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## Empowering Consumers and Investors to Choose a Sustainable Future

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# Empowering Consumers and Investors to Choose a Sustainable Future

*Olivier Jamin*<sup>†</sup>

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## I. INTRODUCTION

Imagine an every-day grocery shopper entering a store. This consumer cares about where products come from and about what goes into a product. For example, this consumer wants to avoid genetically modified organisms (GMOs) because of health concerns and environmental impact. Walking through the aisles to pick basic products such as cereal, canned corn or beans, this consumer takes a quick look at the label to find the information he or she needs. The only information available on the labels is a Quick Response Code (QR code),<sup>1</sup> for which the consumer needs a smartphone. There are many reasons why this consumer might give up on using the QR code: being in a hurry, not being able to afford a smartphone, poor cell service, or lack of technological knowledge. The results are the same: use of the QR code to designate the presence of GMOs effectively deprives the consumer of the right to choose GMO-free food. This unappealing result is essentially the consequence of the new federal GMO labeling law. Investors experience similar difficulties when trying to identify opportunities with companies that claim to have adopted sustainable practices. The lack of enforcement of climate risk disclosures from the Security Exchange Commission (SEC) and attacks from big industry lobbies on other types of disclosure requirements deprive consumers and investors of the power to encourage sustainable practices.

The concept of sustainability has become increasingly important over the last couple of decades. Governments around the world struggle to en-

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<sup>1</sup> QR codes are high capacity encodings of data that can be printed out in small sizes on packages and labels that users can scan with the use of a smart phone to access a Web page containing more information about the product. See QRCode.com, *What is a QR Code?*, <https://perma.cc/R4DD-EGRB>.

hance economic growth while minimizing the negative impacts on the environment and providing humane working conditions for a growing population.<sup>2</sup> Defining the term “sustainability” itself has proven difficult, centering on the idea of promoting economic development in a way that will benefit present and future generations without detrimentally affecting the resources of the planet.<sup>3</sup> Sustainability law presents political and legal challenges that environmentalists have not yet been able to solve efficiently.<sup>4</sup> An increasing number of scholars have recognized that the traditional “command and control” environmental statutes enacted in the 1970s and 1980s have failed to adapt to the 21<sup>st</sup> century.<sup>5</sup> In order to provide efficient protection to our environment, we must shift our focus toward a policy based on sound science, careful cost-benefit analysis and risk assessment, and greater transparency.<sup>6</sup> Consumers and investors play a central role in this sustainability-based framework by choosing products and investment opportunities that promote sustainable practices. In turn, this will encourage businesses to enter the market to supply such products, potentially bringing down their cost. However, consumers and investors currently lack the crucial information they need to be able to make informed choices regarding sustainability, such as: the raw materials going into a product, the labor practices of the producer, or the carbon intensity of the product.

Recent developments regarding disclosure requirements imposed on companies seem to reflect the will to provide consumers and investors with more information regarding the products they purchase. However, these

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<sup>2</sup> See David R. Boyd, *Sustainability Law, Respecting the Laws of Nature*, MCGILL INT’L REV. 57 (2005) (depicting a pessimistic image of human activity’s impact on our planet, arguing that the Earth’s ozone layer was badly damaged in the past century, that forests, grasslands, coral reefs and other ecosystems have been destroyed or damaged, and that the majority of the world’s fisheries are in decline).

<sup>3</sup> The Environmental Protection Agency (“EPA”) declares that “[s]ustainability is based on a simple principle: Everything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. To pursue sustainability is to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations.” U.S. Environmental Protection Agency, *Lean About Sustainability*, <https://perma.cc/J29M-NXZN>. Oregon defines “sustainability” as “using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives.” OR. REV. STAT. §184.421 (2015).

<sup>4</sup> See generally John C. Dernbach & Joel A. Mintz, *Environmental Laws and Sustainability: An Introduction*, 3 SUSTAINABILITY 531 (2011).

<sup>5</sup> Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 117–20 (2004).

<sup>6</sup> Daniel C. Esty and Steve Charnovitz, *Environmental Sustainability and Competitiveness: Policy Imperative and Corporate Opportunity 1*, (Harvard Bus. Sch., Working Paper).

developments have proven largely ineffective.<sup>7</sup> One of these developments, the 2016 GMO labeling law, reflects a bi-partisan compromise, but has encountered mixed feelings from consumers.<sup>8</sup> In addition, the SEC issued guidelines indicating how public companies should report climate risks in yearly reports; however, this requirement has remained largely unenforced since the first two years after its promulgation, and has little influence today.<sup>9</sup> A third attempt to compel disclosure of “non-sustainable” practices came with the Dodd-Frank Act’s<sup>10</sup> provisions addressing conflict minerals—which require all companies to report the use of conflict minerals in their supply chain.<sup>11</sup> These mandated disclosures are all part of a broader effort to develop sustainability law by adopting a similar scheme: empowering consumers and investors to have a positive impact on decision-making with regard to sustainability issues.

Although the GMO law, the SEC-mandated climate risk disclosures, and regulations like the Dodd-Frank Act take an important first step toward developing a sustainable economy, all of these legislations implicate First Amendment issues in one way or another. Opponents of these developments, often lobbyists and industries, argue that compelling companies to disclose factually true information related to products and corporate practices constitutes a violation of the Constitution. Specifically, they argue that such requirements intrude upon freedom of speech, a fundamental right that has always been championed in the United States. These examples do not implicate traditional freedom of speech issues; rather, these laws fall into the specific category of *compelled* commercial free speech, according them a different level of constitutional protection under *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>12</sup>

The Supreme Court’s jurisprudence regarding compelled commercial speech makes it difficult to legislate in this area, as the Court applies different tests for different categories of regulations affecting commercial speech. Following *Central Hudson*, the courts have generally subjected regulations on commercial speech to a level of heightened scrutiny, but, in *Zauderer v. Office of Disciplinary Counsel*,<sup>13</sup> the Supreme Court applied

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<sup>7</sup> See *infra* § II(C).

<sup>8</sup> See Andrea Hayley, *Organic Industry at Odds Over National GMO Labeling Bill*, EPOCH TIMES (July 18, 2016), <https://perma.cc/PA63-YZ92>. Despite the criticism, the new law still marks a step towards the right direction. See Mark Bittman, *G.M.O. Labeling Law Could Stir a Revolution*, N.Y. TIMES, Sept. 2, 2016, at A19.

<sup>9</sup> See David Gelles, *When Investors Aren’t Told About Climate Change*, N.Y. TIMES, Jan. 23, 2016, at BU7.

<sup>10</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

<sup>11</sup> *Id.* at §§1502-1504; Conflict Minerals, 77 FR 56273 (Sept. 12, 2012).

<sup>12</sup> 447 U.S. 557 (1980). See *infra* §III.

<sup>13</sup> 471 U.S. 626 (1985).

a lower “rational basis” scrutiny to determine the constitutionality of a government regulation compelling commercial speech when the governmental interest at stake was “preventing deception of consumers.”<sup>14</sup> However, recent jurisprudential developments have blurred this distinction, leaving uncertainty as to what standard must be met by regulations compelling disclosure.<sup>15</sup>

This article aims at providing a guide towards rehabilitation of compelled disclosure legislation by arguing that the Supreme Court should address and resolve the confusion around the scope of *Zauderer* by adopting a rational basis test for compelled commercial speech regulations.<sup>16</sup> The current state of compelled speech jurisprudence limits the government’s ability to promote sustainability, thus preventing consumers from accessing information necessary to make more sustainable choices. This status quo essentially allows industry lobbies to conceal valuable information from the public. Accordingly, the Supreme Court should reassess the *Zauderer* test to send the important message that companies will not be allowed to use the First Amendment as a shield against consumers and investors’ requests for more transparency. By adopting a clear standard governing compelled commercial speech, the Supreme Court could indirectly empower consumers and investors to choose a more sustainable future. Additional information would allow consumers and investors to choose products based on their impact on the environment, local communities, and other sustainability-related data.

This article analyzes the legal difficulties in trying to better inform consumers and investors, particularly as applied against freedom of speech in the commercial setting. Part II analyzes recent legal developments

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<sup>14</sup> *Id.* at 651. Under the rational basis standard, a regulation compelling commercial speech will not run afoul of the First Amendment if there is a rational connection between the warnings’ legitimate purpose and means used to achieve that purpose. *Id.* However, the Supreme Court has only applied *Zauderer* in one other case also involving misleading advertising. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

<sup>15</sup> For example, The D.C. Circuit, in a 2014 decision reviewing a government regulation forcing companies to list on the labels of their meat cuts the country of origin of the animal, held that “*Zauderer* in fact does reach beyond problems of deception, sufficiently to encompass the disclosure at issue here.” *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) [hereinafter *AMI*]. The *AMI* decision turned out to be particularly important in the context of disclosure requirements addressed in this article, as the decision also overruled the first holding of the D.C. Circuit striking down the provisions of the Conflict Minerals rule under the *Central Hudson* test. *Nat’l Ass’n of Mfgs. v. S.E.C.*, 748 F.3d 359 (D.C. Cir. 2014) [hereinafter *NAM I*]. On rehearing, the D.C. Circuit affirmed its initial decision on a different basis. *Nat’l Ass’n of Mfgs. v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015) [hereinafter *NAM II*]. Still, these three D.C. Circuit opinions do highlight the confusion surrounding the reach of the *Zauderer* decision.

<sup>16</sup> It is of note that at least one other scholar has argued that regulations that compel commercial speech should have to clear the same constitutional test as restrictions on commercial speech. See Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know”*, 58 ARIZ L. REV. 421 (2016); *But see infra* §V(A).

aimed at informing consumers and investors, describing the controversies surrounding the SEC climate risks disclosures, the Dodd-Frank Act's conflict minerals provisions, and GMO labeling requirements. Part III provides a summary of the Supreme Court's jurisprudence with regard to commercial speech and compelled speech, and also addresses the latest cases scrutinizing mandated disclosures. Part IV explains why disclosure requirements are integral in empowering investors and consumers to choose a sustainable future. Part V analyzes and rejects the argument that the mandated disclosures discussed here violate free speech protections. Part VI then argues that the Supreme Court should address and clarify the test applied to compelled commercial speech by adopting a more permissive test for the government. The article concludes that labeling requirements and mandated climate risks disclosures are not only consistent with the Constitution; but are also fundamentally important as tools to educate consumers and investors about the impact of their choices on the development of a sustainable economy.

