June 17, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, D.C. 20549-1090
File No: S7-10-22

Dear Ms. Countryman:

I write to offer comments on the Commission's proposed climate risk disclosure rule. I am a law professor who teaches and writes about corporate and securities law and the First Amendment. I write in my individual capacity; my affiliation with W&L Law School is noted for identification purposes only.

As the Commission is aware, claims have surfaced that the proposed rule would violate the First Amendment rights of reporting companies. This assertion is incorrect; under American legal tradition and history, courts do not subject ordinary securities regulation to First Amendment review. In light of existing precedent and longstanding practice, a final version of the proposed rule would be subject, at most, to rational basis review, which it would easily satisfy.

However, there is reason to worry that the politicization of climate change and ESG activism could give a political boost to claims that the proposed rule relates to a "politically controversial" subject, climate change. Such arguments should fail, since the proposed rule in no way compels issuers to take a position on climate change or to endorse an ideological position of any kind. Under the rule, issuers remain free to supplement the required disclosures with any information that they believe is relevant, and to express disagreement with the rule or its subject matter. Thus, issuers' First Amendment rights are minimally burdened by the proposed disclosures, if they are burdened at all.

To the extent that the First Amendment is held to apply to the proposed rule, the Commission is uniquely competent to balance the competing First Amendment interests involved. The Commission's expertise in information economics and the securities markets—its deep knowledge of how information is used by market participants to value companies, to inform securities trading, to design investment portfolios, to inform shareholder voting, and to facilitate shareholder engagement and activism—makes the Commission an important authority on the balance of speaker and listener interests. The courts should respect the Commission's unique competence on this issue. My own assessment is that the proposed rule expertly balances the First Amendment interests of issuers, the public, and investors.

My draft essay, "The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule," which can be found here, provides an overview of the issues and a summary of my analysis.[1] I

[1] *See* Sarah C. Haan, *The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule* (June 16, 2022), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138712

have attached a copy of the draft essay to this comment letter, and summarize some key points below.

- Existing caselaw provides a strong basis to conclude that ordinary securities disclosure is outside the scope of First Amendment review. The Commission should prepare to defend this position, because the application of First Amendment scrutiny to securities disclosure would threaten federal securities regulation. The application of First Amendment scrutiny to securities disclosure rules would be a significant change to existing law. It would potentially force the Commission to defend numerous existing rules against First Amendment challenges, draining the Commission's resources. Some rules might not survive heightened First Amendment scrutiny. The application of First Amendment review to securities disclosure rules would potentially threaten garden-variety proxy disclosures that investors take for granted, such as disclosure of executive compensation.
- The Commission should fully articulate the purpose of the rule (the State interest), including interests related to investor protection, capital allocation, climate risk, and corporate governance. The Commission should not shy away from articulating public-interest purposes that exist in addition to investor-protection interests.
- The Commission should emphasize that the proposed rule fits easily within America's long tradition of securities disclosure. The Commission should consider describing the history of environmental securities disclosure and risk factor disclosure in the United States, which date back at least to the 1960s, to underscore this point.
- If a court were to apply intermediate or exacting scrutiny to the proposed rule, it would engage in a "narrow tailoring" analysis. (If strict scrutiny were applied, the court would employ "least restrictive means" analysis.) The Commission should explain why there is no less intrusive alternative for investors to obtain climate risk disclosure information. It should explain, for example, why private ordering is not a reasonable alternative to SEC-mandated disclosure.

The Commission has good reason to expect that courts will continue to treat securities disclosure as outside the scope of First Amendment review, but it should be prepared to defend the final rule on First Amendment grounds.

Sincerely,

Sarah C. Haan
Professor of Law
W&L Law School

The First Amendment and
the SEC's Proposed Climate Risk Disclosure Rule

By Sarah C. Haan†

The U.S. Securities and Exchange Commission (SEC) has proposed its long-awaited climate risk disclosure rule, which would require companies to disclose nine categories of information, including the geographic location of properties or operations subject to physical climate risk, and scope 1, scope 2, and scope 3 emissions.[1] Two state attorneys general already have announced that they will challenge the rule on First Amendment grounds, and a group of law and finance professors recently submitted a comment letter to the SEC that raised a loose mix of First Amendment concerns.[2] A securities law professor has argued that the climate risk disclosure rule is commercial speech, should be evaluated under intermediate scrutiny, and would fail that test.[3] The state AGs of Missouri and West Virginia have argued that the climate risk disclosure rule cannot survive strict scrutiny—and that strict scrutiny is the standard courts should apply.[4]

This Essay sketches the stakes in this debate, the First Amendment values served by ESG disclosure mandates, and the contours of the coming "free speech" battle over the SEC's proposed climate risk disclosure rule. Given the current composition of the Supreme Court, a First Amendment challenge is likely to lead to precedent-setting caselaw that extends First Amendment Lochnerism into the securities markets.[5] The conservative justices on the Supreme

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[1] SEC Release No. 33-11042; 34-94478, The Enhancement and Standardization of Climate-Related Disclosures for Investors, at 42-43, at https://www.sec.gov/rules/proposed/2022/33-11042.pdf. The SEC's rule would require disclosures only of issuers that report to the SEC, not all companies.

[2] *See* Comment Letter from Lawrence A. Cunningham and twenty-one other professors of law and finance to the SEC, File No. S7-10-22 (April 25, 2022), at https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf at 14-15 (arguing, among other things, that the proposed rule compels political speech because "[c]limate change is a politically-charged issue").

[3] Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment*, SSRN draft ("The commercial speech doctrine applies to the basic substance of securities regulation, involving as it does, the buying and selling of investment products.")

[4] *See, e.g.*, Letter of Patrick Morrisey, Attorney General of West Virginia, to The Honorable Allison Herren Lee, Acting Chair, SEC (March 25, 2021), at https://www.sec.gov/comments/climate-disclosure/cll12-8563794-230748.pdf (arguing, *inter alia*, that it is "highly unlikely" that courts will find that ESG disclosure protects investors from fraud and deceptive practices, and that the SEC will "be hard-pressed to demonstrate that mandating companies to issue statements regarding [ESG] matters which are not material to future financial performance constitutes the least-restrictive means for investors to obtain such information").

[5] On First Amendment Lochnerism, see generally Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 10 B.U. L. REV. 1377 (2020); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959 (2020); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015) (describing First Amendment Expansionism as "where the

Court are generally hostile to compelled speech—a posture that was evidenced just last year in *Americans For Prosperity Foundation (AFPF) v. Bonta.*[6] Several of these same justices are on the record expressing skepticism about climate change. For example, in her 2020 Senate confirmation hearings, Justice Amy Coney Barrett declined to affirm that climate change "is happening," and countered that it is "a very contentious matter of public debate" and "politically controversial"—terms that carry weight in First Amendment law.[7]

Introducing First Amendment scrutiny to securities disclosure will undermine the First Amendment values that such disclosure serves, upend capital markets regulation, politicize (and polarize) securities law, and disable the price-setting function of the securities markets, with far-reaching, destabilizing effects. Such a move would constitutionalize a political backlash against the strengthening ESG movement and, in the process, prevent millions of investors from incorporating information about companies' environmental, social, and governance performance into their core decision-making.[8] These decisions include how to value companies, whether to buy, hold, or sell securities (i.e., how to design self-actualizing investment portfolios), and how to participate in shareholder governance through voting and other expressive activities. Climate-informed decision-making by investors also serves the vital, public-interest function of mitigating systemic risk. If, as experts increasingly worry, companies are failing to accurately value their own assets in the face of climate change, climate risk disclosure is essential for investors to assess those values independently—a function that not only protects investors from fraud and mismanagement (i.e., agency costs), but also fortifies the market against climate-related shocks.[9] Introducing First Amendment scrutiny to securities disclosure would be a radical departure from existing law, and an unprecedented step by the judiciary to interfere with markets and to distort market outcomes. In the end, it would even threaten garden-variety proxy disclosure that investors currently take for granted, including disclosure of such "controversial" matters as executive compensation.[10]

First Amendment's territory pushes outward to encompass ever more areas of law"); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2586 (2008); *see also* Janus v. AFSCME, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (discussing the weaponization of the First Amendment); Nat'l Ins. Of Family & Life Advocates v. Becerra, 138 S.Ct. 2361, 2381-83 (2018) (Breyer, J., dissenting) (connecting recent First Amendment caselaw to Lochner v. New York, 198 U.S. 45 (1905)).

[6] 141 S.Ct. 2373 (2021). For insightful commentary on this recent case, see Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 229-33 (2022).

[7] *See, e.g.*, video clip posted by the BBC: https://www.youtube.com/watch?v=TTNKg1jygpQ (at 0:30) (clip from the October 15, 2020 Senate confirmation hearing of Supreme Court nominee Amy Coney Barrett, who was responding to then-Senator Kamala Harris's question, "And do you believe that climate change is happening and it's threatening the air we breathe and the water we drink?" Barrett declined to affirm this belief.).

