THE IMPOSSIBILITY OF CORPORATE POLITICAL IDEOLOGY: UPHOLDING SEC CLIMATE DISCLOSURES AGAINST COMPELLED COMMERCIAL SPEECH CHALLENGES

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ABSTRACT—To address the increasingly dire climate crisis, the SEC will require public companies to reveal their business’s environmental impact to the market through climate disclosures. Businesses and states challenged the required disclosures as compelled, politically motivated speech that risks putting First Amendment doctrine into further jeopardy. In the past five years, the U.S. Supreme Court has demonstrated an increased propensity to hear compelled speech cases and rule in favor of litigants claiming First Amendment protection from disclosing information that they disagree with or believe to be a politically charged topic. Dissenting liberal Justices have decried these practices as “weaponizing the First Amendment” to evade government regulation.

The threshold question—whether certain types of speech such as securities regulations implicate the First Amendment—is rarely addressed by the Court and has never been affirmatively decided. Historically, commercial speech (expression by a corporation about an economic transaction) receives lower levels of protection relative to political or individual speech. The Court has held that compelled commercial disclosures of a factual and uncontroversial nature required only rational basis review. The Court, however, has never ruled on protections for corporations when the compelled speech is potentially of a political, rather than purely factual, nature and has continually avoided this question with narrow holdings and carved out exceptions. A First Amendment challenge to climate disclosures would force them to confront it directly.

If the challenges to the SEC climate disclosures reach the Court, it will need to consider its precedents in both commercial and compelled speech cases and incorporate the most applicable First Amendment theory. This Note argues that the compelled speech doctrine is the appropriate First Amendment analysis in deciding whether a corporation can be forced to speak and add more speech to the marketplace. By relying upon compelled speech doctrine and addressing the unnatural fit between speaker rights and corporate law, this Note ultimately concludes that corporations do not have
personal First Amendment rights, and, as a result, climate regulations should only be subject to rational basis review.

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INTRODUCTION

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A cursory glance through recent U.S. news cycles reveals shocking and dangerous trajectories for important yet seemingly unrelated concepts: our climate and our First Amendment doctrine.¹ However, the invisible string between these topics may be getting ever shorter. As the government attempts to address climate change by compelling businesses to speak on and disclose their climate impacts, it risks jeopardizing fundamental doctrines of the First Amendment.

The climate crisis grows increasingly dire. The results of climate change remain devastating: temperatures rise, putting humans and other species at risk, and natural disasters ravage communities at never-before-seen frequencies. Scientists warn that the Earth is nearing its threshold of recovery. They urge people and governments to stop this crisis by making changes immediately. Facing a scientific community in alarm, the United States has taken steps to mitigate climate change’s impacts. One such approach, proposed by the U.S. Securities and Exchange Commission (SEC), requires companies to reveal their climate impact to investors through financial statement disclosures. The hope is that the market will punish unsustainable business practices, and this momentum will force businesses into positive climate actions. The disclosure regulations have sparked controversy as businesses push back on the costs and logistics of implementation. Concerns about free speech have also been raised by those who believe disclosing climate information is forcing a political statement, rather than supplying the market with factual information on economic risk.

The fate of the disclosure requirements is especially concerning given the U.S. Supreme Court’s posture in recent free speech cases. In the past five years, the Court has demonstrated an increased propensity to grant certiorari to cases involving compelled speech, ruling in favor of those claiming protection. In examining the Court’s highly speech-protective opinions, scholars have noted that the majority of the current bench has been willing to engage in a First Amendment battle any time the government attempts to regulate a type of speech. Zealous litigants representing corporate interests have responded by relying on First Amendment theories to challenge laws that regulate subjects at the crossroads of politics and markets, which some

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3 Paddison, supra note 1.

4 Id.

5 See infra notes 27–31 and accompanying text.


describe as “First Amendment Lochnerism.”
8 Liberal Justices in dissent have called out this behavior as “weaponizing the First Amendment.”
9 Recognizing this trend, and in response to the SEC’s final climate disclosure rule, opponents of the rule argue that the First Amendment protects companies from being compelled to speak on and disclose information that they disagree on or believe to be a politically charged topic.
10 Courts will be tasked with untangling a messy area of First Amendment doctrine to resolve challenges brought against the climate disclosures.

Historically, commercial speech (expression by a corporation about an economic transaction) receives less protection than does political or individual speech.

11 The contours of this doctrine remain vague and undefined. The Court has never heard a case to decide the degree of protection for corporations when commercial speech is compelled and potentially of a political, rather than purely factual, nature. Some scholars argue that First Amendment challenges to climate disclosure regulations will be ineffective because the Court views categories of speech as a dichotomy between expressive speech, covered under the First Amendment, and nonexpressive speech used in contracts, antitrust and securities regulation, tax returns, etc., considered outside of First Amendment coverage.

12 As Professor Frederick Schauer commented, however, the Supreme Court rarely addresses the threshold question of whether certain types of speech, such as securities regulation, actually implicate the First Amendment and whether a dichotomy between expressive and nonexpressive speech exists.

13 The Court has never explicitly stated why nonexpressive speech, such as entering into contracts or regulating markets, receives no First Amendment coverage, while other speech, such as civil disobedience, receives great protection.

14 Instead, the Court too often assumes that regulation falls outside the purview of the First Amendment without explanation.

15 Circuit courts’ decisions show that not all courts endorse this binary view of speech, and the current Court may not either.

10 See infra Part I.
11 See infra Section II.A.
12 Shanor & Light, supra note 8, at 2075–76.
14 Id. at 1773.
15 Id. at 1766–67.
16 See infra Section II.C.
The Court’s minimal explanation leaves unsatisfactory “descriptive or explanatory accounts of the existing coverage of the First Amendment.”17 This lack of articulation about the First Amendment’s boundaries, previously assumed but never specifically addressed, creates an opening for challenges to any regulation that a group may find unfavorable.18 If groups convince courts to view their speech as expressive, the courts may be willing to strike down regulations that touch upon the speech. Circuit courts deciding these cases are left without clear direction about how to categorize a given challenge and, subsequently, the appropriate level of scrutiny to apply.

Despite the societal benefits afforded by climate-related disclosure laws, the Supreme Court may consider them compelled expression prohibited by the First Amendment. The Supreme Court has not decided upon or articulated a test for compelled disclosures, and none of the Court’s intentionally narrow holdings about compelled speech, nor commercial speech jurisprudence, will appropriately govern the situation. If the Court takes a case regarding the SEC climate disclosure rule, it must answer a key question: should the First Amendment protect corporations from mandatory quasi-political disclosures at all, and if so, what test should apply?

When faced with questions about compelling commercial speech from corporations, some circuit courts have relied upon the traditional commercial speech jurisprudence. These courts are misguided in attempting to fit compelled commercial disclosures into unrelated commercial speech tests, which focus on expanding the “marketplace of ideas.” Understanding future regulations and applying appropriate speech theories requires a new analysis. This should be driven by the compelled speech doctrine, which focuses on the rights of speakers to only associate with their own values and ideology. By relying upon compelled speech doctrine and addressing the unnatural fit between speaker rights and corporate law, this Note argues that a corporation does not have a personal constitutional right and should not receive heightened First Amendment protection.

Part I of this Note examines the SEC climate disclosure regulations that have led to First Amendment compelled speech challenges. Part II outlines the current state of First Amendment Supreme Court jurisprudence for both commercial speech and compelled speech. Part II also explores how circuit

17 Schauer, supra note 13, at 1785.
courts differ in their opinion of which doctrine and test to use in cases where corporations are being compelled to disclose potentially controversial or political information. Part III concludes that the compelled speech doctrine is more applicable than the commercial speech doctrine to a climate disclosure challenge and finds that this is a novel issue for the Court. Part III also addresses how the Court should approach the question using the speaker-centric values articulated in the Court’s compelled speech jurisprudence. Part III ultimately concludes that a corporation does not have a First Amendment right as a speaker, and, as a result, the SEC climate disclosure rule should only be subject to rational basis review.

