-risk disclosures,<sup>124</sup> which suggests that mandating such disclosures protects investors, at least to the degree that investors would have information that they consider relevant to their economic choices.

Do climate disclosures *directly* advance the SEC’s asserted interests? Some critics think not, arguing that the climate rule is a result of “mission creep” by the SEC diverging from its mandate to protect investors.<sup>125</sup> And materiality depends almost entirely on whether one accepts the claim that

<sup>119</sup> See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–73 (2018) (declining to apply *Zauderer* because information was not “purely factual and uncontroversial” but not evaluating *Central Hudson*).

<sup>120</sup> *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2360 (2021) (quoting *id.* at 2347 (plurality opinion)).

<sup>121</sup> 138 S. Ct. at 2371.

<sup>122</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>123</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995) (citations omitted).

<sup>124</sup> Climate-Related Disclosures, 87 Fed. Reg. at 21340–43.

<sup>125</sup> See Morrisey Letter, *supra* note 4; see also Press Release, Hester M. Peirce, Commissioner, U.S. Sec. & Exch. Comm’n, We Are Not the Securities and Environment Commission—At Least Not Yet (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321> [perma.cc/W5GD-9N3G].

climate change will impact financial markets. If a court accepts that claim, it likely would have accepted that climate risk information satisfied *Zauderer* as purely factual and uncontroversial, since controversial depends on consensus as to the relevance of the facts. In other words, to even reach *Central Hudson* for climate disclosures, one must dispute a claim that is necessary to satisfy it.

In light of these issues, the Court should adopt a more nuanced approach to constitutional protection of speech by corporate actors, one that offers a deeper appreciation for the First Amendment values that are implicated by the relationship between a corporation and its stakeholders.

### C. *Derivative Corporate Constitutional Rights*

One such approach lies in a framework advanced by Professors Margaret Blair and Elizabeth Pollman. They argue that the Supreme Court “has never based its corporate rights jurisprudence on the idea that a corporation is a constitutionally protected ‘person’ in its own right.”<sup>126</sup> Instead, they contend that the Court treats corporations “as artificial entities representing associations of individuals” and grants rights for the corporation that are derived from the constitutional rights of “natural persons behind the corporation.”<sup>127</sup> The Court should apply this understanding of corporate constitutional rights to its review of the First Amendment challenges to the SEC’s proposed climate rule.

For derivative First Amendment rights, the “natural persons behind the corporation” are those whose informational or autonomy interests are implicated by the challenged government action. Any natural person associated with a corporation can express their own ideas within the limits of their *personal* First Amendment right. But if this right is infringed by a government restriction or compulsion of corporate speech, the corporation receives constitutional protection.<sup>128</sup> Recall that the fundamental tension in compelled corporate speech is the apparent conflict between the autonomy of the speaker and the informational interest of the listener. A derivative-

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<sup>126</sup> Blair & Pollman, *supra* note 20, at 1678.

<sup>127</sup> *Id.* at 1695.

<sup>128</sup> *See id.* at 1735–36 (noting that corporations receive constitutional rights when necessary to protect rights of natural persons).

rights conception of compelled corporate speech resolves this tension. “[I]f speech rights for corporations are justified based on the right of listeners to hear what the corporations have to say, then it is the speech that is the target for protection, not the corporation.”<sup>129</sup> Alternatively, if a corporation’s speech right is justified based on the right of its members to act freely, the nature of the corporate form becomes the target for protection.

This is where the Supreme Court’s monist conception of the corporation falters. Some incorporated entities exist to advance beliefs shared by their members, so their “association in a corporate form may be viewed as merely a means of achieving effective self-expression.”<sup>130</sup> Organizations may enjoy associative rights when their members’ associative rights are at stake. *Americans for Prosperity Foundation v. Bonta*, which struck down a California law that compelled disclosure of charities’ donor lists to the state attorney general, illustrates this claim.<sup>131</sup> The *Americans for Prosperity* Court repeatedly stressed that “disclosure requirements can chill association” by members.<sup>132</sup> By associating themselves with an organization that engages in advocacy, members associate themselves with that organization’s expression. In those cases, the organization’s First Amendment expression *is* the members’ expression.

