NOTES

THE FIRST AMENDMENT AND REGULATORY RESPONSES TO WORKPLACE SEXUAL MISCONDUCT: CLARIFYING THE TREATMENT OF COMPELLED DISCLOSURE REGIMES

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In response to revelations about the pervasiveness of workplace sexual misconduct, legislators have proposed a variety of regulatory solutions. Among those responses are proposals to require companies to disclose information related to the settlement of sexual misconduct allegations made by employees. This proposal merits special attention because it conceivably compels speech, making it vulnerable to a First Amendment challenge. While such a claim appears surprising, recent developments in First Amendment law have taken the idea from laughable to plausible. This Note situates the proposals in light of recent First Amendment challenges to compelled disclosure regimes, using the proposals as a lens to examine how courts have addressed such challenges. The analysis demonstrates the need for greater clarity in the treatment of information-forcing regulations. A suggested approach is for courts to explicitly recognize regulatory exceptions to compelled speech claims when the compelled speech is only incidental to the broader purpose of the regulation.

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Introduction

In late 2017, the United States was rocked by revelations of pervasive workplace sexual misconduct.[1] The trigger for the public outcry was the discovery that Hollywood producer Harvey Weinstein had repeatedly and credibly been accused of sexual assault and harassment throughout his career, but had quashed such allegations through the use of nondisclosure agreements.[2] From there, the revelations snowballed, and, in short order, more than seventy executives were fired or resigned in the face of similar allegations.[3] In the wake of those admissions, legislators have floated a variety of policy proposals to address the silence around sexual assault and sexual harassment in

[1] *See* Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. Times (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html (chronicling these revelations).

[2] Jodi Kantor & Megan Twohey, *Sexual Misconduct Claims Trail a Hollywood Mogul*, N.Y. Times, Oct. 6, 2017, at A1.

[3] *See* Almukhtar, Gold & Buchanan, *supra* note 1.

the workplace.[4] This Note considers one corrective measure that merits special attention because it conceivably compels speech, making it vulnerable to a First Amendment challenge: requiring companies to disclose information about allegations of sexual misconduct made by employees.[5]

The idea of a First Amendment challenge to such a requirement may seem surprising. After all, disclosure doesn't implicate the citizen-on-a-soapbox "speech" that we instinctively associate with the First Amendment, nor does it restrict speech. Yet several recent lawsuits have sought to block disclosure requirements on compelled speech grounds. These suits have encompassed a range of regulations, including challenges to an SEC regulation requiring publicly traded companies to provide information about whether their products were linked to armed conflict abroad,[6] a Department of Labor regulation requiring potential federal contractors to disclose pending labor law violations,[7] and laws requiring pharmaceutical companies to disclose the reasons behind price increases.[8] The upshot is that companies have mounted successful First Amendment challenges to policies that have important similarities to the proposed legislative responses to workplace sexual misconduct.[9]

This Note uses the disclosure of workplace sexual misconduct information as a lens for examining the First Amendment treatment of disclosure more broadly. It explains how recent cases have indicated that such disclosure may be subject to intermediate—or even strict—scrutiny if challenged. It then argues that applying heightened scrutiny is unwarranted for both public policy and constitutional rea-

[4] *See, e.g.*, Press Release, Office of Assemblywoman Lorena Gonzalez Fletcher, Lorena Gonzalez Fletcher Announces Bills to Empower Sexual-Harassment Victims (Jan. 4, 2018), https://a80.asmdc.org/press-releases/lorena-gonzalez-fletcher-announces-bills-empower-sexual-harassment-victims (proposing legislation that would ban forced arbitration of sexual harassment claims in California); Angela Couloumbis, *State Lawmakers Seek to Ban Nondisclosure Agreements in Sexual Harassment Settlements*, Pittsburgh Post-Gazette (Nov. 15, 2017, 2:57 PM), http://www.post-gazette.com/news/state/2017/11/15/sexual-harassment-nondisclosure-agreement-ban-Judy-Schwank-Vincent-Hughes/stories/201711150209 (discussing legislation that would ban nondisclosure agreements in cases involving sexual harassment and assault).

[5] *See infra* Part II.

[6] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015).

[7] Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *5 (E.D. Tex. Oct. 24, 2016).

[8] Complaint at 1–2, Pharm. Research & Mfrs. of Am. v. Brown, 2:17-cv-01323 (E.D. Cal. Dec. 18, 2017), http://phrma-docs.phrma.org/files/dmfile/sb17-complaint.pdf.

[9] *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 530 (holding a portion of the Conflict Minerals Rule disclosure requirements unconstitutional); *Rung*, 2016 WL 8188655, at *5 (preliminarily enjoining a rule requiring companies to disclose violations of federal labor laws and allegations of such violations when applying for federal contracts).

sons. On the public policy front, disclosure is a useful regulatory tool. By correcting information asymmetries, it allows a variety of audiences, such as consumers, investors, and workers, to make more informed decisions. On the constitutional front, because disclosure improves the ability of citizens to make informed decisions, it may help to ensure a healthy, functioning democracy, a key interest underlying the First Amendment. The analysis thus illustrates the need for a course correction in First Amendment challenges to disclosure, which could be solved by creating a regulatory exception. Such an exception would explicitly recognize that many disclosures simply serve broader regulatory schemes unrelated to speech and should be subject at most to reasonableness review.

The Note proceeds as follows. Part I describes examples of disclosure proposals at the municipal, state, and federal levels and situates them in the context of information-forcing strategies more broadly. Part II then analyzes the potential First Amendment objections that could be levied against such disclosures, focusing specifically on *National Ass'n of Manufacturers v. SEC* (*NAM*),[10] which is the most troubling precedent for the constitutionality of mandated disclosures. Part II explains that *NAM* suggests that laws compelling the disclosure of sexual misconduct information could be subjected to intermediate or even strict scrutiny. Part III then turns to the question of whether heightened scrutiny for disclosure requirements is justified. It discusses the normative and constitutional arguments against applying intermediate or strict scrutiny to sexual misconduct and other similar disclosures and suggests that courts explicitly adopt a regulatory exception that would exempt such disclosures from compelled speech claims.

The contribution of the Note is twofold. First, it adds to a growing body of scholarship on the nexus between the First Amendment and regulation.[11] To date, this scholarship has not addressed the potential for First Amendment challenges to regulations of sexual misconduct that are based on compelled speech claims. To be clear, the Note does not contend that the potential First Amendment arguments against compulsory disclosure of sexual misconduct claims should be sustained. Quite to the contrary: the goal is to demonstrate the necessity of clarifying how compelled speech claims levied against compelled

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[10] 800 F.3d 518 (D.C. Cir. 2015).

[11] *See, e.g.*, Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 868–69 (2015) (discussing the application of court decisions striking down mandatory commercial disclosures); Amanda Shanor, *The New* Lochner, 133 WIS. L. REV. 133, 134–35 (2016) (identifying a "growing constitutional conflict between the First Amendment and the modern administrative state").

disclosure should be treated. Second, the Note provides a useful guide for policymakers. The public interest in finding regulatory solutions to workplace sexual misconduct is undeniably strong. Those who are drafting policy solutions will want to ensure that regulations are not undermined by constitutional challenges. One might hope that challenging the constitutionality of such policies will itself be bad for business and, accordingly, that companies will be discouraged from bringing such challenges. But given the recent success that business interests have had in bringing First Amendment challenges to regulatory regimes, it is not farfetched to imagine the possibility.[12] Moreover, because disclosure is used across policy domains, clarifying how compelled disclosure squares with the First Amendment is critical outside of this specific context as well.

I
Disclosure as a Policy Response to Workplace Sexual Misconduct

Section I.A describes the rise of public concern about the secrecy surrounding workplace sexual misconduct claims. It then discusses one policy response that has been floated by legislators: requiring employers to disclose information about such claims. Section I.B situates the proposal in the context of disclosure requirements more broadly.

A. Mandatory Disclosure Proposals in the Sexual Harassment Context

In late 2017, news that movie producer Harvey Weinstein had been repeatedly and credibly accused of sexual misconduct throughout the course of his career unleashed a wave of attention to the use of nondisclosure agreements.[13] Although Weinstein's behavior

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[12] *Cf. supra* notes 6–9.