I. BACKGROUND ON THE SEC CLIMATE DISCLOSURE RULE

In March 2022, the SEC proposed new disclosure rules requiring public companies to include climate-related information within their registration statements and annual reports (Form 10-Ks). In doing so, the SEC emphasized that these disclosures were important to respond to investors and issuers’ needs by providing environmental impact information. The notice-and-comment periods mandated by the Administrative Procedure Act (APA) drew a great deal of interest and criticism, prompting the SEC to extend the opportunity for interested parties to submit comments. The SEC took two years to release the final rules.

On March 6, 2024, the SEC finally released a final rule requiring registrants to add certain climate change disclosures to their annual reports and registration statements. These changes take effect for the year ending December 31, 2025 for large accelerated filers. The requirements include footnote disclosures related to: “(1) specified financial statement effects of severe weather events and other natural conditions, (2) certain carbon offsets and renewable energy certificates (RECs), and (3) material impacts on

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financial estimates and assumptions that are due to severe weather events and other natural conditions or disclosed climate-related targets or transition plans. Additionally, companies will need to disclose material impacts of climate risks on a company’s “strategy, results of operations, or financial condition,” as well as the controls to mitigate these risks, the governance and oversight of these risks, and targets and goals. Further, large accelerated and accelerated filers must track and disclose material Scope 1 and Scope 2 emissions metrics.

The SEC’s requirements have received pushback from companies, including concerns about the lack of existing resources to implement these new rules and the cost of adding these resources. Within days of the final rule publication, businesses and states filed complaints to challenge the legality of the rules. They also requested an emergency stay of the rules. The complaints pose typical administrative law challenges to the regulations: invoking the major questions doctrine and characterizing the rules as arbitrary and capricious. The complaints additionally presented an argument outside the typical administrative law challenges—a First Amendment compelled speech challenge to required disclosures. Without articulating any reasoning, the Fifth Circuit granted the motion for an administrative stay. The SEC has agreed to stay the rules as litigation plays out. As these cases percolate throughout the circuits, the Supreme Court may be asked to decide the fate of the climate-related disclosures, including

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24 Id.
26 Id.
27 Id.
29 E.g., Complaint, Liberty Energy, Inc. v. SEC, No. 24-60109, 2024 WL 1152283 (5th Cir. Mar. 8, 2024).
30 Id. at *35.
31 Id. at *7–24.
32 Id. at *24–27.
33 Liberty Energy, 2024 WL 1152283, at *1.
considering the First Amendment arguments. The Court has never ruled directly on the constitutionality of compelled securities disclosures nor articulated the appropriate test to assess them. As Part II will explain, this challenge will require the Court to harmonize its commercial and compelled speech precedents and articulate a concise and enduring theory of compelled commercial speech to guide the doctrine going forward.

II. SUPREME COURT JURISPRUDENCE ON COMMERCIAL SPEECH AND COMPelled SPEECH

The Supreme Court has yet to fully define what kinds of speech or disclosures the government can compel from corporations, nor has it established the level of scrutiny for assessing government efforts to compel speech. The Court has also not ruled on a situation where the corporation claims that the disclosure is political, rather than purely factual, which leaves open an avenue for companies to challenge and attempt to evade regulation. If the Court hears a case about the climate disclosures, it will need to consider its precedents in both commercial and compelled speech and incorporate the most applicable First Amendment theory. In doing so, it is essential to understand the rationale underlying the cases decided: why is this speech protected and what democratic values does protecting this speech advance?35

As Professor Robert Post explains, the Court has not articulated a singular First Amendment doctrine.36 The First Amendment “values different kinds of speech for different reasons” and protects them in differing manners in line with their constitutional value.37 For example, political speech is afforded the highest level of protection because of the democratic belief “that debate on public issues should be uninhibited, robust, and wide-open.”38 The reasoning for protections of commercial speech or protections against compelled speech differ slightly. As such, a thorough understanding of both commercial and compelled speech doctrine is necessary to understand why climate disclosures require application of the compelled speech doctrine. Section II.A discusses the commercial speech doctrine and its focus on maintaining a robust speech marketplace for listeners. Section II.B outlines the background and current state of the compelled speech doctrine, including its more individualized focus on protecting speaker choice. Finally, Section II.C demonstrates how the Court’s approach to compelled speech has created

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37 Id. at 871–72.
uncertainty and variance amongst circuit courts—a problem ripe for Court resolution.

A. Listener Focus for Commercial Speech

Commercial speech typically refers to expression that proposes or relates to an economic transaction.\textsuperscript{39} Prior to 1976, commercial speech received no First Amendment protection at all.\textsuperscript{40} Beginning with \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council} (\textit{Virginia Board}) and continuing in the cases outlined below, the Court began to offer some protection, focusing its commercial speech doctrine on the marketplace of ideas\textsuperscript{41} and self-government theories.\textsuperscript{42} In doing so, it only assessed commercial speech regulations with an intermediate level of scrutiny. The Court’s use of intermediate scrutiny indicates a discomfort with fully protecting commercial speech as compared to its treatment of political speech, which receives strict scrutiny protection.\textsuperscript{43} Additionally, the Court’s reasoning has evinced more of a purpose in protecting the consumer’s right to hear the speech, rather than the corporation’s right to speak it at all.

The Court first articulated a theory for protecting commercial speech in \textit{Virginia Board} in 1976. The Court struck down a ban on advertising by

\begin{footnotesize}
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\item[40] Post, \textit{supra} note 36, at 872.
\item[41] The concept of the “marketplace of ideas” originated in Justice Oliver Wendell Holmes’s dissent in \textit{Abrams v. United States} in which he stated that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Scholars have asserted that “[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law.” Joseph Blocher, \textit{Institutions in the Marketplace of Ideas}, 57 DUKE L.J. 821, 824–25 (2008). The concept that speech deserves the upmost protection to advance the exchange and competition of ideas permeates all of First Amendment law. See Daniel E. Ho & Frederick Schauer, \textit{Testing the Marketplace of Ideas}, 90 N.Y.U. L. REV. 1160, 1161 (2015).
\item[42] Alexander Meiklejohn’s democratic self-governance theory of the First Amendment is an extension of the marketplace of ideas theory. However, this theory asserts that the First Amendment guarantees absolute protections “if (and only if) speech is relevant to the people’s self-governing decisions.” Martin H. Redish & Abby Marie Mollen, \textit{Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression}, 103 NW. U. L. REV. 1303, 1311 (2009).
\end{enumerate}
\end{footnotesize}
pharmacists in the name of allowing consumers to gather information.\textsuperscript{44} Its holding rested on the idea that the consumers are best served by having this advertising and product information put forward in the market to facilitate autonomous decision-making.\textsuperscript{45}

The Court outlined a test for when commercial speech should be protected in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (Central Hudson)}, where the Court addressed whether a ban on advertising by electric utility companies in New York State violated the First Amendment.\textsuperscript{46} In asserting why the commercial speech should be protected, the Court emphasized that it “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”\textsuperscript{47} The creation and dissemination of information for consumption by citizens are key in its decision to protect speech.

