No. 24-1522 and all consolidated cases: Nos. 24-1624, 24-1626, 24-1627, 24-1628, 24-1631, 24-1634, 24-1685, and 24-2173

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

State of Iowa, et al.,

Petitioners,

v.

United States Securities and Exchange Commission,

Respondent,

District of Columbia, et al.,

Intervenors.

Petition for Review from an Order of the Securities and Exchange Commission

BRIEF OF AMICI CURIAE FIRST AMENDMENT LEGAL SCHOLARS, IN SUPPORT OF RESPONDENT AND DENYING THE PETITIONS FOR REVIEW

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Interest of Amici Curiae[1]

Amici are a group of legal scholars at leading universities who have dedicated significant attention to the study of the First Amendment. They have an interest in promoting an interpretation of the First Amendment that is consistent with the values and purposes the First Amendment is meant to serve. Amici's names and professional affiliations are set forth in an appendix following the conclusion of this brief.

Introduction

On March 6, 2024, the U.S. Securities and Exchange Commission adopted a new rule requiring public companies to include certain climate-related disclosures in their registration statements and periodic reports. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, and 249) (the "Climate Disclosure Rule" or "Rule"). Behind the Rule is a recognition that climate-related events and conditions may create financial risk for registrants, and that existing disclosures do not adequately protect investors. The Rule seeks to

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

provide investors with more complete and reliable information about the climate-related risks that registrants face, and how registrants are measuring and responding to them.

Securities regulations have long required disclosures in this vein that inform investors' investment and voting decisions. Disclosures of this kind reduce information asymmetries—both among investors and between investors and registrants—allowing all potential investors to better assess and price risk. This, in turn, enables markets to allocate capital more efficiently and productively. Disclosure mandates that protect investors and markets in this way generally do not raise First Amendment concerns because they regulate the exchange of information about securities only incidentally, as part of a broader regulatory scheme aimed at securities dealing. These mandates have not historically drawn First Amendment scrutiny even though they are typically and often necessarily content- or speaker-based. Such distinctions reflect the value of investment-relevant information to investors—not the suppression of disfavored ideas.

The Climate Disclosure Rule falls within this longstanding tradition. The Rule requires registrants to disclose information about the material climate-related risks they face, the impacts of those risks, and how registrants are managing them. In addition, to facilitate investors' assessment of particular types of risk, the Rule requires larger registrants to disclose how much greenhouse gas (GHG) they emit

through their operations and energy use, when those emissions are material to their financial performance or position. It also compels registrants to disclose the financial effects of severe weather events and other natural conditions in a footnote to their audited financial statements. As the administrative record documents, many investors want this information because it bears upon the value of the securities in question, but the information that companies currently provide is inconsistent and often difficult for investors to find or compare across companies. By requiring and standardizing these disclosures, the Rule reduces informational asymmetry and mispricing in the market, thereby promoting market efficiency and stability.

If the Rule triggers First Amendment scrutiny at all, it should be evaluated under the framework that the Supreme Court established in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). Under *Zauderer* and its progeny, laws that compel the disclosure of "purely factual and uncontroversial information" about a commercial good or service are evaluated less stringently than laws that compel other forms of speech. *Zauderer*, 471 U.S. at 651. This is because disclosures of this kind promote the free flow of accurate information to the public about goods and services, furthering the Court's justification for extending the First Amendment protection to commercial speech in the first place. *Id*. The Rule's disclosures satisfy the predicates for *Zauderer* review: they require registrants to disclose factually accurate information about the securities that they

offer to the investing public—not to take a moral or ideological stand on climate change or make some admission of moral culpability.

The Rule satisfies *Zauderer* scrutiny because it is "reasonably related to the State's interest" and does not "unduly burden[]" speech. *Id.* The mandated disclosures directly advance the Commission's longstanding mission of protecting investors and markets by providing investors with information they need to make informed investment and voting decisions. And because registrants otherwise remain free to speak or opine about climate-related issues in any way they wish, the disclosures do not chill registrants' speech. The Rule is therefore not unduly burdensome.

I. Securities disclosure requirements that seek to inform and protect investors do not ordinarily raise First Amendment concerns.