[8] For a discussion of how the acronym "ESG" is used in securities law, see Jennifer O'Hare, *Don't Forget the "G" in ESG: The SEC and Corporate Governance Disclosure*, 64 ARIZONA L. REV. 417, 421-22 (2022).

[9] *See* Madison Condon, *Market Myopia's Climate Bubble*, 2022 UTAH L. REV. 63, 65 (2022) ("A growing number of financial experts at institutions ranging from BlackRock, to McKinsey, to the U.S. Commodities Futures Trading Commission, have reached the conclusion that markets are not accurately assessing and pricing climate change-related risks.").

[10] In particular, proxy contests have been invigorated by Engine No. 1's success at ExxonMobil in 2021, and the SEC's new rule creating the "universal proxy" may also encourage proxy contests. Disclosures that might pose reelection concerns for incumbent board members, such as executive compensation disclosures, may be particularly vulnerable to First Amendment challenge in the future. *See infra* notes __ and accompanying text.

Some scholars have suggested that the D.C. Circuit's 2015 case, *National Association of Manufacturers v. Securities and Exchange Commission* (*NAM v. SEC*), provides the framework for understanding how courts will apply the First Amendment to the SEC's new climate risk disclosure rule. This Essay rejects that view, except insofar as *NAM v. SEC* demonstrates the willingness of some courts to decide, as a normative matter, what is—and thus what isn't—securities disclosure for constitutional purposes.[11]

To the extent that courts have the power to overrule other branches of government on this normative issue, they should exercise it with extraordinary caution. It is, in effect, the power to decide that investors *shall not* consider certain information, because it prevents investors from obtaining that information. When exercised, this power turns the "free" market for corporate securities into a judicial construction. Market mechanisms, which would otherwise organically set prices to reflect the value that investors place on ESG performance, would be distorted. If, in fact, companies are not already doing a good job of integrating climate risk into their own operations and planning, the risks of a significant, climate-related correction in the future increase. At a time when investor demand for environmental disclosure has reached an all-time high[12], the willingness of the judiciary to wield this power—to suppress the role of the investor in corporate law and capital allocation, over investors' objections—would have far-reaching political and economic consequences.

Courts seeking to exercise this power are likely to use a First Amendment challenge to the proposed climate risk disclosure rule to distinguish ESG disclosure from "real" securities disclosure. There are several ways a court might do this. It could employ a historical framework to determine what counts as securities disclosure and what doesn't, or it could fall back on an old, bogus distinction between "financial" and "non-financial" corporate information. In a 2018 compelled speech case, *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, the Supreme Court emphasized that its precedents do not permit the government to impose content-based regulation of speech "without 'persuasive evidence of a long ... tradition'" of such regulation.[13]

There is, of course, a long American tradition of mandatory securities disclosure, which is content-based regulation of speech.[14] The history of this regulation dates back at least to the

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[11] The question of what constitutes securities disclosure for First Amendment purposes is different from the question of what constitutes securities disclosure in a colloquial sense, or to practitioners. For First Amendment purposes, the question determines which disclosures will be insulated from rigorous First Amendment review.

[12] *See, e.g.*, Quinn Curtis, Jill E. Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) ("ESG investing—that is, investing informed by environmental, social, and governance criteria or considerations—is growing explosively.").

[13] 138 S.Ct. 2361, 2372 (2018) (rejecting arguments that "professional speech" was such a category, and noting that the Supreme Court "has been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions. This Court's precedents do not permit governments to impose content-based restrictions on speech without ''persuasive evidence ... of a long (if heretofore unrecognized) tradition'' to that effect") (*quoting* U.S. v. Alvarez, 567 U.S. 709, 722 (2012)).

[14] *See, e.g.*, Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 169 (2015) ("a speech regulation targeted at a specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter").

mid-1800s.[15] Opponents of the SEC's new rule will argue—wrongly—that climate risk disclosure falls outside that long tradition, and thus is not *bona fide* securities disclosure for First Amendment purposes. This Essay argues that, using any reasonable understanding of that category, the proposed climate risk disclosure mandate is *bona fide* securities disclosure, and thus should be subject, at most, to rational basis review. Courts that understand the stakes, the mechanics of the securities markets, the high value of securities disclosures to investors and the public interest, and First Amendment law, will resist calls to eviscerate the climate risk disclosure rule on "free speech" grounds.

A. The Politics of ESG Shareholder Activism

One of the most significant political developments in American capitalism is the accelerating power of shareholders in corporate governance. This development is neither conservative nor liberal; it reflects a shift in power from one set of actors in corporate organization (corporate managers) to another (shareholders).[16] The rise of shareholder power is often presented on political terms, however. The directors and C-suite officers of public companies are a rarefied group, typically among the so-called One Percent, while the shareholder category includes millions of middle- and lower-income Americans saving for modest retirements (and their agents, asset managers). In addition, the rise of shareholder power has been associated with a contemporaneous trend in favor of ESG shareholder activism. Although the most powerful shareholders in corporate governance today, asset managers, often take a conservative stance on matters of corporate social policy, they have occasionally sided with ESG activists on issues of corporate reform. Climate risk disclosure is the most important example of this. Climate change has no true political valence—it is a matter of scientific fact—but climate risk disclosure has been advocated mainly by progressive ESG activists, funds, and nonprofits, and thus *appears* politically progressive. As Madison Condon has shown, whether one "believes in" a human role in climate change is irrelevant to companies' need to incorporate climate change-related risks into asset prices to avoid future financial shocks.[17]

The ESG movement, which dates back at least to the 1960s[18], has produced big wins only recently, buoyed by the growing power of shareholders and the increased willingness of asset

[15] Though federal securities regulation did not begin until the 1930s, the states were mandating securities disclosure long before this. *See, e.g.,* An Act to Authorize the Establishment, and to Prescribe the Duties of Manufacturing Companies, Acts of the Seventieth Legislature of the State of New Jersey (Trenton 1846) (Approved, February 25, 1846) (Section 20 requiring publication of the amount of capital stock fixed and paid in; Section 21 requiring publication of increases to capital stock; Section 23 requiring publication of voting results to reduce capital stock, Section 25 requiring publication of an annual report).

[16] For much of the twentieth century, corporate managers controlled corporate governance through proxy voting; shareholders struggled to act collectively. Following the rise of institutional investors and the re-concentration of shareholding at the end of the century, however, shareholders have had more success exercising voting power in firms. This accounts for much of the shift in power.

[17] *See* Madison Condon, *Market Myopia's Climate Bubble*, 2022 UTAH L. REV. 63, 69 (2022) (noting, for example, that "[n]et global sea level rise over the next fifteen years ... can be predicted with some certainty," and that this is (obviously) relevant to asset-allocation decisions, but that many public companies have not recognized this).

[18] A precursor to today's ESG movement was the corporate social responsibility ("CSR") movement, exemplified by Ralph Nader's Campaign GM. Other terms that have been used over time to refer to the movement include "ethical investing," "impact investing," "sustainable investing," and "socially responsible investing" ("SRI"). *See, e.g.,* AMY

managers to recognize ESG risks and support ESG reforms. Some (including this author) see a connection between shareholders' growing ESG activism and the breakdown of democratic politics in the U.S.[19] With Congress unable to legislate effectively on climate change, some groups have rechanneled their political activism into corporate governance. Public opinion research has found that a sizable majority of Americans want to act to address climate change, even as the U.S. government lags in responding.[20]

As a result of these intersecting developments, the ESG movement has built considerable strength measured both in investment dollars and corporate voting power. Bloomberg has projected that ESG assets under management will reach $41 trillion worldwide by the end of 2022.[21] Last year, ExxonMobil's incumbent board suffered a high-profile defeat at the hands of shareholder activists concerned about climate risk[22]; this year, climate-related shareholder proposals at other companies have won by large voting margins, an outcome that was nearly unthinkable a few years ago.[23] Many of these unprecedented wins have been celebrated by progressive politicians and commentators—and decried by conservative politicians and commentators—increasing the political valence that attaches to the ESG movement.

In response to surging investor demands, Nasdaq and the SEC have issued or proposed new ESG disclosure mandates: the Nasdaq board diversity disclosure mandate, which the SEC approved last summer[24], the proposed climate risk disclosure mandate, and new proposed disclosures for ESG funds.[25] These new disclosures will allow U.S. securities markets to

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L. DOMINI WITH PETER D. KINDER, ETHICAL INVESTING (1984) (using the term "ethical investing"); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEORGETOWN L. J. 923 (2019) (using the term "sustainable investing"). My own research has found that shareholders were engaging in pro-labor activism as early as the Progressive Era. *See* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 541-42 (2022) (describing Progressive Era shareholder activism to reform labor practices at major companies).