[13] *See, e.g.*, Ted Johnson, *New York Lawmakers Target Non-Disclosure Clauses in Wake of Harvey Weinstein Scandal*, Variety (Oct. 18, 2017, 4:43 PM), http://variety.com/2017/politics/news/harvey-weinstein-non-disclosure-agreements-battle-1202593671 (discussing legislative proposals that would void nondisclosure agreements). Nondisclosure provisions generally provide that a signatory will not disclose certain facts related to a settlement, such as the underlying events or the amount of the settlement, absent a court order. They may also bar individuals from talking to a regulatory body about the underlying facts of an allegation or settlement. *See* Lisa Rapaport, *In Malpractice Settlements, Injured Parties Often Agree to Keep Mum*, Reuters (May 11, 2015, 4:15 PM), https://www.reuters.com/article/us-malpractice-nondisclosure/in-malpractice-settlements-injured-parties-often-agree-to-keep-mum-idUSKBN0NW21H20150511?feedType=RSS&feedName=healthNews (describing NDAs in the context of medical malpractice settlements). For a sample nondisclosure provision, see American Corporate Counsel

was considered by some to be an "open secret,"[14] it quickly became clear that he had largely avoided public knowledge of the allegations by entering into confidential out-of-court settlements that prohibited his accusers from speaking about the claims.[15] It was subsequently revealed that other public figures across a variety of industries had entered into similar settlements.[16] As the public outcry about the secrecy of workplace sexual misconduct mounted, legislators began to call for increased transparency about the problem.[17] This led to a variety of policy proposals, including banning the use of nondisclosure provisions in sexual misconduct settlements,[18] prohibiting the mandatory arbitration of sexual misconduct claims in order to force them into court and raise their public visibility,[19] and—the topic of this Note—requiring companies to disclose information about sexual misconduct claims made by employees.[20]

Disclosure proposals have been floated at the federal, state, and municipal levels. The federal proposal, known as the Sunlight in Workplace Harassment Act (the "Sunlight Act"), is likely to be the most impactful because it would apply to all publicly held companies.[21] At a high level, the Sunlight Act would require companies to annually disclose the amount of money they paid to settle disputes related to sexual abuse, harassment, and discrimination claims, as well as the total number of settlements they entered into.[22]

Association, *Sample Private and Confidential Settlement and Non-Disclosure Agreement*, ACCA Docket, Winter 1994, at 58, 60.

[14] Megan Garber, *In the Valley of the Open Secret*, Atlantic (Oct. 11, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/harvey-weinstein-latest-allegations/542508 (discussing this popular description of Weinstein's conduct).

[15] Ronan Farrow, *Harvey Weinstein's Secret Settlements*, New Yorker (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.

[16] *See, e.g.*, Paul Farhi, *Report: Bill O'Reilly Settled Sexual Harassment Claim from Fox News Contributor for $32 Million*, Wash. Post (Oct. 21, 2017), https://www.washingtonpost.com/lifestyle/style/bill-oreilly-settled-sixth-sexual-harassment-claim-for-32-million/2017/10/21/ff34b24c-b68c-11e7-9e58-e6288544af98_story.html?utm_term=.ada846299ae0; Sheryl Gay Stolberg, *Secret Payouts in House over Harassment Claims*, N.Y. Times, Dec. 20, 2017, at A13.

[17] *See, e.g.*, Couloumbis, *supra* note 4 (describing such legislative efforts in Pennsylvania).

[18] *See, e.g.*, *id.*

[19] *See, e.g.*, Press Release, Office of Assemblywoman Lorena Gonzalez Fletcher, *supra* note 4.

[20] *See infra* notes 21–26 and accompanying text.

[21] Sunlight in Workplace Harassment Act, S. 2454, 115th Cong. (2018). Notably, the Weinstein Company is privately held, and so the Sunlight Act would not have applied to it. *See* Daniel Hemel & Dorothy Shapiro Lund, *It May Not Matter What the Weinstein Company Knew*, Atlantic (Oct. 14, 2017), https://www.theatlantic.com/business/archive/2017/10/harvey-weinstein-company-legal-consequences/542838 (noting that the Weinstein Company is a privately held Delaware limited liability company).

[22] *See* S. 2454 § 2.

The Sunlight Act is notable for its broad subject-matter scope. It is not limited to the disclosure of information about sexual misconduct claims; rather, it would require companies to provide information about all out-of-court settlements of disputes involving "discrimination" or "harassment," which are defined to include claims involving violations of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, discrimination against veterans in violation of 38 U.S.C. § 4311(b), and discrimination in programs funded under the Violence Against Women Act.[23] Moreover, the term "settlement" in the Act is not confined to confidential settlements. It covers any agreement involving consideration paid to an individual because of an allegation that the individual was the victim of harassment, discrimination, or sexual abuse, regardless of whether the agreement contains a nondisclosure provision.[24] It also applies to settlements that affect the terms of an individual's employment (for example, if the individual agreed to resign) if the settlement was the result of harassment or discrimination allegations and the individual agreed (a) not to bring a legal, administrative, or other action against the employer; or (b) to keep the allegation confidential.[25]

Under the Sunlight Act, companies would also be required to disaggregate their settlement data along two dimensions.[26] The first dimension would require companies to distinguish between allegations involving the behavior of one employee toward another employee, as opposed to those that involve the behavior of a corporate executive toward an employee.[27] The second dimension would require companies to classify settlement data into one of seven categories depending on whether the underlying harassment or discrimination allegation was based on (1) sex; (2) race, color, or national origin; (3) religion; (4) disability; (5) genetic information; (6) veteran status; or (7) sexual orientation or gender identity.[28] Claims of sexual abuse would be included in the sexual harassment and discrimination category.[29] Finally, in addition to the disclosure of settlement information, the Act would require companies to include a description of the measures they have taken to prevent employees from committing or engaging in sexual abuse, harassment, and discrimination; information

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23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

about the average length of time it takes them to resolve discrimination and harassment complaints; and the total number of pending complaints.[30]

The Sunlight Act would apply only to publicly held companies and would not cover private companies such as the Weinstein Company, but proposals to require private companies to make analogous disclosures have been floated in New York State and in New York City. In early 2018, for example, New York Governor Andrew Cuomo proposed a mandatory annual reporting requirement for companies seeking to do business with the state, which would mandate that those companies disclose the number of sexual harassment violations they faced and the number of nondisclosure agreements they executed.[31] Since announcing the idea, however, Cuomo has not released additional details describing the scheme. Similarly, at the municipal level, New York City Mayor Bill de Blasio suggested that private companies seeking to contract with New York City should also be required to annually report sexual misconduct information.[32]

B. The Use of Disclosure as a Regulatory Tool

Disclosure has become a commonly used regulatory tool,[33] and so it is perhaps unsurprising that a common response to the sexual misconduct revelations was to propose disclosure requirements.[34] This Section first describes the use of regulatory disclosure in the hopes of demonstrating the massive implications of resolving the First Amendment treatment of disclosure mandates.[35] It then situates the

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30 *Id.*

31 Press Release, Office of the Governor, Governor Cuomo Unveils 18th Proposal of 2018 State of the State: Combat Sexual Harassment in the Workplace (Jan. 2, 2018), https://www.governor.ny.gov/news/governor-cuomo-unveils-18th-proposal-2018-state-state-combat-sexual-harassment-workplace.

32 *See* Rich Calder, *De Blasio Wants Private Companies to Disclose Sex Harassment Claims*, N.Y. POST (Jan. 5, 2018, 1:44 PM), https://nypost.com/2018/01/05/de-blasio-wants-private-companies-to-disclose-sex-harassment-claims (praising Cuomo's plan and suggesting "something similar on the city level").

33 The advantages of disclosure regimes from a government perspective are well catalogued. For example, disclosure regimes are inexpensive for governments to enforce as compared to other regimes. *See* Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. L. REV. 653, 660 (1993) (discussing these advantages).

34 In addition, companies face ever-greater demands from the public to disclose information about their business practices. *See, e.g.*, Stephanie Clifford, *Some Retailers Reveal Where and How That T-Shirt Is Made*, N.Y. TIMES, May 9, 2013, at A1 ("[C]onsumers concerned with working conditions, environmental issues and outsourcing are increasingly demanding similar accountability for their T-shirts.").

35 There is a thick literature on disclosure, most of which is beyond the scope of this paper. The important point is simply that disclosure is heavily relied on as a regulatory tool, and it can serve a variety of purposes. *See, e.g.*, ARCHON FUNG, MARY GRAHAM &

sexual misconduct disclosure proposals in the broader context of disclosure.

The usual prerequisite for a disclosure mandate is an information asymmetry.[36] Archon Fung, Mary Graham, and David Weil have explained that governments generally enact disclosure mandates when such asymmetries lead to or exacerbate one of the following: (1) increased risks being borne by the public; (2) the impairment of public services; (3) the perpetuation of social inequities; or (4) corruption.[37] By reducing information asymmetries,[38] disclosure requirements enable individuals to make choices in an informed way.[39] For example, risk-based disclosures, which are common in the environmental, health, and safety domains,[40] allow individuals to decide at what price they are willing to absorb certain hazards.[41] Securities disclosure laws function in this way as well, by ensuring that buyers and sellers have the information necessary to adequately assess the investment risk associated with a particular security.[42] The underlying assumption is that more complete information would lead an indi-

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DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 38–41 (2007) (deriving a disclosure typology of voluntary disclosure, warnings, right-to-know policies, and targeted transparency); Brandon Kraft & Dennis Bogusz, *Disclosure Created Accountability: An Analysis of the National Environmental Policy Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 13 GEO. J.L. & PUB. POL'Y 447, 449 (2015) (discussing disclosure laws as premised on either transparency or accountability).

[36] FUNG ET AL., *supra* note 35, at 40.

[37] *Id.* at 40–41.

[38] *Id.* at 6 (explaining that the idea behind mandatory disclosure is that "markets and deliberative processes do not automatically produce all the information people need to make informed choices among goods and services").