But *Americans for Prosperity* fails to recognize that not all organizations, or even nonprofits, meet these criteria. Some charities may have associational interests in protecting the identities of their donors where the donors themselves have the same associational interests. These should be the organizations for which “a disclosure requirement is likely to cause an objective burden on First Amendment rights.”<sup>133</sup> For charities that “concern relatively uncontroversial matters,” it may be less reasonable to expect disclosure requirements to chill donors’ willingness to donate.<sup>134</sup> But for charities concerning more controversial matters, that assumption is more likely warranted. And the members of a charity are easily identified on donor

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<sup>129</sup> *Id.* at 1736.

<sup>130</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting).

<sup>131</sup> 141 S. Ct. 2373, 2389 (2021).

<sup>132</sup> *Id.* at 2388; *see also id.* at 2382 (citation omitted) (“[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [a] restraint on freedom association . . .”).

<sup>133</sup> *Id.* at 2404 (Sotomayor, J., dissenting).

<sup>134</sup> *Id.* (Sotomayor, J., dissenting) (quoting *Reed*, 561 U.S. at 203 (Alito, J., concurring)).

lists, so their rights are easily identified and protected by granting derivative rights to the charity.

The Court’s associational view of the corporate form as a mechanism by which natural persons organize to achieve a common goal represents a simplistic view of the modern corporation, in which hundreds or thousands of shareholders and employees complicate the historical view of the corporate form as an aggregation of associational interests.<sup>135</sup> It makes sense for establishing a corporation’s constitutional status as to contract and property interests, both of which directly relate to the common goal of creating profit.<sup>136</sup> But “membership” in a modern corporation is much more complicated. In many instances, shareholders own stock indirectly through institutional investors and are “rationally apathetic, without information or a voice in the corporation.”<sup>137</sup> In stark contrast to a list of people who donated to an organization with a clear advocacy mission, stock ownership in a corporation does not necessarily associate a person with messages expressed by a corporation. If I donate to the Natural Resources Defense Council, for example, one may reasonably infer that I want to protect the environment. But does owning stock in PepsiCo imply that I agree with the corporation’s position on food labeling? Probably not.

This nuance challenges the compelled speech doctrine. As I have explained, the compelled- and commercial-speech doctrines base their First Amendment coverages on the characteristics of expressions, rather than a serious examination of whether protecting certain expression serves a constitutional value. This approach—the categorical approach—caused the Court to treat compelled corporate speech like any other compelled speech because it assumed that the identity of the speaker did not matter, that all speakers had the same constitutional interests. Thus, early commercial-speech cases stressed listeners’ informational interests and did not examine whether corporations had First Amendment autonomy interests.<sup>138</sup> When the Court shifted to stressing autonomy interests for compelled speech, it did not consider whether the corporate identity changes those interests.

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<sup>135</sup> See Blair & Pollman, *supra* note 20, at 1709–10 (explaining features of modern corporations).

<sup>136</sup> See *id.* at 1689–92 (noting that early corporate constitutional rights were limited to contract and property interests).

<sup>137</sup> *Id.* at 1722.

<sup>138</sup> *Id.* at 1720–21.

Two questions emerge. The first is whether compelled corporate speech changes the content of protected speech that natural persons associated with the corporation cannot express in their own right. Such compelled speech would operate as a speech restriction on those members of the corporation if the compulsion prevents the corporation from successfully expressing an idea common to its members but that its members cannot successfully or effectively communicate on their own. This would be an unconstitutional limitation on the corporation's autonomy interests because it unconstitutionally limits *members'* autonomy interests. But equally concerning is whether a speech compulsion forces natural persons to associate with a corporation's expressive speech. If a natural person is associated with a corporation by virtue of a characteristic independent of the compelled speech, why should the corporation enjoy derivative First Amendment protection to purportedly protect that natural person's speech? Such protection does not protect any constitutional interests. The corporation does not have any constitutional speech interests in its own right, and the natural person's speech rights in this scenario are not implicated by the corporation's speech. By thinking about corporate-speech rights as rights derived from the informational and autonomy interests of natural persons, we refocus our compelled-speech inquiry on the constitutional value of speech.

A company that is compelled to disclose information related to its climate risk should receive First Amendment protection only if the disclosure harms the First Amendment rights of natural persons behind the corporation. This approach adopts a lower level of protection for speech that contributes to listeners' interests. Thus, we refocus our First Amendment analysis on promoting the types of speech that our constitutional system values.