For as long as securities trading has been regulated, disclosure requirements have been an integral part of the nation's regulatory scheme. Well before the passage of the first federal securities laws, states regulated what sellers of securities could say about their companies by prohibiting certain false and misleading speech and by requiring the disclosure of accurate information to inform investors' decision-making. *See* Helen Norton, *What Twenty-First Century Free Speech Law Means for Securities Regulation*, 99 Notre Dame L. Rev. 97, 128–30 (2023) (tracing the history of mandatory securities disclosure in the U.S. to at least 1846, and the history of similar requirements in England to even earlier). In the Securities Act of 1933 and

Securities Exchange Act of 1934, Congress vested the Securities Exchange Commission with broad authority to compel disclosures "as necessary or appropriate in the public interest or for the protection of investors." Securities Exchange Act of 1934 §§ 12(b), 14(a), 15 U.S.C. §§ 78l, 78n; Securities Act of 1933 §§ 7, 10(c), 15 U.S.C. §§ 77g, 77j(c); *see also* Exchange Act § 13(a). And, as explained further below, in the ninety years since, the Commission has regularly mandated general and specific disclosures on a broad range of topics, from executive compensation to environmental risks. *See infra* Part II.

The main purpose of federal securities disclosure requirements is to protect investors from information asymmetries, and capital markets from inefficiency and instability. *See, e.g.*, Securities Act § 2(b); Exchange Act §§ 14(a)(1), 23(a)(2); *see also* Cynthia A. Williams, *The SEC and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1209–10 (1999). Disclosure reduces information asymmetries among investors, and between investors and the issuers of securities, by arming all potential investors with information that is relevant to investment and voting decisions. *See, e.g.*, S. Rep. No. 73-47, at 1 (1933) (explaining that "[t]he basic policy [of the Act] is that of informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce"); *see also* S. Rep. No. 73-792, at 12 (1934) (noting the importance of ensuring shareholders' "adequate knowledge" of "the financial condition of the corporation, . . . [and] the major questions of policy, which

are decided at [shareholders'] meetings."). Addressing information asymmetries, in turn, promotes market efficiency and stability by empowering investors to better assess and price risk. *See, e.g.*, H.R. Rep. No. 73-1383, at 11 (1934); *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 186 (1963).

Disclosure requirements that play this role generally do not raise First Amendment concerns because they regulate the exchange of information about securities not directly, but rather incidentally, as part of a broader regulatory scheme aimed at securities dealing. As the Supreme Court has repeatedly explained, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *accord Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 769 (2018); *cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968). This is especially true when a restriction is part of a finely reticulated regulatory scheme. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (citing antitrust laws as an example); *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997) (upholding a compelled subsidy for speech in the context of a broader regulatory system). Thus, in *SEC v. Wall Street Publishing Institute*, the D.C. Circuit observed that the federal government's power to impose securities disclosure requirements on public companies derives from its "broad powers" to regulate securities markets. 851 F.2d 365, 372 (D.C. Cir. 1988); *see also Bangor &*

A. R. Co. v. Interstate Com. Comm'n, 574 F.2d 1096, 1107 (1st Cir. 1978) (similar). Where the government "extensively regulates a field of economic activity," the court explained, "communication of the regulated parties often bears directly on the particular economic objectives sought," and "regulation of such communications has been upheld." *Wall St. Publ'g Inst.*, 851 F.2d at 373 (internal citations omitted).[2]

Although the Supreme Court has not decided to the issue, it has repeatedly suggested that regulating the exchange of information about securities is compatible with the First Amendment. For example, in *Ohralik v. Ohio State Bar Association*, the Court observed that "[n]umerous examples can be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, [and] corporate proxy statements," and that "[e]ach of these examples demonstrates 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." 436 U.S. 447, 456 (1978) (cleaned up); *accord Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 n.5 (1985) (plurality opinion).

[2] As the court acknowledged, a securities disclosure requirement might nevertheless raise First Amendment concerns if it "poses the danger that 'speech deserving of greater constitutional protection [will] be inadvertently suppressed.'" *See Wall St. Publ'g Inst.*, 851 F.2d at 374 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring)). The Rule, however, does not pose that danger. *See infra* Part IV (explaining that the Rule does not chill protected speech).

Similarly, in *Paris Adult Theatre I v. Slaton*, the Court remarked: "[N]either 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. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." 413 U.S. 49, 64 (1973) (internal citation omitted).