[39] *See* Sunstein, *supra* note 33, at 659 (discussing the value of information disclosure). Many commentators have argued that disclosure does not always result in an efficient market because the users of the information (e.g., consumers or investors) cannot absorb it effectively. *See, e.g.*, FUNG ET AL., *supra* note 35, at 44 (discussing research suggesting that *how* information is presented influences users' behavior as much as the factual content of the information).

[40] *See* MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 2–5 (2002) (discussing disclosures in these contexts).

[41] FUNG ET AL., *supra* note 35, at 32 (discussing the price distortion caused by information asymmetry). Imagine a homebuyer seeking to purchase a house in an area near a hazardous waste disposal site; mandatory environmental disclosure of the risks would let her accurately determine whether to absorb the environmental risks in exchange for the lower house price. Absent such disclosure, she might overpay for the house because she does not know the associated risk.

[42] *See id.* at 13 (describing the corporate financial disclosure required by the securities laws as the United States' most sophisticated example of targeted transparency); Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1094–96 (2007) (discussing the role of disclosure in the functioning of securities markets); *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1276–77 (1999) (discussing social investors, while noting that few people are solely economic or solely social investors and

vidual to make a different decision (e.g., demanding a higher premium to absorb risk) than he or she would make in the absence of that information.

In other words, disclosures are intended to lead to changes in behavior through the communication of information.[43] Generally, the recipient of the information—the information "user"—is thought to be the direct target for behavior change. The expectation is that given fuller information, users will be able to make decisions that are better aligned with their preferences.[44] The discloser's behavior can also be targeted indirectly through consumers' purchasing patterns, capital markets, or organized political activity by users or intermediaries.[45] In addition, a discloser may alter its behavior so as to avoid having to make potentially reputation-damaging disclosures, or may seek to mitigate the effects of a disclosure, such as by announcing a policy change concurrently with the release of information.[46]

Compulsory disclosure of sexual misconduct information by employers can be understood within this paradigm.[47] First, the use of nondisclosure agreements in the settlement of such claims creates an obvious information asymmetry. The result may be that investors are unwittingly absorbing the risk of negative reputational effects, should

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that instead, a mix of economic and noneconomic preferences inform most investors' views).

[43] Fung et al., *supra* note 35, at 40 ("Targeted transparency policies are designed to change the behavior of information users and/or disclosers in specified ways."); *see also* Williams, *supra* note 42, at 1211 (arguing that Congress intended securities disclosures to affect corporate conduct).

[44] *See* Fung et al., *supra* note 35, at 40 (discussing this aim). Users are, of course, free to take no action at all. *Id.* at 49 (noting this option). The point is that this decision would be fully informed.

[45] *Id.* at 46–49 (discussing these methods of exerting influence).

[46] Disclosure can in some cases fail to achieve its intended benefits. *See* Sunstein, *supra* note 33, at 665–66 (discussing the downsides of disclosure). For example, there can be a risk that people receive information that is distorted or incomplete. Graham, *supra* note 40, at 5 (warning of the dangers of flawed disclosure). In addition, whether and how disclosure affects the behavior of disclosers is far from clear. *See* Dalley, *supra* note 42, at 1127–28 (discussing the various ways in which disclosers may respond to disclosure schemes).

[47] It bears noting that two other policy proposals floated in response to workplace sexual misconduct also involve disclosure-based regulation: mandating sexual harassment training and notice posting about employees' rights. For some analysis of those issues, see J. David Goodman, *City May Require Harassment Training for Businesses*, N.Y. Times, Feb. 23, 2018, at A19 and Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 Conn. L. Rev. 177 (2015). Alexander's brief discussion of the constitutionality of notice posters suggests, relying on a 2015 decision by the district court for the District of Columbia, that requiring employers to post notices about employee rights does not violate the First Amendment. *See id.* at 209–11 (citing Nat'l Ass'n of Mfrs. v. Perez, 103 F. Supp. 3d 7 (D.D.C. 2015)).

the settlements become public.[48] Second, the disclosures also contemplate behavioral changes from both the disclosers and the users of the information. As to the disclosers, the anticipated reputational effects of disclosing large numbers of sexual misconduct allegations or high settlement figures may lead companies to alter their behavior.[49] Indeed, the Sunlight Act would require companies to describe what changes in corporate policy they intend to make.[50] Jacky Rosen, one of the bill's sponsors, commented that the legislation would "help lead to greater transparency, safer work environments, and a more robust discussion of how to prevent workplace misconduct and hold people in power accountable."[51] Behavior changes by users of the information are contemplated as well: If disclosure is made privately to state or city governments, then presumably states and cities would base contracting decisions in part on companies' track records related to sexual misconduct claims. If disclosure is publicly required, as with the Sunlight Act, the expectation may be that consumers or investors purchase fewer products or less stock from those companies with poor sexual misconduct track records.

Importantly, disclosure differs from other forms of regulation in that it functions through communication.[52] That makes it peculiarly vulnerable to First Amendment claims, since every disclosure implicates speech, at least in the popular sense of the word.[53] Indeed, disclosure mandates in some cases have been successfully challenged on the grounds that they force an individual or a company to convey a government message, which the First Amendment prohibits.[54] This reveals one of the tensions of analyzing disclosures under the First Amendment—namely, that disclosures are not "neutral": Rather, they are enacted with the expectation that introducing information into the public domain will lead to changes in consumer and investor decision-making or to organized political activity.[55] As Part II demon-

48 The securities laws provide that companies must disclose information that is material to investors, so in theory this risk is accounted for already.

49 For example, companies may announce the adoption of more comprehensive sexual misconduct policies or mandatory training. *Cf.* FUNG ET AL., *supra* note 35, at 85–86 (describing how the anticipated reputational and regulatory threats associated with environmental disclosure led executives to announce anti-pollution plans).

50 Sunlight in Workplace Harassment Act, S. 2454, 115th Cong. § 2 (2018).

51 Press Release, Office of Sen. Elizabeth Warren, Warren, Rosen Unveil Bicameral Legislation to End Secrecy in Workplace Harassment Settlements (Feb. 27, 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-rosen-unveil-bicameral-legislation-to-end-secrecy-in-workplace-harassment-settlements.

52 FUNG ET AL., *supra* note 35, at 47.

53 *See infra* text accompanying notes 56–61.

54 *See infra* Section II.A.3.

55 FUNG ET AL., *supra* note 35, at 46–49.

strates, the use of communication as a regulatory tool thus creates the opportunity for First Amendment challenges. This is not to argue that compulsory disclosures should or do violate the First Amendment. Quite the contrary: It is instead to point out that courts hearing such challenges must distinguish between instances in which compulsory disclosure truly compromises First Amendment values and when government is doing its job—i.e., regulating—albeit through a tool that relies on communication. The next Part turns to that issue.

II
First Amendment Analysis

Not all regulation that functions through communication is thought to implicate the First Amendment,[56] and so the threshold question in a compelled speech claim is whether the challenged law even implicates the First Amendment. The type of reporting that would be required under the Sunlight Act and similar proposals has never been directly considered by the Supreme Court.[57] In recent cases, however, lower courts have treated compelled disclosures as implicating the First Amendment, regardless of whether the relevant information must be disclosed publicly,[58] submitted privately to a government agency,[59] or simply privately disclosed to another party.[60] Finding that such speech is *covered* by the First Amendment should

[56] As Frederick Schauer has explained, it is helpful to think of a distinction between First Amendment *coverage* and First Amendment *protection*. Only once a challenged action or law is covered by the First Amendment does a court even need to consider the question of whether and to what extent the speech at issue is protected. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1769–73 (2004) ("[T]he strictures of the First Amendment plainly apply not only to a subset of all legal controversies, but also to a subset of those legal controversies involving what would be called 'speech' in ordinary language."). For example, antitrust law, which restricts speech, is not thought of as "covered" by the First Amendment. *Id.* at 1770.

[57] *See id.* at 1780 (explaining that the expectation of a "collision course" between securities law and the First Amendment went unrealized).

[58] *See* Full Value Advisors, LLC v. SEC, 633 F.3d 1101, 1106–07 (D.C. Cir. 2011) (holding that a First Amendment challenge to an SEC public disclosure requirement was not yet ripe for adjudication).

[59] *See id.* (analyzing a First Amendment compelled speech challenge to the confidential disclosure of information to the SEC).

[60] *See* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 298–99 (1st Cir. 2005) (considering a compelled speech challenge to the requirement that pharmacy benefit managers, who serve as brokers for pharmaceutical manufacturers, disclose information to health insurers about conflicts of interest and their financial arrangements with third parties).

not be confused with the question of to what extent such speech is *protected*, however.[61] This Part takes up that question.

If a court determines that a disclosure implicates the First Amendment, the next step is to determine what level of constitutional scrutiny applies. The level of scrutiny varies dramatically—from rational basis review to strict scrutiny—depending on the type of speech involved and the content of the disclosure being compelled.[62] In particular, whether a regulation is considered to regulate commercial or non-commercial speech can be outcome determinative because it can mean the difference between strict scrutiny or relaxed rational basis review.[63]

This Part begins in Section II.A by providing a general overview of the tiers of First Amendment scrutiny and of compelled speech doctrine. It then discusses recent First Amendment challenges to disclosure requirements that mirror sexual misconduct disclosures in order to set up the discussion in Section II.B of how the disclosure of sexual misconduct information might be challenged under the First Amendment.