## II. BACKGROUND

For consumers and investors to make further strides towards a more sustainable economy, they need information enabling them to choose between products which were manufactured using environmentally-conscious processes that accounted for environmental or human harm as opposed to products manufactured with little concern for such impacts. Recent legal developments have tried to remedy the lack of information for consumers and investors in different sectors of our economy. The SEC-mandated climate risk disclosures, the Dodd-Frank Act conflict minerals disclosures, and most recently, the emergence of GMO labeling laws are all evidence of the effort to provide consumers with more information. This section analyzes these recent developments to highlight their strengths and flaws.

### A. SEC Climate Risk Disclosures

In 2010, the SEC issued guidelines encouraging companies to report serious climate risks that could potentially harm their profits.<sup>17</sup> This information, along with other substantial events relating to business activities such as lawsuits, financial performance, and business trends, is compiled in annual reports known as 10-Ks, which are available to investors. Many

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<sup>17</sup> See Benjamin Hulac, *Inside the Mirage of Good Climate Info at the SEC*, CLIMATEWIRE (Aug. 11, 2016), <https://perma.cc/597C-FNHF>. Then-SEC chairwoman Mary Schapiro warned that “[w]e are not opining on whether the world’s climate is changing, at what pace it might be changing, or due to what causes.” *Id.* The guidelines basically served as a reminder the companies have an obligation to disclose all “material” information to investors.

investors, convinced that climate effects, such as rising sea levels and extreme weather, harmed their financial returns, originally welcomed the new guidelines. In the past, the SEC enforced these guidelines, asking companies to explain in greater detail how climate change-related issues affected their business.<sup>18</sup> However, these practices were short-lived and eventually stopped under the current chairwoman.<sup>19</sup>

The agency has since faced growing criticism for its lack of enforcement of climate risk disclosures.<sup>20</sup> Studies of U.S. public companies listed on major stock exchanges showed that only 27 percent of about 4,000 total companies even mentioned the words “climate change” or “global warming” in their filings.<sup>21</sup> The fact that so many companies failed to mention these terms shows a deficiency with regard to the SEC’s enforcement power, which stems from the voluntary nature of the disclosures.<sup>22</sup> However, mandatory climate risk disclosure would surely draw strong opposition from industry lobbies. These lobbyists generally argue that requiring disclosure of facts that companies would not otherwise elect to disclose is “compelled speech,” and thus a violation of the First amendment.<sup>23</sup> Even in their current state, the voluntary disclosures are facing attacks from a majority Republican Congress.<sup>24</sup> Congressman Bill Posey introduced legislation to block SEC reporting guidance on climate change risks for publicly traded companies, as he also did in 2010 and 2012,<sup>25</sup> arguing that the uncertainty of the science of climate change defeated the need for such a guidance.<sup>26</sup> Opponents of the guidance also argue that the number of climate risk disclosures have failed to improve since the guidance was enacted in 2010 and that the quality of disclosure was poor.<sup>27</sup> However, the flaws of the guidance seem to come from the fact that the SEC has no real

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<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See* David Gelles, *S.E.C. Is Criticized for Lax Enforcement of Climate Risk Disclosure*, N.Y. TIMES, Jan. 24, 2016, at BU7; Robert Repetto, *It’s Time the SEC Enforced its Climate Disclosure Rules*, IISD, (Mar. 23, 2016), <https://perma.cc/LA2H-5XUC>.

<sup>21</sup> Zahra Hirji, *Most U.S. Companies Ignoring SEC Rule to Disclose Climate Risks*, INSIDE CLIMATE NEWS, Sept. 19, 2013, <https://perma.cc/9BKG-F22T>.

<sup>22</sup> Gelles, *supra* note 20.

<sup>23</sup> When the Conflict Minerals Rule was held unconstitutional, some scholars expressed concern that few disclosure requirements would survive First Amendment scrutiny and that companies’ free speech would always trump disclosure obligations. Dynda A. Thomas, *SEC Conflict Minerals Rule Legal Challenge is Over – But Not For Good*, CONFLICT MINERALS LAW (Apr. 12, 2016), <https://perma.cc/KT8T-DT5W>.

<sup>24</sup> Mindy Lubber, *SEC Climate Risk Disclosure Effort Under Serious Attack from Congress*, FORBES (July 18, 2016), <https://perma.cc/FNQ6-Y8ME>.

<sup>25</sup> *Id.*

<sup>26</sup> Hiroko Tabuchi, Clifford Kraus, *A New Debate Over Pricing the Risks of Climate Change*, N.Y. TIMES, Sept. 27, 2016, at B1.

<sup>27</sup> *See* GARY SHORTER, CONG. RESEARCH SERV., SEC CLIMATE CHANGE DISCLOSURE GUIDANCE: AN OVERVIEW AND CONGRESSIONAL CONCERNS 4-5 (2013).



enforcement tools, rather than because of the uncertainty of climate change.

While the SEC's climate risk disclosures are far from perfect in their current state, they could become an important tool to provide investors with the information necessary to make sustainable choices. The SEC received strong support for more detailed and stricter disclosure requirements, with dozens of institutional investors submitting letters to the federal agency in 2016.<sup>28</sup> The letters requested quick action to "require stronger reporting of sustainability risks such as climate change, water scarcity and global forestation."<sup>29</sup> The SEC should act toward this goal in order to fulfill its mission of ensuring that publicly traded companies provide investors with the necessary information material to make meaningful choices.<sup>30</sup> Such information is not easily available, and it is the SEC's responsibility to facilitate investors' access to it.

### *B. Conflict Minerals Disclosure*

The SEC was also at the center of a controversial sustainability-related provision when it enacted the final rule implementing Section 1502 of the Dodd-Frank Act. The Act requires companies using gold, tin, tungsten, and tantalum to determine whether the minerals came from the Democratic Republic of Congo (DRC) or adjoining countries similarly plagued by conflicts.<sup>31</sup> If so, companies must carry out a "due diligence" review of their supply chain to assess whether they are funding armed groups by purchasing these minerals.<sup>32</sup> The SEC issued the final rule implementing Section 1502 in August 2012, requiring companies to report publicly on their due diligence starting in 2013, and mandating independent audits on the reports.<sup>33</sup>

Compared to the SEC climate risk disclosures, the Conflict Minerals rule created a stronger enforcement mechanism. The rule calls for civil

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<sup>28</sup> Peyton Fleming, *In Unprecedented Response, Investors Call On SEC To Improve Reporting Of Climate Risks And Other Sustainability Challenges*, CERES (July 20, 2016), <https://perma.cc/P94S-KVYG>.

<sup>29</sup> *Id.*

<sup>30</sup> Lubber, *supra* note 24.

<sup>31</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1502 (codified as amended in scattered sections of 15 U.S.C. Ch 2B) (2010).

<sup>32</sup> *Implementation of US Dodd-Frank Act Rule on Conflict Minerals: Commentaries, Guidance, Company Actions*, BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <https://perma.cc/AVA2-RTG4>. Due diligence measures must conform to a nationally or internationally recognized due diligence framework, for example as approved by the Organisation for Economic Co-operation and Development (OECD). See *Fact Sheet, Disclosing the use of Conflict Minerals*, U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 14, 2017), <https://perma.cc/N55Q-DV52>.

<sup>33</sup> Conflict Minerals, 77 FR 56273 (Sept. 12, 2012).

penalties for companies knowingly making a false or misleading statement. Companies also face pressure from human rights activists, nongovernmental organizations (NGOs), and consumers to show that minerals used in the supply chain are conflict-free.<sup>34</sup> The rule rapidly came under attack in the D.C. Circuit,<sup>35</sup> and the Court of Appeals for the D.C. Circuit recently affirmed a lower court judgment holding that the Conflict Minerals Rule was unconstitutional.<sup>36</sup> Specifically, the Court held that the requirement to report minerals as having “not been found to be DRC conflict Free”<sup>37</sup> violated the First Amendment by compelling companies to disclose information they would not otherwise elect to disclose. Although the Court accepted the premise that alleviating the conflict in Congo was a sufficient governmental interest to pass the *Central Hudson* test, the Court held that the rule’s effects on the conflict were too speculative and could instead have “a significant adverse effect on innocent bystanders in the DRC.”<sup>38</sup> At this time, the future of the Conflict Minerals rule is uncertain, and the SEC may have to rewrite some or all of the rule, consistent with the First Amendment.<sup>39</sup>

Uncertainty around regulations such as the Conflict Minerals Rule, which aims at promoting social and environmental responsibility in the corporate world, is only growing as President Trump’s administration settles into office.<sup>40</sup> The new administration has already vowed to repeal or replace parts of the Dodd-Frank Act.<sup>41</sup> Whether President Trump will keep his campaign promises — and if so, to what extent — should be worth following.

### C. The Long-Disputed GMO Labeling Law

Organic farmers and environmental groups in the United States have pushed for a mandatory GMO labeling law for years,<sup>42</sup> but the resulting

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<sup>34</sup> Lynnley Browning, *Companies Struggle to Comply With Rules on Conflict Minerals*, N.Y. TIMES, Sept. 8, 2015, at B1.

<sup>35</sup> See *NAM I*, 748 F.3d 359 (D.C. Cir. 2014).

<sup>36</sup> See *NAM II*, 800 F.3d 518, 520–21 (D.C. Cir. 2015).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 526.