On the other hand, the Court emphasized a “‘commonsense’ distinction between speech proposing a commercial transaction . . . traditionally subject to government regulation” and other types of speech, such as individual political speech.\textsuperscript{48} As a result of this distinction, commercial speech is afforded a lesser constitutional protection than other types of expression.\textsuperscript{49} Further, the Court stated that since the First Amendment value underlying commercial speech protection rests with the informational value to consumers, there can be no constitutional protection against the “suppression of commercial messages that do not accurately inform the public about lawful activity.”\textsuperscript{50} In order to merit First Amendment protection, communications cannot be misleading or related to unlawful activity.\textsuperscript{51} The government must show a substantial interest in regulation and narrowly tailor the regulation to directly advance this interest.\textsuperscript{52} Even if it meets this interest, regulation of such speech would be assessed with an intermediate level of scrutiny, as opposed to the strict scrutiny used for political speech.\textsuperscript{53}

In laying out this rubric, the Court clearly established that its interest in protecting commercial speech was the promotion of speech and information

\textsuperscript{44} \textit{Virginia Board}, 425 U.S. at 749–50, 773.
\textsuperscript{45} \textit{Id.} at 765.
\textsuperscript{46} 447 U.S. at 559.
\textsuperscript{47} \textit{Id.} at 561–62.
\textsuperscript{48} \textit{Id.} at 562 (quoting \textit{Ohralik v. Ohio State Bar Ass’n}, 436 U.S. 447, 455–56 (1978)).
\textsuperscript{49} \textit{Id.} at 563.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 563–64.
\textsuperscript{52} \textit{Id.} at 564.
\textsuperscript{53} \textit{Id.} at 573 (Blackmun, J., concurring).
in the marketplace for consumers.\textsuperscript{54} The actual interests of the businesses and their desire to advertise were of little consequence to the First Amendment. As scholars such as Professors Amanda Shanor and Sarah Light have pointed out, the scope of the doctrine lies in the goals of public access to commercial information, which is “not found in the nature of corporations but instead by asking whether the public listener is informationally dependent on the commercial speaker and whether the information in question could materially inform the public’s political or economic choices.”\textsuperscript{55} In short, the goals of the commercial speech doctrine cater to listeners, not speakers.\textsuperscript{56}

The Court furthered its commitment to the marketplace of ideas and protecting the dissemination of commercial information in the name of listener rights in later cases. In \textit{First National Bank of Boston v. Bellotti}, banks and businesses challenged a law which prohibited them from making campaign expenditures to influence votes on a ballot referendum.\textsuperscript{57} The Court intentionally avoided addressing whether the bank had its own First Amendment right to project this speech via issue advertisements, saying that the question was not “whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons.”\textsuperscript{58} Instead, its decision turned on whether the statute abridged the type of “expression that the First Amendment was meant to protect.”\textsuperscript{59} The Court answered yes: the law inhibited political arguments made in an open debate of a government issue from reaching residents of Massachusetts.\textsuperscript{60} To the Court, the value of the speech in terms of providing information to the public was not dependent upon the speaker’s identity as an individual or corporation.\textsuperscript{61} Again, the main focus of the Court was on protecting voter ability to hear the argument and giving more information to the listener and the public—regardless of any intention of the corporation.\textsuperscript{62} The Court did

\begin{thebibliography}{9}
\bibitem{Post} Post, supra note 36, at 872–73.
\bibitem{Shanor} Shanor & Light, supra note 8, at 2080.
\bibitem{Id} \textit{Id.} at 2099.
\bibitem{435} 435 U.S. 765, 767 (1978).
\bibitem{Id2} \textit{Id.} at 776; see also William E. Lee, \textit{The Conscience of Corporations and the Right Not to Speak}, 43 \textit{Harv. J.L. & Pub. Pol’y} 155, 170–72 (2020) (recounting that Justice Lewis Powell and his clerk considered framing the issue as whether corporations had the right to speak but eventually avoided the question of corporate self-expression).
\bibitem{Bellotti} \textit{Bellotti}, 435 U.S. at 776.
\bibitem{Id3} \textit{Id.}
\bibitem{Id4} \textit{Id.} at 777.
\end{thebibliography}
not put any weight on whether or not the business itself had its own ideology or interests worth protecting.

The Court continued to expand on the idea of corporations contributing to the marketplace of ideas in *Citizens United v. FEC*. Among other issues, a key inquiry involved whether a ban on corporations making political expenditures violated the First Amendment. In reaching their decision, the Court emphasized that political speech receives the most protection because it allows citizens “to inquire, to hear, to speak, and to use information to reach consensus.” It also reasoned that by restricting which speakers get to disseminate information, the campaign finance regulation on business expenditures deprived the public of being able to determine for themselves which “speech and speakers are worthy of consideration.” The Court emphasized that if the government limits the campaign spending of corporations, then it can prevent these corporations’ viewpoints “from reaching the public and advising voters on which persons or entities are hostile to their interests.”

In striking down the ban, the Court was primarily concerned with political information being removed from the marketplace. Given that corporations cannot vote in elections, and all election information is to influence citizens, the Court’s priority is listener- and citizen-focused. Throughout the Court’s commercial speech cases, an underlying theme emerges: The listener’s ability to access and gather information allows the best ideas to win out in the marketplace. To allow this marketplace to flourish, the Court has demonstrated stringent protection over rights of listeners to receive information, protecting the speakers only as a by-product. The Court’s approach shifts, however, when the speaker’s words are compelled.

**B. Speaker Ideological Focus for Compelled Speech**

Compelled speech refers to a situation where the government requires a speaker to disclose information, associate with an idea, or make a representation. The compelled speech doctrine gives rise to “complications not present when the issue concerns the constitutionality of suppression.” The Court’s line of compelled speech precedent suggests a focus on protecting speakers from being forced into expression that contradicts their

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64 Id. at 339.
65 Id. at 341.
66 Id. at 354.
beliefs and ideology. However, in past cases, especially with commercial aspects, the Court has continually limited its holdings to narrow, fact-specific situations, avoiding the articulation of an overarching doctrinal test. These piecemeal opinions collectively demonstrate the Court’s effort to avoid addressing corporate speech head-on, and, as a result, leave behind a path of confusion and holdings in conflict with one another.

Section II.B.1 discusses the Court’s original foundation for compelled speech as it relates to the individual. Section II.B.2 looks at the Court’s first attempt at addressing compelled commercial speech and its rational basis approach. Section II.B.3 demonstrates how the Court has refused to address corporate speaker rights by avoiding and carving out exceptions to the rational basis test first established for compelled commercial speech.

1. Compelled Speech and the Individual

In the landmark West Virginia State Board of Education v. Barnette decision, the Court stated that the government could not require Jehovah’s Witnesses to salute the American flag because this was “a ceremony so touching matters of opinion and political attitude.”68 Wooley v. Maynard, the quintessential, cornerstone case of compelled speech law, built on Barnette. In Wooley, the plaintiff, a Jehovah’s Witness, was arrested multiple times for covering up the words “Live Free or Die” on his New Hampshire license plate.69 The question before the Court was whether the State could “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private [car license plate] in a manner and for the express purpose that it be observed and read by the public."70 The Court stated that the First Amendment included “both the right to speak freely and the right to refrain from speaking at all.”71 It noted that “[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”72 The issue came down to whether someone could be forced to publicly identify with an ideology or point of view that they find unacceptable.73 The Court then held that people cannot be forced into speech they ideologically disagree with or compelled to endorse beliefs counter to

68 319 U.S. 624, 636, 642 (1943).
70 Id. at 713.
71 Id. at 714.
72 Id.
73 Id. at 715.
their own.\textsuperscript{74} The Court’s reasoning reflects the importance of people’s innate capability to form beliefs and political ideologies of their own.\textsuperscript{75}