[19] *See, e.g.*, Sarah C. Haan, *Is American Shareholder Activism a Social Movement?*, REVUES INTERNATIONALE DES SERVICES FINANCIERS (forthcoming 2022), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974031 ("Americans have come to view shareholding and stock trading as important modes of resistance to the economic and political status quo"); Mike Pence, *Republicans Can Stop ESG Political Bias*, WALL ST. J., May 26, 2022 ("ESG is a pernicious strategy, because it allows the left to accomplish what it could never hope to achieve at the ballot box…").

[20] Jacob Poushter et al., *Americans are less concerned—but more divided—on climate change than people elsewhere*, PEWRESEARCH.ORG, Sept. 14, 2021 (finding that "[s]ix-in-ten U.S. adults say that they are concerned that global climate change will harm them personally," and "74% of Americans are willing to make a lot or some changes in their lifestyles to deal with climate change").

[21] Saijel Kishan, *ESG by the Numbers: Sustainable Investing Set Records in 2021*, BLOOMBERG.COM, February 3, 2022, at https://www.bloomberg.com/news/articles/2022-02-03/esg-by-the-numbers-sustainable-investing-set-records-in-2021.

[22] *See* Christopher M. Matthews, *Activist Wins Exxon Board Seats After Questioning Oil Giant's Climate Strategy*, WALL ST. J., May 26, 2021, at https://www.wsj.com/articles/activist-wins-exxon-board-seats-after-questioning-oil-giants-climate-strategy-11622050087.

[23] *See infra* notes __ and accompanying text.

[24] *See* Alexander Osipovich, *Nasdaq's Board-Diversity Proposal Wins SEC Approval*, WALL ST. J., August 6, 2021, at https://www.wsj.com/articles/nasdaqs-board-diversity-proposal-faces-sec-decision-11628242202.

[25] *See* SEC Press Release, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices, May 25, 2022, at https://www.sec.gov/news/press-release/2022-92.

impound social and environmental performance information into prices with accuracy and efficiency. The state is not driving this market process—investors are.

However, sensing the activization of market forces in favor of board diversity, environmental reforms, and other politically popular, left-of-center reforms, conservative political actors are preparing a muscular and well-funded counter-response that will aggressively challenge the new disclosure mandates on free-speech grounds.[26] After the SEC proposed the climate risk disclosure rule, Mike Pence—a likely GOP candidate for the presidency in the 2024 election—argued in the *Wall Street Journal* that "the next Republican president and GOP Congress should work to end the use of ESG principles nationwide."[27] In this backlash, the goal is not just to vindicate corporations' First Amendment rights, but to use judicial fiat to control the flow of information to markets.[28]

B. Securities Disclosure and the First Amendment

Since the middle of the twentieth century, the First Amendment has been interpreted to limit the State's ability to compel speech. The origin case is *West Virginia State Board of Education v. Barnette*, in which the Supreme Court held that West Virginia's state board of education had violated the First Amendment by requiring school children to recite the Pledge of Allegiance while making a stiff-arm salute.[29] Although that case obviously involved compelled speech with a strong ideological valence, compelled speech cases quickly moved beyond oaths and pledges to invalidate information-forcing laws targeting commercial actors.

When *Barnette* was decided in 1943, no one imagined that it threatened the constitutionality of federal securities disclosure. The SEC had been created in 1934[30], and its original disclosure authority was defined by the Securities Act of 1933 and the Securities Exchange Act of 1934, both of which empowered the agency to compel corporate disclosures "as necessary or appropriate in the public interest or for the protection of investors."[31] At the time, the Senate Committee on Banking and Currency noted that it is "essential" that shareholders be "enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings."[32] The SEC promulgated the first set of proxy rules in September 1935.[33]

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[26] The proposed rule will be challenged on many other grounds as well, including an important challenge to the SEC's authority under administrative law. This essay does not address those arguments.
[27] Mike Pence, *Republicans Can Stop ESG Political Bias*, WALL ST. J., May 26, 2022.
[28] *Id.* (arguing against corporate policies tying executive compensation to ESG performance by characterizing this as basing pay "on how well [employees] conform to the woke political opinions of their supervisors").
[29] 319 U.S. 1178 (1943). The Board of Education resolution at issue required school children to perform a "'stiff-arm' salute" while repeating these words: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." *Id.* at 1180-81.
[30] https://www.sec.gov/fast-answers/answerssecworkhtm.html.
[31] Securities Act §§ 7 & 10(c); Securities Exchange Act §§ 12(b), 14(a); *see also* Securities Exchange Act §§ 13(a) (requiring issuers to make disclosures in accordance with rules promulgated by the SEC "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security"); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1204-05 (1999).
[32] S. Rep. 792, 73d Cong., 2d Sess. 12 (1934).
[33] Rules LA 1-7, Securities Exchange Act of 1934 Release No. 378 (Class A) September 24, 1935.

The Shareholder Proposal Rule also predated *Barnette*.[34] It requires a company to publish a shareholder's proposal in the Proxy Statement—that is, it requires a corporation to transmit statements to its shareholders with which the corporation disagrees. Today, if the Shareholder Proposal Rule was treated as commercial speech, it would be viewed as a potentially significant burden on corporate speech rights. In 1986, the Supreme Court invalidated an analogous requirement that required a utility company to transmit third-party content to customers, over the company's objection.[35]

C. Coverage vs. Protection

Today, First Amendment experts view some categories of speech as *not covered* by the First Amendment, while others are deemed covered but *not protected*. Securities disclosure is understood by most experts to be outside the coverage of the First Amendment.[36] This helps explain why securities regulations—both restrictions on speech and mandatory disclosure requirements—generally have not been subject to First Amendment review.[37]

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[34] The Shareholder Proposal Rule was formally promulgated the year before *Barnette* was decided, but had been informally enforced by the SEC since 1938. *See* Mortimer M. Caplin, *Proxies, Annual Meetings and Corporate Democracy*, 37 Va. L. Rev. 653, 669-70 (1951). 1938 was the year that the Supreme Court wrote, in *United States v. Carolene Products Co.*, that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless" it was shown not to rest "upon some rational basis within the knowledge and experience of the legislators." 304 U.S. 144, 152 (1938). On the Shareholder Proposal Rule (SEC Rule 14a-8), see generally Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L. J. 262 (2016).

[35] *Compare, e.g.*, Pacific Gas & Electric Co. v. Pub. Service Com., 475 U.S. 1, 14, 20-21 (1986) (compelled access that "forces the speaker's opponent ... to assist in disseminating the speaker's message" violated the First Amendment).

[36] *See, e.g.*, *See, e.g.*, Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 318 (2018) (noting that "[m]any activities that are colloquially considered 'speech' are not subject to constitutional challenge, let alone review or decision: the regulation of contracts, commercial and securities fraud, conspiracy and solicitation, workplace harassment, the compelled speech of tax returns, and large swaths of the administrative state, including antitrust, securities, and pharmaceutical regulation, to name just a few"); *see also, generally*, Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073 (2016); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1780 (2004) (securities regulation remains "a domain largely outside the coverage of the First Amendment"); *see also* Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 n.9 (1988); Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc., 472 U.S. 749, 758-59 n.5 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Paris Adult Theatre I v. Slaton, 413 U.S. 49,64 (1973) ("neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares").

[37] Before *NAM v. SEC*, the D.C. Circuit had (in one instance) applied rational basis review in a First Amendment challenge to an SEC disclosure mandate—a laxer standard than *Zauderer*'s "reasonable relation" test—though that case did not involve a disclosure required of issuers. *See* SEC v. Wall Street Publishing Institute, 851 F.2d 365, 373 (D.C. Cir. 1988) (concluding, in a case evaluating an SEC disclosure mandate targeting a publication about securities, that it was not necessary for the court to inquire "whether the government's specific regulatory objective—disclosure of consideration—is constitutionally permissible" because in "areas of extensive federal regulation—like securities dealing—we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme"). For a discussion of how *Zauderer*'s "reasonable relation" test is more rigorous than rational-basis review, *see* American Meat Institute v. U.S. Dep't of Agric., 760 F.3d 18, 33-34 (2014) (Kavanaugh, J., dissenting) (the "*Zauderer* fit requirements are far more stringent than mere rational basis review"). More recently, in *New York Republican State Committee v. SEC*, the D.C. Circuit applied a higher level of First

In fact, until 1976, when the Supreme Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*—famously announcing that "commercial" speech enjoys a measure of First Amendment protection—commercial speech was understood to be completely fair game for government regulation.[38] Importantly, two years later, the Court expressly stated that it had not meant for *Virginia Pharmacy* to subject securities regulation to First Amendment review.[39] *Virginia Pharmacy* concerned a commercial speech restriction, and thus (ironically) vindicated the sort of listener interests that are, today, undermined when twenty-first-century courts invalidate compelled disclosure on First Amendment grounds.