A. *An Overview of Compelled Speech Law*

In evaluating a First Amendment challenge, a court selects from among the full range of constitutional standards, ranging from strict scrutiny, to intermediate scrutiny, to rational basis review. The choice of which level of scrutiny to apply in a compelled speech challenge generally depends on two factors: (1) the type of speech involved and (2) the content of the compelled speech—specifically, whether or not it compels a party to convey a government message. This Section provides a brief introduction to the levels of scrutiny and how they are applied to different types of speech.

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[61] *See* Schauer, *supra* note 56, at 1770–71 (discussing antitrust law as an example of speech regulation not thought to implicate the First Amendment).

[62] *See infra* Section II.A.1.

[63] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795–97 (1988) (discussing whether the regulation of charitable solicitations involved commercial speech, and was thus subject to lesser scrutiny, or noncommercial speech subject to heightened scrutiny); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("[T]he degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech . . . ."); *see also* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1211 (2015) ("First Amendment doctrine is rife with specialized tests governing particular types of speech, and different tests may arguably apply to the same speech.").

1. Tiers of Scrutiny

The most rigorous standard, strict scrutiny, requires a regulation to serve a compelling government interest and be narrowly tailored in order to survive a constitutional challenge.[64] Strict scrutiny generally applies when a regulation directly targets fully protected speech.[65] For example, laws requiring the disclosure of political-contribution information fall into this category because the contributions are themselves protected First Amendment speech.[66] The underlying concern is that the requirement may burden protected speech (the contributions) because individuals may avoid speaking in order to prevent public knowledge of their political leanings.[67] Similarly, requiring individuals to make a disclosure while engaging in fully protected speech—such as soliciting charitable donations—is also subject to strict scrutiny.[68] Finally, strict scrutiny or outright invalidation may also apply when a law compels a party to support or convey a government-selected message, which is discussed *infra* in Section II.A.3.

In contrast, the more deferential approaches—intermediate scrutiny and rational basis review—are generally reserved for regulations of commercial speech, which is protected to a lesser degree than expressive and political speech.[69] Intermediate scrutiny requires the government to demonstrate (1) a "substantial" interest; (2) that the law directly serves the asserted interest; and (3) that the law is no more extensive than necessary.[70] The Court has stated that "[t]his means, among other things, that '[t]he regulatory technique may extend only as far as the interest it serves.'"[71]

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64 *See Riley*, 487 U.S. at 800 (articulating the strict scrutiny formula).

65 *See id.* In cases where a government message is involved, the Supreme Court has sometimes held the law to be per se invalid without even considering whether the law survives strict scrutiny. This is discussed further in Section II.A.3.

66 *See* Buckley v. Valeo, 424 U.S. 1, 65–66 (1976) (reasoning that the right to group association includes the right to "pool money through contributions," since money is necessary for advocacy).

67 *See id.* at 68 (noting the burdens on individual rights caused by political disclosure requirements).

68 *See Riley*, 487 U.S. at 799.

69 Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) ("Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))). The Supreme Court has applied intermediate scrutiny in some compelled speech challenges that involved non-commercial speech, but the cases did not involve disclosure. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

70 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

71 Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (quoting *Central Hudson*, 447 U.S. at 565).

The most deferential level of review available is reasonableness (or rational basis) review,[72] which applies to commercial disclosures intended to cure consumer deception, so long as the required disclosure is factual, uncontroversial, and not overly burdensome.[73] The case in which the Court announced the rule, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[74] involved attorneys whose advertising stated that their clients would owe no "legal" fees if they lost, but failed to say that the clients would be liable for court costs.[75] The Court held that the attorneys could be required to make corrective disclosures.[76] So far, the Supreme Court has only applied the reasonableness standard in consumer deception cases,[77] but lower courts have extended it to disclosures intended to further other government interests, such as protecting human health and the environment.[78]

2. *Commercial Versus Non-Commercial Speech*

The line between commercial and non-commercial speech can be a hazy one.[79] The Supreme Court first recognized commercial speech as protected in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[80] which involved the regulation of the advertising of drug prices by pharmacies.[81] Since then, the Court has used a

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[72] *See* Post, *supra* note 11, at 883 ("*Zauderer* does not employ the specific vocabulary of 'rational basis' review [but] . . . instead adopts terminology that unequivocally locates judicial review further toward the deferential end of the spectrum than the intermediate scrutiny authorized by *Central Hudson*.").

[73] *See* Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 650–51 (1985).

[74] *Id.*

[75] *Id.* at 652.

[76] *Id.* at 650–51.

[77] *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–52 (2010) (applying the *Zauderer* standard to advertising by debt-relief agencies); *Zauderer*, 471 U.S. at 650–51; *see also* Am. Beverage Ass'n v. City & County of San Francisco, 871 F.3d 884, 892 (9th Cir. 2017), *reh'g en banc granted*, 880 F.3d 1019 (9th Cir. 2018) ("Subsequent Supreme Court cases have applied *Zauderer*'s analytic framework only to government-mandated disclosures aimed at preventing consumer deception.").

[78] *See, e.g.*, CTIA—The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1115 (9th Cir. 2017) (extending *Zauderer* to "truthful disclosure in commercial speech" over a dissent); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114–15 (2d Cir. 2001) (upholding a Vermont statute requiring manufacturers of mercury-containing products to label their products to inform consumers that the products contained mercury and, when disposed of, should be recycled or disposed of as hazardous waste). *But see* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 523–54 (D.C. Cir. 2015) (confining the application of *Zauderer* to commercial advertising and point-of-sale disclosures).

[79] *See* Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) ("[T]he line between commercial and non-commercial speech is not always clear . . . .").

[80] 425 U.S. 748 (1976).

[81] *Id.* at 770.

variety of verbal formulations to define commercial speech. In *Bolger v. Youngs Drug Products Corp.*,[82] the Court stated that commercial speech is "speech which does no more than propose a commercial transaction" and elaborated three factors relevant to determining whether speech is commercial: (1) whether the speech involves advertising; (2) whether it refers to a specific product or service; and (3) whether the speaker has an economic motivation for the speech.[83] The Court was clear that the three factors are *relevant*, not necessary or sufficient.[84] For example, an advertisement may promote a product, but also convey a political or expressive message.[85] Subsequently, in *Board of Trustees v. Fox*,[86] the Court clarified that speech does not by necessity become non-commercial if it touches on important public issues.

3. *Government Message Doctrine*

As explained above, the level of scrutiny applicable in a First Amendment challenge depends primarily on the type of speech at issue. But a second factor can also play a role: whether the compelled speech at issue requires a private party to convey a government "message." The classic example is *West Virginia State Board of Education v. Barnette*,[87] in which the Supreme Court held that public school students could not be compelled to salute the U.S. flag while reciting the Pledge of Allegiance. West Virginia argued that the purpose of the requirement was to foster national unity, but the Court held that the means to that end—requiring the flag salute and pledge—were per se impermissible under the First Amendment because they compelled ideological speech.[88] Later, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[89] the Supreme Court extended *Barnette* to prohibit the government from forcing private parties to accommodate a "message" with which they may disagree. *Hurley* involved a

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[82] 463 U.S. 60 (1983).

[83] *See id.* at 66–67; *see also, e.g.*, Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 721 F.3d 264, 285 (4th Cir. 2013) (noting the three factors).

[84] *Bolger*, 463 U.S. at 67–68 n.14. For example, advertising can have a clear political message, and newspaper publishers have an economic motivation.

[85] *See, e.g.*, Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 511–12 (7th Cir. 2014) (discussing whether an advertisement in *Sports Illustrated* congratulating Michael Jordan for being inducted into the Basketball Hall of Fame was commercial or non-commercial speech).

[86] 492 U.S. 469, 473–75 (1989) (applying commercial speech standards to the regulation of Tupperware parties, even though they involved discussions of how to run an efficient home and be financially responsible).

[87] 319 U.S. 624 (1943).

[88] *Id.* at 642.

[89] 515 U.S. 557 (1995).

state-court decision forcing the organizers of a privately run Saint Patrick's Day parade to allow a group of openly gay, lesbian, and bisexual (GLB) Irish-Americans to march.[90] The would-be marchers sought to convey a message of pride in being openly GLB individuals of Irish heritage.[91] According to the Court, the parade organizers could not be forced to accommodate the messages of others because a speaker may choose "not to propound a particular point of view," and "that choice is presumed to lie beyond the government's power to control."[92]

The *Barnette* line of cases clearly prohibits requiring a speaker to convey or accommodate ideological messages and beliefs. The cases do not, however, address the question of when the government has crossed the line from requiring speech that is within its power to demand, to impermissibly compelling a speaker to accommodate or convey a particular "message." The closest the Supreme Court has come to answering the question is *Rumsfeld v. Forum for Academy & Institutional Rights, Inc.* (*FAIR*).[93] In *FAIR*, the Court considered a compelled speech challenge to the Solomon Amendment, which required law schools receiving federal funding to allow the military to recruit on their campuses.[94] The Court acknowledged that "compelled statements of fact"—for example, "The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m."—are subject to First Amendment scrutiny.[95] Despite this, the Court explained, the speech compelled was only "incidental" to the regulation of conduct and therefore did not raise First Amendment concerns.[96] In other words, because the purpose of the law was to allow for military recruitment—not primarily to compel speech, as in *Barnette* and *Hurley*—the law was subject at most to reasonableness review.