Both cases emphasized that the problem with compelled speech is that it forces an \textit{individual} to express ideas that they \textit{personally} and \textit{morally} disagree with. Despite the Court’s assertion of First Amendment protection against forced speech, some uncertainty remained about when and to what speech this would be applied. In both \textit{Wooley} and \textit{Barnette}, the government did not articulate any sort of serious compelling interest to require the speech acts, leaving it unclear what the Court would have ruled with a countervailing compelling interest.\textsuperscript{76}

2. \textit{Commercial Speech and Rational Basis}

In 1985, the Court decided its first compelled commercial speech case in \textit{Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio}. In \textit{Zauderer}, an attorney brought a First Amendment challenge against the state requirement to include disclaimers on advertisements that clients may be liable for litigation costs even if their cases are unsuccessful.\textsuperscript{77} The Court distinguished between the lawyer’s interests in advertising and the plaintiff’s interests in \textit{Wooley}, noting that the attorney’s speech (the advertisements) did not implicate matters of “politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act upon their faith therein.”\textsuperscript{78} Further, as the compelled disclosure was “purely factual and uncontroversial information” about the terms of the attorney–client relationship, the Court reasoned that there was minimal constitutional protection over withholding factual information.\textsuperscript{79} Additionally, emphasis was placed on this compelled commercial speech increasing the flow and availability of information.\textsuperscript{80} The Court further held that the advertisers did not have their First Amendment rights violated when the State’s interest was in preventing deception of consumers, and the regulations were reasonably related to this interest.\textsuperscript{81} The compelled disclosure was also considered to be less disruptive to the business than outright prohibiting advertising.\textsuperscript{82}

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\item \textsuperscript{74} \textit{Id.} at 717.
\item \textsuperscript{75} \textit{See generally} Lee, \textit{supra} note 58 (discussing the Court’s aversion to confronting corporate identity and conscience and the impact on First Amendment rights).
\item \textsuperscript{76} Redish, \textit{supra} note 67, at 1756.
\item \textsuperscript{77} 471 U.S. 626, 650–51 (1985).
\item \textsuperscript{78} \textit{Id.} at 651 (quoting \textit{W. Va. State Bd. of Educ. v. Barnette}, 319 U.S. 624, 642 (1943)).
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} Shanor & Light, \textit{supra} note 8, at 2087.
\item \textsuperscript{81} \textit{Zauderer}, 471 U.S. at 651.
\item \textsuperscript{82} Redish, \textit{supra} note 67, at 1760.
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Zauderer’s reasoning, and the rational basis review, indicated the existence of a weak degree of speaker-based protection for businesses.\(^8^3\) Instead, there was an important interest in disseminating truthful information to the public. The case also left significant gaps, including what the Court would decide if a disclosure was not merely factual or uncontroversial. Additionally, Zauderer was written at the time when commercial speech did not have a great deal of protection, making its precedential value uncertain.\(^8^4\) Some scholars, such as Professor Martin Redish, believe that Zauderer’s doctrinal contribution is the Court’s conditional support for protecting compelled commercial speech.\(^8^5\) If it is to “prevent deceiving consumers in a manner that could result in economic harm” and “only as a less invasive alternative to outright suppression,” compelled commercial speech regulations are permissible.\(^8^6\) However, the rhetoric used to distinguish the advertising in Zauderer from the political speech in Wooley indicated that the Court broadly viewed these types of speech and speakers differently. The Court did not assign the same ideological importance of citizen speech on matters of politics or religion to the business speech in the advertisements. The Court also found the degree of imposition on First Amendment rights was much less when the speech was purely business related, allowing for regulation by the government and subjecting the regulation to only a rational basis level of scrutiny.

The Court’s jurisprudence surrounding compelled commercial speech in Zauderer would suggest an easy path for climate disclosures to survive under First Amendment challenges. However, compelled commercial speech doctrine subsequently grew messier and more complicated with each new case, including two in 2018 and one in 2023. These cases pushed the Court to articulate the underlying First Amendment values and a test to address compelled commercial speech related to regulations, such as disclosures. Instead, the Court opted to jump through hoops in avoidance of the question.

3. Distinguishing and Limiting Zauderer

In 2018, in National Institute of Family & Life Advocates v. Becerra (NIFLA), the Court addressed whether it is constitutional for a state to require pro-life pregnancy clinics to provide patients with information about other options that the State provides, including abortion services.\(^8^7\) The lower

\(^8^3\) Zauderer, 471 U.S. at 651 (“[W]e hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

\(^8^4\) Redish, supra note 67, at 1760.

\(^8^5\) Id. at 1761.

\(^8^6\) Id.

\(^8^7\) 138 S. Ct. 2361, 2368 (2018).
courts found that professional speech (speech by individuals providing personal client services subject to a licensing or regulatory scheme) was subject to a lower degree of scrutiny. The Supreme Court disagreed, rejecting the contention that professional speech was a separate speech category subject to lesser scrutiny. The Court reasoned that, in this case, individuals do not receive less speech protection when they act in their professional rather than personal capacity. The Court avoided addressing any arguments about corporate or organizational identity or ideology by focusing on the professionals as “individuals” and applied a traditional content-based analysis over the regulations. The opinion discussed the “dangers” associated with content-based regulations, “such as the risk that the government is actually seeking to suppress unpopular ideas.”

The Court clarified that two situations exist where professional speech receives lower protection and rational basis review: disclosures of “factual, noncontroversial information” in “commercial speech” (Zauderer), and regulations of professional conduct that “incidentally involve[] speech” (Ohralik). Despite affirming Zauderer’s holding about commercial speech and rational basis review, the Court goes to great lengths to distinguish this case, suggesting that the content of the speech (abortion options) may have been the real driving force, not any speaker’s right. In doing so, NIFLA clarified some of Zauderer’s potentially vague holdings but limited its scope as a result.

The Court noted that Zauderer required that a disclosure cannot be “unjustified or unduly burdensome” but did not provide guidance on how to interpret these terms. The Court discussed the burden the disclosures had on the professional’s business. It was concerned that the notice may draw attention to the government speech rather than the speaker’s message itself, reducing the effectiveness of the speaker’s speech. The NIFLA Court

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88 Id. at 2371.
89 Lee, supra note 58, at 199–200.
90 NIFLA, 138 S. Ct. at 2371–72.
91 Id. at 2371; see also Lee, supra note 58, at 198–99.
92 Lee, supra note 58, at 200.
93 NIFLA, 138 S. Ct. at 2365–66. The Court referred to Ohralik v. Ohio State Bar Ass’n, which held that states could regulate lawyers who attempted to personally solicit accident victims even if there was a speech element involved in this conduct. 436 U.S. 447, 447 (1978).
94 See NIFLA, 138 S. Ct. at 2372.
95 See Andra Lim, Limiting NIFLA, 72 STAN. L. REV. 127, 151 (2020) (explaining how NIFLA may have narrowed Zauderer to only apply when speech is “purely factual” and “uncontroversial”).
96 NIFLA, 138 S. Ct. at 2377.
97 Id. at 2378.
considered the “burdensome” standard to require that a harm be at least “potentially real” and not just hypothetical.98 The Court did not reach the question of what state interest would be sufficient to satisfy a rational basis review.99

The Court also affirmed that Zauderer only applied to “purely factual and uncontroversial information”100 and found abortion services to be “anything but an ‘uncontroversial’ topic.”101 The Court determined that the commercial disclosures about abortion were “controversial” because of the inherently political nature of the topic, not because of any factual disputes. This potentially impacts climate disclosures. As climate change remains a politically charged topic,102 this could lead to its classification as controversial despite the factual evidence supporting climate change.103 The holding in NIFLA, however, still did not fully result in a clear doctrine for general compelled commercial speech disclosures. It left open the question of how to treat corporations (as compared to individuals working as licensed professionals), what the value of the speech in question in a compelled corporate situation is, and what makes speech controversial.