D. First Amendment Values

Securities disclosures advance critical First Amendment values in our twenty-first-century world, extending far beyond those served by ordinary commercial speech. Securities disclosures allow investors to participate in the capital markets on their preferred terms, and to engage in core expressive acts.[40] They are essential to shareholders' participation in corporate democracy, a foundation of American corporate governance dating back (at least) to the nation's origin. They help investors to avoid fraud and greenwashing, and to reduce agency costs. Mandatory securities disclosures help investors save for the future, and thus to live fulfilling, autonomous lives, and they play a key role in setting stock prices; efficient capital allocation could not occur without them. Investors are not only listeners but also speakers of securities disclosure, and the same is true of issuers—corporations are audiences for their own disclosures and beneficiaries of the processes that produce them. Companies are attentive to the disclosures of other companies and their own investors, and get value from the iterative processes—unique to the cycles of securities disclosure—that produce knowledge about companies and the world we live in. All of these contribute both to "the public interest"—in a stable, functioning economy that reflects the values of its participants, in efficient capital allocation, in human flourishing through economic and political self-actualization, and in effective corporate governance—and to "the protection of investors." It was no accident that "the public interest" and "the protection of investors" were jointly advanced as the core purposes of federal securities regulation in the 1933

Amendment scrutiny (borrowed from campaign finance cases such as McCutcheon v. FEC, 572 U.S. 185 (2014)) to SEC Rule 2030, which prohibits certain "pay to play" activities by FINRA placement agents. *See* 927 F.3d 499, 510-12 (D.C. Cir. 2019).

[38] 425 U.S. 748 (1976).

[39] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.").

[40] As the twentieth century's most famous shareholder activist argued, "Participation in the nation's business" is "the only real democracy in a modern world where it is indisputable that industry and finance are primary even in the field of political decision." LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY 229 (1956).

and 1934 Acts; these laws embodied and promoted First Amendment values from their earliest formulation.[41]

E. The Categorical Approach

After *Barnette*, the compelled speech doctrine continued to evolve, developing a categorical approach in which different levels of First Amendment scrutiny apply to different kinds of disclosure. Today, the relevant categories are: (1) securities disclosure, (2) commercial disclosure, (3) "purely factual and uncontroversial" commercial disclosure, (4) campaign finance disclosure, and (5) a catch-all category of content-based or political disclosure.

As already mentioned, under longstanding principles, securities disclosure is subject to minimal (if any) First Amendment scrutiny.[42] Commercial disclosure is subject to intermediate scrutiny under *Central Hudson Gas & Electric Corporation v. Public Service Commission.*[43] "[P]urely factual and uncontroversial" commercial disclosure/advertising is a subset of commercial speech that is subject to laxer review under *Zauderer v. Office of Disciplinary Counsel of Supreme Court.*[44] Campaign finance disclosure is subject to "exacting scrutiny" under *Buckley v. Valeo* and its progeny.[45] Disclosure mandates falling outside of these categories—that is, content-based or political disclosure—receive strict scrutiny.[46] Though relatively well-developed, these categories remain in flux: just last year, a case that invalidated IRS regulatory disclosures furnished to the California Attorney General's Office suggested that exacting scrutiny may be more widely applicable to regulatory disclosure regimes.[47]

[41] For discussions of the First Amendment values at play in compelled speech generally, see Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1082-90 (2022); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1986-2006 (2018).
[42] To be sure, commentators have criticized the special treatment of securities disclosure. *See, e.g.*, Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 VA. J. LAW & POL. 535, 536 (2014) ("the Court has yet to offer any sound jurisprudential grounds for placing the securities laws on an island of immunity from First Amendment attacks"); Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 829 (2007) (finding unpersuasive arguments that the First Amendment should not apply to securities regulation).
[43] 471 U.S. 626, 651 (1985); see Caroline Mala Corbin, *Compelled Disclosures*, 65 ALABAMA L. REV. 1277, 1283 ("the Supreme Court distinguishes first between commercial and noncommercial speech and second, within commercial speech, between compelled statements of fact and compelled statements of beliefs and opinions"); *see also* Sorrell v. IMS Health, Inc., 564 U.S. 552, 571-72 (2011) ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. To sustain the targeted, content-based burden [the challenged law] imposes on protected expression, the State must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest. There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" (*quoting* Bd. of Trs. v. Fox, 492 U.S. 469, 480-81 (1989)).
[44] 471 U.S. 626 (1985).
[45] As discussed in the text infra, after *AFPF v. Bonta*, the category of corporate disclosure subject to "exacting scrutiny" has expanded to include, at least, disclosure of an organization's donors or contributors.
[46] Caroline Mala Corbin, *Compelled Disclosures*, 65 ALABAMA L. REV. 1277, 1283 ("The default rule is that as a content-based regulation, compelled speech must pass strict scrutiny.")
[47] AFPF v. Bonta, 141 S.Ct. 2373 (2021).

Some commentators[48] and courts[49] have suggested that securities regulation is really a subcategory of commercial speech, and thus securities regulation should be subject to First Amendment analysis as regulation of commercial speech.[50] Commercial speech is generally understood to be speech that proposes a commercial transaction[51]—a definition that fits securities disclosure poorly.[52] The acquisition of a share of stock does not involve a single transaction or informed decision by the buyer. That acquisition entitles the stockholder to a set of rights, including voting rights, as long as the stock is held. In our current era of index investing and shareholder activism, securities disclosures probably do more to inform governance relationships and decision rights than they do to inform active trading.

While it may be tempting for securities law experts to assert that courts should treat securities regulation as commercial speech, this Essay urges caution. That choice ignores the meaningful difference between buying a pair of sneakers and buying an equity interest in a business. It would make nearly every securities regulation a target for First Amendment challenge. With the proliferation of well-funded trade organizations willing to bring such challenges, the SEC would likely see its resources drained to defend existing mandates in court. Treating securities disclosure as commercial speech would subject broad swaths of securities regulation to intermediate scrutiny under *Central Hudson*.[53] Many aspects of the federal

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[48] *See, e.g.*, Lloyd L. Drury III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 760 ("the Court should apply its newly-robust commercial speech protection to regulations issued by the SEC").

[49] *See* Bulldog Investors Gen. P'ship v. Sec'y of the Commonwealth, 460 Mass. 647, 703 (2011), *cert. denied*, 132 S. Ct. 2377 (2012); NAM v. SEC, No. 13-5252, Slip op. (D.C. Cir. Aug 18, 2015) (refusing to treat a disclosure mandate enacted as an amendment to the Securities Exchange Act as securities disclosure).

[50] For a recent example, see Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment*, SSRN draft.

[51] *See* Bd. of Trs. v. Fox, 492 U.S. 469, 473-74 (1989) (the "test for identifying commercial speech" is speech that "'propose[s] a commercial transaction'" (*quoting* Virginia Pharmacy, 425 U.S. at 762)); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496 (1996) (noting that "[i]t was not until the 1970s ... that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993) (the State's "interest in preventing commercial harms" is "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech"); *see also* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154-55 (2012) (noting the "unavoidable ambiguity of the concept of commercial speech" but observing that "[i]n the bulk of the Court's commercial speech cases, the regulation at issue seeks to avert harmful consequences to consumers from heeding communications made as part of an effort of a for-profit enterprise to induce purchase of specified commodities or services").

[52] As Helen Norton points out in a new draft, securities disclosure serves not only to inform those seeking to buy or sell a security, but also to inform shareholders who already own stock about matters on which they will vote. Helen Norton, *Securities Law and the First Amendment* (draft on file with the author). This is supported by empirical research. *See, e.g.*, Quinn Curtis, Jill E. Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 399 (2021) (finding that "ESG funds appear to be considering ESG criteria in voting as well as investment decisions").

[53] *See, e.g.*, SEC v. Wall Street Publishing Institute, 851 F.2d 365, 373 (D.C. Cir. 1988) ("The Supreme Court itself has distinguished between the government's power to regulate 'commercial speech' and its powers to regulate the securities industry."); Brief for Law Professors as Amicus Curiae in Opposition to Motion to Dismiss at 21, SEC v. Siebel Syst., Inc., 384 F. Supp. 2d 694 (S.D.N.Y. 2005) (No. 04-5130) ("if this Court were to hold that Regulation FD were subject to heightened First Amendment review, numerous other securities laws would also become constitutionally suspect"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985).

securities laws would be vulnerable under that standard.[54] These include mandatory disclosures of a board's opinion, the Management Discussion & Analysis (MD&A) section of financial reports, supply chain disclosures[55], "comply or explain" disclosures, and the Shareholder Proposal Rule itself, the "small stockholder's Magna Carta."[56]

The categorical approach means that First Amendment review of a challenged disclosure mandate starts with a determination of which category of speech (and thus which standard of review) applies to the disclosure. In other words, a court's first step in evaluating the constitutionality of the disclosure mandate is to say what kind of disclosure it is.