Indeed, historically, disclosure mandates that seek to inform and protect investors have not drawn First Amendment scrutiny. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1778 (2004); Norton, *supra*, at 100. Although mandates of this kind have, from the very beginning, drawn content- and speaker-based distinctions, Norton, *supra*, at 130; *see also City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 79 (2022) (Breyer, J., concurring), courts have generally not deemed this a sufficient reason for applying heightened scrutiny—and for good reason. These distinctions are unavoidable, as any compelled commercial disclosure requirement will apply only to certain information and to certain companies. And, in this context in particular, they are "*compelled* by the historical rationales" of securities regulation, which are to inform and protect investors who depend on registrants for investment-relevant information and to protect capital markets from inefficiency and instability. *Vidal v. Elster*, 602 U.S. 286, 299–300 (2024) (emphasis added) (finding that this feature of trademark law,

together with trademark protection's longstanding coexistence with the First Amendment, counseled against the application of heightened scrutiny to content-based, but viewpoint-neutral, trademark restrictions); *id.* at 316 (Barrett, J., concurring in part) (similar); *see also* Norton, *supra*, at 130 (observing that securities regulation "necessarily" draws content- and speaker-based distinctions "because those distinctions are relevant to the expression's potential for harm and value").

II. The Climate Disclosure Rule falls within the tradition of securities disclosure requirements that do not raise First Amendment concerns.

Since its creation in 1934, the Commission has regularly mandated disclosures to protect investors from the emerging risks and concerns of the day. These disclosures have covered a wide array of topics, including executive compensation, related-party transactions, and environmental regulation. 89 Fed. Reg. at 21,683–85 (describing this history in detail). For example, in 2014, the Commission adopted a rule requiring the disclosure of information about asset-backed securities because "the financial crisis highlighted that investors and other participants in the securitization market did not have the necessary information and time to be able to fully assess the risks underlying asset-backed securities and did not value asset-backed securities properly or accurately." Asset-Backed Securities Disclosure and Registration, 79 Fed. Reg. 57,184, 57,186 (Sept. 24, 2014). And in 2020, the Commission adopted a rule requiring companies to disclose detailed information about their workforces in the recognition that "human capital accounts for and drives

long-term business value much more so than it did 30 years ago." Remarks of Chair Jay Clayton, Modernizing the Framework for Business, Legal Proceedings and Risk Factor Disclosures (Aug. 26, 2020), https://perma.cc/R3DF-MJXF.

The Climate Disclosure Rule falls squarely within this tradition because it mandates the disclosure of factual and accurate information that is relevant to investors' valuation of securities and voting decisions. Broadly speaking, the Rule requires a registrant to disclose the following:

1. Any climate-related risks that have had or are reasonably likely to have a material impact on its operations, strategy, or financial prospects, and the actual and potential material impacts of any identified risks on its business strategy, model, and outlook. 89 Fed. Reg. at 21,687–710. For example, if a registrant determines that floods are reasonably likely to substantially disrupt its operations in the next twelve months, it must disclose that fact, along with the location and nature of the exposed operations. And if a registrant uses a scenario analysis to assess its exposure to that risk, it must disclose that analysis. This requirement helps investors understand a registrant's own assessment of the material climate-related risks it faces. *Id.* at 21,852.[3]

2. Any governance and processes used by the company to manage climate-related risks. *Id.* at 21,710–20. For example, if a registrant has climate-related targets or goals, the registrant must disclose whether and how its board of directors oversees progress toward those targets or goals. *Id.* at 21,716. This disclosure is intended to improve investors' ability to evaluate a registrant's overall management of climate-related risks. *Id.* at 21,712.

[3] "Climate-related risk" is defined to mean "the actual or potential negative impacts of climate-related conditions and events on a registrant's business, results of operations, or financial condition," and includes both physical risks (i.e., risks that relate to weather events and trends) and transition risks (i.e., risks that relate to a transition to a low-carbon economy). *Id.* at 21,692.

3. Any material climate-related targets or goals, the registrant's plans for achieving those targets or goals, and its annual progress towards those goals. *Id.* at 21,720–26. For example, if a registrant has publicly announced that it will achieve net zero emissions by 2045, it must disclose this goal and any progress it has made towards it in its annual filings. This disclosure helps investors assess a registrant's commitment to achieving its climate-related goals. *Id.* at 21,856–57.