Additionally, the majority and dissent argued about the appropriate methodology for approaching this question. Justice Stephen Breyer’s dissent argued that a values-based approach was the best option, as compared to the majority’s content-based versus content-neutral approach.104 Under this values-based approach, the Court should only employ strict scrutiny when “a value residing at the core of the First Amendment is jeopardized.”105 He stated that the Court should protect government compelled speech, like the abortion disclosures, to allow consumers to access more information.106 The professional’s countervailing interest in withholding such information is

98 Id. at 2377.
99 Id.
100 Id. at 2372.
101 Id.; see also Shanor & Light, supra note 8, at 2088 (arguing that the Court essentially treated the disclosures as “opinion messaging” because of the controversial and debated nature of the topic and did not consider the disclosures to be factual, uncontroversial protected commercial speech).
102 Petitioner challenging the SEC final rule argue that “climate change in general is a politically charged matter” and “whether emissions and climate change are material to corporate performance is a strongly debated political matter.” Complaint, supra note 29, at 24–25.
104 Calvert, supra note 7, at 117.
105 Id.
minimal, as it is purely factual information and not a regulation prescribing anything “orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by words or act their faith.” Justice Breyer finally cautioned that a literal reading of the majority’s opinion would turn all regulation into First Amendment covered speech and could place “much securities law or consumer protection at constitutional risk.”

Janus v. AFSCME, Council 31, decided in the same term as NIFLA, provides further insight into the Court’s approach to compelled speech. In Janus, the Court held that unions infringed upon fundamental free speech rights by compelling nonunion members to pay fees for the union’s collective bargaining action. The majority emphasized that “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning” and violates the First Amendment; compelling a person to subsidize speech, according to Janus, has the same effect. A strong dissent by Justice Elena Kagan chastised the majority’s expansion of First Amendment protections. Echoing Justice Breyer in NIFLA, she cautioned that this holding, which considered union fees to be compelled speech and a First Amendment infringement, threatened to classify all compliance with government regulation as business speech. This would allow for constant First Amendment challenges to regulations, rendering them ineffective. Justice Kagan scolded the majority for allowing the First Amendment to be used as a “sword” to attack “workaday economic and regulatory policy.” She asserted that the “First Amendment was meant for better things” than cutting down economic policy and government regulations.

In both NIFLA and Janus, the dissents argued that the rational basis approach was more appropriate, as in Zauderer. This position, echoed by scholars such as Professor Clay Calvert, suggests that some government compulsion of speech—in “the interest of helping an audience that is confronted with important choices by expanding its knowledge—should not be measured against a heightened test.” Nevertheless, as the Court

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107 Id.
108 Id. at 2380.
110 Id. at 2464.
111 Id. at 2502 (Kagan, J., dissenting).
112 Id.
113 Id. at 2501.
114 Id. at 2502.
115 See Calvert, supra note 7; see also NIFLA v. Becerra, 138 S. Ct. 2361, 2387 (2018) ("There is no reason to subject such laws to heightened scrutiny."); Janus, 138 S. Ct. at 2493–94 ("[T]he Court saw no legitimate managerial interests in compelling its subsidization.").
116 Calvert, supra note 7, at 119.
established limits on Zauderer in NIFLA, it is unlikely that the Court will apply Zauderer’s rational basis test unless the regulation is completely uncontroversial.\textsuperscript{117}

In the 2023 term, the Supreme Court continued its trend of espousing a compelled speech ruling while limiting its holding to the very specific situation at hand. In \textit{303 Creative LLC v. Elenis}, the Court considered whether a State can force a wedding-website designer, a provider of “expressive” services, to cater to same-sex couples in opposition of her religious beliefs.\textsuperscript{118} The opinion’s reasoning clarified that the First Amendment does extend to persons engaging in this expressive conduct, even if they seek a profit in doing so.\textsuperscript{119} The importance to the individual of the right to speak their mind, regardless of the government’s view on their speech, was central to the Court’s holding.\textsuperscript{120} The opinion also emphasized the importance of thought to the Framers in drafting the First Amendment and the “freedom to think as you will and to speak as you think.”\textsuperscript{121} The Court expressed a view that the First Amendment was meant as both a means and an end, and that the Framers’ ultimate goal was to allow freedom for people to test and improve “thinking both as individuals and as a Nation.”\textsuperscript{122} Despite this strong language advancing the understanding that speaker protection constitutes an underlying purpose of the First Amendment, the Court continually reminded that the parties stipulated to the speech here being “expressive.”\textsuperscript{123} While no definition is provided for what constitutes “expressive conduct,” the stipulation to “expressive” indicates a personal, individualized aspect that separates this from a holding affecting corporations. This case maintains the Court’s continued emphasis of the individual in the compelled speech doctrine as established in \textit{Barnette} and \textit{Wooley}, but it does so without resolving the commercial questions left open in Zauderer and NIFLA.

None of the Court’s limited compelled speech holdings have yet articulated the approach for compelled commercial disclosures when they have a potential political aspect. The wide variance in circuit court application discussed in Section II.C demonstrates why the Court will have to reconsider and adopt a new test in this space to determine what First

\textsuperscript{117} See infra Part III.
\textsuperscript{118} 143 S. Ct. 2298, 2309 (2023).
\textsuperscript{119} Id. at 2320.
\textsuperscript{120} Id. at 2312.
\textsuperscript{121} Id. at 2310 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000)).
\textsuperscript{122} Id. at 2310–11.
\textsuperscript{123} Id. at 2309, 2316, 2319.
Amendment protections are available to corporations when facts are “controversial,” or more opinion based, than “factual.”

C. Circuit Court Discord

Given the lack of doctrinal clarity from the Supreme Court on what the government can compel corporations to disclose, circuits courts have struggled to articulate a standard to assess this issue. Circuit courts are split on whether to use the commercial speech doctrine or the compelled speech doctrine as the key test in this situation. Courts are further split on how to apply compelled speech doctrine and the scope of Zauderer.

In the late 2000s, Congress passed the Family Smoking Prevention and Tobacco Control Act, which created a variety of disclosure requirements for tobacco manufacturers, including displaying graphic images of smoking hazards on the packaging. Circuits approached challenges to this law in different ways. The Sixth Circuit applied Central Hudson’s commercial speech test to speech that was nonmisleading and Zauderer to speech that was potentially misleading. The D.C. Circuit in R.J. Reynolds Tobacco Co. v. FDA took the approach that content-based speech regulations are subject to strict scrutiny unless there is an exception. They considered commercial speech to be an exception carved out by the Court for intermediate scrutiny. They rejected using Zauderer, finding that the disclosures were not purely factual or uncontroversial and thus fell outside this test; the D.C. Circuit instead opted to use Central Hudson. Under this standard, they found that the FDA did not present enough evidence to demonstrate how the Act’s objective would accomplish the goal of stopping smoking.

Next, in 2015, the D.C. Circuit decided a case regarding SEC disclosures which required companies to disclose whether their minerals

124 Maggie C. Little, Yes, the FDA Can Make You Say That: Why the FDA’s Proposed Nutrition Facts Label Changes Will Withstand First Amendment Challenges from Food Industry Members, 13 IND. HEALTH L. REV. 233, 246 (2016); see also Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 558 (6th Cir. 2012) (holding that Zauderer was the appropriate standard for use in a case about disclosures).

125 Lim, supra note 95, at 134, 142.

126 Disc. Tobacco City & Lottery, 674 F.3d at 520.

127 Id. at 522–24.


129 Id. at 1212.

130 Id. at 1217. The Ninth Circuit recently followed a similar approach. It found that lack of scientific consensus on the dangers of a chemical rendered a required warning to not be an “uncontroversial proposition” and thus not eligible for a Zauderer exception. The court then applied Central Hudson. Nat’l Ass’n of Wheat Growers v. Bonta, 85 F.4th 1263, 1282 (9th Cir. 2023).