Fortunately, the derivative-rights view of climate disclosures is fairly simple. Few, if any, registrants possess an organizational form that would warrant serious attention to associational interests. As publicly traded corporations with stockholder bases that change rapidly, these registrants share only one relevant interest with their members: to maximize profits. Even within this, stakeholder interests may fracture. The SEC has framed climate disclosures as a way to protect this interest. Even if one accepts the claim that registrants shared other interests with their shareholders (e.g., sustainability), disclosing facts does not constitute expression by the

shareholders *through* the corporation, as in *Americans for Prosperity*, but rather expression by the corporation for the benefit (constitutional and otherwise) of shareholders and potential investors.

Under the derivative-rights view, the autonomy of the speaker—here, the corporation—has constitutional value only insofar as it protects the constitutional rights of natural persons. When a corporation discloses information to its shareholders, there are no speaker autonomy interests because the “speaker” is derivatively the same group of natural persons whose informational interests are served by the compelled speech. For example, the compelled climate speech is directed at investors to protect them from unforeseen climate-related risk, so its compulsion serves an informational interest. The only autonomy interest is that of the audience to receive this information. The corporation does not have an autonomy interest in its own right because the implicated rights of natural persons associated with the corporation are possessed by the audience of potential investors. The only natural persons who could create a speaker-autonomy interest—shareholders and, perhaps, executives—are members of the audience. The corporation itself has no constitutional interests as the speaker.

Because the informational value to the listener is compelled corporate speech’s primary constitutional value, the government should not have to show that disclosure regimes are “the least restrictive means” or that they are “narrowly tailored” to the interest.<sup>139</sup> If we have faith in the listener’s ability to use the information most relevant to her own situation, the over-disclosure of factual information *improves* the listener’s ability to make informed decisions. The only constitutional values harmed by a disclosure regime that is not narrowly tailored is the speaker’s autonomy, which is not relevant for compelled corporate speech when the natural persons from whom the corporation derives its potential autonomy interest do not share with the corporation a common expressive interest and benefit as listeners from the disclosed information. Compulsion of climate-related risk information need not be narrowly tailored, then, because the stage at which the interests of the corporation as a speaker were constitutionally relevant was the stage during which the corporation could have had a derivative right to engage in

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<sup>139</sup> See *Ams. for Prosperity*, 141 S. Ct. at 2373, 2383 (2021) (explaining strict and exacting scrutiny).

speech.<sup>140</sup> And during this stage, listener interests won out. Investors determined that climate-risk information is material to their financial decisions, and the SEC, which is responsive in part to those investors who are voting U.S. citizens, chose to compel disclosure of that information.<sup>141</sup>

When corporate speech services an informational function, the constitutional interests of the listener are the same as the constitutional interests of the speaker because the listener *is* the speaker. Our First Amendment doctrine would no longer protect the autonomy of entities that do not possess autonomy that our Constitution values. And courts would no longer be forced into a formalistic and tenuous balancing of speaker and listener interests. Few conflicting interests exist for compelled corporate speech in the derivative-rights regime because it recognizes that the Constitution protects the rights of natural persons over the illusory constitutional rights granted to corporations.

#### CONCLUSION

As the Supreme Court trends toward harsher reviews of government speech compulsions, government disclosure regimes, including the SEC's proposed rule on climate disclosures, are at risk. Much of this risk stems from doctrine built upon a fundamental misunderstanding of the nature of corporate constitutional rights. The better understanding—the derivative-rights understanding—allows us to refocus the Court's compelled-speech doctrine on First Amendment values and away from the categorical approach. The SEC's proposed climate rule demonstrates that this derivative-rights approach enables the Court to engage in a more nuanced review of corporate speech compulsions that is more consistent with First Amendment values than the categorical approach which dominates its current doctrine on compelled speech. Corporations have an increasingly

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<sup>140</sup> Cf. *Citizens United v. FEC*, 558 U.S. 310, 318–20 (2010) (describing *Citizens United* as a group of people associated for the purpose of political speech); see also Blair & Pollman, *supra* note 20, at 1734–35 (describing derivative rights in *Citizens United*).

<sup>141</sup> Cf. *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2359 (2021) (Breyer, J., concurring in judgment with respect to severability and dissenting in part) (“From a democratic perspective . . . it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse.”).

complicated relationship to federal regulation. Our constitutional practice should keep up.