4. GHG emissions metrics. Larger registrants must disclose direct emissions and emissions associated with energy purchases, when those emissions are material, together with an independent attestation report. *Id.* at 21,726–72. This requirement seeks to empower investors to assess a registrant's exposure to and management of transition risks as well as progress towards its own climate-related goals, if any. *Id.* at 21,732.

5. The financial statement effects of severe weather events and other natural conditions. *Id.* at 21,776–817. For example, if a registrant suffers material financial losses because its factories are damaged by flooding or wildfires, it must disclose those losses in a footnote to its audited financial statement. This requirement helps investors evaluate a registrant's exposure to physical risks. *Id.* at 21,779.

As the administrative record explains, investors need this information to make informed investment and voting decisions. Climate-related risks can affect a company's financial performance and position in myriad ways. *Id.* at 21,672. "Climate-related natural disasters can damage issuers' assets, disrupt their operations, and increase their costs." *Id.* Market trends such as shifting consumer preferences may reduce demand for carbon-intensive products. *Id.* And changes in law and policy may prompt companies to transition to lower carbon products and practices. *Id.* An increasing number of investors "consider information about [these] risks to be important to their decision-making," *id.* at 21,685, but existing disclosures

are "fragmented and difficult for investors to compare across companies or reporting periods," *id.* at 21,670. The Rule seeks to "reduce information asymmetry" among investors, and between investors and registrants, thereby enabling climate-related risks "to be more fully incorporated into securities prices." *Id.* at 21,830.

III. At most, the Rule should be evaluated under *Zauderer*'s lenient standard of review.

If the Rule triggers First Amendment scrutiny at all, it should be evaluated under the framework that the Supreme Court established in *Zauderer*. In *Zauderer*, the Court upheld a rule that required lawyers who advertised their services on a contingency-fee basis to disclose that clients could be required to pay fees and costs. 471 U.S. at 650–53. The Court acknowledged that the disclosure requirement required attorneys "to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650. But, it observed, the disclosure was limited to "purely factual and uncontroversial information about the terms under which [the attorney's] services will be available." *Id.* at 650–51. And an attorney's constitutionally protected interest in withholding this information was "minimal" because the First Amendment's "protection [of] commercial speech is justified principally by the value to consumers of the information such speech provides." *Id.* at 651. The Court therefore concluded that while "unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," "an advertiser's rights are adequately protected so long as disclosure

requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

Although *Zauderer* itself concerned a law intended to address consumer deception in commercial advertising, its reasoning applies more broadly, as the Supreme Court reaffirmed just this term. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2398 (2024) (directing courts on remand to apply *Zauderer* to state laws that require a social media platform to give reasons to a user if it removes or alters their posts); *id.* at 2439 (Alito J., concurring).[4] In fact, the Court has long presumed that *Zauderer* applies not just to advertising, but also to "disclosures about commercial products" more generally. *See NIFLA*, 585 U.S. at 775 ("[W]e do not question the legality of health and safety warnings long considered permissible."); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 n.12 (1986) ("The State, of course, has substantial leeway in determining appropriate disclosure requirements for business corporations." (citing *Zauderer*, 471 U.S. at 651)). And although the Eighth Circuit has not had occasion to consider the question, every other federal court of appeals to address the issue has recognized as much. *See CTIA – The*

[4] In doing so, the Court implicitly rejected NetChoice's argument that *Zauderer* does not apply outside "the context of correcting misleading advertising." NetChoice Reply Br. 22, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024) (No. 22-277), 2024 WL 693684; NetChoice Br. 16, *NetChoice, LLC v. Paxton*, 144 S. Ct. 2383 (2024) (No. 22-555), 2023 WL 8437869.

Wireless Ass'n v. City of Berkeley (*CTIA*), 928 F.3d 832, 844 (9th Cir. 2019) (collecting cases).

This conclusion is supported by *Zauderer* itself, which recognized that compelled commercial disclosures serve the principal justification for "[extending] First Amendment protection to commercial speech" in the first instance—"the value to consumers of the information such speech provides." 471 U.S. at 651. This rationale applies to any disclosure requirement that facilitates the free flow of accurate commercial information—not merely to requirements that would prevent misleading advertising. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal."); *Am. Meat Inst. v. U.S. Dep't of Agric.* (*AMI*), 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (similar).

It follows that the Rule is subject to *Zauderer* scrutiny so long as it requires the disclosure of factual and uncontroversial information about the regulated entity's goods or services. It does.

