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SECURITIES & EXCHANGE COMMISSION VS. ELON MUSK & THE FIRST AMENDMENT

Jerry W. Markham†

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.[1]

ABSTRACT

The Securities and Exchange Commission ("SEC") is responsible for administering the federal securities laws, which mandate the content and timing of information disseminated to shareholders of public companies. SEC regulations adopted under those statutes are claimed to be exempt from First Amendment protection because they only regulate "commercial" speech. Such speech has been historically denied full First Amendment protection. However, an SEC enforcement action brought against Telsa, Inc. and its chief executive officer Elon Musk demonstrates the danger of the SEC's unrestrained application of the commercial speech doctrine to viewpoint-based speech. Through that action, the SEC is causing the censorship of Musk's "tweets" on Twitter concerning his often-controversial views on the role and success of Tesla's electronic automobiles in combating climate change, one of the most critical political and social issues of our time. This Article argues that the SEC should cease regulation of viewpoint-based speech on Twitter and other social media. The rough and tumble world of social media, and its now central role in the public debate on vital political and social issues, deserves full First Amendment protection.

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INTRODUCTION

The Securities and Exchange Commission ("SEC") is responsible for the administration of the federal securities laws, which mandate the content and timing of information disseminated to shareholders of public companies.[2] SEC regulations are generally held to be exempt from First Amendment protection because they regulate only "commercial" speech.[3] Such discourse is said to be unworthy of the broad First Amendment protections given to political and social speech.[4] An SEC enforcement action brought against Tesla, Inc. and its chief executive officer Elon Musk demonstrates the danger of the SEC's unrestrained application of the commercial-speech doctrine to viewpoint-based speech on social media.[5] Through that action, the SEC is effectively censoring Musk's "tweets."[6] Those postings concern his often

2. *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET (3d ed. 2003) (describing the history and role of the SEC).

3. *See* Russell G. Ryan, *The Federal Securities Laws, the First Amendment and Commercial Speech: A Call for Consistency*, 59 ST. JOHN'S L. REV. 57, 67 71 (1984) (describing the application of the "commercial speech" doctrine to federal securities laws).

4. *See, e.g.*, Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 790 92 (2007) (observing that "an impressive list of commentators" have argued that the First Amendment should not apply to securities regulation, but asserting that arguments supporting that claim are unpersuasive); Karl M.F. Lockhart, *A 'Corporate Democracy'? Freedom of Speech and the SEC*, 104 VA. L. REV. 1593, 1598 99 (2018) (examining limitations on free speech imposed by federal securities laws); Lloyd L. Drury, *Disclosure is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757 (2007) (same).

5. Complaint at 3, U.S. Sec. & Exch. Comm'n (SEC) v. Musk, No. 1:18-cv-8865 (S.D.N.Y. Sept. 27, 2018), ECF No. 1.

6. *See* Consent Motion for Entry of Final Judgment at 13 ex.2, *SEC v. Musk*, No. 1:18-cv-8865 (S.D.N.Y. Oct 16, 2018), ECF No. 14; *see also* Knight

controversial views on the role of Tesla's all-electric automobiles in combating climate change, one of the most important political and social issues of our time.[7]

This Article argues that the SEC should cease regulating viewpoint-based speech on Twitter and other social media. The rough-and-tumble world of those Internet-based forums and their central role in the public debate on critical social and political issues deserve full First Amendment protection.

I. THE ELON MUSK TWITTER CONTROVERSY

Tesla's core mission is "to accelerate the advent of sustainable transport by bringing compelling mass market electric cars to market as soon as possible."[8] As Tesla's CEO, Elon Musk is the leader of that effort.[9] Although Tesla's popular production models did not start

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First Amendment Inst. v. Trump, 928 F.3d 226, 230 31 (2d Cir. 2019) (describing Twitter and how its participants interact with each other).

7. *See* Catherine Clifford, *Elon Musk; Tesla's Work 'Supersedes Political Parties, Race, Creed, Religion'*, CNBC (Nov. 6, 2018, 9:00 AM), https://www.cnbc.com/2018/11/05/elon-musk-teslas-work-is-important-to-the-future-of-the-world.html [https://perma.cc/NC9X-WNWR]. Musk and Tesla are also developing solar energy systems for residential housing. ASHLEE VANCE, ELON MUSK: TESLA, SPACEX, AND THE QUEST FOR A FANTASTIC FUTURE 16 (2015). Musk is separately pursuing the commercial exploitation of space and colonization of Mars through SpaceX, the reconstruction of the nation's infrastructure through the Boring Company, and the linkage of computers with the human brain through the Neuralink Corporation. *Id.* at 22; Aarian Marshall, *Elon Musk's Boring Company Inches Closer to Making Hyperloop a Reality*, WIRED (Apr. 19, 2019, 10:00 AM), https://www.wired.com/story/elon-musks-boring-company-takes-small-step-toward-reality/ [https://perma.cc/JBR6-9ARH]; Daniela Hernandez & Heather Mack, *Elon Musk's Neuralink Shows Off Advances to Brain-Computer Interface*, WALL ST. J. (July 17, 2019, 3:05 AM), https://www.wsj.com/articles/elon-musks-neuralink-advances-brain-computer-interface-11563334987 [https://perma.cc/62US-7SQX].

8. Elon Musk, *The Mission of Tesla*, TESLA (Nov. 18, 2013), https://www.tesla.com/blog/mission-tesla [https://perma.cc/UM7F-WQRC].

9. Musk became Tesla's chairman in 2004 and its CEO in 2008. Abigail Hess, *How Tesla and Elon Musk Became Household Names*, CNBC (Nov. 21, 2017, 11:46 AM), https://www.cnbc.com/2017/11/21/how-tesla-and-elon-musk-became-household-names.html [https://perma.cc/WBY3-SWZP]. Tesla issued stock to the public in 2010, which subjected it to SEC regulations. *See Timeline: Main Events in Tesla's History as a Public Company*, REUTERS (Aug. 10, 2018, 3:30 PM), https://www.reuters.com/article/us-tesla-musk-timeline/timeline-main-events-in-teslas-history-as-a-public-company-idUSKBN1KV2A0 [https://perma.cc/7PXA-Q994].

appearing until 2013,[10] Tesla delivered to consumers roughly 245,000 all-electric vehicles in 2018.[11] Tesla was then the world's leading producer of all-electric motor vehicles,[12] allowing the company to boast that it was "starting to make a tangible impact on accelerating the world to sustainable energy."[13]

Musk is an avid user of Twitter.[14] Many of his tweets express his unique and controversial viewpoints[15] on Tesla's efforts to transform the largely fossil-fuel-based automobile industry into a more eco-

10. *See* Drake Baer, *The Making of Tesla: Invention, Betrayal, And the Birth of the Roadster*, BUS. INSIDER (Nov. 11, 2014, 12:06 PM), https://www.businessinsider.com/tesla-the-origin-story-2014-10 [https://perma.cc/C3X6-MTS5].

11. *Tesla Q4 2018 Vehicle Production & Deliveries, Also Announcing $2,000 Price Reduction in US*, TESLA (Jan. 2, 2019), https://ir.tesla.com/news-releases/news-release-details/tesla-q4-2018-vehicle-production-deliveries-also-announcing-2000 [https://perma.cc/MZ7X-AW7N].

12. Kalyan Kumar, *Tesla Model 3 Dominates US Electric Car Market with 60% of EV Sales*, INT'L BUS. TIMES (Apr. 8, 2019, 10:47 AM), https://www.ibtimes.com/tesla-model-3-dominates-us-electric-car-market-60-ev-sales-2783940 [https://perma.cc/8UKZ-LA6F]; *see also* Noel Randewich, *Tesla Becomes Most Valuable U.S. Car Maker, Edges Out GM*, REUTERS (Apr. 10, 2017, 12:35 PM), https://www.reuters.com/article/us-usa-stocks-tesla/tesla-becomes-most-valuable-u-s-car-maker-edges-out-gm-idUSKBN17C1XF [https://perma.cc/3LK3-BRS4] (describing Tesla's capital market growth). In 2018, Tesla held a seventy-five percent share of the U.S. all-electronic car market. *See* Kumar, *supra*.

13. *Tesla Q4 2018 Vehicle Production & Deliveries, Also Announcing $2,000 Price Reduction in US*, *supra* note 11; *see also* Simon Alvarez, *The Tesla Effect is Reaching Critical Mass, and it Could Put Big Oil on the Defensive*, TESLARATI (May 12, 2019), https://www.teslarati.com/tesla-effect-puts-big-oil-on-the-defensive/ [https://perma.cc/3N3X-PSVU] (describing Tesla's place within the growing electric-vehicle market).

14. Matthew Goldstein & Emily Flitter, *Tesla Chief Elon Musk is Sued by S.E.C. in Move That Could Oust Him*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/business/elon-musk-sec-lawsuit-tesla.html [https://perma.cc/H668-AUBB].

15. *See, e.g.*, Elon Musk (@elonmusk), TWITTER (Aug. 25, 2018, 4:15 PM), https://twitter.com/elonmusk/status/1120502923136520192?lang=en [https://perma.cc/6N8V-GGZD] (claiming that the cost of operating an electric car is "much lower" than operating a gas-powered car); Andrew J. Hawkins, *How Tesla Changed the Auto Industry Forever*, THE VERGE (July 28, 2017, 6:58 PM), https://www.theverge.com/2017/7/28/16059954/tesla-model-3-2017-auto-industry-influence-elon-musk [https://perma.cc/KN6E-9MPY] ("[M]any are parsing over every tweet by CEO Elon Musk for clues about the car's cost, interior, and what sort of options will be available.").

friendly industry.[16] His tweets are often unstructured, erratic, inaccurate, indecorous; they are also typically scathing about his critics.[17] Nevertheless, Musk's tweets are of broad public interest, as evidenced by the fact that he has some twenty-eight million followers on Twitter.[18] Those tweets are also intensely scrutinized, criticized, and widely reported on by mass media and Internet blogs.[19]

The SEC brought an enforcement action against Tesla after Musk tweeted in August 2018 that Tesla had secured financing that would allow it to buy out public shareholders at a premium over existing market prices.[20] Tesla's stock price then jumped over six percent, but the plan to go private, if there ever was one, was abandoned a few

16. *See, e.g.*, Kristin Houser, *7 Ways Tesla is Changing Everything*, FUTURISM (Feb. 26, 2017), https://futurism.com/ready-for-edit-7-ways-tesla-is-changing-everything [https://perma.cc/U6FQ-V93H].

17. *See* Rebecca Marston, *The Weird and Wonderful Life of Elon Musk*, BBC (Nov. 16, 2018), https://www.bbc.com/news/business-45560987 [https://perma.cc/5E7X-QXP8] (describing Musk's innovative, controversial, and sometimes bizarre actions); Nathan Bomey, *Why Does Tesla CEO Elon Musk Keep Getting Himself into a Mess*, USA TODAY (Sept. 7, 2018, 4:54 PM), https://www.usatoday.com/story/money/cars/2018/09/07/tesla-ceo-elon-musk-marijuana-controversy/1222499002/ [https://perma.cc/N7P6-YZ5E] (describing a podcast during which Musk was apparently smoking marijuana and describing his quarrels with the press). Musk also engaged in a Twitter slanging match with a cave diver over the issue of how to rescue some children trapped in a cave in Thailand. In the course of that exchange, Musk referred to the diver as the "pedo guy." The diver sued Musk for defamation and sought $190 million in damages. Musk defended his remark as being a mere taunt and testified that such insults were common in the free wheeling world of Twitter. A jury found in favor of Musk, leading a least one media source to claim that Twitter is effectively immune from defamation complaints. Nichola Groom & Rachel Parsons, *Tesla Boss Elon Musk Wins Defamation Suit Over His 'Pedo Guy' Tweet*, REUTERS (Dec. 6, 2019), https://www.reuters.com/article/us-musk-lawsuit/tesla-boss-elon-musk-wins-defamation-trial-over-pedo-guy-tweet-idUSKBN1YA13U [https://perma.cc/6UVD-7M25].