In summary, litigants seeking to persuade a court to evaluate a disclosure requirement under heightened scrutiny have two pathways: They can argue (a) that the disclosure regulates non-commercial speech or (b) that the disclosure requires them to affirm a government message. The next Section turns to a recent case in which litigants made exactly these arguments.

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[90] *Id.* at 561.
[91] *Id.*
[92] *Id.* at 575.
[93] 547 U.S. 47 (2006).
[94] *Id.* at 51.
[95] *Id.* at 62.
[96] *Id.*

4. *Recent Constitutional Challenge to Disclosure Requirements:* National Ass'n of Manufacturers v. SEC

The most troubling precedent for the constitutionality of the disclosure of sexual misconduct information is *National Ass'n of Manufacturers v. SEC* (*NAM*).[97] In *NAM*, the D.C. Circuit Court of Appeals addressed a First Amendment challenge to an SEC disclosure requirement that shares similarities with the sexual misconduct disclosure proposals. The regulation, called the Conflict Minerals Rule, mandated that publicly traded companies conduct an audit to determine whether the minerals used in their products were linked to violence in the Democratic Republic of the Congo (DRC).[98] If an audit either revealed that they were linked or was inconclusive on the question, then the company was required to file a conflict minerals report with the SEC and to post the report on its website.[99] In the reports and online, the companies were required to state that their minerals had "not been found to be 'DRC conflict free.'"[100]

The parties to *NAM* disputed two issues, both of which could be raised in a constitutional challenge to sexual misconduct disclosures. The first issue was whether the rule regulated commercial speech. The manufacturers contended that the information to be provided was meant to affect companies' behavior, not to provide information to investors, and therefore did not regulate speech used to sell securities.[101] They pointed to the fact that the phrase "not conflict free" had to be used on their websites and in SEC filings, as opposed to in the context of a transaction or advertisement.[102] They also argued that the disclosure was related to conflict in another country—a non-commercial "contentious political subject[ ]."[103] The manufacturers also focused heavily on distinguishing the required disclosures from those usually required by the SEC,[104] explaining that the rule was intended to achieve "social benefits," not to "generate measurable, direct economic benefits to investors or issuers specifically."[105]

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[97] 800 F.3d 518 (D.C. Cir. 2015).

[98] *See id.* at 531 (Srinivasan, J., dissenting).

[99] *See id.*

[100] *Id.* at 530.

[101] *Id.*

[102] Suppl. Brief of Appellants at 18–19, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015) (No. 1:13-cv-00635), 2014 WL 7387243, at *18–19.

[103] *Id.* at 19.

[104] *See id.* at 18–19.

[105] Brief of Appellants at 20–21, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014), 2013 WL 6019681, at *20–21, *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014). The case was reheard by the original panel after an intervening decision of the D.C. Circuit Court of Appeals, which is why this citation differs from the earlier ones.

Ultimately, the court of appeals invalidated the rule on two separate grounds. First, without deciding whether the rule regulated commercial or non-commercial speech, the court held that it could not survive intermediate scrutiny because less burdensome regulatory options were available, and the government had not provided evidence for why those options would be less effective.[106] For example, the court explained, the government could compile its own list of products affiliated with the war in the Congo or could allow securities issuers to use their own language to describe their products.[107]

Second, the court held in the alternative that the rule could not survive even *Zauderer*'s rational basis review[108] because the government lacked evidence showing that the disclosure would achieve its intended goal (achieving peace and security in the Congo)[109] and because the disclosure was not "factual and uncontroversial."[110] As to the former point, the court faulted the government for relying on "speculation" that the disclosure would help eliminate violent conflict in the Congo, noting that congressional hearings on the bill were inconclusive on the disclosure's effects and that there were some indications that the rule had backfired.[111] As to the latter point, the court explained that the use of the phrase "not conflict free" "compell[ed] an issuer to confess blood on its hands"[112] and that this "scarlet letter" approach forced the companies to convey a message of stigma and shame that they disagreed with, thus violating the First Amendment.[113]

B. Hypothetical Constitutional Analysis of Sexual Misconduct Disclosures

As explained in Section II.A, the applicable level of scrutiny in a compelled speech challenge to a disclosure requirement depends on two key variables: (1) the type of speech involved and (2) the content of the disclosure being compelled—specifically, whether it requires a

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[106] *Nat'l Ass'n of Mfrs.*, 800 F.3d at 555–56.

[107] *Id.* at 556.

[108] Although it analyzed the rule under *Zauderer* for good measure, the court's opinion stated that *Zauderer* only applies to disclosures connected to advertising or product labeling at the "point of sale." *See id.* at 524 ("*Zauderer* has no application to this case.").

[109] *Id.* at 524–27 (explaining that the SEC may not rest on speculation or conjecture).

[110] *See id.* at 522 (explaining that "even if the conflict minerals disclosures are categorized as 'commercial speech,'" they may be subject to intermediate scrutiny).

[111] *See id.* at 526 ("Because of the law, and because some companies in the United States are now avoiding the DRC, miners are being put out of work or are seeing even their meager wages substantially reduced, thus exacerbating the humanitarian crisis and driving them into the rebels' camps as a last resort.").

[112] *Id.* at 530.

[113] *See id.* at 532–33.

company to convey a government message. This Section considers how those factors would apply in a challenge to the mandatory disclosure of workplace sexual misconduct information.

1. Whether Sexual Misconduct Disclosures Would Qualify as Commercial Speech

Sexual misconduct disclosure requirements would apply to commercial *speakers*, but would not obviously regulate commercial *speech*. The result is that under current doctrine, such disclosures may be subject to intermediate or even strict scrutiny.

a. Applying *Bolger*

First, the disclosure of sexual misconduct information does not square easily with *Bolger*'s commercial speech factors. Under the *Bolger* approach, "commercial" speech is primarily concerned with the advertising and sale of specific products or services.[114] Sexual misconduct disclosures, by contrast, involve the provision of information about a company's internal practices, which may have nothing to do with the products or services sold.[115] Moreover, advertising is absent. And while *Bolger*'s third factor—the speaker having an economic interest—is satisfied, the consequences of relying only on this factor risk roping in a host of speech in other instances, such as opinions on newspaper editorial pages, that are fully protected.[116] To put it another way, the factual scenario present in *Zauderer*—in which the state seeks to protect a consumer from the negative effects of deceptive advertising by requiring a corrective disclosure—can be distinguished on several dimensions from the disclosure of workplace sexual misconduct data. The former involves a clear offer to sell services and a mandatory disclosure in order to cure potential consumer deception about the cost of those services. In contrast, the latter is not specific to any service or product that is being sold, and therefore consumer deception is not playing any role. This suggests that the sexual misconduct disclosures would not qualify as commercial speech under

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114 *See supra* Section II.A.2.

115 In a footnote, the *Bolger* Court stated that it was reserving judgment on "whether reference to any particular product or service is a necessary element of commercial speech." Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 68 n.14 (1983). *Bolger* involved the mailing of pamphlets about contraceptives. One argument that it did not involve commercial speech was that the pamphlets were about contraceptives generally, not about a particular contraceptive. Thus, while that statement would seem to provide support for the argument that sexual misconduct disclosures are a commercial speech regulation, a narrower reading is more appropriate.

116 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 580 n.2 (1980) (Stevens, J., concurring).

the *Bolger* test, although the context of the disclosure may impact this analysis.

b. The Securities Context

Does tying the disclosures to the sale of securities render them commercial? It may be plausible that information about sexual misconduct claims is critical to investors' economic decision-making and accordingly should be considered commercial speech. For example, after sexual misconduct allegations against Steve Wynn, the longtime CEO of Wynn Resorts, were revealed, Wynn Resorts' stock price fell by almost a quarter.[117] Moreover, shareholders have already filed suit against Wynn Industries claiming that its Board of Directors breached its fiduciary duties by withholding knowledge that Wynn faced sexual misconduct claims.[118]

Yet the D.C. Circuit Court of Appeals implicitly seemed to reject this argument in *NAM* when it emphasized that the Conflict Minerals Rule was unlike other securities disclosures requirements.[119] Some of the same arguments from *NAM* could be raised against the disclosure of sexual misconduct data: the idea that such information is intended to change company or consumer behavior and not necessarily to generate economic benefits to investors. Moreover, the idea that placing mandatory disclosures in the securities laws is sufficient to immunize them from First Amendment review would appear to create a First Amendment loophole.

c. Outside of the Securities Context

What of sexual misconduct disclosures outside of the securities context? New York State and New York City officials have suggested requiring the disclosures as a condition of doing business with the state and city.[120] Such a disclosure would be tied to a contract but would not provide information about any particular product or service. Compared to the securities context, where revelations about workplace sexual misconduct claims could affect share prices, the disclosure is less tightly associated with the services for which the government is contracting: The company could competently perform on a

[117] *See* Maggie Astor & Julie Creswell, *Casino Mogul Resigns from Company Amid Harassment Scandal*, N.Y. Times, Feb. 7, 2018, at A18 (stating that the stock price fell from $200.60 on January 25, 2018 to $163.22 on February 6, 2018, when the allegations were announced).