<sup>39</sup> As for now, companies should still investigate and review their activities, as the European Union is developing its own conflict minerals regulation, and the SEC rule is still valid at the moment. See Thomas, *supra* note 23.

<sup>40</sup> See Lam Bourree, *Trump’s Promises to Corporate Leaders: Lower Taxes and Fewer Regulations*, THE ATLANTIC (Jan. 23, 2017), <https://perma.cc/J7YT-AYNN> (quoting Mr. Trump telling corporate leaders he “think[s] we can cut regulation by 75 percent, maybe more”).

<sup>41</sup> Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES, Feb. 3, 2017, at A4.

<sup>42</sup> See Chelsea Harvey, *People want GMO food labeled – which is pretty much all they know about GMOs*, THE WASHINGTON POST (July 21, 2016) <http://perma.cc/L2TS-9QKX>.

legislation left these activists largely unsatisfied. On July 29, 2016, President Obama signed a bill amending the Agricultural Marketing Act of 1946, requiring the Secretary of Agriculture to establish a national disclosure standard for bioengineered foods.<sup>43</sup> This was the result of a bitter fight in which environmentalists and consumer groups opposed large food companies that were generally supported by Republicans. Congress finally passed the bill with strong bipartisan support in both the Senate and the House.<sup>44</sup> The state of Vermont was instrumental in the passing of the bill as the enactment of Vermont's own stricter labeling law forced GMO-friendly legislators to reach a compromise on a federal bill.<sup>45</sup> The Vermont law would have required clear labeling of the presence of GMOs on labels.<sup>46</sup> The requirement would have applied regardless of whether these products were manufactured in Vermont or in other states,<sup>47</sup> forcing big food companies to either create two types of labels for their products — one for products sold in Vermont and one for products sold elsewhere — or simply disclose GMOs on all their products. Fearing the stigmatizing effect from disclosing GMOs in foods,<sup>48</sup> companies were willing to reach a legislative compromise. President Obama signed the bill into law in July 2016, requiring disclosure of GMOs, while giving these companies freedom to make it hard for consumers to find this information.

Supporters of the new bill see the potential for a positive impact because the provision could open the door for more transparency regarding what goes into our food.<sup>49</sup> Given that up to 90 percent of the corn, soybeans, and cotton produced in the U.S. comes from genetically modified seeds, the law could reach a substantial amount of products, and help educate the public about the food it consumes.<sup>50</sup> The satisfaction of a rare successful bipartisan compromise was short-lived, and the law has already

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<sup>43</sup> National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (codified as amended in scattered sections of 7 U.S.C.) (2016).

<sup>44</sup> See Andrea Hayley, *Organic Industry at Odds Over National GMO Labeling Bill*, EPOCH TIMES (July 18, 2016) <https://perma.cc/V36U-SHQ2>.

<sup>45</sup> See Dan D'Ambrosio, *Obama Signs National GMO labeling law; VT Law Now Moot*, Burlington Free Press (Aug. 1, 2016) <https://perma.cc/BV22-3CV9>.

<sup>46</sup> The Vermont law required that a "packaged raw agricultural commodity" be labeled "with the clear and conspicuous words 'produced with genetic engineering.'" 9 VT. STAT. ANN. § 3043(b)(1) (2014). The law also prohibited manufacturers from labeling, advertising or indicating that food produced through genetic engineering is "'natural,' 'naturally made,' or any words of similar import that would have a tendency to mislead a consumer." 9 VT. STAT. ANN. § 3043(c) (2014).

<sup>47</sup> 9 VT. STAT. ANN. §3043(a)(1) (2014).

<sup>48</sup> Chris Moran, *President Signs Law That Overturns Vermont GMO Labeling Rules, Replaces Them with Barcodes*, CONSUMERIST (July 29, 2016), <https://perma.cc/JZ7G-T84J>.

<sup>49</sup> Mark Bittman, *G.M.O. Labeling Law Could Stir a Revolution*, N.Y. TIMES, Sept. 2, 2016, at A19..

<sup>50</sup> *Id.*

faced strong criticism from consumer groups.<sup>51</sup> While the law states that companies will have to disclose the presence of GMO ingredients, it leaves great discretion to companies over how to make this disclosure. The company can disclose the presence of GMOs in its product through text labels, symbols, or digital links such as QR codes.<sup>52</sup> This provision is particularly controversial, as big food companies will likely elect to adopt QR codes, effectively depriving low-income populations and non-tech-savvy individuals from accessing the information.<sup>53</sup>

The bill is also under attack from GMO-friendly industries, arguing that “[t]he existence of a label disclosing GMO content, in itself, suggests that this is a product characteristic that consumers *should* care about. Consequently, such labels are likely to ‘stigmatize’ GMO-containing products.”<sup>54</sup> Because science is unsure whether the use of GMO ingredients poses any direct health risk to consumers, GMO-friendly lobbyists argue that mandatory labeling could actually “mislead and falsely alarm consumers.”<sup>55</sup> Just as with the SEC Climate risks disclosure and the Conflict Minerals rule, opponents of GMO labeling argue that the law is unconstitutional on the basis that it mandates companies to make disclosures in violation of their First Amendment rights.

### III. SUPREME COURT’S JURISPRUDENCE ON COMMERCIAL SPEECH

The idea itself that the First Amendment could protect a company’s right to “conceal” information might seem counterintuitive to consumers and investors that are not experts in the field. For example, why would a company’s right to remain silent about the risk that climate change poses to its business trump investors’ right to get access to critical information? The Supreme Court has attempted to address this complex commercial speech issue through its jurisprudence over the last four decades, sometimes reaching inconsistent results. This section contains two subsections; the first summarizes this jurisprudence with regard to commercial speech, and the second with regard to compelled speech. Both sections are relevant

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<sup>51</sup> Dan Charles, *Congress Just Passed a GMO Labeling Bill. Nobody’s Super Happy About It*, NPR (July 14, 2016), <https://perma.cc/Z2UP-QSL7>.

<sup>52</sup> Richard Fama, *The New GMO Labeling Law: A matter of Perspective*, FOOD SAFETY NEWS (Sept. 8, 2016), <https://perma.cc/R76V-ENCW>.

<sup>53</sup> This disclosure scheme raises discrimination issues, as one-third of adults in the United States do not have a smartphone necessary to scan a QR code. Bittman, *supra* note 49; *President Obama Signs GMO ‘Non-labeling’ Bill, Leaves Millions of Americans in the Dark*, CENTER FOR FOOD SAFETY (July 29, 2016), <https://perma.cc/4G5Z-UR2V>.

<sup>54</sup> See Adler, *supra* note 16, at 460–61.

<sup>55</sup> Statement by the AAS Board of Directors on Labeling of Genetically Modified Food, Am. Ass’n for the Advancement of Sci. (Oct. 20, 2012) <https://perma.cc/W4W7-D85H> [hereinafter AAAS STATEMENT].

to the sustainability disclosure requirements, as they are necessary to understand the tension between mandated disclosures and freedom of speech. Although disclosure requirements analyzed in this article seem to better fit the “compelled speech” area, the *Central Hudson* test<sup>56</sup> remains important as, due to the confusion engendered by the Supreme Court in compelled speech cases, *Central Hudson* ends up governing many of these issues.

#### A. *The Recognition of Commercial Speech as Protected Speech*

For a long time, the government could freely regulate purely commercial advertisement,<sup>57</sup> and the Supreme Court did not start scrutinizing commercial speech restrictions until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>58</sup> In this case, a Virginia law provided that a pharmacist was guilty of unprofessional conduct by publishing, advertising or promoting, “directly or indirectly, in any manner whatsoever, any amount price, fee, premium, discount, rebate or credit terms, for any drugs which may be dispensed only by prescription.”<sup>59</sup> Writing for the majority, Justice Blackmun asked whether speech that does “no more than propose a commercial transaction” is so removed from any “exposition of ideas” and from “truth, science, morality, and arts in general,” that it lacks all protection.<sup>60</sup> The Court concluded that such speech did not lack all protection, recognizing that individual consumers and society in general have a strong interest in the free flow of commercial information.<sup>61</sup> In a paragraph that seems to strongly support the type of disclosures analyzed in this article, Justice Blackmun wrote:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those

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<sup>56</sup> 447 U.S. 557 (1980).

<sup>57</sup> See *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding although states and municipalities cannot unduly burden free expression in public streets, the Constitution did not prevent the government from regulating purely commercial advertising). The first attempt at protecting commercial speech came in *Bigelow v. Virginia*, 421 U.S. 809 (1975). Justice Blackmun, writing for the majority, noted that the First Amendment should prevent states from prohibiting advertisements of products or conduct that is clearly legal at the place advertised. *Id.* at 824–25.

<sup>58</sup> *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976).

<sup>59</sup> *Id.* at 750.

<sup>60</sup> *Id.* at 762 (citing *Pittsburg Press Co. v. Human Relations Comm’n*, 413 U.S. 376, at 385 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>61</sup> 425 U.S. at 763–64.

decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>62</sup>

Although the Court also recognized that the state had a strong interest in making sure that pharmacists are held to high professional standards, the Court held that the close ethical regulations to which pharmacists in Virginia are subject to were sufficient to guarantee that interest.<sup>63</sup> This decision established that commercial speech enjoyed constitutional protection. But, the Court failed to articulate a clear test to scrutinize governmental regulations affecting this kind of speech.

Four years later, the Court established a test to determine whether commercial speech regulations were permissible in *Central Hudson Gas v. Public Service Commission*.<sup>64</sup> In this case, the Court considered whether a regulation completely banning promotional advertising by an electrical utility violated the First Amendment.<sup>65</sup> Justice Powell, writing for the majority, established a four-part test to analyze the constitutionality of governmental regulations on commercial speech. First, the government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.<sup>66</sup> Accordingly, to rely on First Amendment protection, the activity in question must be legal. If the government decides to restrict commercial speech regarding illegal activities, the First Amendment would not apply. Second, assuming the government is regulating an otherwise legal activity, the government must assert a substantial interest.<sup>67</sup> Third, the interest must be directly achieved by the restrictions on commercial speech.<sup>68</sup> Fourth, the regulatory technique must be no more than is necessary to further that interest.<sup>69</sup>

In *Central Hudson*, since the regulated activity, the distribution of electricity, was legal,<sup>70</sup> the Court turned to the second question: analyzing the state interest in energy conservation.<sup>71</sup> The Court concluded that “[i]n view of our country’s dependence on energy resources beyond our control, no one can doubt the importance of energy conservation.”<sup>72</sup> The State’s

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<sup>62</sup> *Id.* at 765.