18. *See @elonmusk (Elon Musk)*, TRACKALYTICS, https://www.trackalytics.com/twitter/profile/elonmusk/ (last updated Dec. 27, 2019) [https://perma.cc/5YAQ-TC92].

19. *See, e.g.*, Marston, *supra* note 17 (analyzing Musk's history of "Twitter outbursts"); Rachel Sandler, *Elon Musk Continues Bizarre Twitter Use Over A Wild Weekend*, FORBES (June 17, 2019, 1:02 PM), https://www.forbes.com/sites/rachelsandler/2019/06/17/elon-musk-continues-bizarre-twitter-use/#67e44d3d3598 [https://perma.cc/WAZ3-4RLK] (analyzing a "strange series of tweets" Musk sent over one weekend).

20. *Elon Musk Charged with Securities Fraud for Misleading Tweets*, SEC (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-219 [https://perma.cc/H668-AUBB].

weeks later.[21] The SEC then sued Tesla and Musk, charging that his tweet had misled investors because the funding for such a transaction was not in place.[22] The SEC sought to remove Musk from the management of Tesla, bar him from acting as an officer or director of any public company, and subject him to large civil fines.[23]

This was not the SEC's first effort to suppress an automotive genius. Shortly after World War II, an SEC investigation led to the indictment of Preston Tucker, a flamboyant figure who was then building an ultra-modernistic automobile with advanced safety features.[24] Tucker sold stock to the public to fund this venture, but he ran

21. *See id.* There is some speculation that Musk's tweet was actually a marijuana-related joke; if so, it was a bad one. *See, e.g.*, Ian Spiegelman, *Elon Musk May Have Ruined Twitter for All Puckish Billionaire CEOs*, L.A. MAG. (June 14, 2019), https://www.lamag.com/citythinkblog/elon-musk-sec-twitter/ [https://perma.cc/P5FV-A8KS] (speculating that Musk's tweet about "taking Tesla private at $420" was a joke, but that, "[o]f course, the stiffs at the SEC didn't get that '420' was a joke about smoking weed"). Musk's tweet stated that: "Am considering taking Tesla private at $420. Funding secured." *Id.*

22. *Elon Musk Charged with Securities Fraud for Misleading Tweets*, *supra* note 20.

23. *Id.* The SEC's action had even broader ramifications because it was "likely to send shock waves across corporate America and could lead to a re-evaluation of how companies use Twitter to communicate with the investing public." Goldstein & Flitter, *supra* note 14.

24. *See* Abigail Tucker, *The Tucker Was the 1940s Car of the Future*, SMITHSONIAN MAG. (Dec. 2012), https://www.smithsonianmag.com/history/the-tucker-was-the-1940s-car-of-the-future-135008742/ [https://perma.cc/N6M8-XNGA]. The so-called "Tucker Torpedo" promoted what were then revolutionary safety innovations such as a protective windshield, padded dashboards, and seat belts; *see also* William Faloon, *Inventor of Safer Automobile*, LIFE EXTENSION MAG. (Aug. 2006), https://www.lifeextension.com/magazine/2006/8/awsi/page-01?p=1 [https://perma.cc/5K56-4KTB]; Alex A., *Find of the Year? 1946 Tucker Torpedo prototype II hides a secret Riviera*, THE VINTAGE NEWS (June 10, 2016), https://www.thevintagenews.com/2016/06/10/find-of-the-year-1946-tucker-torpedo-prototype-ii-hides-a-secret-riviera-ii-hides-a-secret-riviera-2-2/ [https://perma.cc/LNX4-8TDH] (describing additional safety features of the Tucker Torpedo).

Musk and Tesla are also advocates of automotive safety as demonstrated by Tesla's exemplary crash ratings and its efforts to introduce autonomous cars as a means of reducing driver errors. *See Tesla Safety Report*, TESLA, https://www.tesla.com/VehicleSafetyReport [https://perma.cc/UKA3-RWGG] (last visited Jan. 2, 2020); Robert Ferris, *Tesla Model 3 Earns Perfect 5-Star NHTSA Safety Rating*, CNBC (Sept. 20, 2018, 12:41 PM), https://www.cnbc.com/2018/09/20/tesla-model-3-earns-perfect-5-star-nhtsa-safety-rating.html [https://perma.cc/VV2R-64BU]. Unsurprisingly, Musk's and Tesla's Internet blog boasts about the safety of Tesla's vehicles led to a brouhaha with another government agency: the U.S. National Highway Traffic Safety Administration (NHTSA). *See* Ryan

afoul of the SEC. The SEC claimed that Tucker was incapable of producing any actual cars, which resulted in the Justice Department indicting Tucker and several of his executives.[25] After a lengthy trial, the defendants were acquitted of all charges.[26] As portrayed in a popular movie, however, the government's action destroyed the company, which was able to produce only fifty-one cars before its failure.[27]

Musk proved to be a wilier target. Initially, he vowed to contest the SEC's charges, contending that the agency was interfering with his First Amendment rights.[28] But calmer heads prevailed. Removing Musk from Tesla's management posed a serious threat to the company's survival and likely would have evaporated billions of dollars in

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Browne, *Tesla Received a Cease-and-Desist Letter From US Agency Over Model 3 Safety Claims*, CNBC (Aug. 7, 2019, 3:12 PM), https://www.cnbc.com/2019/08/07/tesla-scrutinized-by-the-nhsta-over-model-3-safety-claims.html [https://perma.cc/PCZ8-88ET]. The NHTSA ordered Tesla to cease and desist from misleadingly claiming that Tesla's NHTSA safety ratings established that Tesla drivers had the lowest probability of being injured in an automobile crash. *See id.* Tesla rejected the agency's request, contending that the NHTSA's ratings *did* prove Tesla's safety claims. *Id.* The NHTSA then referred the matter to the Federal Trade Commission for a consumer fraud investigation. *Id.*

25. Keith Barry, *Jan. 22, 1950: Jury Acquits Tucker of Fraud*, WIRED (Jan. 22, 2010, 12:00 AM), https://www.wired.com/2010/01/0122preston-tucker-acquitted/ [https://perma.cc/7WMV-BZGS]. The U.S. Attorney prosecuting this case was Otto Kerner, Jr. *See* James Warren et al., *Tucker's Film Trial Torpedoes Reality*, CHI. TRIB. (Oct. 4, 1988), https://www.chicagotribune.com/news/ct-xpm-1988-10-04-8802040657-story.html [https://perma.cc/27D6-3NB9]. Kerner later became the Governor of Illinois, a federal judge on the Seventh Circuit, and an inmate in a federal prison after he was convicted on corruption and stock-fraud charges. Seth S. King, *Ex-Gov. Otto Kerner Dies; Convicted While a Judge*, N.Y. TIMES (May 10, 1976), https://www.nytimes.com/1976/05/10/archives/exgov-otto-kerner-dies-convicted-while-a-judge.html [https://perma.cc/54JM-EFDA].

26. *See* Peter Liebhold, *Preston Tucker's Sedan: Showcasing a Beautiful Business Failure*, NAT'L MUSEUM OF AM. HIST.: STORIES FROM THE MUSEUM (Aug. 10, 2016), https://americanhistory.si.edu/blog/preston-tuckers-sedan-showcasing-beautiful-business-failure [https://perma.cc/X3XH-HXCN].

27. *See Tucker: The Man and His Dream* (Lucasfilm Ltd. 1988); *see also* Warren et al., *supra* note 25 (describing the film and the company's automobile-production numbers).

28. Chris Isidore & Jethro Mullen, *Elon Musk Says the SEC is Trying To Trample on His Freedom of Speech*, CNN BUS. (Mar. 11, 2019), https://www.cnn.com/2019/03/11/tech/elon-musk-deadline-sec/index.html [https://perma.cc/5ZGD-V8CV].

shareholder value.[29] Instead, Musk and Tesla settled with the SEC.[30] In exchange for allowing him to continue as Tesla's CEO, Musk forfeited his First Amendment rights by agreeing to submit his tweets to an undefined oversight process at Tesla that would ensure the tweets conformed to SEC speech mandates before their publication.[31]

Musk was unrepentant after settling the SEC charges, as reflected in a tweet in which he derided the SEC for failing to protect Tesla shareholders from attacks by short-sellers.[32] Musk sarcastically asserted that the SEC's acronym actually stands for the "Shortseller Enrichment Commission" and that it was "doing incredible work" in aiding those traders.[33] Musk also revealed on national television that no one at Tesla

29. *See* Irina Ivanova, *SEC Fraud Suit Against Elon Musk Threatens to Unravel Tesla*, CBS NEWS (Sept. 28, 2018, 6:38 PM), https://www.cbsnews.com/news/secs-fraud-suit-against-elon-musk-threatens-to-unravel-tesla/ [https://perma.cc/T6G9-33RA] (describing "investor uncertainty over Musk's future at the company" and Tesla's $20 billion loss in market value since Musk's August 2018 tweet).

30. *Elon Musk Settles SEC Fraud Charge; Tesla Charged With and Resolves Securities Law Charge*, SEC (Sept. 29, 2018), https://www.sec.gov/news/press-release/2018-226 [https://perma.cc/93Z6-TEVJ].

31. *Id.* Musk and Tesla each agreed to pay a $20 million fine, which were to be distributed to shareholders purportedly harmed by Musk's tweet. Musk also agreed to resign from his position as chairman of the Tesla board. *Id.*

32. *See generally* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 136 S. Ct. 1562, 1566 (2015) (describing short-sale transactions). Short sellers arouse the ire of Musk because they benefit from stock-price declines that result from, among other things, publication of criticism and bad news about a public company. *See* Lawrence Delevingne, *Short & Distort? The Ugly War Between CEOs and Activist Critics*, REUTERS (Mar. 21, 2019, 1:07 AM), https://www.reuters.com/article/us-usa-stocks-shorts-insight/short-distort-the-ugly-war-between-ceos-and-activist-critics-idUSKCN1R20AW [https://perma.cc/T8CR-NMLT]. Through his tweets, Musk tried to counter short-sellers of Tesla stock and his critics in the mainstream media and elsewhere, but he is now muzzled from doing so by the SEC injunction. *See* David Ingram, *Elon Musk Taunts SEC as 'Shortseller Enrichment Commission'*, NBC NEWS (Oct. 4, 2018, 4:36 PM), https://www.nbcnews.com/tech/tech-news/elon-musk-taunts-sec-shortseller-enrichment-commission-n916816 [https://perma.cc/N7BJ-Y9L6]. *But see* Bill Alpert, *Tesla CEO Elon Musk is Wrong About Short Sellers*, BARRON'S (Oct. 15, 2018), https://www.barrons.com/articles/why-elon-musk-is-wrong-about-short-sellers-1539384687 [https://perma.cc/U45W-DPBN] (describing the economic role of short sellers); JERRY W. MARKHAM & THOMAS LEE HAZEN, BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAWS §§ 9:7, .50, Westlaw (updated Nov. 2018) (describing criticism of the SEC's prior efforts to curb short selling and the adverse market effects of those efforts).

33. Tim Higgins & Gabriel T. Rubin, *Elon Musk Tweet Mocks the Securities and Exchange Commission,* WALL ST. J. (Oct. 4, 2018, 11:50 PM), https://www.wsj.com/articles/elon-musk-tweet-appears-to-mock-the-securities-and-exchange-commission-1538685320 [https://perma.cc/

was reviewing his tweets, stating: "I want to be clear. I do not respect the SEC."[34]

Less than six months after its initial complaint, the SEC initiated a contempt order against Musk.[35] The subject of the contempt proceeding was a Musk tweet, which stated that Tesla would make around 500,000 cars in 2019.[36] This was an increase of 100,000 cars over an earlier projection by the company.[37] Musk corrected that tweet a few hours later by stating that Tesla would deliver 400,000 cars in 2019, but that it would be producing at a rate of 500,000 cars per year at year-end.[38] Nonetheless, the SEC sought a contempt citation because Musk's tweets had not received prior approval from Tesla, a step the SEC claimed was required by the prior settlement agreement.[39] Within one day Musk tweeted that the SEC's action against him had harmed Tesla shareholders by pushing Tesla's stock price down, and he charged that "[s]omething is broken with SEC oversight."[40] He further argued

V3B7-4MNT].