This is where *NAM v. SEC* becomes relevant. That 2015 case is a roadmap for judges seeking to substitute their judgment for the judgment of other branches of government about the types of information that investors should get to consider in their investments, voting, and engagement.

F. *NAM v. SEC*

The Conflict Minerals Rule was a securities disclosure mandate enacted by Congress in 2010 in the Dodd-Frank Wall Street Reform and Consumer Protection Act.[57] It required public companies to make disclosures related to their manufacturing use of four minerals.[58] Corporations that sourced these minerals from the Democratic Republic of the Congo and the surrounding area, or that could not identify their origin, were required to disclose this on a form filed with the SEC and on their company websites. The National Association of Manufacturers, a trade group, challenged the rule on the ground that it compelled speech in violation of the corporations' First Amendment rights.

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[54] *See, e.g.,* SEC v. Wall Street Publishing Institute, 851 F.2d 365, 372-73 (D.C. Cir. 1988) ("If speech employed directly or indirectly to sell securities were totally protected [by the First Amendment], any regulation of the securities market would be infeasible"); Brief for Law Professors as Amicus Curiae in Opposition to Motion to Dismiss at 21, SEC v. Siebel Syst., Inc., 384 F. Supp. 2d 694 (S.D.N.Y. 2005) (No. 04-5130) ("many securities laws" would be "presumptively unconstitutional" under strict scrutiny); *see also* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOKLYN L. REV. 5, 52 (1989) (predicting that "the introduction of hearer-centered free speech analysis into the SEC's domain should lead to a more skeptical approach to" SEC regulation); *But see* Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALABAMA L. REV. 903, 956 ("the vast majority of speech subject to securities regulation is commercial, and thus most securities regulation likely satisfies the Central Hudson test").

[55] For an interesting, recent example of disclosures of this type, see Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues, May 3, 2022, at https://www.sec.gov/corpfin/sample-letter-companies-pertaining-to-ukraine.

[56] John Bainbridge, *The Talking Stockholder—I*, NEW YORKER, Dec. 11, 1948, at 46 (*quoting* Lewis D. Gilbert); *see Griffith, What's "Controversial" About ESG?*, *supra* note __, at 1 (arguing that Rule 14a-8 "will likely be invalidated" under *Central Hudson*).

[57] *See* NAM v. SEC, No. 13-5252, slip op. (D.C. Cir. Aug. 18, 2015); P.L. 111-203, Sec. 1502.

[58] 77 Fed. Reg. 56275-6. These "conflict minerals," gold, tantalum, tin, and tungsten, are primarily used in the manufacture of electronics. *See* 77 Fed. Reg. 5656283-84 (describing common uses of the four minerals); Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 R. U. L. REV. 351, 359 (2013) ("almost every consumer product that requires electronics uses one of the four regulated minerals").

Congress had designed the Conflict Minerals Rules as securities disclosure. The statute amended the federal securities laws and directed the SEC—the federal agency that regulates the securities markets—to promulgate and enforce the disclosure regulations. The disclosures required by the law *looked* like securities disclosure—they were submitted on a Form SD (subject to the prohibition on false or misleading statements or omissions common to securities regulation), and were publicly available on the SEC's EDGAR database, which is the go-to place for investors to obtain information about issuers. (This is something of an understatement—due to the functionality of the Edgar database, new information in securities filings is instantaneously impounded into stock prices, through algorithmic processes.)

The D.C. Circuit would later say that the disclosures were *not* for investors but rather for consumers. However, this was a dubious claim. Commercial disclosures are typically advertisements and point-of-sale disclosures, such as product labels, which communicate information directly to consumers engaged in purchasing decisions. Although conflict minerals information was loosely linked to products sold at retail (the invalidated disclosure would have specified that a company's products were "not 'DRC conflict free'"[59]), that information was not furnished directly to consumers, and was not even easily obtainable by them. Thus, it was a stretch to claim, as the court did, that the disclosure mandate was commercial speech as that category has been used in First Amendment law.

The SEC also claimed that the disclosure was not for investors.[60] "[U]nlike in most of the securities laws," the SEC wrote in its rulemaking release, "Congress intended the Conflicts Mineral Provision to serve a humanitarian purpose, which is to prevent armed groups from benefiting from the trade of conflict minerals."[61] The SEC repeatedly framed the rule as providing information to groups other than investors: "Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains," the SEC asserted.[62] In its cost-benefit analysis, the SEC stated that the "objectives of [the Conflict Minerals Rule] appear to be directed at achieving overall social benefits and are not necessarily intended to generate measurable, direct economic benefits to investors or issuers specifically."[63] As a result, the SEC wrote, it had "not attempted to quantify the benefits of the final rule."[64]

Contrast this with the deference the SEC showed to Congress in 1973, when it was asked to mandate disclosure of information about expenditures on corporate PACs "to be utilized for

[59] NAM v. SEC, 748 F.3d 359, 370 (2014) (describing the challenged disclosure).
[60] Federal Register at 56275.
[61] Federal Register at 56350.
[62] Federal Register at 56275.
[63] Federal Register at 56350.
[64] *Id.* The SEC later acknowledged that "There may also be a benefit to investors given the view expressed by some commentators that the provision also protects investors by requiring disclosure of information that may be material to their understanding of the risks of investing in an issuer or its supply chain. To the extent that the required disclosure will help investors in pricing the securities of the issuers subject to the Conflict Minerals Statutory Provision, the rule could improve informational efficiency. Because, however, the cost of compliance for this provision will be borne by the shareholders of the company, which could potentially divert capital away from other productive opportunities, the rule may result in a loss of allocative efficiency." *Id.*

political purposes by a corporation.'"[65] Then, the SEC refused on the ground that Congress had already created a disclosure regime administered by the Federal Election Commission. "We cannot assume," the SEC wrote, "that the [disclosure] channels chosen by the Congress are inadequate for its purposes or that the agencies with whom the responsibility is placed will not adequately discharge that responsibility."[66] By 2012, the SEC had changed its mind and now was willing to second-guess Congress's choice of disclosure channel.

The D.C. Circuit seized on the SEC's statements as a basis for refusing to analyze the Rule as securities disclosure. Echoing the SEC's own words, the D.C. Circuit wrote that "the conflict minerals disclosure regime is not like other disclosure rules the SEC administers."[67] The court quoted the SEC's observation that the Conflict Minerals Rule was "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve."[68] It quoted the SEC's claims that Section 1502 was "directed at achieving overall social benefits," and "not 'intended to generate measurable, direct economic benefits to investors or issuers.'"[69]

The First Amendment consequences of this choice were clear: Instead of treating the disclosure mandate as securities disclosure, the D.C. Circuit held that either the *Central Hudson* test or strict scrutiny applied.[70] In an opinion concluding that part of the Rule violated the First Amendment, the court also held that the disclosure was not eligible for *Zauderer* review (which is a laxer standard applied to a subset of "purely factual and uncontroversial" commercial disclosures) because "[p]roducts and minerals do not fight conflicts."[71]

The main problem with *NAM v. SEC* was the willingness of a federal court to override Congress's determination of what kind of disclosure Congress itself had created. The D.C. Circuit failed to credit Congress's plausible legislative choice that the disclosure would be useful to investors—implicitly holding that its own view about the types of information that should be important to investors mattered more than Congress's. Some recent commentary on the SEC's proposed climate risk disclosure rule has tried to ring this bell, arguing that only a handful of large institutional investors, motivated by circumstances unique to them, really care about climate risk information.[72] This argument invites a court to do what the D.C. Circuit did in *NAM*

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[65] Denial of Petition Seeking to Amend Rules Promulgated Under Section 14(a) of the Securities Exchange Act of 1934, 2 S.E.C. Docket 276, 1973 WL 149356 (Aug. 7, 1973) at *2.
[66] *Id.*
[67] *Id.* at 6.
[68] *Id.* (*quoting* Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012)).
[69] *Id.* at 8.
[70] 800 F.3d 518, 524 (D.C. Cir. 2015). The District Court had applied *Central Hudson.* NAM v. SEC, 956 F. Supp.2d at 73.
[71] 800 F.3d 518, 524 (D.C. Cir. 2015). The court concluded that part of the Rule failed the *Central Hudson* test, and thus violated the First Amendment. Upon rehearing, the court expressly adopted the reasoning from its first opinion on that subject. *Id.*
[72] *See, e.g.*, Lawrence A. Cunningham, *SEC's Climate Change Proposal Gives Main Street Investors No Voice. Here's How to Make Yourself Heard*, MARKETWATCH.COM, April 4, 2022, at https://www.marketwatch.com/story/secs-climate-change-proposal-gives-main-street-investors-no-voice-heres-how-to-make-yourself-heard-11649113087?mod=quality-investing (arguing that "the SEC appears to have gotten carried away with representing the views of the largest institutional investors, especially the massive index funds, rather than consider the interests of individual investors").

v. SEC—to hold, as a matter of constitutional law, that the climate risk disclosures aren't really for "Main Street" investors.