<sup>63</sup> *Id.* at 768.

<sup>64</sup> 447 U.S. 557 (1980).

<sup>65</sup> *Id.* at 558.

<sup>66</sup> *Id.* at 563–64.

<sup>67</sup> *Id.* at 564.

<sup>68</sup> *Id.* (“First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive”).

<sup>69</sup> *Id.* (“The limitation on expression must be designed carefully to achieve the State’s goal”).

<sup>70</sup> *Id.* at 567–68.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 568.

interest in regulating electricity advertisement was, thus, substantial. On the third prong, the Court concluded that, although the link between fair and efficient rates and electricity advertising was tenuous at best, there was an immediate connection between advertising and demand for electricity, meaning that the regulation passed the third inquiry.<sup>73</sup> However, the regulation failed on the last prong because the law banned all promotional advertising, regardless of the impact on overall energy use, thereby exceeding the regulatory capacity necessary to further the interest of energy conservation.<sup>74</sup> This substantial interest could not justify suppressing information about devices and services that would cause no net increase in energy or even reduce energy consumption, so the Court held the regulation unconstitutional.<sup>75</sup>

Subsequent Supreme Court decisions merely qualified the four-part test. In *Board of Trustees v. Fox*,<sup>76</sup> the Court clarified that the “no more extensive than necessary” requirement did not mean that the state had to use the least restrictive alternative.<sup>77</sup> It must be a fit “that is not necessarily perfect, but reasonable.”<sup>78</sup>

### B. Compelled Speech Jurisprudence

Certain types of compelled commercial speech fall under a rational basis standard of review, which is a lower level of scrutiny than the *Central Hudson Test*. Under this approach, the government need only demonstrate a legitimate interest and a rational connection between that interest and the means used to achieve it.<sup>79</sup> Only a few cases have applied this standard in the context of compelled commercial speech, including the recent D.C. Circuit decision regarding country-of-origin labeling on meat products.<sup>80</sup>

#### 1. Applying rational basis to compelled commercial speech

The rational basis test in the context of compelled commercial speech comes from the Supreme Court case *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,<sup>81</sup> where a state law required attorneys to disclose in advertisements that clients may still be liable for costs if their

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<sup>73</sup> *Id.* at 569.

<sup>74</sup> *Id.* at 570.

<sup>75</sup> *Id.* at 569–71.

<sup>76</sup> Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).

<sup>77</sup> *Id.* at 480.

<sup>78</sup> *Id.* at 480 (citing *In Re R.M.J.*, 455 U.S. 191 (1982)).

<sup>79</sup> Legal Information Institute, *Rational Basis Test*, <https://perma.cc/CUZ3-Q6TB>.

<sup>80</sup> See *AMI*, 760 F.3d 18, 20 (D.C. Cir. 2014).

<sup>81</sup> 471 U.S. 626 (1985).

cases were unsuccessful. The Court explained that a state may require advertisers to disclose specific information if such requirement is “reasonably related to the State’s interest in preventing deception of consumers.”<sup>82</sup>

Under the *Zauderer* test, courts should be more favorable to government’s intrusions on commercial speech when such intrusions are aimed at compelling speech rather than restricting speech. Factual disclosures can even serve First Amendment value by promoting the exchange of ideas. In *Abrams v. United States*, Justice Holmes insisted on the concept of the First Amendment protecting a “marketplace of ideas.”<sup>83</sup> Laws mandating factual disclosures inject more information into the marketplace of ideas and further First Amendment goals.<sup>84</sup>

However, the Supreme Court’s language in the case created four potential limits to the application of *Zauderer*, which opponents of compelled commercial speech were quick to seize on. First, because of the specific context of the case — compelling lawyers to disclose costs of representation — later decisions interpreted *Zauderer* as limiting the rational basis scrutiny to regulations aimed at preventing consumer deception.<sup>85</sup> Second, because the regulation at stake in *Zauderer* affected advertising or product labeling at the point of sale, scholars and some lower courts have assumed that this was another limit to the application of rational basis in compelled commercial speech cases.<sup>86</sup> Third, Justice White, writing for the majority, noted that the regulation only compelled the advertisement of “purely factual and uncontroversial information about the terms under which his services will be available.”<sup>87</sup> Fourth, the Court acknowledged that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”<sup>88</sup> By using abstract concepts, such as “unduly burdensome,” or “uncontroversial,” that it failed to define, the Supreme Court created considerable confusion around the standard to apply to compelled commercial speech cases.<sup>89</sup>

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<sup>82</sup> The Supreme Court applied the same test in *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), and upheld a federal law requiring law firms practicing in the debt relief area to identify themselves as debt relief agencies.

<sup>83</sup> *Abrams v. United States* 250 U.S. 616, 630 (1919) (J. Holmes, dissenting).

<sup>84</sup> Jennifer M. Keighley, *Can you Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 J. OF CONST. L. 539, 551 (2012).

<sup>85</sup> *Milavetz*, 559 U.S. 229.

<sup>86</sup> See Adler, *supra* note 16.

<sup>87</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 651.

<sup>88</sup> *Id.*

<sup>89</sup> See *NAM II*, 800 F.3d at 528–29 (“It is also the case that propositions once regarded as factual and uncontroversial may turn out to be something quite different. What time frame should a court use in assessing this? At the time of enactment of the disclosure statute? At the time of an agency’s rule-making implementing the disclosure statute? Or at some later time when the compelled disclosures are no longer considered ‘purely factual’ or when the disclosures have become ‘controversial?’”).



## 2. Compelled commercial speech jurisprudence after *Zauderer*

The Supreme Court only considered the issue of compelled commercial speech one other time, in *Milavetz, Gallop & Milavetz, P.A. v. United States*.<sup>90</sup> Although the Court could have refined the test to apply to compelled commercial speech, the facts of the case were so similar to *Zauderer* that the Court did not bother addressing the issue in its opinion.<sup>91</sup> Rather, the Court considered the constitutionality of a statute that required debt relief agencies to disclose the nature of their services. The Court simply applied the *Zauderer* rational basis standard to similar facts.<sup>92</sup>

Two questions left open in the *Zauderer* case have engendered most of the confusion with regard to the compelled commercial speech test. The first question is whether the rational basis test articulated in *Zauderer* only applies to mandated disclosures aiming at preventing consumer deception. The second question left open by the Court is whether the rational basis test only applies to disclosures of “purely factual and uncontroversial” information, and what this standard means. The D.C. Circuit’s back-and-forth with regard to the test illustrates this confusion.

When reviewing the Conflict Minerals rule in 2014, a D.C. Circuit panel first took the stance that the reduced level of scrutiny used in *Zauderer* only applies where the disclosure prevents consumer deception.<sup>93</sup> Shortly after this decision, however, another D.C. Circuit panel considered whether a congressional mandate to place country-of-origin labeling on meat products violated the First Amendment.<sup>94</sup> In *AMI*, the panel took a strikingly different position, observing that “First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.”<sup>95</sup> The Court concluded that “*Zauderer*’s characterization of the speaker’s interest in opposing forced disclosure of such information as ‘minimal’ seems inherently applicable beyond the problem of deception,”<sup>96</sup> thus expressly overruling *NAM I*.<sup>97</sup>

On rehearing, the three-judge panel that decided *NAM I* still concluded that the Conflict Minerals rule violated the First Amendment. Not being able to rely on the “limited to prevent consumer deception” reasoning, the panel used other language of *Zauderer* to reach its conclusion, holding that the lower level of scrutiny only comes into play when the

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<sup>90</sup> *Milavetz*, 559 U.S. at 229.

<sup>91</sup> *Id.* at 249-50.

<sup>92</sup> *Id.* (“The challenged provisions of §528 share the essential features of the rule at issue in *Zauderer*.”).

<sup>93</sup> See *NAM I*, 748 F.3d 359 (D.C. Cir. 2014).

<sup>94</sup> See *AMI*, 760 F.3d 18, 20 (D.C. Cir. 2014).

<sup>95</sup> *Id.* at 22.

<sup>96</sup> *Id.*

<sup>97</sup> *NAM I*, 748 F.3d 359 (D.C. Cir. 2014).

government regulation impacts advertising or product labeling.<sup>98</sup> Since the Conflict Minerals rule compelled speech on a company's website or annual report, the court concluded that the case was outside the scope of *Zauderer* and applied *Central Hudson*.<sup>99</sup> The decision in *NAM II*<sup>100</sup> also illustrates the confusion around the "purely factual and uncontroversial" aspect of the *Zauderer* decision. Trying to make sense of this possible limitation, the court explained that,

[i]t is also the case that propositions once regarded as factual and uncontroversial may turn out to be something quite different. What time frame should a court use in assessing this? At the time of enactment of the disclosure statute? At the time of an agency's rulemaking implementing the disclosure statute? Or at some later time when the compelled disclosures are no longer considered 'purely factual' or when the disclosures have become 'controversial'?<sup>101</sup>

The paragraph highlights one of the main issues with the "purely factual and uncontroversial" provision: the Supreme Court provided no guidance as to the timing applicable to the analysis and failed to define the meaning of "uncontroversial."