131 R.J. Reynolds Tobacco, 696 F.3d at 1222.
came from conflict regions. The court chose to apply commercial speech doctrine and the Central Hudson test. The SEC acknowledged that the disclosure was for “achieving overall social benefits” rather than “economic or investor protection benefits that [SEC] rules ordinarily strive to achieve.” The D.C. Circuit here considered whether Zauderer should apply to “compelled disclosures that are unconnected to advertising or product labeling at the point of sale.” The court, however, interpreted Zauderer as “confined to advertising, emphatically and, one may infer, intentionally.” Since a disclosure about mineral sourcing was not purely commercial advertising and included a social-benefit component, the court determined the appropriate test to be the more rigorous Central Hudson test.

On the opposite coast, the Ninth Circuit decided a case en banc in 2019 regarding whether San Francisco could require corporations to disclose the negative health risks related to soda on the product’s packaging. Taking a different approach than the D.C. Circuit, the majority held that Zauderer was the “appropriate framework to analyze a First Amendment claim involving compelled commercial speech—even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers.” It did not interpret Zauderer as simply limited to advertising. To determine whether the disclosure is compelled commercial speech, the court applied the following test: “[W]hether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.” The court then found that the required label (which would cover 20% of the packaging) was not justified and unduly burdensome.

However, there was much disagreement in the concurrences about what the correct standard should be. Judge Sandra Segal Ikuta argued that a court should first determine whether the regulation is content based. Her concurrence emphasized NIFLA’s holding that “a government regulation that compels a disclosure . . . is a content-based regulation of speech, which is subject to heightened scrutiny under the First Amendment unless the

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132 Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518, 522 (D.C. Cir. 2015).
133 Id. at 524.
134 Id. at 522 (internal citation and quotations omitted).
135 Id.
136 Id.
137 Id. at 522–24.
138 Am. Beverage Ass’n v. City of San Francisco, 916 F.3d 749, 754 (9th Cir. 2019).
139 Id. at 756.
140 Id. at 756.
141 Id. at 757.
Zauderer exception applies.” Judge Ikuta further explained her interpretation of the Zauderer exception as only applying when the compelled speech is “[1] ‘commercial advertising’ and requires the disclosure of [2] ‘purely factual and [3] uncontroversial information about [4] the terms under which . . . services will be available’” and such disclosures are not “[5] ‘unjustified or [6] unduly burdensome.’” Since Judge Ikuta determined that these disclosures were not purely factual and uncontroversial, she applied intermediate scrutiny. In another concurrence, Judge Morgan Christen argued that the majority skips the first step of Zauderer, which is deciding whether or not the disclosure required is completely factually true. Finally, Judge Jacqueline Nguyen asserts that Central Hudson, and intermediate scrutiny, is the correct test to apply as Zauderer’s rational basis review is intentionally narrow and only applies to speech that is “false, deceptive, or misleading.” This case demonstrates the doctrinal confusion within this area and the need for the Court to establish a clear test and articulate its underlying theory.

These cases highlight the disagreement among circuits, and even judges within circuits, about the appropriate test to address compelled commercial speech and how much First Amendment protection corporations receive. They also have varying characterizations of the criteria for the tests and what First Amendment theories they are grounded in. This circuit split needs to be resolved and clarified by the Supreme Court. The Court will have to examine what the driving factors of the First Amendment theory of the speech in this area are and evaluate speech regulations using a values-based approach. Based on the core tenets of compelled speech jurisprudence beginning with Barnette and Wooley, the analysis should take the form of a speaker-based ideology approach as discussed in Part III.

III. APPLICATION OF COMPELLED SPEECH DOCTRINE

To address a challenge to the SEC climate disclosures, the Court will have to sort out the currently unsettled doctrine around compelled commercial speech. Section III.A addresses why the Court should use the

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142 Id. at 758; see also Lim, supra note 95, at 151 (noting that Judge Ikuta found the Zauderer exception inapplicable and applied intermediate scrutiny).
143 Am. Beverage Ass’n, 916 F.3d at 761–62 (citing NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018)).
144 Id. at 761–62; see also Lim, supra note 95, at 151 (explaining that Judge Ikuta considered the disclosures a “controversial topic” that were “not narrowly tailored enough to survive”).
145 Am. Beverage Ass’n, 916 F.3d at 765 (Christen, J., concurring).
146 Id. at 767–68 (Nguyen, J., concurring); see also Lim, supra note 95, at 152 (noting that Judge Nguyen believed “Zauderer only applies when a compelled disclosure addresses commercial speech that is ‘false, deceptive, or misleading’”).
compelled speech progeny rather than commercial speech. Applying compelled speech doctrine, Section III.B explains why climate disclosures are likely controversial and political enough to be a novel issue that will force the Court to actually confront the question of corporate-speaker rights. Section III.C addresses how the Court should resolve this dilemma using both First Amendment and corporate law to hold that corporations, unlike individuals, do not merit speaker protection against compelled disclosures.

A. Adopting the Ideological, Speaker-Centric Compelled Speech Doctrine for Compelled Commercial Cases

As the Court’s speech cases above demonstrate, two separate and distinct values underlie First Amendment protection of speech. One is a listener-focused marketplace of ideas value. The other is an individual-speaker-focused protection from compelled expression contrary to one’s ideology. The coverage of the First Amendment depends upon the value protected because “[d]ifferent kinds of speech embody different constitutional values, and each kind of speech should receive constitutional protections appropriate to the value it embodies.” The value of the speech, and the associated protection, shifts based on the nature of the challenged speech regulation. The first question that the Court will grapple with is which category the climate disclosures fit into: commercial speech or compelled speech.

As discussed above, the commercial speech doctrine and the Central Hudson test have been applied to SEC disclosures by some circuits. While it is possible that climate disclosures could withstand a Central Hudson challenge if narrowly tailored enough, using that test and a commercial speech focus is misplaced and would be a poor approach for addressing SEC disclosures in the future. Central Hudson discussed whether the government could regulate speech that the business already sought to disseminate. The Court upheld the business’s right to publish its chosen advertisements and ruled against the government in its attempt to silence the advertisements. The focus in Central Hudson was allowing the listeners and consumers to have access to more information to aid in decision-making. The Court’s primary focus was protecting a robust marketplace of ideas. The commercial

147 Post & Shanor, supra note 35, at 181–82.
148 See supra Section II.C.
150 See supra Part II.
152 See supra Part II.
speech protections against suppression are in stark contrast to situations in which the government or the SEC seek to compel additional information or disclosures. In such situations, additional disclosures make more information available to consumers, and the corporation wishes to keep this out of the market and away from consumers. As Professors Shanor and Light explained, the commercial speech doctrine “supports both speech protections and speech regulations that advance the ability of listening consumers to make decisions in their political and economic lives.”  

The commercial speech doctrine “revolve[s] around listeners, not speakers.” As a result, the theories underlying the Central Hudson test, designed to protect and promote more speech, are an unnatural fit in a situation where a company is attempting to withhold speech.

By challenging climate disclosures, corporations ask the Court to focus on their rights as speakers. The appropriate analysis for speaker rights is the compelled speech doctrine, addressing whether a corporation can be forced to speak and to add more speech to the marketplace. As established in Wooley and affirmed recently in 303 Creative, the Court considers the First Amendment value associated with commercial speech to be about the rights of the speaker to identify with or refrain from identifying with certain ideas and ideologies. In a situation where corporations challenge whether they can be forced to create speech on a certain topic that they claim to politically disagree with, this is the value set the Court should use to weigh the corporation’s interest in withholding information against the importance of the speech being compelled.