To be factual, a disclosure must communicate a statement of fact, not subjective opinion. *See Zauderer*, 471 U.S. at 651. Each of the Rule's disclosure requirements meets this standard. They require companies to disclose relevant facts about their own activities: what material climate-related risks they face, if any; how

they are accounting for those risks, if at all, in their financials; how are they meeting any climate-related targets or goals; and how much GHG they emit in their operations. A registrant could conclude that they do not face any material climate-related risks and still be in compliance. That the Rule requires companies to disclose their determinations about *future* risks does not make the disclosures non-factual. *Cf.* Nat'l Legal & Pol'y Ctr. Br. 55; Chamber of Com. of U.S. Br. 60. The Rule merely "requires that management evaluate the consequences of [climate-related] risk as it would any known trend, demand, commitment, event, or uncertainty," that is, by making "an objective evaluation, based on materiality." 89 Fed. Reg at 21,696. Other disclosure requirements, such as those relating to market risk, also require registrants to convey "complex information about uncertain future risks." *Id.* at 21,855 n.2800; *see also id.* at 21,810 (making similar observation about financial statement disclosures). Ultimately, what companies are being asked to disclose is "information supported by the facts" and "conclusions driven by those facts"— not "unfalsifiable" opinions. *R J Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 878 (5th Cir. 2024).

Factual statements of this kind are generally considered "uncontroversial" so long as there is no "disagree[ment] with the truth of the facts required to be disclosed." *AMI*, 760 F.3d at 27; *R J Reynolds*, 96 F.4th at 881; *see also Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 249–50 (2010) (concluding that the

challenged mandate shared "the essential features of the rule at issue in *Zauderer*" where it involved "only an accurate statement" of "factual information"). For example, in *AMI*, the D.C. Circuit treated as uncontroversial a purely factual statement about the national origin of meat, *AMI*, 760 F.3d at 27, even though that statement arguably involved a controversial issue, *see Nat'l Ass'n of Mfrs. v. SEC* (*NAM*), 800 F.3d 518, 529 (D.C. Cir. 2015). And in *NetChoice*, the Supreme Court treated as uncontroversial state requirements that social media platforms explain content take-downs and demotions—again, a topic that is highly politicized in today's public discourse. 144 S. Ct. at 2399 n.3; *id.* 2439 (Alito, J., concurring).

As these cases demonstrate, a statement of fact does not become controversial merely because it "can be tied in some way to a controversial issue" or because a listener may rely on it to form an opinion. *CTIA*, 928 F.3d at 845; *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 n.5 (1980) (finding that commercial speech that "links a product to current public debate" is not entitled to greater protection because "many, if not most, products may be tied to public concerns"). Petitioners point to *NIFLA* and the D.C. Circuit's decision in *NAM*, but those cases do not say otherwise. *Cf.* Nat'l Legal and Pol'y Ctr. Br. 55; Chamber of Com. of U.S. Br. 64. In *NIFLA*, the Court found controversial a requirement that clinics, whose purpose it was to oppose abortion, disclose information about state-sponsored services including abortion—a message

that was "fundamentally at odds with [their] mission." *CTIA*, 928 F.3d at 845.[5] And in *NAM*, the D.C. Circuit considered "ideological" a requirement that companies state on their websites whether their products were "DRC conflict free," a label the court believed "convey[ed] moral responsibility for the Congo war" and was tantamount to "compelling an issuer to confess blood on its hands." 800 F.3d at 530.

The Rule does not require registrants to convey any such thing. Although the general issue of climate change might be controversial, the Rule does not force companies to convey a message to which they are morally or religiously opposed, or to make an admission of moral culpability. It simply requires registrants to disclose facts about their business that they themselves have determined to be material. For example, have they identified climate-related risks that will materially impact their operations in the next twelve months or beyond? And, if so, will those risks materially impact their business strategy or model? These disclosures do not require companies to take a moral or ideological stand on climate change, to take steps to reduce their GHG emissions, or to engage in any other mitigation activities. In fact, they do not require registrants to opine on the issue of climate change *at all*. They require registrants to disclose information about climate-related, *not* climate-

[5] The requirement also "in no way relate[d] to the services that [the] clinics provide." *NIFLA*, 585 U.S. at 769; *cf. Zauderer*, 471 U.S. at 651 (requiring disclosures to concern the regulated party's products or services).

change–related, risks. *See* 89 Fed. Reg. at 21,692 (defining "climate-related risk" as the "actual or potential negative impacts of climate-related conditions and events on a registrant[]"); *id.* at 21,799 (explaining that registrants need not determine where a severe weather event or other natural condition "was, in fact, caused by climate change").