The Tobacco Control Act<sup>102</sup> of 2009 provides another illustration of the confusion in *Zauderer*. Under this act, the Food and Drug Administration (FDA) published a June 2011 final ruling requiring colored graphic warnings on the front and back of each cigarette package sold in the U.S. and on advertisements.<sup>103</sup> Tobacco companies challenged that rule in the D.C. Circuit, and the court struck down the rule under the *Central Hudson* test.<sup>104</sup> The court specifically refused to apply *Zauderer* because the government failed to affirmatively demonstrate that advertisements regulated by the law threatened to deceive customers.<sup>105</sup> Acknowledging that the governmental goal of reducing smoking may be a substantial interest, the

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<sup>98</sup> *NAM II*, 800 F.3d 518, 523 (D.C. Cir. 2015).

<sup>99</sup> *Id.* at 523–24.

<sup>100</sup> *Id.* at 523.

<sup>101</sup> *Id.* at 528–29.

<sup>102</sup> Family Smoking Prevention and Tobacco Control and Retirement Reform, Pub. L. No. 111-131, 123 Stat. 1776 (2009) [hereinafter Tobacco Control Act].

<sup>103</sup> Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28973 (Aug. 8, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, and 1143).

<sup>104</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) ("Under *Central Hudson*, the government must show that its asserted interest is 'substantial.' If so, the Court must determine 'whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest'").

<sup>105</sup> *Id.* at 1214–15 ("in the absence of any congressional findings on the misleading nature of the cigarette packaging itself, there is no justification under *Zauderer* for the graphic warning labels").

court nevertheless found that the rule violated the First Amendment because the FDA failed to show that the graphic warning rule would directly advance this interest.<sup>106</sup>

In the Sixth Circuit, the Tobacco rule had a different fate. In *Discount Tobacco*, the court found that the rule addressed the public's understanding of the health risks of smoking, thus preventing tobacco companies from being deceptive.<sup>107</sup> Although the court framed the inquiry under a "preventing consumer deception" rationale to apply the lower level of scrutiny from *Zauderer*,<sup>108</sup> the underlying reasoning may have been that *Zauderer* could be applicable in other situations like when the government is trying to reduce the public's exposure to health risks.<sup>109</sup> This would be a reasonable assumption as the rule was directly promoting public health by warning consumers of the risks associated with smoking.

#### IV. EMPOWERING CONSUMERS AND INVESTORS BY DISCLOSING "BAD PRACTICES"

The move toward a sustainable economy requires more incentives for companies to move in the same direction. Governmental incentives are one way to encourage companies,<sup>110</sup> but the main driving force remains consumers' and investors' demand for more sustainable or "cleaner" products.<sup>111</sup> Some information is already available to consumers and investors at the point of sale using labeling such as "USDA organic" or "fair trade."<sup>112</sup> This type of labeling informs consumers and investors about "good practices" employed by product manufacturers. Although such disclosures do have a positive impact on part of the consumer population,<sup>113</sup> disclosing "bad practices" is a better way to empower consumers and investors in the everyday choices they make on the market.

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<sup>106</sup> *Id.* at 1222.

<sup>107</sup> *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 551 (6th Cir. 2012).

<sup>108</sup> *Id.* at 562.

<sup>109</sup> See Terry Baynes, *Court: Tobacco Health Labels Constitutional*, REUTERS (Mar. 19, 2012), <https://perma.cc/CRK5-H42W>.

<sup>110</sup> See Environmental Protection Agency, *Economic Incentives*, <https://perma.cc/KD75-FYKY>; Michael Cole, *Using Governmental Incentives to Finance Solar Renewable Energy Projects: Alternative Investments for High-Net-Worth Individuals*, 1 LSU J. ENERGY L. & RESOURCES 67 (2012).

<sup>111</sup> As early as 1776, the economist Adam Smith argued that consumers would determine by their choices what products, and what quality of products would be produced. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (1776).

<sup>112</sup> The organic label has enjoyed quite a bit of success, registering an impressive 11 percent raise in sales in 2015 from the 2014 numbers, according to the Organic Trade Association. See Maggie McNeil, *U.S. Organic Sales Post New Record of \$43.3 billion in 2015*, ORGANIC TRADE ASSOCIATION (May 19, 2016), <https://perma.cc/VRW7-JLQS>.

<sup>113</sup> See USDA, *Organic Market Overview*, <https://perma.cc/K5V9-NG4G> (last updated April 4, 2017) (showing the consistent increase in demand for organic products).

### A. Illustration by the Vegetarian Movement

The vegetarian and vegan movements provide a good illustration of the impact of disclosing “bad practices” on consumer decision making. Although these movements have been around for a long time—especially the vegetarian movement—the percentage of the U.S. population following a vegetarian diet has increased dramatically in the last five years, as more information is available to consumers about the negative impact of animal farming on the environment, on health, and on the economy.<sup>114</sup> Mandated disclosures would also change consumers and investors’ behavior by promoting the availability of information.

#### 1. The significant economic and environmental benefits of the vegetarian movement

Consumers are realizing that choices made about the food they eat affect their health and impacts the environment.<sup>115</sup> Food production causes a quarter of all greenhouse gas (GHG) emissions, of which 80% come from livestock production.<sup>116</sup> Consequently, something as simple as changing diet may be more effective than technological mitigation options for avoiding climate change.<sup>117</sup>

Changing diet would also prove valuable for the economy. Analyzing the effect of food diet on the economy, a study determined annual savings in 2050 for three different scenarios.<sup>118</sup> The study concluded that if the U.S. population followed dietary recommendations (less red meat, more plant-based products), such a change would save \$150 billion in direct health-care savings, \$28.1 billion in indirect health-care savings, and \$18.1 billion in environmental savings.<sup>119</sup> These numbers increase if everyone went vegetarian: \$187 billion in direct health-care savings, \$36.4 billion in indirect health-care savings, and \$35 billion in environmental

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<sup>114</sup> See Sarah Marsh, *The Rise of Vegan Teenagers: ‘More People are into it Because of Instagram’*, THE GUARDIAN (May 27, 2016), <https://perma.cc/9B6Q-FUDF> (noting that the movement “is driven by the young,” who testify that the availability of information explaining the environmental impact of the meat industry, as well as animal cruelty and the health benefits of veganism, on social media such as Instagram and Twitter, is the main driving force behind the movement).

<sup>115</sup> Ryzia de Cassia Vieira Cardoso et al., STREET FOOD: CULTURE, ECONOMY, HEALTH, AND GOVERNANCE 137 (1st ed. 2014).

<sup>116</sup> Marco Springmann et al., *Analysis and Valuation of the Health and Climate Change Cobenefits of Dietary Change*, 113 Proc. of the Nat’l Acad. Of Sci. 4146 (2016).

<sup>117</sup> *Id.*

<sup>118</sup> Lauren Cassani Davis, *The Economic Case for Worldwide Vegetarianism*, THE ATLANTIC (Mar. 28, 2016), <http://perma.cc/7VX8-WDD5>.

<sup>119</sup> *Id.*

savings, for a total of \$258 billion worth of savings.<sup>120</sup> The numbers increase even more for a vegan diet.<sup>121</sup>

## **2. A key component to the growth of vegetarianism: consumer access to information**

In 2009, only one percent of the U.S. population reported following a vegetarian or vegan diet. In 2014, an impressive 5% (for a total of 16 million people) of the population reportedly followed a vegetarian diet, and half of those people followed a vegan diet.<sup>122</sup> These numbers do not even consider the percentage of the population that decreased their meat consumption in the last five years, or completely stopped eating beef.<sup>123</sup>

One might ask why these movements gained such popularity over the last few years. The campaign aimed at educating consumers about the impact farming meat has on the environment and health appears to be the main factor driving this trend.<sup>124</sup> Approximately 42% of the population that does not eat animal products say they made that choice after they saw an educational film highlighting the negative impacts of the meat industry.<sup>125</sup> The availability of information highlighting the negative effects of meat eating, as well the increasing number of studies analyzing the impact of cattle farming on the environment or health has been a fundamental factor in the vegetarian trend that the U.S. has been experiencing over the last few years.<sup>126</sup>

The correlation between the increase in percentage of vegetarians in the country and the growing access to the information about “bad practices” is clear. When consumers are aware of the negative impact of meat-

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<sup>120</sup> *Id.*

<sup>121</sup> With a vegan diet, these numbers reach 208 billion in direct health-care savings, 40 billion in indirect savings, and 40 billion in environmental savings. *Id.*

<sup>122</sup> See Nadine Watters, *16 Million People in the US Are Now Vegan or Vegetarian*, THE RAW FOOD WORLD, <https://perma.cc/VE3X-BA9M>.

<sup>123</sup> The Department of Agriculture estimated that meat consumption in the U.S. was 12.2 percent lower in 2012 than in 2007. See Mark Bittman, *We're Eating Less Meat. Why?*, N.Y. TIMES: OPINION PAGES (Jan. 10, 2016), <https://perma.cc/W44Z-DWT4>.

<sup>124</sup> Sixty-nine percent of people asked why they do not eat animal products say they chose to eat a vegan diet to support the ethical treatment of animals. See Watters, *supra* note 122.

<sup>125</sup> *Id.*

<sup>126</sup> In a popular documentary, “Cowspiracy,” filmmaker Kip Andersen investigated the animal agriculture industry, showing how this industry is the “leading cause of deforestation, water consumption and pollution, is responsible for more greenhouse gases than the transportation industry, and is a primary driver of rainforest destruction, species extinction, habitat loss, topsoil erosion, ocean ‘dead zones,’ and virtually every other environmental ill.” See *About the Film*, COWSPIRACY: THE SUSTAINABILITY SECRET, <https://perma.cc/4XK6-7VHB>. Although this picture might seem exaggerated, it does reflect the negative environmental impacts behind the animal agriculture industry. See Food and Agric. Org., *Livestock Policy Brief 03: Cattle Ranching and Deforestation 2* (2006).

heavy diets on their health or the environment, they feel a sense of responsibility and make choices that better align with a healthy lifestyle. This process—empowering consumers by providing the necessary information to choose between products—must expand to other sectors of the economy.