34. Alan Ohnsman, *Judge Says SEC Can Have a Crack at Statements by Elon Musk's Lawyers*, FORBES (Mar. 12, 2019, 4:38 PM), https://www.forbes.com/sites/alanohnsman/2019/03/12/judge-oks-sec-request-to-respond-to-musk-lawyers-assertions-in-tesla-case-or/#47be26ad74ad [https://perma.cc/AWA8-ULY8].

35. *See* Russ Mitchell, *Elon Musk Keeps Slamming the SEC on Twitter. He has 2 Weeks to Respond in Court*, L.A. TIMES (Feb. 26, 2019, 5:50 PM), https://www.latimes.com/business/la-fi-hy-elon-musk-sec-20190226-story.html [https://perma.cc/BDX2-A7EK].

36. *Id.*

37. Neal Boudette, *S.E.C. Asks Court to Hold Tesla's Elon Musk in Contempt for Twitter Post on Production*, N.Y. TIMES (Feb. 25, 2019), https://www.nytimes.com/2019/02/25/business/elon-musk-contempt-tweet-sec-tesla.html [https://perma.cc/4VTE-YF9A].

38. *Id.*; *see also* Alexandria Sage, *SEC Seeks Contempt Charge Against Tesla's Musk, Says Tweet Violates Deal*, REUTERS (Feb. 25, 2019, 6:31 PM), https://www.reuters.com/article/us-tesla-musk-sec/sec-seeks-contempt-charge-against-teslas-musk-says-tweet-violates-deal-idUSKCN1QE2OR [https://perma.cc/CNK5-MGTS].

39. SEC's Motion and Memorandum of Law in Support of an Order to Show Cause at 1 2, SEC v. Musk, No. 1:18-cv-8865-AJN-GWG (S.D.N.Y. Feb. 25, 2019), ECF No. 18; *see also Elon Musk Never Sought Approval for a Single Tesla Tweet, U.S. SEC Tells Judge*, REUTERS (Mar. 18, 2019, 8:25 PM), https://www.reuters.com/article/us-tesla-musk-sec/elon-musk-never-sought-approval-for-a-single-tesla-tweet-u-s-sec-tells-judge-idUSKCN1R001J [https://perma.cc/GS46-YANP].

40. Elon Musk (@elonmusk), TWITTER (Feb. 26, 2019, 7:35 AM), https://twitter.com/elonmusk/status/1100371207491248128 [https://perma.cc/FHL7-89WP]; *see also* Robert Ferris, *Elon Musk Lashes Out: "Something is Broken With SEC Oversight"*, CNBC (Feb. 26, 2019, 8:59 AM), https://www.cnbc.com/2019/02/26/elon-musk-lashes-out-something-is-

that the First Amendment protected his tweets and that the company had already publicly announced the substance of his message.[41]

The judge hearing the SEC contempt motion ordered the parties to seek a settlement.[42] A law school professor then publicly advocated imposing more explicit and defined prior restraints on Musk's speech, i.e., that Musk's tweets, before their dissemination, be reviewed by an attorney versed in SEC censorship requirements who would act as the SEC's "baby sitter" for Musk.[43] That was the course the parties took through an amended settlement agreement in which Musk agreed to submit his tweets for review and prior approval by an "experienced

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broken-with-sec-oversight.html [https://perma.cc/2GVU-XMKA] (describing the timing of Musk's tweet and his view that the SEC harmed Tesla shareholders); Mitchell, *supra* note 35. Despite his criticism of the SEC, Musk is conflicted over whether SEC regulation bestows a benefit. On the one hand, he advised SpaceX employees that cashing in their stock and option grants through a public offering was a bad idea because of SEC regulations and market flaws. *See* VANCE, *supra* note 7, at 259 60. On the other hand, Musk claimed that Tesla was different from SpaceX because Tesla was forced to go to the public market in order to raise much-needed capital. *See id.* at 290. This ambivalence surfaced again after the conclusion of the SEC's contempt proceedings against Musk, and after Tesla reported a large quarterly loss. Tesla then made a successful public offering of stock and bonds totaling $2.3 billion. Sam Goldfarb & Allison Prang, *Tesla Completes $2.35 billion Stock and Bond Sale,* WALL ST. J. (May 3, 2019), https://www.wsj.com/articles/tesla-seeks-raise-as-much-as-2-7-billion-up-from-2-3-billion-11556886130 [https://perma.cc/9VS7-VZBC].

41. Response to Order to Show Cause Why Defendant Elon Musk Should Not be held in Contempt for Violating the Court's Final Judgment at 3, SEC v. Musk, No. 1:18-cv-8865-AJN-GWG (S.D.N.Y. Mar. 11, 2019), ECF No. 27. Musk's lawyers argued in the SEC contempt proceeding that the injunction against Musk was an impermissible prior restraint that violated the First Amendment. *Id.* at 21 25. The SEC contended that Musk waived his First Amendment rights when he agreed to the court's injunction, a claim that was rebutted by Musk's lawyers. *Id.* at 20; *see also* SEC's Reply Memorandum to Defendant Elon Musk's Response to Order to Show Cause at 12, SEC v. Musk, No. 1:18-cv-8865-AJN-GWG (S.D.N.Y. Mar. 18, 2019), ECF No. 30. The court did not resolve this issue because the parties agreed on a settlement of the contempt issue. *See infra* notes 42 48 and accompanying text (describing the settlement).

42. The judge ordered the parties to "put their reasonableness pants on" to reach a compromise. *See* Dave Michaels & Tim Higgins, *Judge Gives Elon Musk, SEC Two Weeks to Strike Deal on Contempt Claims*, WALL ST. J. (Apr. 4, 2019, 7:22 PM), https://www.wsj.com/articles/judge-asks-elon-musk-and-sec-to-hold-talks-over-contempt-claims-11554408620 [https://perma.cc/W2D9-HNA9].

43. John C. Coffee, Jr., *How the SEC Can Be the Babysitter Elon Musk Needs*, CNN BUS. (Apr. 23, 2019, 5:25 PM), https://www.cnn.com/2019/04/23/perspectives/tesla-elon-musk-sec/index.html [https://perma.cc/5FHZ-2VSL].

securities lawyer,"[44] who was quickly given the derisive sobriquet of "Twitter sitter."[45]

This settlement was considered to be another victory for Musk because he was allowed to continue in his role as Tesla's CEO and no further sanctions were ordered.[46] Nevertheless, it was a loss for First Amendment–protected speech. Anyone dealing with corporate lawyers on SEC disclosure issues knows that such review is a time-consuming process that can take days or even weeks. Rather than submit to that ordeal, and as a direct result of the SEC injunction, Musk self-censored the volume and content of his tweets.[47] As his attorneys advised the court during the SEC contempt proceeding, Musk was tweeting half as often as he did before the SEC injunction.[48]

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44. Dave Michaels, *Judge Approves Deal Spelling Out Oversight of Elon Musk's Tweets*, WALL ST. J. (Apr. 30, 2019, 9:04 PM), https://www.wsj.com/articles/judge-approves-deal-spelling-out-oversight-of-elon-musks-tweets-11556669333 [https://perma.cc/F65X-MVQR]. The long laundry list of topics subject to this prior restraint included financial information about the company, new products, sales numbers, and production figures. Dave Michaels & Tim Higgins, *Musk, SEC Reach Deal to End Court Fight Overt Tesla CEO's Tweets*, WALL ST. J. (Apr. 26, 2019, 6:33 PM), https://www.wsj.com/articles/elon-musk-sec-propose-deal-to-end-latest-court-fight-over-tesla-ceos-tweets-11556314495 [https://perma.cc/4GPF-4TE8]; Dana Hull & Benjamin Bain, *Elon Musk's Mystery Twitter Sitter Has One Wild and Crazy Job*, BLOOMBERG (Feb. 26, 2019, 3:35 PM), https://www.bloomberg.com/news/articles/2019-02-26/elon-musk-s-mystery-twitter-sitter-has-one-wild-and-crazy-job [https://perma.cc/5PNH-CJM2].

45. Hull & Bain, *supra* note 44.

46. Bob Van Voris & Dana Hull, *Musk, SEC Settle Legal Fight Over His Tweets About Tesla*, BLOOMBERG (Apr. 27, 2019, 10:49 AM), https://www.bloomberg.com/news/articles/2019-04-26/musk-sec-settle-legal-fight-over-his-tweets-about-tesla-juykzbwq [https://perma.cc/3KJU-RR5T].

47. *See infra* note 48 and accompanying text.

48. *See* Drew Harwell, *Elon Musk's Defense of his Tesla Tweets 'Borders on the Ridiculous,' Says SEC*, WASH. POST (Mar. 19, 2019, 7:56 AM), https://www.washingtonpost.com/technology/2019/03/19/elon-musks-defense-his-tesla-tweets-is-flawed-sec-says/?utm_term=.63a52de720cd. [https://perma.cc/HXG5-F7ZL]. Further illustrating the effects of the SEC injunction is the advice given to Musk by Mark Cuban, the brash and outspoken owner of the Dallas Mavericks who successfully fought SEC charges of insider trading. Despite that victory, Cuban advised that, in order to avoid further SEC retaliation, Musk had to "try to bite [his] tongue no matter how hard it is, because [the SEC] do[es]n't care." Aarthi Swaminathan, *Mark Cuban Told Elon Musk to 'Bite Your Tongue' in Dealings with SEC*, YAHOO FINANCE (May 29, 2019), https://finance.yahoo.com/news/mark-cuban-elon-musk-sec-200719978.html [https://perma.cc/VWD7-Y5R9]. Cuban added, "[W]hen you've got a bunch of bureaucrats trying to come at you in a world where there aren't bright line guidelines, that's tough." *Id.*

II. THE FIRST AMENDMENT AND "COMMERCIAL SPEECH"

The First Amendment allows citizens to advocate controversial changes in society without submitting to government censorship or control.[49] Its purpose is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[50] In that marketplace, even false statements count as protected speech.[51] As a means of reaching the truth, protecting one's freedom to make false statements may, at first, seem incongruous. As the United States Supreme Court recognized, however, in *United States v. Alvarez*, "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[52] The Court further opined: "The remedy for speech that is false speech is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[53]

The First Amendment bans prior restraints on protected speech, including court-ordered injunctions.[54] Government actions inducing self-censorship of protected speech are also prohibited.[55] "Whenever an individual . . . engages in self-censorship, the values of the First Am–

49. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

50. FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

51. *See* United States v. Alvarez, 567 U.S. 709, 718 (2012).

52. *Id.*

53. *Id.* at 727.

54. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 701, 713 19 (1931) (newspapers containing "malicious, scandalous and defamatory" articles could not be enjoined from publication). The Second Circuit has noted:

> A "prior restraint" on speech is a law, regulation or judicial order that suppresses speech or provides for its suppression at the discretion of government officials on the basis of the speech's content and in advance of its actual expression. It has long been established that such restraints constitute "the most serious and the least tolerable infringement" on our freedoms of speech and press. Indeed, the Supreme Court has described the elimination of prior restraints as the "chief purpose" of the First Amendment. Any imposition of a prior restraint, therefore, bears "a heavy presumption against its constitutional validity." . . . A prior restraint is not constitutionally inoffensive merely because it is temporary.

United States v. Quattrone, 402 F.3d 304, 309 10 (2d Cir. 2005) (citations omitted).

55. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (describing the dangers of government-induced self-censorship).

endment are compromised, because the public is denied information or ideas."[56] First Amendment jurisprudence is "designed to prevent self-censorship premised on fear of governmental sanctions against expression."[57]

The First Amendment additionally protects against speech compelled by the government.[58] That is, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[59] This includes such things as requiring students to stand and salute the flag[60] and compulsory union dues used for purposes that government employees do not support.[61] The Supreme Court has further held that requiring the baking of a cake for a same-sex wedding may violate the cakemaker's First Amendment–protected religious beliefs.[62]

Of course, the First Amendment's right of free speech is not unlimited in scope. The Constitution does not protect those who falsely shout "fire" in a crowded theatre,[63] or those whose speech presents a clear and present danger of inciting unlawful activities.[64] Nevertheless,

56. Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (2012).

57. *Id.*

58. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2464 (2018) ("[M]ost of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.").

59. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 97 (1988) (requiring disclosures by charitable fundraisers regarding how the donated funds were used violated First Amendment); *see also* Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980) (invalidating on First Amendment grounds an ordinance restricting the type of persons that could solicit charitable contributions).

60. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

61. *Janus*, 138 S. Ct. at 2486.

62. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 24 (2018).

63. Schenck v. United States, 249 U.S. 47, 52 (1919).

64. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (First Amendment protects advocacy of the use of force or a violation of the law, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting the argument that the "constitutional freedom of speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"). *But see* N.Y. Times, Co. v. United States, 403 U.S. 713 (1971) (the classification as secret of a Defense Department's Vietnam War study did not justify a prior-restraint injunction against its publication by the press).

government regulations that affect speech's contents or viewpoints are subject to "strict" scrutiny by the courts.[65] This means, among other things, that a statute that regulates speech based on content "must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[66]

Difficult and complex delineations are drawn between protected and unprotected speech. For example, libel and slander proceedings may be brought where private individuals are the subjects of false statements.[67] In contrast, damages may be awarded only under limited circumstances where the target of a false statement is a public figure.[68] The government may also impose reasonable, but "very limited," restrictions on the time, place, and manner of speech in public forums.[69] Such restrictions, however, must be "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[70]

The government may require a license where a benefit is bestowed, but it cannot deny a license on grounds that are "viewpoint" based.[71] Viewpoint discrimination "is an 'egregious form of content discrimination' and is 'presumptively unconstitutional.'"[72] Viewpoint protection, for example, precludes the denial of a trademark license for marks that "disparage" any person, "living or dead."[73] The government also cannot deny a trademark for matters that are "immoral or "scandal–

65. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 813 14 (2000).

66. *Id.* at 813.

67. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

68. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 80 (1964).

69. McCullen v. Coakley, 573 U.S. 464, 477 (2014).

70. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983) (invalidating Postal Service regulations that prohibited mailing unsolicited advertisements for contraceptives); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (holding as unconstitutional an ordinance that required a permit to distribute literature).

71. *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019).

72. *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 30 (1995)).

73. Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (quoting 15 U.S.C. § 1052(a) (2012)).

ous."[74] Moreover, it is a "bedrock" First Amendment principle that the government cannot deny a license to "ideas that offend."[75]

The so-called commercial-speech doctrine has historically been the broadest exception to the application of full First Amendment speech protections. For example, in *Valentine v. Chrestensen,*[76] the Supreme Court stated that, although the First Amendment protects political speech from government regulation, it is "equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[77] The Supreme Court has defined commercial speech as a communication that "does no more than propose a commercial transaction"[78] and is "related solely to the economic interests of the speaker and its audience."[79]

The Supreme Court's harsh view of the value of commercial speech has leavened over time. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[80] the Court recognized that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[81] Society "may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public

74. *Iancu*, 139 S. Ct. at 2302.

75. *Id.* at 2299 (quoting *Matal*, 137 S. Ct. at 1751).

76. 316 U.S. 52 (1942).

77. *Id.* at 54.

78. United States v. United Foods, Inc., 533 U.S. 405, 409 (2001).

79. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

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

81. *Id.* at 763.

interest."[82] Among other things, this meant that advertising retail alcohol beverage prices could not be banned.[83]

In *Sorrell v. IMS Health*,[84] the Supreme Court gave First Amendment protection to commercial information-gathering activities. The Court noted that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression."[85] This means that professionals licensed by a state cannot be required to make compelled speech disclosures to consumers, absent a strong reason.[86] The First Amendment also protects corporations when they are carrying out political activities even if those acts are commercial in nature.[87]

Compounding the analysis of the commercial-speech exception is the fact that such speech may be mixed with political speech that would otherwise receive full First Amendment protection. The Supreme Court has asserted that, in such cases, it does not believe that "speech retains

82. *Id.* at 764 65. The Court further observed that:

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

Id. at 765. The Court noted that First Amendment protection has been given to commercial speech concerning such things as advertisements for abortion referrals; claims that a manufacturer's sale of artificial fur was a desirable alternative to the killing of animals; and claims that consumers should prefer a domestic producer because it provided American jobs. *Id.* at 764 (citing Bigelow v. Virginia, 421 U.S. 809 (1975); Fur Info. & Fashion Council, Inc., v. E.F. Timme & Son, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973); Chi. Joint Bd., AFL-CIO v. Chi. Trib. Co., 435 F.2d 470 (1970)).

83. Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

84. 564 U.S. 552 (2011).

85. *Id.* at 567.

86. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018) (state could not mandate "professional" speech dealing with abortion services).

87. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2009) (protecting under the First Amendment a video political advertisement critical of presidential candidate, Hillary Clinton).

its commercial character when it is inextricably intertwined with otherwise fully protected speech."[88]

Still, the Supreme Court continues to recognize a commercial speech exception. In *Ohralik v. Ohio State Bar Association*,[89] the Court observed that it had not discarded the "'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."[90] This commercial-speech exception has allowed "modes of regulation that might be impermissible in the realm of noncommercial expression."[91] The Court stated that it could cite "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, [and] corporate proxy statements," which are regulated by the SEC.[92]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[93] the Supreme Court held that, although it "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech,"[94] the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[95] Misleading commercial speech will not receive First Amendment protection. That is, "the government may ban forms of communication more likely to deceive the public than to inform it."[96]

88. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1998); *see also* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (stating that courts must consider whether speech is both commercial and noncommercial).

89. 436 U.S. 447 (1978).

90. *Id.* at 455 56.

91. *Id.* at 456; *see also State Univ. of N.Y. v. Fox*, 492 U.S. at 477.

92. *Ohralik*, 436 U.S. at 455 56; *see also* Ibanez v. Fla. Bd. of Accountancy, 512 U.S. 136 (1994) (describing limitations on governmental restrictions on advertising by professionals); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (rejecting a blanket prohibition of attorneys' advertising speech).

93. 447 U.S. 557 (1980).

94. *Id.* at 562. The Court further stated: "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561 62.

95. *Id.* at 563.

96. *Id.*; *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (analyzing commercial tobacco advertising restrictions in light of the First Amendment).

The *Central Hudson* opinion set forth a four-part test to govern the First Amendment's application to commercial speech: (1) protected commercial speech must involve lawful activity and not be misleading; (2) the government must have a "substantial" interest in regulating the speech; (3) the regulation must "directly advance[]" that interest; and (4) the government's regulation must not be broader than necessary to carry out its interest[97] (e.g., government mandated warnings or disclaimers are a preferable alternative to the suppression of speech).[98]

In applying that test in *Edenfield v. Fane*,[99] the Supreme Court noted that:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.[100]

Nevertheless, the Court in *Edenfield* stated that "our cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification."[101]

III. THE SEC AND THE FIRST AMENDMENT

A. The Core Mission of the SEC is to Compel and Censor Commercial Speech

The SEC's compelled-speech and licensing requirements seek to protect investors from false or deceptive information[102] and to allow

97. *Central Hudson*, 447 U.S. at 566.

98. *Id.* at 565; *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2009) ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

99. 507 U.S. 761 (1993).

100. *Id.* at 767.

101. *Id.* at 768 69.

102. The SEC has stated that a principal purpose of the federal securities laws is to assure that companies publicly selling securities "must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing. *What We Do*, SECS. & EXCH. COMM'N, https://www.sec.gov/Article/whatwedo.html [https://perma.cc/4946-5MRW] (last modified June 10, 2013).

them to make informed investment decisions.[103] In carrying out that mission, the federal securities laws impose licensing requirements and compulsory speech mandates on public companies[104] by requiring those companies to publish information about their finances and operations.[105] The SEC, in various ways, also censors the speech of executives at public companies.[106]

Both the federal securities laws and SEC regulations require the disclosure of "material" facts about a public company that a reasonable investor would want to consider in making an investment decision.[107] These disclosure requirements are implemented through detailed SEC

103. *Id.* ("The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires public companies to disclose meaningful financial and other information to the public. This provides a common pool of knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a particular security. Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.").

104. The licensing requirements for public companies are found in the Securities Act of 1933, 15 U.S.C. §§ 77f 77g (2012), and the Securities Exchange Act of 1934, 15 U.S.C. § 78*l* (2012).

105. *See infra* Part III.G K. The SEC's speech censorship is premised on the theory that its licensing and speech mandates bestow a benefit because they "facilitate capital formation." *See About the SEC*, SECS. & EXCH. COMM'N, https://www.sec.gov/about.shtml (last modified Nov. 22, 2016) [https://perma.cc/7FBP-E32D]. But there is some question as to whether those regulations fulfill that mission. *See* Frank Holmes, *The Public Pool of Publicly Traded Stocks is Shrinking. Here's What Investors Can Do*, FORBES (Aug. 13, 2018, 12:25 PM), https://www.forbes.com/sites/greatspeculations/2018/08/13/the-pool-of-publicly-traded-stocks-is-shrinking-heres-what-investors-can-do/#39bab8042078 [https://perma.cc/U5PC-XMA5] ("[T]he number of publicly listed companies in the U.S. has fallen steadily since 1997. More companies have delisted, in fact, than gone public in every year of the past 20 years except one, 2013.").

106. *See infra* Part III.F.

107. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 440 (1976); Matrixx Initiatives v. Siracusano, 563 U.S. 27, 37 (2011).

regulations and forms, such as forms SK,[108] 10-K,[109] 10-Q,[110] and 8-K.[111] Those forms require a company to make financial disclosures before it can be registered (licensed) by the SEC and the company must update those disclosures on a quarterly and annual basis and when unusual events occur.[112] The SEC's disclosure requirements and sanctions are ever-expanding, increasingly onerous, and have led to severe civil and criminal prosecutions that resulted in injunctions restricting speech, long prison terms, large fines, and lifetime employment debarments.[113]

The following subsections of this Article describe some areas of SEC regulation that raise First Amendment concerns in the application of the commercial-speech exception. Although jurisprudence on this subject is surprisingly limited, there is case law that provides guidance on the limits of SEC censorship regarding some speech content.[114] In other areas, the application of the commercial-speech exception remains uncertain.

B. SEC Licensing Requirements and the Financial Press

In *Lowe v. SEC*,[115] the defendants were charged with publishing an investment advisory newsletter without being licensed under the Investment Advisers Act of 1940.[116] This action, which would have otherwise been a fundamental abridgement of free speech, was brought by the SEC under the guise of regulating "potentially deceptive

108. *See* 17 C.F.R. § 229.101 (2019).

109. *Form 10-K*, SECS. & EXCH. COMM'N, https://www.sec.gov/about/forms/form10-k.pdf [https://perma.cc/FK5J-TTKS] (last updated May 2019).

110. *Form 10-Q*, SECS. & EXCH. COMM'N, https://www.sec.gov/files/form10-q.pdf [https://perma.cc/M7WP-AQWJ] (last updated May 2019).

111. *Form 8-K*, SECS. & EXCH. COMM'N, https://www.sec.gov/files/form8-k.pdf [https://perma.cc/R4EH-SQL4] (last updated May 2019).