NAM v. SEC is not the final word about how the First Amendment is likely to apply to the SEC's new climate risk disclosure mandates, however. First, the SEC did not appeal the decision, so it is unknown whether the Supreme Court would have upheld the D.C. Circuit's analysis. More importantly, cases decided after 2015 have reshaped the compelled speech doctrine in ways that depart from the D.C. Circuit's analysis in *NAM v. SEC.*

G. Zauderer *Review*

In the 1980s, when information-forcing laws were becoming increasingly important to address information asymmetries in commercial transactions, the Supreme Court devised a new "reasonable relation" test for "purely factual and uncontroversial" commercial disclosures, but it later narrowed the applicability of that test. In 2018, in *NIFLA v. Becerra*, the Supreme Court emphasized the limited scope of *Zauderer* review. In *NIFLA*, a case about health clinic disclosures, the Supreme Court refused to apply *Zauderer* review to a state-mandated notice posted in a health clinic, emphasizing that its precedents had applied *Zauderer* review only to cases involving "commercial advertising" that "required the disclosure of 'purely factual and uncontroversial information about the terms under which ... services will be available."[73] Later, the NIFLA Court again depicted *Zauderer* review as limited to advertising, stating that, in *Zauderer*, it had "emphasized that the lawyer's statements in *Zauderer* would have been 'fully protected' if they were made in a context other than advertising."[74] After *NIFLA*, it is less likely that a court would apply *Zauderer* review to the proposed climate risk disclosure rule, particularly since climate risk disclosures are even *less* like point-of-sale commercial information than were the health notices in the clinics' waiting rooms in *NIFLA*.

There is another reason that *Zauderer* is unlikely to apply to the climate risk disclosure mandates: the Supreme Court has already stated that climate change is a "controversial subject." I have argued elsewhere that courts should not use "controversiality" as a basis for deciding what level of scrutiny to apply to disclosure laws.[75] However, under *Zauderer*, this is common practice. In a 2018 case, *Janus v. American Federation of State, County & Municipal Employees*, five Supreme Court Justices joined a majority opinion articulating a list of "controversial subjects" that started with climate change (and included the Confederacy, sexual orientation and gender identity, evolution, and minority religions), adding that "[t]hese are sensitive political topics, and they are undoubtedly matters of profound "value and concern to the public.""[76] In a dissent in a 2019 denial

[73] 138 S.Ct. 2361, 2372 (2018) (quoting *Zauderer* at 651 and citing to Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995)) ("The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to 'purely factual and uncontroversial information about the terms under which ... services will be available.'").

[74] *Id.* at 2374 (*quoting Zauderer* at 637).

[75] *See generally,* Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351 (2019).

[76] 138 S.Ct. 2448, 2476 (2018) ("Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound "value and concern to the public." We have often recognized that such speech ''occupies the highest rung of the hierarchy of First Amendment values''

of certiorari, Justice Alito wrote at length about how climate change is a "contentious subject" and "controversial."[77] Justice Barrett made similar claims in her 2020 Senate confirmation hearings, repeating the claim that climate change is "political controversial."[78]

H. Intermediate Scrutiny

If a court decides that the two laxest levels of scrutiny—rational basis and *Zauderer* review—do not apply to the climate risk disclosure mandate, is intermediate scrutiny under *Central Hudson* the proper test? Recall that, in *NAM v. SEC*, the D.C. Circuit Court of Appeals determined that conflict minerals information was more plausibly for consumers than for investors, and proceeded to analyze the rule in the alternative under both intermediate and strict scrutiny.

Even if the climate risk disclosure rule were commercial speech—which it is not—the logic of *NAM v. SEC* does not readily apply to the rule. It will be much harder for a court to conclude that climate risk disclosure information is not really "for" investors. On this point, the climate risk disclosure mandate differs considerably from the Conflict Minerals Rule.

By any objective measure, investor interest in climate risk information is significant. There really is no plausible claim that investors don't care about this information, or that they aren't demanding it.[79] Just in the past few weeks, more than 89% of shares at Boeing Co. voted in favor of a shareholder proposal for a climate-related disclosure report, while more than 75% of shares at Dominion Energy Inc. voted in favor of a proposal demanding a report on the risk of stranded natural gas assets.[80] This kind of evidence—and there is much more—eviscerates any argument that a politically-charged SEC has gone rogue by using securities regulation to compel disclosures that are really for a non-investor audience.

I. Two Approaches for Heightening the Scrutiny

As mentioned above, courts that want to apply rigorous First Amendment scrutiny to ESG disclosures like the climate risk disclosure mandate may try to exclude climate risk disclosures from "real" securities regulation. To do this, a court would treat climate disclosure as outside the traditional/historical category of securities disclosure—an approach that the conservative wing of the Court gestured toward in *NIFLA v. Becerra*, when it suggested that persuasive evidence of a long tradition of regulation would be required before the Court would allow content-based speech regulation.

Two arguments might support this approach. First, the courts might identify a historical moment when "real" securities regulation existed, and measure new forms of disclosure against

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and merits "special protection.'") (*quoting* Snyder v. Phelps, 562 U.S. 443, 453 (2011)). The five Justices who agreed with this "controversial" characterization were Alito, Gorsuch, Kennedy, Roberts, and Thomas.

[77] National Review, Inc. v. Mann, 140 S.Ct. 344, 344-48 (2019) (Alito, J., dissenting from a denial of certiorari).

[78] *See, e.g.*, video clip posted by the BBC: https://www.youtube.com/watch?v=TTNKg1jygpQ (at 0:30).

[79] *See, e.g.*, Ceres, ADDRESSING CLIMATE AS A SYSTEMIC RISK: A CALL TO ACTION FOR U.S. FINANCIAL REGULATORS, June 2020 (documenting investor demands for mandatory climate risk disclosure).

[80] Corbin Hiar, *Dominion Shareholders Pass Resolution on Stranded Assets*, CLIMATEWIRE, May 12, 2022, at https://www.eenews.net/articles/dominion-shareholders-pass-resolution-on-stranded-assets/; The Boeing Co., Form 8-K, April 29, 2022 (reporting voting results—percentage is for shares voted and excludes broker non-votes); Dominion Energy, Inc., Form 8-K, May 12, 2022 (same).

that historic standard. The further back in history the courts look, of course, the more limited they will find all forms of securities disclosure. One interesting problem raised by the historical approach is that it could justify cutting back important disclosures that investors rely on today, such as executive compensation disclosure. Much modern disclosure of executive compensation is of recent vintage.[81]

Second, the courts simply could announce that "financial" information is real securities disclosure, while "non-financial" information—a term often used to mean ESG information[82]—is not. The line between financial and non-financial information is not clear-cut, however. Many ESG disclosures relate to the company's bottom line, including the proposed climate risk disclosures, and some, such as corporate political spending disclosure, pertain exclusively to financial matters. Because the financial/non-financial line is not clean, courts are likely to prefer the first approach, which might allow them to construct a history of securities regulation that emphasizes differences between New-Deal-era disclosures and ESG disclosures.

Anticipating that adversaries of the rule will characterize it as outside the traditional category of American securities regulation, the Chair of the SEC, Gary Gensler, recently gave an address in which he expressly argued that the climate risk disclosure rule will build on the "long tradition" of securities disclosure mandates of "risk factors," which he described as dating back to 1964.[83]

J. Climate Risk Information & the Traditional/Historical Category

Arguably, climate risk disclosures *are* part of the historical category of securities disclosure, if that category is understood to extend through the early 1970s. The SEC was already compelling corporate disclosure of environmental information by 1976, when the Supreme Court decided *Virginia Pharmacy*.[84] Some of the pressure for this regulatory action

[81] *See, e.g.*, Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEORGETOWN L. J. 923, 936 (2019) ("After years of taking a restrictive approach in which the SEC regularly went so far as to allow corporations to exclude shareholder proposals seeking to address executive pay, the SEC changed its position [in 1992] and imposed extensive mandatory disclosure requirements."). For example, until December 1942, the SEC required issuers to disclose only the compensation of their three highest-paid executives. *See* Harwell Wells, *No Man Can Be Worth $1,000,000 a Year: The Fight over Executive Compensation in the 1930s Americas*, 44 U. RICH. L. REV. 689, 743 (2010) ("Form 10-K's item 9 required issuers to provide, in tabular form, "[t]he name and aggregate remuneration of each person among the officers, directors, and employees of the registrant receiving one of the three highest aggregate amounts of remuneration.'"). In 1942, the proxy rules were amended to required compensation disclosure only of executives receiving $20,000 or more annually. SEC Rule X-14A-7, SEC Securities Exchange Act Release No. 3347 (Dec. 18, 1942), 7 Fed. Reg. 10, 655-56 (1942). As Wells documented, Congress also used provisions in the Revenue Act of 1934 to increase transparency of executive compensation through tax law, outside the administration of the SEC. *Wells, No Man*, at 745-46.