### *B. Empowering Consumers and Investors*

Of little surprise, disclosing “bad practices” can have a more rapid and larger impact on consumers’ and investor’s choices. Picture a consumer walking into a store to buy a product; she must decide between two versions of the same product, one of them labeled “fair trade,” the other having no specific information. A consumer sympathetic to the “fair trade” label may pick the first product and overlook the potential surplus in cost associated with it. However, the relative impact of a “fair trade” label will depend on the consumer’s or investor’s knowledge about the meaning of the label and the level of concern associated with it. Picture the same consumer trying to choose between two similar products; one has no specific message on it, while the other contains a message, “this product was manufactured using child labor.” Consumers would probably choose not to buy the latter product. Of course, this is an extreme example, as we are a long way from requiring such labels on products. This example simply illustrates a point: disclosing “bad practices” used to manufacture a product plays an important role in educating the population about the choices they make when purchasing goods or investing in a company.

Some companies fear that disclosing bad practices may effectively act as a ban on practices or content. On the other hand, such sustainability-related disclosures generally aim at promoting the health and safety of the public. Should we allow companies to hide practices that endanger local communities in the name of profit and the companies’ freedom of speech? To the contrary, health and environmental concerns should trump companies’ rights in this context.

The vegetarian movement is a good example of the positive impact of disclosing bad practices; it is growing because more food consumers become aware of the negative impact of livestock on the environment, health, animal welfare, and the economy. The same scheme could provide similar results in many other industries. By providing consumers and investors with the information necessary to understand the impact of a company on the community or the environment, such consumers and investors must now consider this impact when choosing to buy or invest in a product. The conflict minerals provision of the Dodd-Frank Act is a subtler

example of the practice aimed at empowering investors.<sup>127</sup> The law orders companies that are unable to prove that minerals used in their chain of supply are “DRC conflict free” to disclose such information on their website. Investors must decide if they will support a company that might be instrumental in financing acts of war.<sup>128</sup> With the SEC climate risk disclosures, companies must investigate and report on how climate change will impact their business. Investors looking at the climate risk disclosures of a company can use that information to make responsible choices.<sup>129</sup> The more information consumers and investors have when making choices about products to purchase or companies to invest in, the more impact these consumers and investors can have on the economy.<sup>130</sup> More importantly, consumers can become aware of the impact of their choices.<sup>131</sup>

Of course, some regulation is necessary. Bombarding consumers and investors with information can become overbearing on companies that are forced to disclose information. It may also overwhelm the consumers and investors who still need to be able to make sense of the information available.<sup>132</sup> A simplification of the constitutional test applied to compelled commercial speech regulations would balance the interests of industries and consumers. As previously discussed, the Supreme Court’s jurisprudence about compelled commercial speech is confusing to say the least.<sup>133</sup> Some courts believe that compelled commercial speech aimed at preventing consumer deception should apply the rational basis scrutiny from *Zauderer*, and other regulations should apply the classic *Central Hudson* test. The Supreme Court should resolve these problems by applying a uniform rational basis test to compelled commercial speech.

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<sup>127</sup> See *supra* notes 31-39 and accompanying text.

<sup>128</sup> It might be too early to assess the true impact of the rule on investors’ behavior. However, the rule has already had a positive impact on the practices of some companies. While many companies have had a de minimis approach to filing with the SEC regarding the conflict mineral rule, Kemet and Intel have taken aggressive steps to purposefully sourcing minerals from conflict-free mines. See Alexandria Bennett, *Will Everything Change in Conflict Minerals Reporting Year Three?*, SOURCE INTELLIGENCE (Nov. 19, 2015), <https://perma.cc/K6ET-UDCC>.

<sup>129</sup> Fleming, *supra* note 28.

<sup>130</sup> There is already a positive relationship between environmental performance and voluntary climate change disclosure. Cedric Dawkins & John W. Fraas, *Coming Clean: The Impact of Environmental Performance and Visibility on Corporate Climate Change Disclosure*, 100 J. OF BUS. ETHICS 303 (2011).

<sup>131</sup> Jessi Baker, *The Rise of the Conscious Consumer: Why Businesses Need to Open up*, THE GUARDIAN (Apr. 2, 2015), <https://perma.cc/E8VS-U5U8>.

<sup>132</sup> Adler, *supra* note 16, at 444.

<sup>133</sup> Michael A. Walsh & Katherine McGahey, *First Amendment in Flux: Supreme Court Clarification Needed on Compelled Commercial Speech*, Legal Backgrounder, Sept. 30, 2016, at 1; Lyle Denniston, *After Three Decades, Does Zauderer Need Updating?*, SCOTUSBLOG (Nov. 18, 2016), <https://perma.cc/JAG2-WSKN>.

V. TOWARD A BRIGHTER FUTURE: COMMERCIAL SPEECH SHOULD NOT BE A HINDRANCE TO SUSTAINABILITY.

Much of the argument coming from lobbyists opposing disclosure requirements relies on the idea that the consumers' right to know is not a sufficient interest justifying an attack on freedom of speech.<sup>134</sup> However, this argument does not really depict the conflict at stake. Freedom of speech does not enjoy as much protection in the context of commercial speech as in the context of political speech.<sup>135</sup> Justice Blackmun's vision in *Virginia Board of Pharmacy*<sup>136</sup> should resonate in this context. In his opinion, Justice Blackmun acknowledged that in a predominantly free enterprise economy like the U.S., the allocation of resources in large measure is made through numerous private economic decisions.<sup>137</sup> As such, "it is a matter of public interest that those decisions be intelligent and well informed. To this end, the free flow of commercial information is indispensable."<sup>138</sup> Adapting his view to the pursuit of a more sustainable economy, one could argue that the future of our environment depends largely on decisions made privately by industries that dominate their markets. To make decision-makers accountable and to empower consumers and investors, it is essential to disclose the impact of manufacturing goods or producing types of food, so that those decisions be intelligent and well informed. In this section, I first reject the industries' legal argument that the government's interest at stake is simply a consumer's right to know, which is insufficient to justify compelled disclosures. Second, I advocate for a simpler, more permissible constitutional test to scrutinize government regulations aimed at compelling commercial disclosures. Finally, I discuss the impact that the new administration could have on governmental regulations aimed at compelling sustainability-related disclosures such as the ones discussed in this article.

*A. Rejecting the Industries' Legal Argument*

When analyzing mandated disclosures, opponents of such measures typically rely on the tension between consumers' "right to know" and companies' freedom of speech.<sup>139</sup> Jonathan Adler, defending the view that

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<sup>134</sup> See generally Adler, *supra* note 16.

<sup>135</sup> *Zauderer v. Office of Disciplinary Counsel*, 421 U.S. 626, 628 (1985).

<sup>136</sup> *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 (1976).

<sup>137</sup> *Id.* at 765.

<sup>138</sup> *Id.*

<sup>139</sup> Adler, *supra* note 16, at 425–26; Xu, Sylvia M. *Who Wants the Right to Know? An Analysis of GMO-labeling in California*, 3 J. of Env'tl. and Resource Econ. at Colby, no. 1, 2016; Other scholars do argue that the right to know is enough to justify government regulations such as compelled disclosures. See Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 *ECOL. L.Q.* 989



mandated disclosures should always be required to meet the *Central Hudson* test, presents four reasons why “the assertion of a consumer right to know, unconnected to a more substantial governmental interest, cannot be sufficient to compel commercial speech.”<sup>140</sup> He starts by noting that a right to know is a rationale potentially without discernible limits, such that there would be “no end to the disclosures that can be mandated.”<sup>141</sup> Adler then argues that calls for disclosure of information on the basis of the right to know come from subjective, normative claims, and not from a neutral viewpoint.<sup>142</sup> Such disclosures, he continues, give voice to politically determined issues that may stigmatize some sellers.<sup>143</sup> Finally, he points out that the right to know facilitates government intrusion into what are, in fact, political questions that infringe on the core values that the First Amendment protects.<sup>144</sup> Although some of the concerns that Adler raises are valid, he relies on flawed reasoning and fails to truly take into account the full purpose served by sustainability-related disclosures. Specifically, Adler’s characterizations of the government interest at stake, and of the “political” character of disclosures, seem simplistic.

First, sustainability-related, mandated disclosures do not only serve the consumers’ “right to know,” but more importantly serve the purpose of protecting future generations from the impact of climate change by educating consumers, investors, and industries. As such, most sustainability-related mandated disclosures should meet the *first* part of the *Central Hudson* test as a “substantial governmental interest.” By limiting the role of disclosure to simply informing consumers, Adler devalues the role and purpose served by such disclosures. Adler is correct that the right to know could potentially be unlimited because consumers are “interested in a near-infinite range of product and process characteristics.”<sup>145</sup> His concern that the government should not be able to justify serious intrusion on freedom of speech based solely on this interest is also valid. However, the reality is that the government interest at stake is often more important than an individual’s “right to know.”

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(2012); David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV’T MAG., July-Aug. 2012; Others argue for a constitutional right to a healthy environment. See Daniel A. Sabsay, *Constitution and Environment in Relation to Sustainable Development*, 21 PACE ENVTL L. REV. 155 (2004); Christina Simeone, *The Necessity and Possibilities of Constitutional Environmental Rights* (Aug. 24, 2006) (unpublished MA thesis, University of Pennsylvania) (on file with Penn Libraries, University of Pennsylvania).

<sup>140</sup> Adler, *supra* note 16, at 444.