That some registrants do not believe climate change is happening or else oppose regulation to mitigate it is therefore beside the point. Every disclosure requirement ultimately upheld in the courts had its opponents, as did the disclosure at issue in *Zauderer* itself. For example, when *Zauderer* was decided, "the bar [was] hopelessly divided on the issue of *any* advertising" by lawyers. Dorothy Virginia Kibler, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision*, 65 N.C. L. Rev. 170, 193 (1986). As the Fifth Circuit recently put it, "[i]f mere dislike sufficed, the government could never compel any disclosure." *R J Reynolds*, 96 F.4th at 881 n.58. What matters for the purposes of *Zauderer*'s non-controversiality requirement is that the information is "factually straightforward, evenhanded, and readily understood." *AMI*, 760 F.3d at 34 (Kavanaugh J., concurring) (finding the requirement easily satisfied in those circumstances). The Rule's disclosures meet this description. Of course, investors may decide that registrants' disclosures reveal poor management

or investment risk, but this is the very purpose of securities disclosures requirements.[6]

IV. The Rule satisfies *Zauderer* review.

Under *Zauderer*'s deferential standard of review, compelled disclosures of commercial information are constitutional so long as they are "reasonably related to the State's interest" and not "unduly burdensome." *Zauderer*, 471 U.S. at 651. The Climate Disclosure Rule easily satisfies these requirements. The Rule is reasonably related to the Commission's longstanding mission of protecting investors and markets by providing investors with the information they need to assess registrants' financial conditions. And the Rule is not unduly burdensome because it does not chill registrants' protected speech.

A. The Rule is reasonably related to the Commission's interest in protecting investors and markets.

The Commission asserts an interest in "'making capital markets more open and efficient' by giving 'all investors equal access to all relevant information.'" SEC Br. 107 (quoting *United States v. Wenger*, 427 F.3d 840, 850–51 (10th Cir. 2005));

[6] Little surprise, then, that courts have routinely concluded that similar SEC disclosures attract *Zauderer* scrutiny. *See, e.g.*, *Chamber of Com. v. SEC*, 85 F.4th 760, 769 (5th Cir. 2023) (requirement that issuers disclose rationale for stock buybacks); *United States v. Wenger*, 427 F.3d 840, 848–51 (10th Cir. 2005) (requirement that persons promoting or publicizing stock for compensation disclose that fact along with the amount of payments received).

see also 89 Fed. Reg. 21,671 (describing the Commission's mission to protect investors, maintain market efficiency, and promote capital formation). There can be no real doubt that this interest is sufficiently strong. In *Chamber of Commerce v. SEC*, for example, the Fifth Circuit concluded that the Commission's interest "in promoting the free flow of commercial information" was "more than enough" to justify a requirement compelling registrants to disclose their reasons for stock buybacks. 85 F.4th 760, 771 (5th Cir. 2023). There, the SEC sought to address a "supposed asymmetry in information surrounding the reasons issuers repurchase their shares," so that investors could better "evaluate whether a share repurchase was intended to increase the value of the issuer or, instead, represented an inefficient deployment of capital." *Id*. So too, here: by adopting the Rule, the Commission seeks to reduce an information asymmetry surrounding the climate-related risks that registrants face, so that investors may better evaluate the impact of those risks and how registrants are measuring and responding to them. 89 Fed. Reg. at 21,673. The Commission believes that giving investors this information will result in "[m]ore efficient prices," and, for some registrants, increased capital formation. *Id.* at 21,888.[7]

[7] The Ninth Circuit has held that the government interest justifying a compelled disclosure must be "substantial—that is, more than trivial." *See CTIA*, 928 F.3d at 844. Other courts have held that an interest need only be "legitimate." *R J Reynolds*, 96 F.4th at 885; *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 540 (D.C. Cir. 2020). Although this Court and the Supreme Court have not yet resolved that question, the