[82] *See, e.g., Fisch, Making Sustainable Disclosure Sustainable*. at 927 ("sustainability reporting is typically characterized as 'non-financial' reporting"); Virginia Harper Ho, *Non-Financial Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L. J. 1 (2018).

[83] Chair Gary Gensler, "Building Upon a Long Tradition"—Remarks before the Ceres Investor Briefing, April 12, 2022, at https://www.sec.gov/news/speech/gensler-remarks-ceres-investor-briefing-041222.

[84] For a review of this history, and the 1977 Sommer Report, see Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEORGETOWN L. J. 923, 934- (2019).

came from the National Environmental Policy Act of 1969 (NEPA)[85], which the SEC would conclude in 1975 required it to "consider the promotion of environmental protection 'along with other considerations' in determining whether to require affirmative disclosures by registrants under" the federal securities laws.[86] In NEPA, Congress required federal agencies to "make available to ... institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment" to "the fullest extent possible."[87]

In 1971, SEC Chair William J. Casey told the *New York Times* that the Commission was "developing guidelines 'on the disclosures a company should make in light of increasing public concern about the environment."[88] His statement was made in response to a rulemaking petition submitted by the Natural Resources Defense Council and the Project on Corporate Responsibility seeking disclosure of information on environmental and civil rights matters.[89] (The existence of this rulemaking petition underscores how investors have been demanding compulsory environmental disclosure as part of securities regulation for more than fifty years.) The SEC would go on to reject the petition, but only after clarifying, in 1971, that information in both categories was already subject to disclosure, if material.[90] (The Supreme Court would not authoritatively define "materiality" until five years later, in 1976.[91]) This did not end the matter, and the SEC expanded environmental disclosure slightly in the years that followed.[92]

In 1973, the SEC required companies to disclose material effects of compliance with environmental protection laws and regulations—including speculative effects, if management had a reasonable basis for believing that future environmental compliance "may" produce a material effect.[93] It also required disclosure of legal proceedings arising under environmental protection provisions, if the proceeding was material to the company's business, or involved a damages claim exceeding 10 percent of the company's current assets.[94] In 1975, the SEC proposed new environmental disclosure rules but scaled them back in its 1976 rule adoption; as

[85] National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1970). *See also* W. Ralph Canada Jr., *The SEC and Environmental Disclosure*, 1 HARV. ENVTL. L. REV. 392, 393-97 (1976) (describing NEPA's application to securities disclosure in the 1970s).
[86] S.E.C. Release No. 5627, 1975 WL 160503 (Oct. 14, 1975) at *11.
[87] 42 U.S.C. § 4332.
[88] *Two Groups Bid S.E.C. Require Pollution and Minorities Reports*, N.Y. TIMES, June 10, 1971.
[89] *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) (detailing the information to be disclosed, which included environmental and equal employment information).
[90] Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Exchange Act Release No. 5170, 1971 WL 127132 (July 19, 1971) [36 FR 13989]; SECURITIES AND EXCHANGE COMMISSION NEWS DIGEST, July 19, 1971, at 1, available at: https://www.sec.gov/news/digest/1971/dig071971.pdf.
[91] TSC Industries, Inc. v. Northway, 426 U.S. 438, 449 (1976) (defining "materiality" under the federal securities laws to mean that there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote").
[92] S.E.C. Release No. 5627, 1975 WL 160503 (Oct. 14, 1975) at *19.
[93] *See* Notice of Adoption of Amendments to Registration and Report Forms to Require Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Securities Act Release No. 5386, Exchange Act Release No. 10,116, Fed. Sec. L. Rep. (CCH) P23,507(A) (Apr. 20, 1973), 1973 WL 149331, at *1 ("If management has a reasonable basis to believe that future environmental compliance may have a material effect on the issuer's expenditures, earnings or competitive position in the industry, then such matters should be disclosed.").
[94] This summary abridges the disclosure requirement a bit. *See id.* at *2.

one expert put it, the 1976 rules were "basically the same requirements that had been in effect since April 1973."[95]

What all this suggests is that the SEC has been compelling disclosures of environmental information since at least 1971, and that its disclosure authority was expanded by Congress before that to include "information useful in restoring, maintaining, and enhancing the quality of the environment," a category that certainly would include information about climate change. If litigants challenge the final climate risk disclosure rule on First Amendment grounds, the rule's defenders can cite this history to show that environmental disclosures *are* traditional securities disclosure.

K. Strict Scrutiny

If the courts decide that the SEC's climate risk disclosure rule is not "real" securities regulation, that it is not commercial speech regulation subject to intermediate scrutiny (i.e., disclosure for consumers) or to *Zauderer* review (i.e., disclosure for consumers that is "purely factual and uncontroversial"), courts are likely to apply strict scrutiny. Opponents of the proposed rule argue that it should receive strict scrutiny because it constitutes content-based speech regulation on a topic that is subject to public debate. This argument is based on the (erroneous) idea that climate change is such a politically-charged subject that it is effectively outside the constitutional bounds of ordinary securities regulation, and thus strict scrutiny should apply to any disclosure mandate related to climate change, even if it does not require the speaker to endorse a viewpoint in the political debate. Strict scrutiny requires a compelling governmental interest and "least restrictive means," and there are strong reasons to believe that the SEC's proposed climate risk disclosure rule might not survive such heightened scrutiny.

The argument that the proposed climate risk disclosure rule is so politically-charged that it should receive special, heightened judicial scrutiny is flawed. If a group of people can politicize a subject and thereby change the constitutional treatment of securities disclosures related to that subject, we should expect widespread efforts to politicize matters that companies would prefer to keep secret. For example, corporate executives have argued strenuously since the 1930s that disclosure of executive compensation creates and inflames political controversy by "promot[ing] class hatred."[96] If strict scrutiny applies to securities disclosures that relate to climate change because climate change is hotly debated in the *Wall Street Journal*, then strict scrutiny may also apply in the future to securities disclosures related to executive compensation,

[95] W. Ralph Canada Jr., *The SEC and Environmental Disclosure*, 1 HARV. ENVTL. L. REV. 392, 396 (1976); *see* 41 Fed. Reg. 21,632 (1976) (adopting rules); Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569 (February 11, 1975) Regarding (1) Such Further Disclosure, If Any, of Environmental Matters in Registration Statements, Reports and Other Documents Required to be Filed or Furnished to Investors Pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934 as May Be Necessary, Consistent with the National Policy Reflected in the Federal Securities Laws, Fully to Comply with the National Environmental Policy Act of 1969; (2) Disclosure in Such Documents of Other Socially Significant Matters; and (3) Investors' Interest in and Use of Such Information, S.E.C. Release No. 5627, 1975 WL 160503 (Oct. 14, 1975) at *2.
[96] Draft letter from Edgar M. Queeny to Mr. James M. Landis, Securities & Exchange Commission, February 7, 1936, in Monsanto Archives, Wash. U. (on file with author).

once opponents of such disclosures have generated sufficient controversy about the subject. This approach to the First Amendment disempowers federal courts, which are constitutionally equipped to balance competing First Amendment interests, by shifting power to any self-interested actor with sufficient wealth to bankroll a controversy campaign. In short, courts should not capitulate to claims that any securities disclosure related to a subject of public debate must receive strict scrutiny.

Is there any alternative to strict scrutiny? The next sections consider whether the Supreme Court has made some exploratory efforts to repurpose an existing level of scrutiny—exacting scrutiny—for broader use.

L. *AFPF v. Bonta* and Exacting Scrutiny

In the final opinion handed down by the Supreme Court in 2021, *Americans for Prosperity Foundation (AFPF) v. Bonta*, the Supreme Court opened the door to application of "exacting scrutiny" to corporate disclosures that are required by longstanding (and unremarkable) regulatory regimes. That case invalidated, on First Amendment grounds, a California requirement that charities file with the California Attorney General's Office a standard, federal tax schedule that discloses the names and addresses of the charity's top donors.