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

Adler's second and fourth arguments advance the same theme. He argues that information consumers seek often depends on what is important to them, the right to know is highly subjective and sometimes brings into the mix political questions that are at the core of the First Amendment.<sup>146</sup> In the context of sustainability-related mandated disclosures, this argument is flawed. Adler argues that disclosures such as the ones covered in this article lack neutrality.<sup>147</sup> But such an argument relies on the idea that compelled disclosures are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political questions, such as how products should be made, animals should be treated and so on.<sup>148</sup> However, the type of disclosures at issue are not inherently political. SEC climate risk disclosures or the conflict minerals rule come from a broader concern for climate change and sustainability. Climate change is not political, it is a science.<sup>149</sup> It is a factual, scientifically proven phenomenon that does not present the subjective and political characteristics that Adler contends.<sup>150</sup>

Finally, Adler argues that compelled disclosures can become a requirement that a producer or seller potentially stigmatize their own product, saying to consumers "think about it before you buy this product because of the following fact or characteristic about which you were previously unaware."<sup>151</sup> But this is precisely the point of compelled disclosures, to inform consumers and investors about the negative impact of a product so they are able to make meaningful decisions. Rather than stigmatizing consumers or producers, compelled disclosures are aimed at encouraging the transition toward more sustainable practices to protect future generations. Take the example of a "carbon cost" disclosure that would require producers and sellers to disclose on the label of their products the amount

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<sup>146</sup> *Id.* at 446–48, 450.

<sup>147</sup> *Id.* at 446–47.

<sup>148</sup> *Id.* at 450.

<sup>149</sup> See Reynard Loki, *How Republicans Made Climate Change America's Most Divisive Political Issue*, Alternet, Sept. 15, 2015, <https://perma.cc/78P5-VJUR> (last visited Nov. 26, 2016) (explaining how climate change has become a partisan issue, as most Republicans do not believe in human-caused climate change while most Democrats do believe in human-caused climate change).

<sup>150</sup> Adler, *supra* note 16, at 450–51. As early as 2001, the Intergovernmental Panel on Climate Change (IPCC)—the United Nations' climate change body, acknowledged the urgency of the issue:

Climate change is real. There will always be uncertainty in understanding a system as complex as the world's climate. However, there is now strong evidence that significant global warming is occurring. The evidence comes from direct measurements of rising surface air temperatures and subsurface ocean temperatures and from phenomena such as increases in average global sea levels, retreating glaciers, and changes to many physical and biological systems. Statement, Joint Science Academies, Global response to climate change (2005) (On file with the National Academies of Sciences, Engineering, and Medicine).

<sup>151</sup> Adler, *supra* note 16, at 448 (citing Lars Noah, *Genetic Modification and Food Irradiation: Are Those Strictly on a Need-to-Know Basis?*, 118 Penn St. L. Rev. 759, 787 (2014)).

of emissions one product is responsible for. Such a measure would not create a stigma, but rather would educate the consumer about the impact of one product compared to another. While Adler sees compelled disclosures as a stigmatizing phenomenon, thus privileging the status quo, compelled disclosures can be viewed from another angle, as a tool to empower producers, sellers, consumers, and investors.

Of course, regulators could simply ban GMOs or conflict minerals from the chain of supply, or better regulate what could be harmful to the population of the environment but there are at least two issues with this approach. First, political opposition would likely prevent any ban from going through the legislative process.<sup>152</sup> Second, relying on regulators to empower consumers and investors and give them the tools to influence the market might be ill-advised. An important perk of mandated disclosures is to give consumers the information they need to make a choice. Relying on regulators would not empower consumers and investors to the same extent.

Opponents of disclosure requirements argue that the intermediate scrutiny of *Central Hudson* is “unlikely to prevent agencies and regulators from safeguarding public health or market efficiency.”<sup>153</sup> This is true to an extent. Warning consumers of the direct health effects of a product will undoubtedly clear the “substantial interest” standard of *Central Hudson*. However, under current jurisprudence, it would fail to capture sustainability-related compelled disclosures that, rather than warning consumers about direct health effect, are indirectly aimed at protecting the planet and future generations.<sup>154</sup>

### *B. Rehabilitating Disclosure Requirements with the Constitution*

The current Supreme Court jurisprudence regarding compelled commercial speech is largely unsatisfying and needs clarification. As mentioned above, there is currently great confusion as to whether the *Zauderer* rational basis standard is limited to disclosures aimed at preventing consumer deception. Because of this confusion, courts have applied the *Central Hudson* test to some cases involving compelled commercial speech that may not have to do with preventing consumer deception.

The Supreme Court should resolve the confusion resulting from the *Zauderer* case in favor of a rational basis test in the compelled commercial speech context. Before diving into the issues with the presumed limitations

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<sup>152</sup> See Norm Ornstein, *Is This the Worst Congress Ever?*, THE ATLANTIC (May 17, 2016), <https://perma.cc/R35K-YUVD> (Describing our “crippled” legislative process).

<sup>153</sup> Adler, *supra* note 16, at 470.

<sup>154</sup> Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 882–83 (2015) (explaining the difference between the *Zauderer* and *Central Hudson* tests).

of the *Zauderer* reasoning, one must understand why the sustainability-related disclosure requirements discussed in this article would not clear the *Central Hudson* test. Most disclosure requirements constitute a substantial governmental interest, meeting the first hurdle of the *Central Hudson* test. The issue emerges on the degree of relation between the means used and the interest protected. Under *Central Hudson*, the interest must be directly achieved by the regulation affecting free speech.

Although the protection of future generations is arguably a substantial governmental interest, the idea that such interest would be directly achieved by compelled disclosures of climate risks or conflict minerals is a far stretch. It would be more accurate to describe this relationship as indirect; the disclosures empower consumers and investors to make choices that, in turn, influence companies to adopt more sustainable practices that promote the interest of future generations. As such, these disclosure requirements may not pass the *Central Hudson* test, which requires using means substantially related to an important governmental interest. Accordingly, the Supreme Court should revisit the *Zauderer* decision in order to eliminate the presumed limitations on the scope of the case.

### 1. The limits of the *Zauderer* decision

The idea that *Zauderer* only applies to regulations aimed at preventing consumer deception simply does not make sense. Preventing consumer deception would most likely clear the higher “substantial interest” bar of the *Central Hudson* test. Accordingly, the rational basis test set out in *Zauderer* would be completely unnecessary if it was limited to such instances. Maybe the higher level of scrutiny is imposed to require a more direct relationship between the regulation and the governmental interest, but nowhere did the Court indicate such a purpose. The type of regulation the Supreme Court considered in both cases having to do with compelled commercial speech happened to be in the context of a regulation preventing consumer deception. But this limit appeared to be more coincidental than voluntary. There is no language in *Zauderer* expressly limiting the scope of the analysis to this type of regulation.<sup>155</sup>

Additionally, “preventing consumer deception” is a difficult concept to define. For example, the D.C. Circuit upheld the country-of-origin labeling requirement on meat products under the *Zauderer* test when the governmental interest was protecting consumers’ right to buy U.S.-made

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<sup>155</sup> Rather, the Court held that “[a]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” But it did not limit the “reasonable relation” to cases of preventing consumer deception. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 628 (1985).

meat.<sup>156</sup> However, one could argue that the provision is indirectly aimed at preventing consumer deception. Providing information about the country-of-origin allows consumers to specifically pick locally-raised meat. In the absence of the country-of-origin label, a consumer might buy meat assuming that it was local, only to later find out the real origin. Most, if not all, of the types of disclosures discussed in this article are related in one way or another to preventing consumer deception by giving them access to information. This information allows consumers to knowingly choose the product that corresponds best to their needs, a choice they would otherwise not be able to make. As such, limiting *Zauderer* to instances of consumer deception does not make any sense.

The Court in *Zauderer* also did not expressly limit the application of the lower scrutiny standard to “purely factual and uncontroversial” information.<sup>157</sup> The problem with the “uncontroversial” provision of *Zauderer* is that it potentially has the effect of opening a Pandora’s box. With impressive financial means and political ties, it is easy for big industries to “create” controversies around any type of information they would be required to disclose in the future.<sup>158</sup> GMO labeling is a perfect example. On its face, whether GMOs are present in a product is purely factual and uncontroversial. Either the product contains GMOs or it does not. However, the opposition between GMO-friendly industries and consumer groups has made the topic highly political,<sup>159</sup> and thus “controversial.” The ability to make a topic “controversial” is potentially unlimited. Therefore, the Supreme Court should make it clear that the lower level of scrutiny set out in *Zauderer* is not so limited to “purely factual and uncontroversial” information.<sup>160</sup>

Third, the notion coming from *NAM II* that *Zauderer* application only applies to disclosure requirements imposed at the point of sale or in advertisements is similarly ill-advised. Nowhere in *Zauderer* is “point of sale”

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<sup>156</sup> Jonathan Adler, *En banc D.C. Circuit Upholds USDA Country-of-Origin Labeling Rule*, WASHINGTON POST (July 30, 2014), <https://perma.cc/Y3PM-5XYK>.

<sup>157</sup> Again, the Court said “[t]he State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.” Rather than a limitation, it was more of an observation. *Zauderer*, 471 U.S. at 651.

<sup>158</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, (1976); and Adler, *supra* notes 145-50 and accompanying text.

<sup>159</sup> The aggressive campaigning against genetic techniques may have stigmatized GMOs. To that extent, fears of the impact of the GMO disclosures might be justified to an extent. See generally Adler, *supra* note 16.

<sup>160</sup> The lack of definition for the “uncontroversial standard” raises a lot interpretative issues. For example, a court might consider that some pieces of information about climate change are “uncontroversial” while the concept of climate change generally has become very controversial.

mentioned,<sup>161</sup> and there are at least two issues with this limitation. First, investors and consumers today find a lot of information about products on companies' websites. *NAM II* argued that the conflict minerals rule was outside the scope of *Zauderer* because the information needed to appear on companies' websites rather than at the point of sale or on advertisements.<sup>162</sup> However, for many companies, their websites constitute their point of sale; this is where investors get access to at least some of the information that will influence the choice to invest in a given company. Additionally, more and more sales happen online.<sup>163</sup> As consumers or investors spend time online, they are targeted by ads from different companies leading them straight to these companies' website where they can then purchase products.<sup>164</sup> The growth of e-commerce manifests itself through giants like Amazon and Ebay, but is now also growing for grocery sales.<sup>165</sup> This current trend has made the distinction between point of sale and websites largely irrelevant.