Petitioners are therefore misguided in arguing that "consumer curiosity" is not a strong enough state interest to sustain the Rule. *See* Liberty Energy Br. 58–59 (citing *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (finding that "consumer interest" was not an adequate justification under *Central Hudson*, where the state disclaimed health or safety motivations for a labeling requirement)); Chamber of Com. of U.S. Br. 61–62 (same). Even assuming that Petitioners are correct that "consumer curiosity" is not sufficient under *Zauderer*, this principle has no bearing here: the Commission does not seek to satisfy mere consumer interest, but rather to facilitate its longstanding mission of investor protection and market integrity by equipping investors with the information they need to evaluate registrants' financial condition. *See AMI*, 760 F.3d at 23 (historical pedigree of country-of-origin information "lift[ed] [the disclosure] well above 'idle curiosity'"); *see also id.* at 32 (Kavanaugh, J., concurring) (similar); *Am. Hosp. Ass'n v. Azar* (*AHA*), 983 F.3d 528, 540 (D.C. Cir. 2020) (disclosure furthered legitimate government interest in "promoting price transparency and lowering healthcare costs"); *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 115 (describing as "significant" the government's interest in "better inform[ing] consumers about the products they purchase" as part of an "overall goal . . . to reduce the amount of mercury released

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Commission's interest easily satisfies the Ninth Circuit's standard. *See Wenger*, 427 F.3d at 850 (describing Commission's interest as "substantial").

into the environment"). This is an important objective that goes far beyond gratifying idle curiosity.[8]

The Rule also furthers the Commission's interest in a reasonable way. *See CTIA*, 928 F.3d at 845. As the administrative record explains, institutional and retail investors find much "voluntary climate-related reporting to be lacking in quality and completeness and difficult to compare." 89 Fed. Reg. at 21,680. Climate-related information is often provided outside of Commission filings and, as such, is not necessarily prepared with the interests of investors in mind. *Id.* Such information is also not subject to the Commission's standard disclosure controls and procedures, making it less reliable. *Id.* In other words, the Commission has identified a gap in investment-relevant information being provided to investors, and the Rule fills that gap by requiring disclosure of such information. *See United States v. Wenger*, 427 F.3d 840, 851 (10th Cir. 2005) (holding that a rule requiring those paid to promote securities to disclose the amount of compensation they received was reasonably

[8] Although this Court should conclude that the Commission's stated interest is sufficient under *Zauderer*, it is worth noting that the Commission has also explained why many parts of the Rule are designed to prevent consumer deception, the precise justification sustained in *Zauderer*. These include the requirement that larger registrants file reports attesting to the accuracy of their GHG emission disclosures, 89 Fed. Reg. at 21,738 n.1089, the requirement that registrants provide "contextual information" describing the assumptions and policy decisions that form the basis of certain financial statement disclosures, *id.* at 21,811, and the requirement that registrants disclose "any progress made" toward their material climate-related goals and targets to mitigate the risk of "greenwashing," *id.* at 21,856.

related to the Commission's interest in "promoting capital markets"); *Chamber of Com.*, 85 F.4th at 771 (holding that a rule requiring registrants to disclose the rationale for share buybacks was reasonably related to the Commission's interest in that case).

For essentially the same reasons, the Commission has demonstrated that the Rule addresses a harm that is "real[,] not purely hypothetical," and that it extends "no broader than reasonably necessary." *NIFLA*, 585 U.S. at 776 (internal citations omitted). The Commission's documentation of a currently existing gap in necessary investor information, *see* 89 Fed. Reg. at 21,679–80, establishes a harm that is real, rather than speculative. And because the agency has responded to that harm by compelling speech that "relates directly to alleviating the information asymmetry" it has identified, the Rule "reaches no broader than necessary." *Chamber of Com.*, 85 F. 4th at 771.

This direct relationship between ends and means makes the Rule categorically unlike the conflict-mining rule invalidated in *NAM*, which required companies to disclose whether their products were "DRC conflict free." 800 F.3d at 518. In that case, a divided panel of the D.C. Circuit assumed that the Commission's stated interest of "ameliorating the humanitarian crisis in the DRC" would be sufficient under *Zauderer*, but found that the rule would fail *Zauderer*'s "reasonably related" test because neither the Commission nor Congress demonstrated that the rule was

likely to be "effective[]" in "achieving" that interest. *Id.* at 524–25. The court reasoned that the idea that the disclosure "will decrease the revenue of armed groups in the DRC and [that] their loss of revenue will end or at least diminish the humanitarian crisis there" was "entirely unproven and rests on pure speculation." *Id.* at 525. Even if the Court agrees with the panel's reasoning in *NAM*, the disclosures at issue in this case are much more tightly connected to the Commission's interest, in large part because that interest *is* in the "economic or investor protection benefits that [the Commission's] rules ordinarily strive to achieve." *Id*. at 521; *see also Chamber of Com.*, 85 F.4th at 771; *AHA*, 983 F.3d at 540–41 (explaining that strict "evidentiary parsing" is not required when "the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait" (cleaned up)). [9]