B. Climate Disclosures Present a Novel Speech Issue for the Court

Once the Court is squarely within the compelled speech arena, it will first need to determine whether prior precedents, namely the current Zauderer test, are determinative such that it will simply apply rational basis. In deciding if Zauderer applies, the Court must decide whether the climate disclosure regulations are factual and uncontroversial, as NIFLA limited the Zauderer test to this type of content. If this were the case, the Court could continue to push the question of whether or not corporations have First Amendment speaker rights down the road. Some scholars, including Shanor and Light, argue that the climate requirements can survive the Zauderer test because the climate disclosures do not become political (or controversial)

153 Shanor & Light, supra note 8, at 2099 (emphasis added); see supra Part II.
154 Shanor & Light, supra note 8, at 2099.
155 See supra Part II.
156 See supra Section II.B.
merely because they fall under “current public debate.” Most commercial products “may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.” They note that this creates a question of line-drawing about commercial versus political and instead propose focusing on whether the “regulation requires disclosure of opinion,” which the purely factual climate requirements would not.

Despite this being a seemingly reasonable approach, the Zauderer test contradicts the Court’s and Justice Clarence Thomas’s opinion in NIFLA, which considered purely factual disclosures about abortion to be controversial because of their political connotations. Critics of environmental, social, and governance (ESG) initiatives, such as Professor Sean Griffith, take this view and believe that when compelled corporate information is considered controversial, it is subject to a higher level of scrutiny. He suggests that although scholars have typically treated securities law with a sort of “constitutional exceptionalism,” the environmental disclosures would not meet the threshold because the goals are outside the SEC’s core mission and do not represent a sufficiently substantial interest to compel such speech.

Griffith contends that many investors concerned with corporate value do not care about these disclosures. Since these disclosures are primarily targeted toward investors trying to build ESG portfolios, Griffith argues that the disclosures are actually not valuable to most investors and the SEC’s mission. He asserts that there is pretext here, meaning that while the SEC claims that the disclosures address financial risk to the companies, they are actually attempting to advance political goals. When the claimed purpose does not match the actual purpose, Griffith says, this creates controversy. The claimed purpose of securities regulations is protecting investors and the public; thus, Griffith contends, that is all SEC regulations should have as their primary goal. He argues that ESG regulations fall short of this goal.

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158 Id.
159 Id. at 2114–15.
162 Id. at 882, 902, 941–42.
163 Id. at 936–37.
164 Id. at 935–38.
165 Id. at 933–34.
166 Id. at 915.
167 Id. at 922.
since their actual purpose lies with social and environmental goals—not just investor protection. He classifies climate information as inherently controversial because it is not exclusively focused on consumer protection and “can plausibly be shown to have some other justification.” He also claims that the “scientific basis of climate change is, at present, poorly understood,” as the “[p]rojections have struggled to predict reality,” which in turn make these topics political, not merely factual.

The Court may agree with this view based on what it has signaled in NIFLA. Issues about climate change often involve cases where the evidence “points to risks, rather than certainties.” Overwhelming and clear evidence supports scientists’ assertions about the dangers of rising temperatures on the planet. As Shanor and Light point out, however, the question of how to address this continues to be debated and unsolved, making it closer to a political issue. Further, the required disclosures include more than quantitative, objective emissions data and also require companies to make qualitative judgments about future risks and business impacts from climate change. This leads to a very murky distinction about whether all climate regulations could be interpreted as factual and uncontroversial.

The Zauderer test is not speech-protective enough to permit the latitude required for appropriate government regulation in the future. If the SEC must defend and litigate every climate change regulation to prove that it is “uncontroversial,” this will stymie the SEC’s ability to operate effectively and provide crucial information for investors. Additionally, a constant fight about whether information is controversial is inconsistent with the protections and values that the First Amendment was intended for, including a robust marketplace of ideas. Instead, the Court should reframe its consideration of the disclosures through the lens of what speakers’ rights and protections should be.

C. Corporations Do Not Have Strongly Protected Speaker Rights

Based on the preceding analyses, a challenge to the SEC climate disclosures requires the Court to finally decide whether corporations themselves can be compelled to speak about controversial or political topics.

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168 See id. at 927–32.
169 Id. at 882.
170 Id. at 929.
171 Id.
172 Shanor & Light, supra note 8, at 2077.
174 Shanor & Light, supra note 8, at 2107.
This should involve an expansion of rational basis review. If it chooses to expand rational basis, the Court must ground its decision in stronger reasoning than simply labeling speech as “factual and uncontroversial” and therefore unproblematic to the First Amendment. Instead, the Court should remain true to the values underlying its compelled speech doctrine. In considering these values and the strength of corporations’ speaker interests, it becomes very difficult for the Court to assert that a corporation is protected by the First Amendment against compelled disclosure.

Acknowledging a First Amendment protection against compelled speech requires the Court to directly endorse the idea that the First Amendment recognizes an individual right for corporations as speakers. Previously, the Court has recognized only limited constitutional rights for corporations.175 It has never offered a general theory for why a corporation has some, but not all, constitutional rights.176 Some scholars have theorized that the difference in treatment lies with a Founding Era distrust of corporations and an understanding that “corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity.”177 Regardless of the reasoning, the Court has clearly asserted that some constitutional rights are “purely personal” and not available to corporations, such as the privilege against self-incrimination.178 Possessing a social, religious, or political ideology and receiving protections against speaking contrary to this ideology should fall into this category of “purely personal” rights.

As the Wooley Court stated, the issue with compelling speech is the imposition of an “ideological point of view that [the speaker] finds unacceptable.”179 The 303 Creative Court furthers this by stating that the essential question to be asked is whether a state can force someone to abandon their conscience and instead speak the state’s message.180 It is impossible for a corporation to have its own ideological point of view or a conscience. As Justice John Paul Stevens stated in his concurring opinion in Citizens United, corporations “have no consciences, no beliefs, no feelings,
no thoughts, no desires” of their own. All ideological ideas that a corporation can profess come from the ideological perspectives of its owners—which are separate from that of the corporation.

Not only can a corporation not possess an ideology, it also cannot express it on its own. Corporations can only speak through representatives, creating “a type of ventriloquist speech.” This ventriloquist speech creates an agency problem, including aligning the interests of all owners and agents (i.e., management). Shareholders, who own the corporation, are generally passive investors; corporate decision-making and control is ceded to management. Shareholders have virtually no ability to influence the speech of the corporation once it is controlled by management.

Management also has “no legitimacy or effective capacity to reconcile” the diverse political and moral beliefs of the corporation’s shareholders. Past a preference for an accession in share value, corporate shareholders possess diverse and heterogeneous noncommercial ideologies, making it impossible for a corporate spokesperson to truly represent these interests. Additionally, most investors are institutions or corporations, both lacking a consistent and human ideology. Further, members of management are bound by law “to advance the corporation’s interests, not their own.” Therefore, asserting the ideology of all corporate shareholders proves impossible and protection of the expression chosen by management runs counter to corporate law.

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181 Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part). Justice Stevens also argued that although corporations make “enormous contributions to our society,” they are not truly societal members with rights to vote or run for office. Id. at 394.


184 Tamara R. Piety, Why Personhood Matters, 30 CONST. COMMENT. 361, 376 (2015); see also Lee, supra note 58, at 209 (indicating that there are significant questions about whether a corporation could assert the beliefs of its shareholders).


187 Id. at 499 (“[T]he vast majority of shares in U.S. public corporations—approximately eighty percent—are primarily owned by institutions, such as pension funds and mutual funds.”).