[118] Complaint at 38, DiNapoli v. Wynn, A-18-770013-B (8th Jud. Dist., Nev. Feb. 24, 2018).

[119] *See* 800 F.3d 518, 521 (D.C. Cir. 2015).

[120] *See* Office of the Governor, *supra* note 31; Calder, *supra* note 32.

contract regardless of the sexual misconduct claims it has settled. Moreover, if the disclosures must be made publicly, they are even more attenuated from economic interests, since they would not impact the economic interests of the public at all: The state or city funds being paid to the companies would be tax dollars that individuals have already paid to the state. At that juncture, individuals in the general public would not be able to use additional information about the company to guide their economic decision-making.[121]

Accordingly, for the reasons explained *supra*, justifying the mandatory disclosure of sexual misconduct claims as "commercial" under *Bolger* is a stretch. The presumptive result of classifying the disclosure requirements as non-commercial is that courts will apply intermediate, or even strict, scrutiny to them. The question of whether such heightened scrutiny is justified will be addressed *infra* in Part III.

2. *Workplace Sexual Misconduct Regulation and Government Message Doctrine*

a. The Implications of *NAM* for Sexual Misconduct Disclosure Requirements

The compulsory disclosure of workplace sexual misconduct information is also vulnerable to the claim that it compels companies to convey a message with which they disagree. Given the public outcry that the #MeToo movement has (rightfully) generated, the disclosures might be criticized as forcing companies to convey a message of moral responsibility for sexual misconduct. This is one of the arguments that ultimately led the D.C. Circuit Court of Appeals to invalidate a portion of the Conflict Minerals Rule in *NAM*, discussed *supra*.[122] Challengers could argue that accused harassers have been subjected to public shaming in the media as a result of sexual misconduct revelations and that Congress seeks to do the same to companies.[123] Politicians have openly declared their hostility to companies that cover up sexual harassment: For example, Warren said of the bill: "[T]here won't be real change until harassment in all corners of the country is

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[121] They could, of course, put pressure on the state not to contract with those companies or use the information (if it is publicly disclosed) to inform their own purchasing.

[122] *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 530 (explaining that compelling securities issuers to convey the message that their products finance war violates the First Amendment).

[123] *See, e.g.*, *After Sexual Misconduct Claims, Vegas Mogul Steve Wynn Fell Fast*, WY. PUB. MEDIA (Mar. 15, 2018), http://wyomingpublicmedia.org/post/after-sexual-misconduct-claims-vegas-mogul-steve-wynn-fell-fast (discussing media shaming of Steve Wynn); Jeffrey Fleishman, *Weinstein Sex Accusations Show the Power of Social Media and the Limits of Shame in our Celebrity-Driven World*, L.A. TIMES (Oct. 27, 2017), http://www.latimes.com/entertainment/movies/la-ca-shame-perspective-20171027-story.html (detailing the use of social media to shame men accused of sexual harassment and sexual assault).

exposed and the harassers are held accountable[.]"[124] Moreover, the public nature of securities disclosures, compounded by the fact that this sort of disclosure has not historically been required in securities filings, may seem like a red flag to a court, as it was in *NAM*.[125]

The current sexual misconduct disclosure proposals would not compel companies to use specific words, and so perhaps could be distinguished from *NAM* on that basis. Yet at least one district court that has relied on *NAM* did not distinguish it on that ground. In *Associated Builders and Contractors of Southeast Texas v. Rung*,[126] a Texas district court preliminarily enjoined a federal regulation requiring applicants for federal contracts to make public disclosures describing any recent violations and pending allegations of federal labor law in order to be eligible for federal contracts.[127] The goal of the disclosure was to "increase efficiency and cost savings" by ensuring that federal contractors "consistently adhere to labor laws."[128] Although the disclosure was to occur on a government website, the companies themselves were assigned to author the disclosure reports, which had to include information about which labor law was violated, the case number, the date of the award or decision, and the arbitrator's name, if relevant.[129] Quoting *NAM*, the district court wrote that the requirement "compel[led] government contractors to 'publicly condemn' themselves" in violation of the First Amendment, even though they were not required to use specific language.[130]

b. Alternative Precedent: Cases Challenging Sex Offender Disclosures

That said, the D.C. Circuit in *NAM* interpreted compelled speech doctrine expansively in comparison to courts in other cases. Plaintiffs have made analogous allegations against disclosure requirements in other contexts, such as with laws that compel companies to explain the

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[124] Press Release, Office of Senator Elizabeth Warren, Warren, Rosen Unveil Bicameral Legislation to End Secrecy in Workplace Harassment Settlements (Feb. 27, 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-rosen-unveil-bicameral-legislation-to-end-secrecy-in-workplace-harassment-settlements.

[125] *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 521 ("[T]he conflict minerals disclosure regime is not like other disclosure rules the SEC administers.").

[126] No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

[127] *Id.* at *9–11.

[128] Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014), *revoked by* Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 30, 2017).

[129] Fair Pay and Safe Workplaces, 81 Fed. Reg. 58,562, 58,574 (Aug. 25, 2016).

[130] *Rung*, 2016 WL 8188655, at *10. It further explained that the agencies that promulgated the rule had not provided adequate evidence that "public disclosure of non-adjudicated determinations of labor law violations on private projects correlates in any way to poor performance on government contracts." *Id.*

reasons behind prescription drug price increases,[131] sex offender identification laws,[132] and laws requiring individuals who are HIV positive to disclose that status to sexual partners,[133] with only varying success.

In *Doe v. Kerry*,[134] for example, a convicted sex offender argued that a federal statute requiring sex offenders to identify as such with a symbol on their passport communicated not just that he was a registered sex offender, but also the message that he had engaged in or was likely to engage in child sex tourism or sex trafficking.[135] Rejecting this argument, the court held that the symbol was a statement of fact that did not communicate an ideological or political message,[136] distinguishing *NAM* on the grounds that the Conflict Minerals Rule required companies "to communicate the government's message relating to controversial social or political issues, not mere facts relating to criminal convictions."[137] Similarly, in *United States v. Fox*,[138] a federal district court rejected a compelled speech challenge to the requirement that convicted sex offenders disclose information about their status to the state, which the state then published in a registry.[139] The *Fox* court agreed that the disclosure requirement compelled speech, but explained that the mandatory disclosures were not ideological, as in *Barnette*, nor did they make the offender into "a moving billboard" for a government-sponsored message, as in *Wooley v. Maynard*.[140]

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[131] Complaint at 4, Pharm. Research & Mfrs. of Amer. v. Brown, 2:17-cv-01323 (E.D. Cal. Dec. 18, 2017) (arguing that a California statute requiring pharmaceutical manufacturers to notify their customers prior to a price increase, and to provide an explanation for the increase, violates the First Amendment by requiring companies to convey the state's message).

[132] *See infra* text accompanying notes 137–47.

[133] *See, e.g.*, State v. S.F., 483 S.W.3d 385, 388 n.4 (Mo. 2016) (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 61–62 (2006)) (explaining that "[t]he statute at issue does not force individuals to adopt or express a government-approved message, but compels only a factual statement 'if, and to the extent' individuals with HIV choose to engage in certain sexual activities with other persons").

[134] No. 16-cv-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016), *appeal dismissed*, No. 4:16-cv-00654-PJH, 2017 WL 5514566 (9th Cir. Mar. 30, 2017).

[135] *Id.* at *9, *17. The court upheld the statute on the grounds that the passport was government speech and so did not implicate the compelled speech doctrine. *Id*. at *18.

[136] *Id.* at *18.

[137] *Id.*

[138] 286 F. Supp. 3d 1219, 1220 (D. Kan. 2018).

[139] *Id.* at 1221.

[140] *Id.* at 1222–23, 1223 n.3. *But see* Arnold v. United States, No. 3:11CR89-MPM-SAA-1, 2012 WL 5035310, at *2 (N.D. Miss. Oct. 17, 2012), *aff'd*, 740 F.3d 1032 (5th Cir. 2014) (holding that the Sex Offender Registration and Notification Act's registration requirements do not violate "any protected right under the First Amendment"). In *Wooley v. Maynard*, the U.S. Supreme Court sustained a First Amendment challenge to a requirement that New Hampshire residents display the motto "Live Free or Die" on their license plates. 430 U.S. 705, 717 (1977).