112. *Exchange Act Reporting and Registration*, SECS. & EXCH. COMM'N, https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting (last modified Oct. 24, 2018) [https://perma.cc/GJ9H-6EZG]. The completion of these forms requires thousands of hours of work by company employees, accountants, and lawyers. For example, the SEC estimates that it takes on average some 2,400 hours of work to complete an annual report on Form 10-K. *See Form 10-K*, *supra* note 109.

113. *See generally* JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS FROM ENRON TO REFORM (2006) (describing the SEC's expansion of its enforcement role and increased punishments for offenders).

114. *See* Karl M. F. Lockhart, *A 'Corporate Democracy'?: Freedom of Speech and the SEC*, 104 VA. L. REV. 1593, 1624 27 (2018) (describing application of the First Amendment to SEC regulations).

115. 472 U.S. 181 (1985).

116. *Id.* at 183; 15 U.S.C. § 80b-3(c) (2012).

commercial speech."[117] The Supreme Court was able to avoid giving a direct answer to the question of whether the defendants were actually publishing protected First Amendment speech. Instead, the Court held that the defendants fell within a registration exemption in the Investment Advisers Act, which was applicable to "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."[118]

In justifying a broad application of that exemption, the Court pointed to its previous decision in *Lovell v. City of Griffin*,[119] where it held that prior restraints and licensing requirements for the exercise of speech "strike[] at the very foundation of the freedom of the press."[120]

The Court then noted that Congress explicitly considered its *Lovell* decision when passing the Investment Advisers Act. Apropos of Elon Musk's tweets, the Court also concluded that, when enacting that Act, Congress was specifically concerned with fraud and deception in the context of "personalized communications."[121] Therefore, the Court reasoned, Congress did not intend to regulate publications generally sold to the public containing factual information and market commentary.[122]

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117. *Lowe*, 472 U.S. at 187 (quoting SEC v. Lowe, 725 F.2d 892, 901 (2d Cir. 1984)).

118. 15 U.S.C. § 80b-2(a)(11)(D) (2012). The SEC brought a number of similar cases against unregistered investment advisory newsletters while it was prosecuting the defendants in *Lowe*. *See* Stacy P. Thompson, Lowe v. SEC*: Investment Advisers Act of 1940 Clashes with First Amendment Guarantees of Free Speech and Press*, 21 U. RICH. L. REV. 201, 216 n.68 (1986). The author was defense counsel in one such case: *SEC v. Financial News Associates*, No. 84-0878-A, 1985 WL 25023 (E.D. Va. Apr. 26, 1985), *vacated*, 1985 U.S. Dist. LEXIS 20386 (June 21, 1985). *See also* SECS. & EXCH. COMM'N, NEWS DIGEST, May 3, 1985, at 1, *available at* https://www.sec.gov/news/digest/1985/dig050385.pdf [https://perma.cc/23Z8-GRUL]. There, the SEC alleged that an unregistered newsletter was a complete scam because it falsely claimed that former officials in government intelligence organizations, such as the CIA in the U.S. and the Mossad in Israel, generated its investment advice. *Fin. News Assocs.*, 1985 WL 25023, at *1 5. After a trial, the district court ruled against the defendants and entered injunctions. *Id.* at *14. Following the *Lowe* decision, the district court withdrew its decision, and injunctions were lifted, including one entered by consent before the trial. *See* SEC v. Fin. News Assocs., No. 84-0878-A, 1985 U.S. Dist. LEXIS 20386, at *1 (E.D. Va. June 21, 1985).

119. 303 U.S. 444 (1938).

120. *Lowe*, 472 U.S. at 205 (quoting *Lovell*, 303 U.S. at 451) (footnotes and citations omitted).

121. *Id.* at 210.

122. *Id.*

C. Effect of Disclaimers on SEC Censorship Requirements

As described in Part II of this Article, the Supreme Court has directed that disclaimers and warnings are the preferred means of regulating commercial speech in lieu of its suppression. Courts have considered the relation of disclaimers to both the SEC's commercial-speech regulation and its antifraud rules, albeit not with the First Amendment in mind.[123] Public companies and their executives are often called upon to give their projections of their company's future performance. An example of such a projection is the one Musk made on Twitter regarding Tesla's delivery and production goals, the same tweets that were the subject of the SEC contempt proceeding.[124]

In *In re Donald J. Trump Securities Litigation*,[125] the United States Third Circuit Court of Appeals noted that several federal courts had dismissed securities law–fraud claims concerning projections on the grounds of a "bespeaks caution" doctrine.[126] This doctrine posits that cautionary language in offering documents can negate the materiality of an omission or misrepresentation.[127] There were several such warnings in the offering materials in *Trump* with respect to the company's revenue projections from its casino operations.[128] The Private Securities Litigation Reform Act of 1995 later codified this exemption into the federal securities laws.[129]

D. SEC Speech Restrictions Negated by Public Debate

Another case demonstrating how SEC disclosure requirements may, unintentionally, interplay with the First Amendment involved Apple Computer, Inc. and its CEO, Steve Jobs.[130] Jobs was the subject of a

123. *Id.* at 225.

124. *See supra* note 20 and accompanying text (describing those tweets).

125. 7 F.3d 357 (3d Cir. 1993).

126. *Id.* at 371.

127. *Id.* at 364.

128. The Court in *Trump Securities* stated that, "as a general matter":

> [W]hen an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the "total mix" of information the document provided investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law.

Id. at 371. *See generally* Donald C. Langevoort, *Disclosures that "Bespeak Caution"*, 49 BUS. L. REV. 481 (1993) (describing this doctrine).

129. 15 U.S.C. §§ 77z-2, 78u-5 (2012).

130. *In re* Apple Comput. Secs. Litig., 886 F.2d 1109 (9th Cir. 1989).

best-selling biography[131] and movie about his deviousness, lack of human empathy, ingenuity, quirks, and tenacity,[132] all of which rivaled or exceeded those qualities in Elon Musk. Like Musk, Jobs was a controversial, idiosyncratic, inventive, and transformative genius whose every pronouncement was closely followed in the press.[133]

One of Apple's innovations was a business-oriented computer named "Lisa" and that computer's disk drive, called "Twiggy."[134] A class action suit filed against Jobs and other Apple executives charged that they committed fraud under the federal securities laws by over-optimistically touting the potential sales of Lisa and Twiggy and by failing to disclose operational problems.[135] The United States Court of Appeals for the Ninth Circuit found that, while the defendants had failed to disclose material facts concerning Lisa and Twiggy, "[a]t least twenty articles stressed the risks Apple was taking, and detailed the underlying problems producing those risks."[136] The Court held that "the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources."[137]

E. SEC Mandated Self-Censorship Through Monitoring Requirements

The SEC placed prior restraints that are similar to those imposed on Musk on the speech of financial analysts during the Enron-era scandals.[138] Those analysts were supposedly independent of their firms' investment banking operations, but they actually acted as shills for

131. WALTER ISAACSON, STEVE JOBS (2011).

132. STEVE JOBS (Legendary Pictures 2015), *available at* https://www.amazon.com/Steve-Jobs-Michael-Fassbender/dp/B016C9WS84/ref=sr_1_1?keywords=Steve+Jobs+movie&qid=1569954908&sr=8-1 [https://perma.cc/MKZ3-D79G].

133. *See* Jeff Bercovici, *A Look Back at How the Media Covered the Death of Steve Jobs*, FORBES (Oct. 4, 2012, 8:02 AM), https://www.forbes.com/sites/jeffbercovici/2012/10/04/a-look-back-at-how-the-media-covered-the-death-of-steve-jobs/#57874985438a [https://perma.cc/V3R3-RD3H].

134. *Apple Securities*, 886 F.2d at 1111.

135. *Id.*

136. *Id.* at 1116. The Ninth Circuit did find a material issue of fact as to whether certain statements by defendants concerning Twiggy's technical problems were negated by critical press coverage. *Id.* at 1118. On remand, a jury exonerated Steve Jobs and Apple but assessed damages of some $100 million against two other Apple executives. The trial judge set that damage award aside as being inconsistent and unsupported by substantial evidence. *Multimillion Dollar Fraud Verdict Set Aside in Apple Computer Litigation*, 23 Sec. Reg. & L. Rep. 1320 (BNA Sept. 13, 1991).

137. 886 F.2d at 1115.

138. MARKHAM, *supra* note 113, at 405 21.

stocks being underwritten by their investment banker colleagues. Those analysts publicly touted stocks they were following as being good investments while internally disparaging their investment quality.[139] The SEC and other regulators entered into a $1.4 billion settlement with several of the world's largest investment banks over these practices.[140] Among other things, the analysts were required to have a lawyer "chaperone" present to monitor conversations whenever analysts met or spoke privately with investment bankers in their firm.[141]

F. SEC Regulation of Speech through Demeanor and Facial Expressions

The SEC's overreaching in imposing speech restraints is further exhibited in its Regulation FD (Fair Disclosure).[142] Some background is needed to put that regulation into context. In *Dirks v. SEC*,[143] the SEC charged an investment adviser with insider trading fraud. The basis for the claim was that the adviser sold the stock of one of his clients' portfolio companies after being privately alerted by an official of that company that it was carrying out a massive fraud.[144] The Supreme Court rejected the SEC's claim, holding that the adviser owed no duty to publicly disclose that information before liquidating customer positions.[145] The SEC did not accede gracefully to the *Dirks* decision. Instead, it adopted Regulation FD, which prohibits executives from making selective disclosures of nonpublic company information to financial analysts or institutional investors in advance of a general disclosure to the investing public.[146]

139. For example, one prominent analyst had internally described the same stocks he had publicly recommended as "crap," "dog[s]," and "a piece[s] of junk." *Id.* at 409.

140. *Regulators Finalize $1.4 Billion Wall St. Settlement*, N.Y. TIMES, (Apr. 28, 2003, 2:46 PM), https://www.nytimes.com/2003/04/28/business/regulators-finalize-14-billion-wall-st-settlement.html [https://perma.cc/BEW5-4FPC].

141. *See* Letter from James A. Brigagliano, Assistant Dir., SEC Div. Trading & Markets, to Dana G. Fleischman, Cleary, Gottlieb, Steen & Hamilton, (Nov. 2, 2004), *available at* https://www.sec.gov/divisions/marketreg/mr-noaction/grs110204.htm [https://perma.cc/3R2T-MEB2].

142. 17 C.F.R. § 243 (2007).

143. 463 U.S. 646 (1983).

144. *Id.* at 648.

145. *Id.* at 666 67.

146. 17 C.F.R. § 243.100 (2007).

Regulation FD raises constitutional issues regarding the regulation of speech because it does not regulate only harmful or false speech.[147] The intrusiveness of Regulation FD and its overarching restraints on commercial speech is illustrated by a case brought by the SEC against the CEO at Schering-Plough Corp. that was settled by consent.[148] The SEC found in its settlement order that the CEO engaged in private meetings with financial analysts.[149] At those meetings, "through a combination of spoken language, tone, emphasis and demeanor," the CEO disclosed material nonpublic information concerning a decline in the company's quarterly earnings.[150] "After this enforcement action, issuers learned that maintaining a poker face might be necessary to avoid Regulation FD liability."[151]

This concern with image, as well as speech control, is certainly applicable to Elon Musk and his use of social media. For example, after settling the SEC's contempt proceeding, and with Tesla "shares once again falling precipitously, Mr. Musk took to Twitter and posted an emoji of a winking face," possibly communicating to investors that "he has another surprise up his sleeve."[152] Does this mean that the SEC now regulates emoji interpretations, as well as voice tones and personal demeanor?[153]

147. Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 84 (2005) (describing Regulation FD as inconsistent with the First Amendment); *see also* Susan B. Heyman, *Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 CARDOZO L. REV 1099, 1105 (2015) (same).

148. In the Matter of Schering-Plough Corp., Exchange Act Release No. 34-48461, 2003 WL 22082153 (Sept. 9, 2003).

149. *Id.* at *8.

150. *Id.* at *1.