188 Piety, supra note 185, at 378.

189 Id.
speaker capable of having and expressing political and social beliefs leads to a very unclear and unpersuasive view of speaker rights for the corporation. There can be no potential ideology which rises to the interests advanced in cases such as Wooley and Barnard. Given the lack of true corporate ideology, there would be no compelling interest to protect the speech of the corporation and only an interest in providing more information to the market.

Owners seeking limited liability to actively separate themselves from the corporation intensifies the tension between corporate law and assertion of constitutional rights. As Professor Jonathan Macey and Judge Leo E. Strine Jr. argue, the “entire point of the incorporation process is to permit the creation of a legal entity that is not an association of individuals, but rather a discrete legal entity whose rights and obligations are distinct from those of its creators, investors, managers, and other constituents.” Corporations are merely “legal fiction[s] . . . [which] ha[ve] the attributes the law gives it, no more, no less.” The corporation is not the same as the individual and intentionally so. As opposed to a sole proprietorship, where all is shared by business and owner, someone incorporating a business intentionally “separates herself from the entity and escapes personal responsibility for the entity’s obligations.” As Professor Tamara Piety points out, the concept of looking to the rights of the people who run the corporation is in tension with corporate law, which “permit[s] courts to disregard those human beings behind the corporate form” in the name of limited liability.

This idea of a “corporate veil” shields the shareholders from the company’s debts and liabilities, but it runs counter to the concept of recognizing free speech rights for owners. If the Court looks through the corporations to the rights of individual owners for constitutional rights, it seems logical and fair to also look to owners for liabilities and burdens. A business owner should not be able to have it both ways: they cannot separate themselves from any liability and burden but also reap all the benefits of evading economic and corporate laws by claiming that they are once again a single mind.

Those asserting a First Amendment claim here will likely try to point to Burwell v. Hobby Lobby Stores, Inc. In that case, the Court held that individual owners of closely held corporations did not forfeit their personal protection under the Religious Freedom Restoration Act of 1993 (RFRA)

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191 Macey & Strine, supra note 187, at 453, 454–55 (arguing that affirming corporations’ First Amendment rights to campaign spending in Citizens United ignored important corporate law principles).
192 Piety, supra note 185, at 364–65.
194 Piety, supra note 185, at 374.
195 See Macey & Strine, supra note 187, at 480–82.
because they chose to organize their business as a corporation. The Court, however, was careful to say its holding was “very specific” and was not intended to allow for-profit corporations to “opt out of any law . . . incompatible with their sincerely held religious beliefs.” As the dissent points out, however, corporations could quickly assert religious objections, or similarly free speech objections, to evade regulation.

The dissent also points out that an owner, not a corporation itself, forms the belief set, an idea which Justice Samuel Alito does not disagree with in his majority opinion. Although he states that Congress employed a legal fiction by including corporations as “persons” for this statutory act, he recapitulates that the “purpose of this fiction is to provide [financial] protection for human beings.”

While the opinion states that pursuing maximum profit should not stop individuals from exercising beliefs, the rhetoric all suggests a consistent theme: the humans running the corporation are capable of having ideas and beliefs, but never the corporation itself. He goes so far as to state that this holding does not apply to publicly traded corporations and that it “seems unlikely” that a public company could bring a RFRA claim because of “numerous practical constraints,” including the unlikely nature of stakeholders “agree[ing] to run a corporation under the same religious beliefs.”

At no point does the Court attribute religious or ideological beliefs to the corporate personality itself, nor does it indicate that such beliefs are possible for a publicly held corporation made up of many owners. Instead, the Court decided on narrow statutory, not constitutional, grounds that, through the RFRA, individual owners can make decisions for closely held corporations in line with the owners’ beliefs. Similar to other cases in the compelled commercial speech line, the Court distinguishes the individual as the rightsholder as compared to the actual organization. Any decision invoking the attachment of beliefs to the corporation itself would be disingenuous. Individual beliefs may be implicated for a closely held corporation (made of five or fewer controlling shareholders), but this would be completely unrealistic and unmanageable for a public company.

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196 Burwell, 573 U.S. at 688–91.
197 Id. at 692.
198 Id. at 757.
199 Id. at 751–52.
200 Id. at 706–07.
201 Id. at 710–13.
202 Id. at 717.
subject to the SEC climate disclosures. Extending this rationale past *Burwell* would run contrary to both the structure of publicly held corporations and the law’s treatment of them.

The language used throughout *303 Creative* furthers this gulf between the protections envisioned for individuals versus corporations. In explaining why the speech cannot be compelled, Justice Neil Gorsuch and the Court stated that the “freedom to think and speak is among our inalienable human rights.” While he notes that simply being paid for the speech is not enough to allow it to lose its First Amendment protection, Justice Gorsuch emphasized that the concern is forcing the “artists, speechwriters, and other whose services involve speech, to speak what they do not believe.” This choice of words seems intentional to create separation for the interests of individual artists from large corporate entities.

The Court also continues to emphasize the importance of thought in stating that the First Amendment is meant to foster an environment where all people have freedom to think and speak as they wish, not as the government chooses. This continued emphasis on “thinking” pushes the direction of the jurisprudence in a distinctly human manner. No matter how creative or deceptive a free speech argument for corporation speech becomes, it cannot be argued that the corporation thinks for itself. If this freedom of thought is really what the First Amendment was designed for and what we seek to protect, these protections should be cabined to the humans that they were originally envisioned for. This idea of political freedom should not be abused by stretching it into the corporate sphere.

Based on the values underlying the compelled speech theory, as well as a close read of the *Hobby Lobby* and *303 Creative* cases, no strong overriding First Amendment protection exists for corporations that attempt to evade disclosure requirements by claiming a free speech imposition. A decision to the contrary would not only misapply precedent, but it would also create a frightening future for business regulation in a time when regulation is very much needed. If one business successfully challenged a climate disclosure regulation by labeling it a “controversial” belief that their owners did not agree with, this would allow all businesses to make similar claims whenever they found government regulation inconvenient or a burden upon their bottom line. This would completely undercut the goals of the climate disclosures, which are designed to inform investors about the business’s long-term sustainability and to incentivize businesses to protect the

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204 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2311 (2023) (emphasis added).
205 Id. at 2313.
206 Id. at 2305.
207 Id. at 2322.
environment. Corporations are creatures of government creation and claim the benefits of limited liability and tax protections. It does not follow that a fiction entirely created by government action can then claim a superseding protection from the regulation by that government.

CONCLUSION

Our planet is in a dire state today. The Intergovernmental Panel on Climate Change released a final report in March 2023 emphasizing the degree of destruction from the current path of global warming, including population declines, plant and animal extinctions, and food scarcity. The report presented a glimmer of hope of remaining time to slow the destruction, but only if countries took swift and forceful action. Action includes forcing companies to collect and share their own emissions data and assess future risks to be judged by their investors.

As companies will attempt to use the First Amendment to invalidate climate disclosures, the Court must articulate the theories underlying First Amendment protections and a test to resolve these challenges. Allowing companies to hide behind a weak free speech challenge based on the “ideology” of a corporation is not what the First Amendment was intended to protect. Justice Alito essentially admitted as much in Hobby Lobby by recognizing that it was really the owner’s ideology being put forth—not the company’s. Companies have tried to weasel their way out of ethical business practices in the Lochner era, where they claimed that they should be free to violate and abuse labor regulations in the name of free markets. The scorn that economic substantive due process receives today should eventually attach to compelled commercial speech. That corporations should be free to withhold information from their investors in the name of fictional ideology is absurd, and the Court should not allow businesses to abuse constitutional provisions as fundamental as the First Amendment. As Justice Kagan stated in Janus, the “First Amendment was meant for better things.” The Court should recognize these higher purposes and hold the line before corporations wreak havoc on both First Amendment law and the future of our planet.

208 See Paddison, supra note 1.