## 2. A resolution to the confusion in favor of compelled disclosures

The Supreme Court should revisit *Zauderer* to clarify that rational basis applies when analyzing whether compelled commercial speech violates the First Amendment. Such a test would reconcile disclosure requirements like the GMO labeling law, the SEC climate risk guidance, and the conflict minerals rule with the Constitution. To avoid potential abuses resulting from governmental intrusion on free speech, the Court could also retain one aspect of the *Zauderer* decision, "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."<sup>166</sup> The Supreme Court, to create an additional safeguard for companies' freedom of speech, could define what "unduly burdensome" means, offering companies the opportunity to rebut

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<sup>161</sup> The context of the *Zauderer* case is obviously "advertising" but this word could mean many things, especially with the increase use of the internet as an advertising tool, which was not available when the Court decided *Zauderer*.

<sup>162</sup> *NAM II*, 800 F.3d 518, 523 (D.C. Cir. 2015).

<sup>163</sup> The National Retail Federation (NRF) estimated that in 2016, though the U.S. retail average growth rate was just 2% for total retail, it was 16% for e-commerce. See *National Retail Federation estimates 8-12% US e-commerce growth in 2017*, BUSINESS INSIDER (Feb. 10, 2017), <http://perma.cc/24SC-FWWB>. The NRF added that it expects online shopping to be the major driver of growth for retail moving forward. *Id.*

<sup>164</sup> Darla Cameron, *How Targeted Advertising Works*, WASHINGTON POST (Aug. 22, 2013), <http://perma.cc/4C5H-962R>.

<sup>165</sup> Jeff Daniels, *Online Grocery Sales Set to Surge, Grabbing 20 percent of Market by 2025*, CNBC (Jan. 30, 2017), <http://perma.cc/46A2-VKSJ>.

<sup>166</sup> *Zauderer, v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 628 (1985).

the government's rational basis argument by showing how a disclosure requirement unduly burdens them.

Consider a governmental regulation mandating the disclosure of the minimum wage applied by companies to their entry-level workers. To pass the rational basis test, the government would first argue that improving the quality of life of U.S. citizens and promoting a sustainable job market are legitimate state interests. By forcing companies to disclose the minimum wage applied, the regulation gives investors and consumers a chance to make informed decisions when purchasing a product. Because these consumers now better understand why two similar products may have different prices, they may choose to spend more money to validate the good practices that the government is seeking to promote. Such a regulation should pass the rational basis test because it advances a legitimate governmental interest and the regulation is rationally related to that interest.

The issue with such a regulation is that certain companies and industries will be hit harder than others, not because they chose to pay their employees lower wages, but rather because some industries thrive on margins between cost of production and sale price that are so slim that raising wages would destroy them. The "unduly burdensome" defense would allow an industry to fight the regulation and force the government to take into account special circumstances in the text of the law to avoid unfair or "unduly burdensome" results. Then, the rational basis test, although easier to clear, would still protect companies from overbroad government regulations.

The rational basis would offer more judicial certainty with regard to compelled commercial speech and allow the government to empower consumers and investors to choose a more sustainable future. The test also aims at striking the right balance: protecting companies' constitutional interests while promoting the circulation of information on the market to empower consumers and investors to choose a sustainable future. As shown above, the main issue with the *Central Hudson* test is that it places a high bar by requiring a close relation between the government's interests and the way the government promotes it. The rational basis standard provides more freedom to promote a more sustainable economy with the use of mandated disclosures. The "unduly burdensome" defense should shield companies from excessive government intrusion by giving courts the discretion to strike down a regulation excessively intruding on freedom of speech.

*C. New Uncertainty: President Trump's Administration*

The election of Donald Trump as President of the United States increased the uncertainty surrounding governmental regulations as they apply to compelled disclosures. President Trump has been very clear that he would target governmental regulations, repeating that “[e]xcessive regulation is killing jobs, driving companies out of our country like never before.”<sup>167</sup> Since he took office, Trump also made clear that environment-related regulations would be among the first targets of his great regulatory rollback,<sup>168</sup> a sentiment reinforced by his announcement that the U.S. would withdraw from the 2015 Paris Climate Change Agreement.<sup>169</sup> It seems unlikely that President Trump’s administration will enact new regulations aimed at compelling disclosures of information promoting sustainability. As to regulations already in place, their future is seriously jeopardized.

The Conflict Minerals rule was the topic of a draft executive order as early as February 2017, in which President Trump proposed a two-year suspension of a portion of the Dodd-Frank Act that requires U.S. companies to carry out due diligence to ensure that their products do not contain conflict minerals.<sup>170</sup> Although the draft has not been signed into law, it remains likely that the rule will be affected in the future as part of a broader effort to undermine the Dodd-Frank Act.<sup>171</sup>

The implementation of the GMO labeling law is also likely to slow down or come to a stop. Although President Obama signed the GMO bill into law in July 2016, the USDA still had to draft regulations governing the disclosure of GMOs.<sup>172</sup> However, President Trump signed an executive order cracking down on federal regulations, requiring federal agencies to eliminate two regulations before one new regulation can be implemented.<sup>173</sup> Although the GMO labeling law itself should remain intact, it is hard to see how it could be executed under Trump’s executive order.

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<sup>167</sup> President Donald Trump, Remarks by President Trump during Signing of Executive Order on Regulatory Reform at the White House (Feb. 24, 2017).

<sup>168</sup> See Juliet Eilperin, *Trump undertakes most ambitious regulatory rollback since Reagan*, WASHINGTON POST (Feb. 12, 2017), <http://perma.cc/K57Q-ZRFD>; Juliet Eilperin & Brady Dennis, *Trump moves decisively to wipe out Obama's climate-change record*, WASHINGTON POST, Mar. 28, 2017, <http://perma.cc/T4S4-PN8E>.

<sup>169</sup> See Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, NY TIMES, June 2, 2017, at A1.

<sup>170</sup> Ed Pilkington, *Proposed Trump executive order would allow US firms to sell 'conflict minerals'*, GUARDIAN (Feb. 8, 2017), <http://perma.cc/J2JS-H9QQ>.

<sup>171</sup> Donna Borak, *Trump signs orders that take aim at Dodd-Frank*, CNN (Apr. 21, 2017), <http://perma.cc/ZR7M-SD6R>.

<sup>172</sup> See Ian Kullgren, *GMO labeling fans, Trump just slowed your roll*, POLITICO (Jan. 31, 2017), <http://perma.cc/PE7C-EP8F>.

<sup>173</sup> *Id.*



As to SEC climate risk disclosures, it is not clear where the new administration stands. Trump's pick for SEC chair, Jay Clayton, said that companies should disclose climate-related risks.<sup>174</sup> Clayton's stance is hard to reconcile with the administration's refusal to treat climate change as a priority.<sup>175</sup> Climate risk disclosures could experience a better fate than the Conflict Minerals rule and the GMO labeling regulations under Trump's presidency for two reasons. First, companies would generally benefit from such disclosures. Investigating climate risk exposure would incentivize companies to build up their climate resilience and be better equipped to face the challenges that they will face due to climate change.<sup>176</sup> Second, companies do not need the government's help or approval to conduct these studies and disclose climate risks.<sup>177</sup>

The full effect the new administration will have on compelled disclosure will not be immediately clear, but President Trump's first executive orders strongly indicate that sustainability and climate resilience are not among his priorities. If anything, his election should create a new sense of responsibility for consumers, investors, and companies to take matters into their own hands and do what the government will not do.

## VI. CONCLUSION

Consumers and investors are becoming increasingly interested in the characteristics of a product: the type of components used, the process being used, the working conditions of the people manufacturing a product, whether the product is local, and the carbon footprint of a product. Investors keep pushing for increased climate risk disclosures from the SEC,<sup>178</sup> while the GMO labeling law came in part from a strong interest from the population to know whether products contain GMOs. Efforts from investors and consumers will be even more important in light of the new administration's opposition to compelled disclosures. They not only face political hurdles, but also judicial challenges. The issue is ripe for the Supreme Court to consider and clarify. The Court should not lack opportunities to do so: the Tobacco Control Act, the GMO-labeling law, or new SEC climate risks disclosures could all provide a chance for the highest court to consider compelled commercial speech. When doing so, the Court should use caution when determining which standard to apply when analyzing the

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<sup>174</sup> Matthew E. Kahn, *Requiring Companies to Disclose Climate Risks Helps Everyone*, HARVARD BUSINESS REVIEW (Feb. 16, 2017), <http://perma.cc/G86K-N4FB>.

<sup>175</sup> See Shear, *supra* note 169 (noting that President Trump already withdrew from the Paris Agreement).

<sup>176</sup> *Id.*

<sup>177</sup> Katy Maher, *Companies Are Planning for Climate Risks*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS (Mar. 9, 2015), <http://perma.cc/N2D4-B95H>.

<sup>178</sup> See Fleming, *supra* note 28.

constitutionality of governmental regulations compelling commercial speech.

As the *AMI* opinion from the D.C. Circuit suggested, “First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.”<sup>179</sup> Sustainability-related disclosure requirements are necessary to empower consumers and investors to choose a sustainable future and protect future generations. Big industries opposing the transition to a more sustainable economy should not be allowed to use the First Amendment as a shield to shy away from their responsibility. At the same time, there needs to be some level of protection to limit governmental intrusion and safeguard the interest of some industries that could become overly burdened by disclosure requirements. Accordingly, the Supreme Court should adopt a rational basis test in the context of compelled commercial speech with a safeguard allowing regulated entities to show how a disclosure regulation unduly burdens their free speech. This solution would clarify the confusion caused by the *Zauderer* decision, and would adequately promote a sustainable economy by empowering consumers and investors to send a strong signal to industries, while safeguarding companies’ First Amendment interests.

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<sup>179</sup> *AMI*, 760 F.3d 18, 22 (D.C. Cir. 2014).