The one case to invalidate a sex offender requirement on compelled speech grounds, *Doe v. Strange*,[141] involved an Alabama law requiring convicted sex offenders to carry a state identification card "with the inscription 'CRIMINAL SEX OFFENDER' in bold, red letters."[142] A federal district court held that the law—which also required offenders to relinquish other forms of identification[143]—violated the First Amendment because there was no identifiable purpose for the inscription other than shaming the convicted sex offender.[144] In the court's view, the inscription conveyed "a host of moral and philosophical messages related to societal concepts of crime and punishment"[145] and was required "for the express purpose that it be observed and read by the public."[146]

The sex offender disclosure cases imply that the disclosure of facts about some conduct that occurred does not impermissibly convey a government message, absent a finding (as in *Doe v. Strange*) that the disclosure has no imaginable purpose other than to shame the discloser. Under that standard, the disclosure of sexual misconduct information would not implicate government message concerns at all. Moreover, to the extent that a disclosure conveys a message of moral condemnation, that message is arguably *strongest* when a label is assigned only after a person has been criminally convicted: After all, the act resulting in the disclosure has already been identified by society as one deserving of moral condemnation. And all of the disclosures at issue—the sex offender label, the phrase "not conflict free," and sexual misconduct disclosures—refer to "mere facts"[147] in the sense that they can be verified as true or untrue: One has been convicted of a sex crime, or one has not. Along the same lines, a company has shown there are no conflict minerals in its supply chain, or it has not. And, either a company has settled harassment and discrimination claims, or it has not. At a minimum, the inconsistency in what qualifies as a government "message" should make us question whether *NAM*'s analysis should be extended to other disclosure requirements.

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141 No. 2:15-CV-606-WKW, 2016 WL 1079153 (M.D. Ala. Mar. 18, 2016).

142 *Id.* at *3. The law also required offenders to relinquish other identification that did not bear the sex offender inscription. *Id.* at *11.

143 *See id.* at *11.

144 *Id.* at *17 ("Outside the context of allowing law enforcement to readily identify a sex offender's registrant status, . . . [the] identification requirements appear to serve no other purpose than to humiliate offenders who have already atoned for their crimes.").

145 *Id.* at *18.

146 *Id.* at *17–18 (quoting Wooley v. Maynard, 430 U.S. 705, 713 (1977)).

147 *See* Doe v. Kerry, No. 16-CV-0654-PJH, 2016 WL 5339804, at *18 (N.D. Cal. Sept. 23, 2016), *appeal dismissed*, No. 4:16-cv-00654-PJH, 2017 WL 5514566 (9th Cir. Mar. 30, 2017).

The underlying difficulty for courts is that factual disclosures can have multiple purposes and multiple effects. While there may be occasional cases in which the only purpose a court can find for a compulsory disclosure is shaming, such as with the Alabama law considered in *Doe v. Strange*, most disclosure requirements will present less clear-cut questions about government messages. The incentive for a litigant to bring the claim of a compelled message is high, because if the court agrees, the disclosure requirement will be subjected to some version of heightened scrutiny. The last Part takes up this issue directly, suggesting that factual disclosures should not be subject to heightened scrutiny so long as they do not compel the use of specific words and serve a legitimate regulatory purpose.

III
Implications

Until recently, First Amendment challenges to laws requiring information disclosure related to a company's internal practices—such as its financial information, business dealings, or wrongdoing—were relatively rare. But as Part II explained, courts increasingly view disclosure as "speech," making it possible for companies to bring constitutional challenges to compulsory disclosure laws. The analysis in Part II demonstrated how the narrow definition of commercial speech and the absence of a clear principle for determining when disclosure compels the communication of a government message have allowed companies to argue that disclosure mandates should be subject to heightened scrutiny. If business disclosures would ultimately survive heightened scrutiny, is there any problem with courts applying it? This Part argues that there is, and that courts should consider explicitly adopting a regulatory exception to compelled speech claims that would apply to compulsory business disclosures. Such an exception would mean that the disclosures would be subject only to reasonableness review. Such an exception is doctrinally defensible for the reasons explained below and is normatively preferable to heightened scrutiny, as discussed *infra* in Section III.B.

As an initial matter, the existence of varying levels of scrutiny reflects the understanding that First Amendment rights are for the most part not absolute. That is, when a government interest is sufficiently important, it can outweigh the interests of speakers. Alternately, if speakers' interests are weak enough, it will be easier for the government's interests to outweigh them. Tiers of scrutiny provide an initial accounting of how a court should balance those interests by putting a thumb on the scale in favor of either the government or the

speaker.[148] The appropriate level of scrutiny, then, should reflect an initial determination about how concerned we are about the interests at stake.

A. Analogous Exceptions

Conceptually, a regulatory exception reflects the idea that a law may primarily seek to regulate conduct, with only an incidental impact on speech—meaning that the First Amendment interests at stake are limited. Courts have applied this idea in other contexts without explicitly recognizing it as a regulatory exception. In *Environmental Defense Center, Inc. v. EPA*,[149] for example, a group of municipalities challenged a set of federal regulations requiring them to inform the public about the hazards created by storm water runoff and improperly disposed-of waste, as well as steps that could be taken to prevent such hazards.[150] The municipalities argued that the rule violated the First Amendment by requiring them to communicate a message that they did not necessarily wish to deliver.[151] Rejecting that argument, the Ninth Circuit explained that the purpose of the provisions was "legitimate and consistent with the regulatory goals of the overall scheme of the Clean Water Act" and as such did not raise compelled speech concerns.[152] The court in *Environmental Defense Center* essentially looked beyond the fact that some compelled speech was involved to view the regulatory scheme as a whole and find that the regulation of speech was simply incidental to a broader focus on conduct—avoiding the runoff of pollution into bodies of water.

Other courts have taken similar approaches. For example, in *State v. S.F.*, the Missouri Supreme Court upheld a requirement that individuals who are HIV positive disclose that fact prior to sexual activity with a person who does not know of their HIV-positive status. The

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[148] *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992) (explaining that balancing takes into account background principles or policies that affect the importance of a right, the severity of infringement, and the quality of the government's reason for infringing the right).

[149] 344 F.3d 832, 851 (9th Cir. 2003) (rejecting a compelled speech challenge to the requirement that municipalities distribute environmental educational materials to the community because the requirement was "consistent with the overall regulatory program of the Clean Water Act"). At least one district court adopted the approach taken in *Environmental Defense Center* to uphold borderline commercial speech regulations. *See* S. Cal. Inst. of Law v. Biggers, No. SACV 1300193 JVS (RNBx), 2013 WL 11316948, at *7–8 (C.D. Cal. Aug. 19, 2013), *aff'd*, 613 F. App'x 665 (9th Cir. 2015) (rejecting a First Amendment challenge to mandatory disclosures about bar passage rates on a law school's website because the disclosure was "justifiable as ancillary to a broader regulatory scheme already constraining accredited law schools in California").

[150] *Envtl. Def. Ctr.*, 344 F.3d at 848.

[151] *Id.* at 848–49.

[152] *Id.* at 849.

Missouri Court held that "any speech compelled by [the statute] [wa]s incidental to its regulation of the targeted conduct[ ]" because the purpose was not to compel disclosure, but to prevent certain conduct that could spread HIV to nonconsenting individuals.[153] Furthermore, the Supreme Court's opinion in *FAIR* used a similar line of reasoning when it explained that the Solomon Amendment did not primarily seek to regulate speech, and therefore the compelled speech concerns in *Barnette*, *Wooley*, and *Hurley* were inapplicable.[154] A regulatory exception of this sort in the context of business disclosures would recognize that the government's purpose is to prevent certain conduct, such as sexual harassment, and that any effects on speech are incidental.

B. The Underlying Concerns in Compelled Speech Doctrine Are Not Relevant to Mandated Disclosures

What are the speech interests at stake in this context? Commentators and case law have identified three primary concerns underlying the right against compelled speech,[155] each of which is minimal in the context of regulatory disclosures, revealing that a regulatory exception and reasonableness review are appropriate here. The first concern is that by requiring a party to speak, the government may be seeking to manipulate public debate about an issue, as opposed to trying to achieve a legitimate regulatory goal.[156] Underlying this concern is the potential that the government could use a law that purports to regulate a harm as a guise for privileging ideas that it favors or that advance its own self-interest.[157] The second concern is that forcing a party to speak violates his or her autonomy, which is thought to be an important First Amendment consideration both instrumentally and as an end to itself.[158] The latter—autonomy as an end to itself—is demonstrated by the fact that First Amendment protection is granted even to speech that has little social value, such as hate

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153 State v. S.F., 483 S.W.3d 385, 387–88 (Mo. 2016).

154 *See supra* text accompanying notes 93–96.

155 *See* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1293 (2014) (explaining that compelled speech may chill speech, distort discourse, or compromise autonomy values).

156 *See id.*; Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 917–18 (2015) (discussing the concern that the government may be trying to manipulate public opinion).

157 *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428–29 (1996).

158 *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.").

speech.[159] And as an instrumental matter, autonomy is necessary to a well-functioning democracy: A society in which individuals cannot think, speak, and make decisions for themselves is inconsistent with the concept of governance by consent.[160] Finally, the third concern is that compelled disclosure may burden protected speech.[161] If a party knows that speaking will obligate it to make a particular disclosure, it may avoid speaking entirely so as to avoid the disclosure. This is referred to as a disclosure having a "chilling" effect.

In the case of compulsory business disclosures, the risk that the values that compelled speech doctrine protects will be compromised is low. The disclosure of sexual misconduct information in particular implicates these concerns only to a limited extent. Concededly, all factual disclosures seek to influence public debate to some extent in the sense that they seek to change behavior, whether of consumers, investors, or companies themselves.[162] Such influence can occur in a variety of ways—for example, by facilitating the ability of consumers or investors to avoid companies that have spent large amounts to settle misconduct claims; because companies forced to make reputation-damaging disclosures will feel pressured to announce the implementation of more rigorous sexual misconduct policies concurrent with such disclosures; or through information intermediaries publishing lists of companies that have faced large numbers of harassment claims. While the disclosures do involve publicly salient issues, the effects that the disclosures may cause—changes in consumer or company behavior—are legitimate regulatory goals for government to pursue. The simple fact that public debate is influenced by the disclosures does not automatically mean that government is acting inappropriately.