One of the main questions raised by the case was what level of scrutiny should be applied. In a fractured opinion authored by Chief Justice Roberts, the majority (that is, a plurality of three and a concurring group of three) agreed that *at least* exacting scrutiny applied. Until *AFPF*, exacting scrutiny was thought to have limited applicability, and was used in cases involving campaign finance disclosure.[97] One section of the *AFPF* opinion, joined by three of the six conservative justices, widened the scope of applicability of exacting scrutiny.[98] Though that part could have limited its holding narrowly to disclosures of an association's donors or members (as in *NAACP v. Alabama*, which it cited), it did not. Instead, it repeatedly described exacting scrutiny as applying simply to "compelled disclosure":

> "It is true that we first enunciated the exacting scrutiny standard in a campaign finance case. And we have since invoked it in other election-related settings. But exacting scrutiny is not unique to electoral disclosure regimes. To the contrary, *Buckley* derived the test from *NAACP v. Alabama* itself, as well as other nonelection cases. As we explained in *NAACP v. Alabama*, "it is immaterial" to the level of scrutiny "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.[99]

[97] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 64 (1976) (*per curiam*).
[98] AFPF v. Bonta, slip op. at 7 ("exacting scrutiny is not unique to electoral disclosure regimes"). Note that although three concurring justices did not join this section of the majority opinion, their concurrence assumed the application of exacting scrutiny to the disclosure, which was outside the electoral context. By implication, it appears that they agreed that exacting scrutiny can be applied outside that context.
[99] AFPF v. Bonta, slip op. at 8 (citation omitted).

Though it is hard to know how broadly the Court will apply exacting scrutiny in future cases, its language left open a range of possibilities.

a. The Narrow Application

Perhaps courts will apply exacting scrutiny narrowly—only to campaign finance disclosures and to disclosures of an association's donors or members. However, recall that the Court has commonly used the word "association" to mean corporations.[100] A corporation's "members" are its shareholders or investors. Even under such a narrow reading, after *AFPF*, exacting scrutiny is likely to be invoked in securities regulation cases.

As just one example, the SEC currently compels investors to identify themselves (and their intentions) on a Schedule 13D within ten days of acquiring five percent of the stock of a reporting company. In February 2022, the SEC proposed amendments to this rule that would shorten the filing deadline to five days, a controversial reform that investors might want to challenge under *AFPF*.[101] This disclosure mandate has recently been in the news in connection with Elon Musk's move to acquire Twitter, Inc.[102] The SEC's rule required Musk to file a disclosure that publicly declared his intent to acquire the company.[103]

b. The Broad Application

On the other hand, courts might seek to apply exacting scrutiny broadly, to a range of regulatory disclosure mandates. Exacting scrutiny has the advantage of being less rigorous than strict scrutiny, but not limited in application to speech proposing a commercial transaction. Both exacting scrutiny and intermediate scrutiny require roughly the same quality of governmental interest, as well as narrow tailoring. That is, exacting scrutiny requires a "sufficiently important" State interest[104], while intermediate scrutiny requires a "substantial" State interest.[105] These are likely to be the similar in quality.

Exacting scrutiny requires the disclosure mandate to be substantially related to the State interest and narrowly tailored, in terms of scope or breadth. Intermediate scrutiny requires the

[100] *See, e.g.*, Citizens United v. FEC, at 900 ("corporations or other associations"); 904 ("If the antidistortion rationale were to be accepted, however it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form"); 906-07 (*Austin v. Michigan Chamber of Commerce* "permits the Government to ban the political speech of millions of associations of citizens. Most of these are small corporations..." (citation omitted)).
[101] For a summary, see Curtis A. Doty et al., *SEC Proposes Amendments to Schedules 13D and 13G*, HARV. L. SCH. FORUM ON CORP. GOV., March 6, 2022, at https://corpgov.law.harvard.edu/2022/03/06/sec-proposes-amendments-to-schedules-13d-and-13g/.
[102] *See, e.g.*, Dave Michaels, *Elon Musk's Belated Disclosure of Twitter Stake Triggers Regulators' Probes*, WALL ST. J., May 11, 2022, at https://www.wsj.com/articles/elon-musks-belated-disclosure-of-twitter-stake-triggers-regulators-probes-11652303894.
[103] Elon R. Musk, Schedule 13D, April 13, 2022.
[104] *Id.*
[105] Central Hudson, 447 U.S. 557, 566 (1980); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 500 n.9 (1996). The *Central Hudson* test applies only to commercial speech that is lawful and not misleading. *See id.*

disclosure rule to directly advance the State's substantial interest and not be "more extensive than is necessary to serve that interest."[106] Again, these are similar.

The narrow tailoring in *AFPF v. Bonta* was characterized as involving not merely the "fit" between disclosure and State interest (i.e., does the disclosure advance the State interest, or is the scope of the disclosure "in proportion to the interest served")[107] but also an inquiry into the existence of a "less intrusive" means to obtain the disclosure information.

This is important. As the Court put it in *AFPF*, "California is not free to enforce any disclosure regime that furthers its interests. It must instead demonstrate its need for universal production *in light of any less intrusive alternatives*."[108] Justice Alito, writing separately in partial dissent, emphasized this aspect of exacting scrutiny: "I agree that the exacting scrutiny standard ... has real teeth," he wrote. "It requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information."[109]

If exacting scrutiny were applied to ESG disclosure, opponents of ESG disclosure will argue—wrongly—that a less intrusive alternative exists: private ordering. For the past three or four decades, in fact, investors have waged private ordering campaigns to force corporations to disclose ESG data.[110] However, these campaigns must be fought company-by-company at great investor expense. They do not produce reliable, comparable information—a main reason that investors have been pushing the SEC to mandate ESG disclosures.

A second set of alternative channels exists, too. When it comes to ESG information, much third-party data, such as supply chain information and scope 2 and scope 3 emissions data, are theoretically obtainable directly from the third parties, rather than indirectly from the issuer. Under an exacting scrutiny analysis, a court might conclude that the state must get third-party information directly from the third party itself. However, the SEC may not have jurisdiction over the third party—perhaps because it is a foreign company (as is common with companies in global supply chains) or because it is not a reporting company under the federal securities laws. This could lead to an outcome in which the third-party information is effectively disclosure-proof, even though it would be possible—perhaps even easy—for the reporting company to obtain and disclose it.

Thus, as reworked in *AFPF*, exacting scrutiny might be an appealing choice for courts looking to invalidate ESG disclosure mandates. Whether lower courts will accept the Supreme Court's tacit invitation to apply it broadly to "compelled disclosure requirements," and extend it beyond donor/membership disclosures, remains to be seen.

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[106] *Id.*
[107] *AFPF*, slip op. at 15.
[108] *AFPF*, slip op. at 14 (emphasis added).
[109] *Id.* at 1 (Alito, J., dissenting).
[110] *See generally*, Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016).

CONCLUSION

This Essay has explored the contours of the coming "free speech" battle over the SEC's proposed climate risk disclosure rule. That battle must be understood in terms of the important First Amendment values served by securities disclosure, and in light of the politics of ESG activism. Securities disclosures inform numerous kinds of decision-making that are vital in twenty-first-century life. They allow investors to participate in the securities markets by valuing companies, trading securities, voting stock, and engaging in an informed manner with corporate boards and other actors. They make it possible for investors to live self-actualizing lives through their investment activities, which include trading, portfolio design, retirement savings and planning, engagement on policy issues, and corporate knowledge-creation. They are essential for investors to protect themselves from fraud, greenwashing, and mismanagement. They are necessary for corporate democracy, which the Supreme Court has advanced as a basis for recognizing and protecting corporations' free speech rights in other domains, such as political spending. They provide the mechanism for efficient capital allocation, which allows the economy to maximize societal welfare. Because investors can choose—independently and freely—to act on disclosure information or not, truthful and comparable disclosures provide the means for investors to engage in an important form of self-government, at the individual and collective levels.

Unfortunately, the politics of securities disclosure are being distorted by actors who oppose ESG shareholder activism and seek to paint ESG information as "politically controversial." The SEC's final climate risk disclosure rule likely will be challenged by litigants seeking to vindicate the First Amendment rights of corporations. These parties will argue that it is not "real" securities disclosure, and therefore should be subject to rigorous First Amendment scrutiny.

Introducing First Amendment scrutiny to securities disclosure would be a radical departure from existing law. It would prevent investors from obtaining decision-useful information that is in high demand, turning the stock market into a judicial construction. And it would create destabilizing uncertainty about which other securities regulations are constitutional. Courts should not impose on the markets their own normative views about what information investors should consider in their decision-making. Though some commentators suggest that courts could (or should) treat securities disclosure as commercial speech, subject to First Amendment scrutiny, this Essay has urged caution. Securities disclosure is not commercial speech. The SEC should not have to defend every existing securities regulation against a First Amendment challenge.

Courts should not apply strict scrutiny to the proposed climate risk disclosure rule, even though it compels disclosure of information related to climate change, which some actors (and some Supreme Court justices) have characterized as "politically controversial." The rule does not require companies to take a position on climate change, and companies remain free to communicate whatever they want on that subject, including objections to the mandatory disclosures and additional details that might cast their own disclosures in a more favorable light. The burden of the proposed rule on companies' free speech rights is small, while investors'

expressive rights (and financial interests) will be significantly impaired if investors are prevented from getting access to basic risk information about their own investments. Based on history and substance, the SEC's climate risk disclosure rule is "real" securities regulation for constitutional purposes.