151. Page & Yang, *supra* note 147, at 23. Nevertheless, this body language speech apparently continues to be a common practice. As reported in the *Wall Street Journal*: "Executives are forbidden from sharing nonpublic information at closed meetings, but investors focus on their body language and parse their language in the hopes of picking up a useful nugget or two." Liz Hoffman & Geoffery Rogow, *Giant Investors Are Coming After One of Wall Street's Cash Cows*, WALL ST. J. (June 27, 2019, 4:59 PM), https://www.wsj.com/articles/giant-investors-are-coming-after-one-of-wall-streets-cash-cows-11561555988 [https://perma.cc/9JRC-CMXB].

152. Charley Grant, *Investors Helped Build Tesla. They Could Undo It, Too*, WALL ST. J. (May 24, 2019, 2:17 PM), https://www.wsj.com/articles/investors-helped-build-tesla-they-could-undo-it-too-11558721830 [https://perma.cc/HXC4-LXHD].

153. *See Winking Face*, EMOJIS.WIKI, https://emojis.wiki/winking-face/ [https://perma.cc/V5KN-7DST] (last visited Dec. 28, 2019) (providing alternative definitions of winking emojis). What about confidential internal Tesla emails from Musk to Tesla employees that have market

In another Regulation FD case, *SEC v. Siebel Systems, Inc*,[154] the SEC was supported by a group of law professors acting as *amici curiae*. They argued that Regulation FD was not subject to the First Amendment because "there is essentially a securities exemption, where–by the First Amendment provides no protection for speech regulated by federal securities laws."[155] The United States District Court for the Southern District of New York did not resolve the constitutional claims because the disclosures were found not to have violated Regulation FD (the company had previously disclosed the information, which was the same defense used by Musk in the SEC contempt proceeding).[156] The district court did, however, caution that Regulation FD posed First Amendment concerns because applying it an "overly aggressive manner" could have a "potential chilling effect which can discourage, rather than, encourage public disclosure of material information." [157]

G. SEC Compelled Speech on Political Issues Proxy Regulations

The conflict between the First Amendment and the SEC's commercial-speech-control requirements also arises in the agency's proxy voting rules. In *Long Island Lighting Co. v. Barbash*,[158] the United States Court of Appeals for the Second Circuit considered the appli–cation of SEC proxy rules to a public and very political controversy involving massive construction cost overruns and mismanagement by a public utility.[159] The stock of this utility company, the Long Island Lighting Company ("LILCO"), was registered with the SEC.[160] Consequently, the company and its shareholders were subject to SEC

effect when leaked? *See* Justin Bariso, *This Email from Elon Musk was (Briefly) Worth Half a Billion Dollars*, INC. (May 22, 2019), https://www.inc.com/justin-bariso/this-email-from-elon-musk-just-may-be-an-evil-stroke-of-genius-but-its-not-enough-to-save-tesla.html?cid=hmhero [https://perma.cc/C3D6-XQWU] (describing such an email and questioning whether Musk might have leaked it because it had "a close resemblance to what Musk would like to share himself, were he not handcuffed by his [SEC] settlement").

154. 384 F. Supp. 2d 694 (S.D.N.Y. 2005).

155. Page & Yang, *supra* note 147 at 6 n.26.

156. *See supra* note 41 and accompanying text (describing Musk's tweets); *Siebel*, 384 F. Supp. 2d at 707 ("The regulation does not prohibit persons speaking on behalf of an issuer, from providing mere positive or negative characterizations, or their optimistic or pessimistic subjective general impressions, based upon or drawn from the material information available to the public.").

157. *Siebel*, 384 F. Supp. 2d at 708.

158. 779 F.2d 793 (2d Cir. 1985).

159. *Id.* at 794.

160. *Id.*

rules governing proxy contests, which require the filing with that agency of proxy solicitations.[161] LILCO sought to use those rules as both a shield and a sword to prevent dissident shareholders from soliciting proxies who sought to effect changes in company policies and structure.

One of the defendants in the LILCO case, John W. Matthews, was a political candidate for the Nassau County Executive position and had campaigned on an anti-LILCO platform.[162] Matthews purchased enough shares of LILCO stock to allow him, under SEC rules, to initiate a proxy contest against LILCO management.[163] A citizens group supported Matthews's efforts to reform LILCO and published newspaper advertisements attacking LILCO managers.[164] LILCO filed suit claiming that the advertisements were misleading and that Matthews and the other defendants supporting the proxy contest had not complied with SEC proxy-disclosure requirements.[165] LILCO sought an injunction against such advertisements.[166]

The district court held that the SEC proxy rules did not apply to the advertisements because the advertisements were protected under the First Amendment.[167] The Second Circuit reserved judgment on whether the advertisements were protected by the First Amendment, but reversed and remanded the matter for discovery on whether the advertisements were, in fact, proxy solicitations.[168] One of the Second Circuit panel members dissented on the grounds that the First Amendment protected the advertisements as political statements.[169] This judge was of the view that LILCO "asks nothing less than that a federal court act as a censor, empowered to determine the truth or falsity of the ad's claims about the merits of public power and to enjoin further advocacy containing false claims."[170] In the aftermath of this decision, the SEC amended its proxy rules to exclude statements on proxy votes that are made in public speeches or in broadcast media, including advertisements.[171]

161. 17 C.F.R. §§ 240.14a-9, -11 (1963).

162. *Long Island Lighting Co.*, 779 F.2d at 794.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 795.

168. *Id.* at 795 96.

169. *Id.* at 797 (Winter, J., dissenting).

170. *Id.* at 798.

171. 17 C.F.R. § 240.14a-1(l)(2)(iv)(A) (2019).

H. SEC Compelled "Shaming"[172] Speech Proxy Votes on Social Issues

SEC proxy regulations raise additional First Amendment concerns. Among other things, they require a report to shareholders for their annual meeting that contains a comprehensive review of the company's operations over the past year and supporting materials for proxy votes.[173] The SEC has used this report to compel issuers to publish and take proxy votes on minority shareholder proposals, even when a company's board of directors opposes those proposals.[174] These proxy votes often seek to shame management into modifying company operations to conform to particular ethical and social views.[175]

A leading case on what must be included for a proxy vote under Rule 14a-8 is *Lovenheim v. Iroquois Brands, Ltd.*[176] The district court ruled that the company had to publish in its proxy report information describing the cruelty to geese inflicted by French suppliers of pâté.[177] That shaming speech was required even though the company's pâté sales were immaterial in economic terms. Rather, the court's decision was premised on the "ethical and social significance" of the proposal.[178] The SEC staff subsequently announced that shareholder proposals raising "significant social policy issues" would generally not be excluded from Rule 14a-8's voting requirements.[179] The SEC thus transitioned

172. "Shaming" speech is "the act or practice of attempting to embarrass a person or group by drawing attention to their perceived offence, esp[ecially] on social media." *Shaming*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/shaming [https://perma.cc/4NTU-ZR8Z] (last visited Dec. 28, 2019).

173. *Fast Answers: Form 10-K*, SECS. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answers-form10khtm.html [https://perma.cc/4NTU-ZR8Z] (last modified June 26, 2009) ("Although similarly named, the annual report on Form 10-K is distinct from the 'annual report to shareholders,' which a company must send to its shareholders when it holds an annual meeting to elect directors.").

174. SEC Rule 14a-8 dictates the eligibility of such proposals. 17 C.F.R. § 240.14a-8 (2019). Among other things, such proposals and supporting statement may not exceed five hundred words and may be submitted only by shareholders that own at least $2,000 or one percent of the securities being voted. *See id.*

175. *See* THOMAS LEE HAZEN ET AL., CORPORATIONS AND OTHER BUSINESS ENTERPRISES 667 (4th ed. 2016) (describing social-based proposals).

176. 618 F. Supp. 554 (D.D.C. 1985).

177. *Id.* at 556, 562.

178. *Id.* at 558 59, 561. *But see* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 58 (1974) (holding that the state could not compel a newspaper to print replies by persons criticized by the newspaper).

179. *See* HAZEN ET AL., *supra* note 175, at 668 69.

from a commercial-speech regulator to a political- and social-issue-referendum referee on shaming speech, a task for which it is ill-suited.

I. SEC Compelled Shaming Speech Executive Compensation Proxy Votes

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank")[180] imposed even more compelled-shaming speech-requirements on public companies through proxy votes. Those requirements included shareholder votes on "golden parachutes"[181] and "say-on-pay" votes for compensation awarded to top executives.[182] They sought to curb executive compensation by publicly shaming executives who receive out-sized pay packages.[183] The requirements were added after prior SEC compelled-shaming-speech requirements and other governmental efforts to reduce executive compensation and golden parachutes failed.[184] The Dodd-Frank say-on-pay votes have been

180. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

181. "Golden parachutes" are large compensation grants made to executives in the event of a hostile takeover of their company. *See* JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES FROM ENRON-ERA SCANDALS TO THE SUBPRIME CRISIS (2004 2006) 93 (2011).

182. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010).

183. SEC regulations adopted under this authority require a non-binding "advisory" shareholder vote on executive compensation and golden parachutes. *See* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Exchange Act Release Nos. 33-9178, 34-63768, 75 Fed. Reg. 66,590 (Oct. 28, 2010).

184. *See* Jerry W. Markham, *Excessive Executive Compensation Why Bother?*, 2 J. BUS. & TECH. L. 277, 293 94 (2007). The SEC had earlier sought to curb executive compensation by requiring top executives to disclose their payouts in order to shame them and to arouse shareholder ire. *See* Jerry W. Markham, *The Politics of Executive Compensation*, 34 REGULATION 38, 41 (2011). That mandate led to further increases in executive compensation. *See* Alex Edmans, *Stop Making CEO Pay a Political Issue*, HARV. BUS. REV. (July 18, 2016), https://hbr.org/2016/07/stop-making-ceo-pay-a-political-issue [https://perma.cc/3GB4-TYXU]. Congress sought to align executive compensation with shareholder interests by restricting executive salaries through punitive taxation, but allowing unlimited compensation through stock options. *See* Markham, *Excessive Executive Compensation Why Bother?*, *supra*. The result was massive stock options grants and wholesale accounting manipulations at Enron, WorldCom, and other large public companies. Those frauds drove stock prices upward, allowing executives to reap profits from stock-option exercises. *See* MARKHAM, *supra* note 113, at 30, 617. Taxes on golden parachutes were equally ineffective. *See* MARKHAM, *supra* note 181, at 93 94.

equally ineffective in curbing executive compensation. Indeed, executive compensation has increased since their adoption.[185]

Dodd-Frank also requires shaming disclosures of the disparity between the money paid to CEOs of public companies and that paid to other employees.[186] In implementing this provision, the SEC admitted that "Congress did not expressly state the specific objectives or intended benefits" of that provision, and that "the legislative history of the Dodd-Frank Act also does not expressly state the Congressional purpose" underlying that provision.[187] So, the SEC simply made up its own purpose and benefit. The agency asserted that this statute "was intended to provide shareholders with a company-specific metric that can assist in their evaluation of a registrant's executive compensation practices,"[188] whatever that means.

In any event, the disparity in executive and worker compensation has only increased since the passage of Dodd-Frank.[189] This seems to undermine any claim that these government requirements meet *Central Hudson*'s requirements that restrictions on commercial speech must "directly advance" the (rather suspect) governmental interest in

185. *See* Ira Kay, *Did Say-on-Pay Reduce or "Compress" CEO Pay?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 27, 2017), https://corpgov.law.harvard.edu/2017/03/27/did-say-on-pay-reduce-or-compress-ceo-pay/ [https://perma.cc/HPH4-T32Z] ("Median S&P 500 CEO pay increased 27% for the 4 years after SOP [say-on-pay] implem entation relative to the 3 years preceding SOP."). This compelled-speech mandate has not achieved its goal of reducing executive compensation because shareholders have generally approved executive compensation and golden parachutes that have been submitted for say-on-pay votes. *See* Kristin M. Davis & Neil M. Leff, *Majority of Say-on-Golden-Parachute Votes Receive Shareholder Support*, SKADDEN: INSIGHTS (Jan. 2016), https://www.skadden.com/insights/publications/2016/01/majority-of-sayongoldenparachute-votes-receive-sha [https://perma.cc/ZTE6-TXKP].

186. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376, 1904 (2010).

187. Pay Ratio Disclosure, Exchange Act Release Nos. 33-9877, 34-75610, 80 Fed. Reg. 50,104, 50,105 (Aug. 18, 2015).

188. *See id.*

189. Diana Hembree, *CEO Pay Skyrockets to 361 Times That of the Average Worker*, FORBES (May 22, 2018, 4:28 PM), https://www.forbes.com/sites/dianahembree/2018/05/22/ceo-pay-skyrockets-to-361-times-that-of-the-average-worker/#1aea752d776d [https://perma.cc/GDG6-X55E] (describing the growth in the disparity of pay between executives and workers). Ironically, Elon Musk is the outlier in the overall disparity between CEO and worker pay by reason of the fact that he was, by far, the highest compensated executive at any public company in the United States in 2018. *See* Anders Melin et al., *A 300% Surge Makes Pot CEO No. 2 in Pay Ranking After Elon Musk*, BLOOMBERG (May 17, 2019), https://www.bloomberg.com/graphics/2019-highest-paid-ceos/ [https://perma.cc/U3CE-6X4X].

regulating executive compensation through compelled shaming speech.[190]

J. SEC Compelled Shaming Speech "Conflict Diamonds"

Dodd-Frank additionally required the SEC to adopt regulations requiring companies using "conflict diamonds" to investigate and disclose the origin of those minerals.[191] That compelled-speech requirement was designed to shame company officials and arouse shareholder action against the purchase of those minerals.[192] It was thought that this shaming would shut off a source of funds for armed groups in the Congo that were committing widespread atrocities and funding their operations through the sale of diamonds and other minerals mined in that region.[193]

The United States Court of Appeals for the District of Columbia Circuit held in *National Association of Manufactures v. SEC*,[194] that the SEC's rule implementing the Dodd-Frank conflict-mineral provision ran afoul of the First Amendment. This was because, as the SEC admitted, the rule was directed at "achieving overall social benefits" rather than providing information affecting the economic interests of investors.[195] "By compelling an issuer to confess blood on its hands, the statute [and SEC rules] interfere[d] with th[e] exercise of the freedom of speech under the First Amendment."[196]

K. SEC Compelled Shaming Speech Climate Change Disclosures

In 2010, the SEC issued "guidance" for public companies' required shaming-speech disclosures regarding the effects of climate change on their business models.[197] The SEC backtracked on the scope of those

190. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); *see supra* notes 97 101 and accompanying text.

191. Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111 203, § 1502, 124 Stat. 1376, 2213 18 (2010).

192. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 545 (D.C. Cir. 2015).

193. *See* Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111 203, § 1502, 124 Stat. 1376, 2218 (2010) (describing conflict minerals).

194. 800 F.3d 518 (D.C. Cir. 2015).

195. *Id.* at 522.

196. *Id.* at 530 (quoting Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 371 (D.C. Cir. 2014).

197. Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release Nos. 33-9106, 34-61469, 75 Fed. Reg. 6,290 (Feb. 8, 2010).

disclosures after the election of Donald Trump as president in 2016.[198] For instance, the SEC allowed Exxon Mobil to exclude a Rule 14a-8 shareholder proposal submitted by two pension fund investors that would have required the company to set targets for emission reductions under the Paris Climate Accord.[199] Nevertheless, the State of New York adopted the pension fund investors' cause. The New York attorney general sued Exxon Mobil over its disclosures, or lack thereof, relating to the future effects of climate-change regulations on its business.[200] The state was seeking an injunction and $1.6 billion for shareholder restitution. After a lengthy bench trial, a New York Supreme Court judge dismissed the case.[201] In the interim, several large companies have announced possible climate-change-related costs on their future business.[202]

These actions only confirm the fact that climate change is a social and political issue that cannot be separated from commercial activities. As the SEC noted in its 2010 guidance, climate change is the subject of "intense public discussion."[203] "Scientists, government leaders, legislators, regulators, businesses, including insurance companies, investors, analysts and the public at large have expressed heightened interest in

198. *See* Alexandra Semenova, *SEC Stops Prodding Companies to Detail Climate Change Impacts*, BLOOMBERG (July 16, 2018, 5:31 AM), https://news.bloomberglaw.com/corporate-law/sec-stops-prodding-companies-to-detail-climate-change-impacts [https://perma.cc/NS4Q-HDJB]. For more on the scope of corporate disclosures under President Trump *see infra* notes 215–218 and accompanying text.

199. *See Corporate Climate Coups Averted*, Opinion, WALL ST. J. (June 2, 2019, 5:14 PM), https://www.wsj.com/articles/corporate-climate-coups-averted-11559510064 [https://perma.cc/BAH7-Z2GB]. Undaunted, those same pension fund investors thereafter submitted a Rule 14a-8 proposal seeking the appointment of a board committee to oversee corporate strategy for dealing with the effects of climate change. That proposal was included in the company's proxy materials but was rejected by shareholders. *See id.*

200. Corinne Ramey & Bradley Olson, *New York Sues Exxon Over Climate Change Disclosures*, WALL ST. J. (Oct. 24, 2018, 4:15 PM), https://www.wsj.com/articles/new-york-sues-exxon-over-climate-change-disclosures-1540404374 [https://perma.cc/U5WT-UXZM].

201. Pippa Stevens, *Exxon Found Not Guilty in New York Climate-Change Securities Fraud Trial, Ending 4-Year Saga*, CNBC (Dec. 10, 2019), https://www.cnbc.com/2019/12/10/exxon-did-not-mislead-investors-a-new-york-judge-ruled-on-tuesday.html [https://perma.cc/AY3N-JWRR].

202. Brad Plumer, *Companies See Climate Change Hitting Their Bottom Lines in the Next 5 Years*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/climate/companies-climate-change-financial-impact.html [https://perma.cc/GX4V-QQJ7].

203. Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release Nos. 33-9106, 34-61469, 75 Fed. Reg. 6,290, 6,290 (Feb. 8, 2010).

climate change."[204] The State of New York's action against Exxon Mobil was also a viewpoint-driven attack that seeks to compel certain speech in order to shame the company.[205]

The rise of the "social investor" further underscores the difficulty of distinguishing viewpoint-driven commercial speech from purely political speech in the context of climate change.[206] Social investors seek to influence corporate decision-making by investing in "green" companies that do not adversely affect the climate.[207] Numerous mutual funds and investment advisory services cater to these investors by selecting portfolios that conform to their social and political viewpoints.[208]

IV. FIRST AMENDMENT PROTECTION FOR MUSK ON TWITTER

"The liberty of the press is not confined to newspapers and periodicals."[209] First Amendment principles do not vary for new forms

204. *Id.*

205. *State AGs' Climate Cover-Up*, Opinion, WALL ST. J. (June 7, 2019, 6:10 PM), https://www.wsj.com/articles/state-ags-climate-cover-up-11559945410 [https://perma.cc/GL4S-QYJ4] (describing a law-school program funded by a private foundation that expresses its social and political viewpoints by paying the salaries of prosecutors, such as those in New York, who agree to pursue "progressive clean energy, climate change, and environmental legal positions").

206. *See* Todd Millay, *Social Investing: The Good, The Bad and Ugly*, FORBES, (Feb. 29, 2016, 3:28 PM), https://www.forbes.com/sites/toddmillay/2016/02/29/social-investing-the-good-the-bad-and-the-ugly/#5ea369c98ba0 [https://perma.cc/RWH3-JM5A].

207. *See* George Kantchev & Sarah Kent, *Funds Say Climate Change is Now Part of Their Investing Equation*, WALL ST. J. (June 10, 2019, 10:09 AM), https://www.wsj.com/articles/funds-say-climate-change-is-now-part-of-their-investing-equation-11560218940 [https://perma.cc/7ZQD-CBK3]. *But see* Heather Gillers, *Calpers' Dilemma: Save the World or Make Money?*, WALL ST. J. (June 16, 2019, 4:22 PM), https://www.wsj.com/articles/calpers-dilemma-save-the-world-or-make-money-11560684601 [https://perma.cc/PA6L-M6LE] (large government pension fund questions climate change viewpoint limitations on investments in non-green companies).

208. Britton O'Daly, *Beleaguered Money Managers Find Bright Spot in ESG*, WALL ST. J. (July 11, 2019, 11:12 AM), https://www.wsj.com/articles/beleaguered-money-managers-find-bright-spot-in-esg-11562846400 [https://perma.cc/6YYQ-H7ST] (record amount invested in socially responsible mutual funds); Dieter Holger, *Startups Target Millennials With Social-Investing Apps*, WALL ST. J. (June 10, 2019, 10:13 PM), https://www.wsj.com/articles/startups-target-millennials-with-social-investing-apps-11560219180 [https://perma.cc/B9BK-UPSM] (describing social investing products).

209. Lowe v. SEC, 472 U.S. 181, 205 (1985) (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)).

of communication.[210] "Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux."[211] Twitter falls squarely within the scope of these observations. As the Supreme Court has observed, Twitter and other social media provide "relatively unlimited, low-cost capacity for communication of all kinds"[212]:

> [O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'[213]

Social media by definition involves the provision and exchange of social thoughts and activities, and it is thus content oriented.[214] That Twitter and other social media are now popular forums for public debate on climate change is most notably demonstrated by mainstream media's interest in President Trump's tweets on that issue,[215] as well as in other social and political "commercial" controversies he has fueled

210. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011).

211. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 326 (2009).

212. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

213. *Id.* at 1735 36 (citation omitted) (quoting *Reno*, 521 U.S. at 870).

214. *See Social Media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media [https://perma.cc/7VF9-CWDY] ("forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)").

215. Frank Newport, *Deconstructing Trump's Use of Twitter*, GALLUP (May 16, 2018), https://news.gallup.com/poll/234509/deconstructing-trump-twitter.aspx [https://perma.cc/M944-GEPW] ("Over three-quarters of Americans say they see, read or hear about Trump's tweets a lot or a fair amount."). The President particularly likes to deride climate change claims. *See, e.g.*, Coral Davenport & Mark Landler, *Trump Administration Hardens Its Attack on Climate Science*, N.Y. TIMES (May 27, 2019), https://www.nytimes.com/2019/05/27/us/politics/trump-climate-science.html [https://perma.cc/Q9GT-XK82]; *Twitter Mobilizes Meme Army After Trump Suggests Snowstorms Disprove Global Warming*, RT (Jan. 21, 2019, 10:24 AM), https://www.rt.com/usa/449315-trump-global-warming-snow-tweet/ [https://perma.cc/7M2N-CLRB] (Trump tweeted that he wished for "a little of that old fashioned Global Warming right now!" after severe snowstorms hit the U.S.).

through Twitter.[216] Trump's tweets cause outrage for the millions who oppose him politically, and mainstream media report relentlessly on the purported lies by Trump on Twitter and elsewhere.[217] Yet neither the President, nor what he gleefully mocks as "fake news"—the mainstream media[218]—are subject to SEC censorship or other prior restraints, and for "good reason."[219] As the United States Court of Appeals for the Second Circuit observed in holding that Trump could not block critics from accessing his Twitter account, the public debate over Trump's policies is historically heated and intense, but "as uncomfortable and as unpleasant as it frequently may be, [that debate] is nonetheless a good thing. . . . [I]f the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[220]

Like Trump, Musk is a controversial figure. Like Trump, Musk is brash, outspoken (indeed, barren of most speech filters), and combative in his Twitter postings.[221] Those traits have simultaneously propelled

216. The President has tweeted about numerous controversial issues that affect commercial, as well as social and political, interests, e.g., the political and commercial effects of tariffs on China and immigration restrictions. These tweets can be found on the White House's Twitter page. The White House (@WhiteHouse), TWITTER, https://twitter.com/whitehouse?lang=en [https://perma.cc/XD57-UBJH].