Moreover, businesses lack the intrinsic autonomy interests associated with individual, human speakers, such as those in *Barnette*. They may have autonomy interests that are important instrumentally—that is, as a means to ensuring a robust democracy—but the disclosure of sexual misconduct information would enhance democratic functioning by introducing additional facts into the public realm, thus serving the same underlying interest. Moreover, the challenges to compulsory dis-

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[159] *See, e.g.*, C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment. 251 (2011).

[160] If the distinction is not clear, consider the fact that we would not need hate speech in order to have a well-functioning democracy. Therefore, if we are trying to explain the First Amendment using existing cases, autonomy must be valued for more than simply instrumental reasons.

[161] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 462–63 (1958) (discussing whether a state's interest in obtaining the disclosure of political membership lists was sufficient to overcome the negative effects on members' exercise of free association).

[162] *See supra* Section II.B.

closure by sex offenders demonstrate that even when an individual, human speaker is involved, autonomy concerns do not always overcome a compelling government interest.[163] So even if we were to think of companies having some autonomy interest, that need not necessarily override the government interest at stake.

And, finally, nothing about business disclosures chills fully protected speech. Businesses required to disclose information about sexual misconduct—or other issues, for that matter—are still free to say whatever else they desire about those topics. Of course, a business that must disclose sexual misconduct settlements worth millions of dollars will have difficulty promoting a message that its workplace is a safe one. But that speech—messaging about the company's internal operations and culture—is at best commercial speech, which is not fully protected under the First Amendment. The same is true of a scenario in which a disclosure is so burdensome that it becomes reasonable for a company to close down its business rather than comply: Any speech that is "chilled" by the closure is at best commercial speech. In such a scenario, to the extent that the company can no longer engage in fully protected speech because it no longer exists, that result does not flow from the disclosure requirement, but rather the result of market decisions. The bottom line is that the fact that a disclosure may lead to public shaming or stigmatization of a company should not be thought of as equivalent to affecting protected speech. Accordingly, it would not be illogical for courts to apply only reasonableness review to compulsory business disclosures.

C. *Recognition of Listeners' Interests*

Applying reasonableness review would put a thumb on the scale for those who have an interest in the information that is disclosed. One result of disclosure is to increase the availability of information in the marketplace, which allows individuals to make better decisions, in the sense that their choices are better informed and therefore more likely to be aligned with their preferences.[164] This idea—that "listeners" should be taken into account in a First Amendment analysis, not just speakers—has been recognized by commentators in the commercial speech context,[165] and was captured by the Supreme Court in

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163 *See supra* Part II.

164 *See supra* Part II.

165 *See, e.g.*, Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 908 (2017) ("[A] hearer's right to receive truthful, non-misleading information helpful in making rational market choices was the sole explanation for the emergence of the commercial speech doctrine in *Virginia* [*Pharmacy*]."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000)

Virginia Pharmacy.[166] Faced with the argument that the purpose of the First Amendment is to ensure "enlighten[ed] public decisionmaking in a democracy," the Court acknowledged that a seller's interests may be solely economic and accordingly did not appear to implicate free speech concerns.[167] But, the Court reasoned, *consumers'* interest in commercial information was sufficiently important to justify protecting economically motivated speech.[168] According to the Court:

> 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 decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[169]

Even though sexual misconduct disclosures do not fit well with the traditional definition of commercial speech provided in *Bolger*,[170] reasonableness review for the disclosures could nonetheless be justified by the same rationale. By mandating that the public be given *more* information, disclosure requirements further, rather than hinder, First Amendment interests.[171] This is all the more true given that the line between commercial and non-commercial speech is hazy.[172] At a minimum, this should make us wary of assigning such

("[The Supreme Court] has therefore focused its analysis [in commercial speech cases] on the need to receive information, rather than on the rights of speakers.").

166 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

167 *Id.* at 765.

168 *Id.* at 762–64. *Virginia Pharmacy* involved a challenge to a statute that prohibited pharmacies from advertising the prices of prescription drugs. In describing the consumer's interest, the court noted that some consumers spend a high portion of their income on prescription drugs, and so information about drug prices—especially given that they varied dramatically depending on the pharmacy—was "more than a convenience." *Id.* at 763–64.

169 *Id.* at 765 (internal citations omitted).

170 *See supra* Section II.B.1.

171 *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 174 (2010) ("[T]he listener-focused reasoning in the commercial speech cases . . . noted that compelled disclosures have a beneficial information-forcing function that is not inconsistent with First Amendment values.").

172 *See, e.g.*, Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know*,*"* 58 Ariz. L. Rev. 421, 430–31 (2016) (pointing out that the line between political and commercial speech is not perfectly defined); Michael R. Siebecker, *Corporate*

significant weight to the distinction between commercial and non-commercial speech in the disclosure context and shows that, although disclosures may qualify as non-commercial speech, lower scrutiny is still appropriate.

D. Potential Challenges and Counter-Arguments

One complication with this proposal is that courts will have to reckon with the question of what qualifies as a broader regulatory scheme. For example, if sexual misconduct disclosure requirements are imposed in the securities context—as with the Sunlight Act—the requirements could be criticized as being dissimilar from standard securities disclosures, which generally focus on financial and in some cases environmental information. Indeed, this was a criticism that the *NAM* Court faced when considering the Conflict Minerals Rule. Accordingly, the exception should not be limited to disclosures that are part of an existing regulatory regime or are equivalent to existing disclosures—otherwise, the application of the exception would be constrained. The inquiry instead must focus on whether the regulatory purpose of the scheme is a permissible one, and if so whether the required disclosures are consistent with that purpose. Applied to the Sunlight Act, a court should ask whether the purpose of the securities regime—remedying informational asymmetries between investors and companies—is consistent with requiring companies to provide information about the settlement of discrimination and harassment claims.

Another potential counter-argument to applying reasonableness review may be that if a challenged disclosure would ultimately survive heightened scrutiny anyway, we need not be too concerned. As an initial matter, *NAM* and *Rung*, in which courts enjoined business disclosure requirements, demonstrate that this is not the case.[173] Rather, those cases show that heightened scrutiny may limit the ability of policymakers to experiment with disclosure as a policy solution. Both intermediate and strict scrutiny require some form of narrow tailoring, which opens the floor to arguments about the scope of disclosure and the manner in which it is required. For example, when the D.C. Circuit Court of Appeals applied intermediate scrutiny to invalidate a portion of the Conflict Minerals Rule, it pointed out that a less speech-impacting rule was possible: The government could have compiled its own list of products thought to be related to violence

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Speech, Securities Regulation, and an Institutional Approach to the First Amendment, 48 WM. & MARY L. REV. 613, 613 (2006) ("[T]he Supreme Court has never articulated sufficiently clear definitions of 'commercial' or 'political' speech, or the boundaries between them, to address claims of politically tinged corporate speech.").

[173] *See supra* Section II.B.2.

abroad.[174] This criticism could be made of every disclosure requirement, because the government will always have the option of requiring only confidential disclosure and then compiling and sharing the information itself.

The narrow tailoring requirement also has the effect of requiring some sort of showing that the rule will actually achieve its stated purpose, which further stymies experimentation.[175] One of course hopes that the policies chosen by Congress are effective, but that is not always possible to know in advance. Applying heightened scrutiny to compulsory disclosures thus creates a circular problem: If Congress cannot experiment in the first place, it will be more difficult for it to demonstrate the effectiveness of a disclosure at achieving a particular regulatory goal.

In addition, imposing strict First Amendment constraints on disclosures may also have the unintended consequence of driving Congress toward more aggressive regulation. Contrast, for example, prohibiting nondisclosure agreements in sexual misconduct settlements entirely with requiring the disclosure of information about such settlements. The former entirely forecloses one option for companies and victims. The latter, in contrast, attempts to influence consumers and investors to use their economic power to discourage the use of nondisclosure agreements. The solution is comparatively minimalist, leaving the ultimate decision about the importance of the issue in the hands of the public, companies, and victims. Thus, normatively, we may prefer that courts are less empowered to invalidate such requirements.

Conclusion

New mandatory disclosure regimes are not intended to regulate commercial speech, at least as it has been defined to this point. But that does not mean that the disclosures should be subject to strict, or even intermediate, scrutiny, which would have the effect of impairing regulatory experimentation despite only minimally implicating free speech concerns. Instead, courts should consider the possibility of explicitly adopting a regulatory exception for such disclosures, which would be normatively preferable and clarify First Amendment doctrine.

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174 Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 556 (D.C. Cir. 2015).

175 As Judge Posner has explained, "judicial decisions invalidating regulation have the unfortunate consequence (very disturbing to a pragmatist) of stifling experimentation and so depriving society of experience with alternative methods of dealing with perceived social problems." Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 Stan. L. Rev. 737, 744 (2002).