B. The Rule does not unduly burden speech.

The Rule does not unduly burden registrants in the relevant sense—that is, the Rule does not chill or drown out registrants' protected speech. *See Zauderer*, 471 U.S. at 651; *NetChoice*, 144 S. Ct. at 2439 (Alito, J., concurring). The *Zauderer* inquiry typically does not ask whether the cost of producing or compiling information is itself unduly burdensome; those costs are relevant only if they are so

[9] Because the *NAM* panel concluded that *Zauderer* did not apply, its application of *Zauderer* was an "alternative ground for [its] decision." *NAM*, 800 F.3d at 524.

great that the disclosure scheme "essentially operates as a restriction on constitutionally protected speech." *AMI*, 760 F.3d at 27; *see also AHA*, 983 F.3d at 541 (making clear that a petitioner "must demonstrate a burden on *speech*" rather than a financial one). In *AMI*, for example, the D.C. Circuit noted that the country-of-origin labeling rule was "of great concern to plaintiffs because of its cost implications," 760 F.3d at 20—the plaintiffs would have to segregate livestock in order to comply with the rule. In its undue-burden analysis, however, the court did not mention these costs, considering only whether there was evidence that the requirement had chilled plaintiffs' protected speech, *id.* at 27.

Petitioners have not shown that the Rule unduly burdens their expression. The Rule requires that registrants include certain factual climate-related information in Commission filings, including registration statements, annual and quarterly reports, and financial statements. 89 Fed. Reg. at 21,675–76. Nothing in the Rule would require registrants "to endorse a particular viewpoint." *AHA*, 983 F.3d at 541. For example, if a registrant has no climate-related goals or targets in place, it need not espouse climate-related goals or targets in order to comply with the Rule. The Rule also requires some disclosures about corporate board governance of climate-related issues; if a registrant does not have a board committee or subcommittee dedicated to overseeing climate-related risks, it need not create one to comply with the rule. Likewise, nothing in the Rule would prevent registrants "from adding their own

message" about climate change, climate-related risks, or climate-related opportunities outside of Commission filings. Registrants remain unconstrained in their ability to discuss, advocate for, and advertise around climate-related issues. *See AHA*, 983 F.3d at 541; *Md. Shall Issue, Inc. v. Anne Arundel Cnty.*, 91 F.4th 238, 251 (4th Cir. 2024) (finding that disclosures were not unduly burdensome because they would not "commandeer or overwhelm any message that the gun dealers would wish to make to gun purchasers"), *petition for cert. docketed*, No. 23-1225 (U.S. May 21, 2024). Because the Rule "compels speech solely within the narrow confines of SEC filings," it is not the type of disclosure that raises concerns about chilling "protected commercial speech." *Chamber of Com.*, 85 F.4th at 772.[10]

Conclusion

For these reasons, the Court should conclude that the Climate Disclosure Rule does not violate the First Amendment.

[10] In response to the Rule's disclosure requirements, some registrants may refrain from "greenwashing"—that is, the practice of falsely conveying to investors the perception that they are taking meaningful action towards climate-related targets or goals. But that is not a burden on protected speech. *Cent. Hudson*, 447 U.S. at 563 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."); *see also Zauderer*, 471 U.S. at 638. Indeed, *Zauderer* itself involved a disclosure requirement that sought to remedy misleading advertising, and courts have routinely upheld similar mandates since. *See supra* Part III; *see also 1-800 Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1056, 1061–63 (8th Cir. 2014).

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Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,494 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in 14-point Times New Roman font, a proportionally spaced typeface. This brief has been scanned for viruses and is virus-free.

Dated: August 15, 2024

/s/ Ramya Krishnan
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Certificate of Service

I, Ramya Krishnan, certify that on August 15, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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