217. For example, the *Washington Post* claimed that President Trump has made more than 10,000 false or misleading statements while in office. Glenn Kessler et al., *President Trump has Made More Than 10,000 False or Misleading Claims*, WASH. POST (Apr. 29, 2019, 3:00 AM), https://www.washingtonpost.com/politics/2019/04/29/president-trump-has-made-more-than-false-or-misleading-claims/?utm_term=.e5f70b55f155 [https://perma.cc/967Z-CM32].

218. Interestingly, this "mainstream" media is operated mostly by public companies and other large commercial enterprises. *See Democracy on Deadline,* PBS: INDEP. LENS, https://www.pbs.org/independentlens/democracyondeadline/mediaownership.html [https://perma.cc/UP6L-86HB].

219. *See* United States v. Alvarez, 567 U.S. 709, 728 (2012) ("The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.").

220. Knight First Amendment Inst. v. Trump, 928 F.3d 226, 240 (2d Cir. 2019).

221. *See* Aaron Pressman & Adam Lashinsky, *Data Sheet What Elon Musk and President Trump Have in Common*, FORTUNE (Aug. 20, 2018), https://fortune.com/2018/08/20/data-sheet-elon-musk-president-trump-tweets/ [https://perma.cc/85VG-NZ85]; Jordan Malter, *Elon Musk Takes*

Musk to world-wide fame and made him otherwise unlikable on any level, save for some who admire his paradigm-changing ventures.[222] Like Trump, Musk's numerous, and sometimes erratic, pronouncements and predictions, and his repartee with his critics on Twitter are sharply debated and much criticized.[223] Like Trump, Musk is waging war with mainstream media; in Musk's case, the media are fighting back with harsh criticism of him and Tesla.[224] Ironically, Trump and Musk are also at loggerheads with each other over their respective viewpoints on climate change.[225]

The SEC's injunction blocking Musk's tweets appears to hinge on the *Central Hudson* exception from First Amendment protection for

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Trump-Style Trash Talk to the Business World, CNBC (Aug. 10, 2018, 2:12 PM), https://www.cnbc.com/2018/08/10/elon-musk-takes-trump-style-twitter-trash-talk-to-the-business-world.html [https://perma.cc/4MV2-92QR]; Scott Austin & Samarth Bansal, *4,925 Tweets: Elon Musk's Twitter Habit Dissected*, WALL ST. J. (July 12, 2018), http://graphics.wsj.com/elon-musk-twitter-habit-analysis/ [https://perma.cc/N7J5-LEW5] (describing Musk's far-ranging and controversial use of Twitter); Matthew Belvedere, *Billionaire Innovator Elon Musk is a 'Force of Nature,' Trump Infrastructure Advisor Says*, CNBC (Mar. 10, 2017, 11:26 AM), https://www.cnbc.com/2017/03/10/billionaire-innovator-elon-musk-is-a-force-of-nature-trump-infrastructure-advisor-says.html [https://perma.cc/UG8T-V73A].

222. As one source notes: "The jury is still out on Elon Musk, as it is for all of us. But it's likely he will one day be remembered as the greatest creative innovator and entrepreneur of our time unless, that is, he manages to sabotage his own success." Bill Murphy, Jr., *With 11 Short Words, Elon Musk Just Showed a Tiny Glimpse of Self-Awareness and Humility (This Needs to Stop Right Now)*, INC. (June 15, 2019), https://www.inc.com/bill-murphy-jr/with-11-short-words-elon-musk-just-showed-a-tiny-glimpse-of-self-awareness-humility-this-needs-to-stop-right-now.html [https://perma.cc/7A9P-499D].

223. Sam Abuelsamid, *Who Would Buy Tesla and Why?*, FORBES (May 29, 2019, 2:46 PM), https://www.forbes.com/sites/samabuelsamid/2019/05/29/who-would-buy-tesla-and-why/#49d691863451 [https://perma.cc/2YRW-WWQU]; Grant, *supra* note 152.

224. Jason Murdock, *Elon Musk Attacks Media for 'Relentlessly Negative' Tesla Coverage*, NEWSWEEK (June 6, 2018, 7:26 AM), https://www.newsweek.com/elon-musk-launches-fresh-attack-media-relentlessly-negative-coverage-1010868 [https://perma.cc/KXK9-2KPV]; Marina Koren, *Elon Musk's Silly War With the Media*, THE ATLANTIC (May 24, 2018), https://www.theatlantic.com/technology/archive/2018/05/elon-musk-tesla-twitter-journalism/561086/ [https://perma.cc/P66A-F4FF].

225. That dispute was touched off by a tweet from Musk announcing his resignation from the President's Economic Advisory Council after Trump withdrew the United States from the Paris Climate Accord. *See* Lucinda Shen, *Elon Musk Leaves President Trump's Advisory Council After Paris Agreement Exit*, FORTUNE (June 1, 2017), https://fortune.com/2017/06/01/elon-musk-trump-paris-agreement/ [https://perma.cc/KF9N-RC47].

misleading commercial speech.[226] Yet there is no such exception for the President's political or social speech carried out through either mainstream media or Twitter. Surely no one could credibly argue that the government can regulate or enjoin speech on climate change, even false speech, by the President, a member of the press, or a concerned citizen.[227] The country depends on the First Amendment, not government-appointed censors, to ferret out false statements on climate change and other critical political and social issues.

Musk should be given equal protection in the expression of his viewpoints about Tesla through Twitter.[228] As Tesla's CEO, Musk is a leader in the debate over whether replacing fossil-fuel cars with electric-powered ones is a commercially viable proposition.[229] Musk's tweets on the role of Tesla in making electric cars are, therefore, "inextricably intertwined" with his political and social views about how Tesla is accomplishing its politically and socially oriented mission of fighting climate change.[230] That intertwining should remove his tweets from the category of commercial speech and place them in the arena of fully protected political speech.[231]

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226. *See supra* notes 93–101 and accompanying text; *see also, e.g.*, Lorenzo v. SEC, 139 S. Ct. 1094, 1099–1100 (2019) (holding that the SEC could bar a person for life from working in the securities industry who disseminated to investors false statements that were provided by his boss); SEC v. World Radio Mission, 544 F.2d 535, 538–40 (1st Cir. 1976) (holding that a religious organization was not protected by First Amendment from the application of federal securities laws to the organization's misleading offer and sale of bonds).

227. *See supra* Part II (discussing First Amendment protection even for false political speech).

228. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2009) ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

229. *See generally, e.g.*, Fred Lambert, *Elon Musk Posits Tesla Under Attack by the Fossil Fuel Industry, What Do You Think?*, ELECTREK (May 30, 2019, 1:43 PM), https://electrek.co/2019/05/30/elon-musk-tesla-under-attack-fossil-fuel-industry/ [https://perma.cc/8PTF-LLN9] (reporting on claims by Musk that Tesla is under attack from traditional car manufacturers and the fossil fuel industry as a whole).

230. *See supra* note 88 and accompanying text (describing full First Amendment protection for "inextricably intertwined" commercial and (even false) political speech).

231. As the Dean of the Florida International University College of Law at Miami presciently observed before Tesla debuted its first commercial product:

> Toyota advertising its hybrid car is a commercial message. "Fight global warming" is a noncommercial, political message. Toyota showing how you can and should fight global warming by

To be sure, financial analysts, and at least some investors, read Musk's tweets and those tweets can and do affect Tesla's stock prices.[232] The SEC's position takes on a high moral tone in claiming innocent persons are defrauded when Musk's tweets and taunts are wrong.[233] Such rectitude is commendable on its face, but it ignores the basic premise of the First Amendment. Truth is best discovered through free and open debate rather than by the dictates of SEC bureaucrats, or by lawyers schooled in that agency's compelled-speech and censorship standards.[234]

Leaving for another day the issue of the precise areas where commercial-speech censorship is appropriate under the federal securities laws,[235] the SEC needs, at the least, to be restricted in its efforts to

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> purchasing a hybrid car would likely be mixed speech. The degree of permissible regulation depends in part on whether the messages are inseparable, or as the Court has stated, "inextricably intertwined."

Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation,* 58 S.C. L. REV. 789, 796 (2007) (footnotes omitted).

232. *See, e.g.*, Robert Ferris, *Tesla is Down 7% Thanks to Elon Musk's Tweets He's All but Wiped out the Gains Tesla Got for Settling with the SEC*, CNBC (Oct. 5, 2018, 10:03 AM), https://www.cnbc.com/2018/10/05/tesla-shares-drop-nearly-5percent-after-musk-mocks-sec-on-twitter.html [https://perma.cc/4MQJ-GQAK].

233. *See* In the Matter of Wealthfront Advisers, LLC, No. 3-18949, 2018 WL 6722756, at *3 (S.E.C. Dec. 21, 2018) (charging misleading tweets).

234. Musk's twitter-sitter lawyers are under compulsion to follow SEC speech mandates, which means they will be inclined to take an overly restrictive approach in censoring Musk's tweets. *See* SEC *In re* Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release No. 34-47276, 2003 WL 193527 (Jan. 29, 2003) (describing Section 307 of the Sarbanes-Oxley Act, 15 U.S.C. § 7245 (2012), which requires attorneys to monitor and report possible securities violations up the chain of command of public companies); *see also* Kim T. Vu, Note, *Conscripting Attorneys to Battle Corporate Fraud Without Shields or Armor? Reconsidering Retaliatory Discharge in Light of Sarbanes-Oxley*, 105 MICH. L. REV. 209, 210 12 (2006) (describing the role of attorneys as whistleblowers under Sarbanes-Oxley).

235. A harder line to draw is where the mainstream media or the Internet and social media are used to commit fraud by, for example: (1) disseminating intentionally false paid advertisements; (2) trading on advance information about a newspaper article that will have a market effect when published; and (3) perpetrating "pump-and-dump" schemes by publishing on the Internet false information that manipulates stock prices. *See, e.g.*, Carpenter v. United States, 484 U.S. 19, 24 (1987) (stating that the Supreme Court is equally divided over the issue of whether a reporter violated federal securities laws by trading on advance information contained in a column in the *Wall Street Journal* that had a market effect when published); SEC v. Wall Street Pub. Inst., Inc., 851 F.2d 365, 366

censor speech on public policy issues in public forums such as social media. Certainly, Musk's tweets and Tesla's role in society extend far beyond the investment interests of a relatively few Tesla shareholders. Shareholder concerns are far outweighed by the widespread public interest in the high-profile role played by Musk on Twitter in the vigorous and ongoing viewpoint-based debate over the future role of electric cars.

The SEC should stop acting like investors' over-protective parents. It should let Musk tweet what he wants about climate change and let investors make of that information what they will.[236] As was the case with Steve Jobs and Apple, the media's intense scrutiny and criticism of Musk's tweets should negate any claim of reliance on the contents of Musk's tweets for investment purposes.[237] If regulatory protection is, nevertheless, deemed necessary to shield unsophisticated investors from the rigors of free speech and public debate, the solution lies in the practice of providing safe harbors for projections—a solution addressed, somewhat ironically, in the *In re Donald J. Trump Securities Litigation*.[238]

The SEC could expand the safe-harbor doctrine to include statements made by company executives on social media. Such a warning is preferable to suppressing viewpoint-driven commercial

(D.C. Cir. 1982) (remanding case of SEC enforcement action under the anti-touting disclosure provisions of Section 17(b) of the Securities Act of 1933, 15 U.S.C. §77q(b), and SEC anti-fraud rules); MARKHAM, *supra* note 181.

236. The SEC apparently believes that investors in public companies are too unsophisticated to assess the value of uncensored public statements by CEOs, even in forums where their accuracy is subject to media scrutiny. Most investors in public companies, however, are highly sophisticated financial institutions, such as mutual funds, pension funds, insurance companies, and banks. *See* Charles McGrath, *80% of Equity Market Cap Held by Institutions,* PENSIONS & INVS. (Apr. 25, 2017, 1:00 AM), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions [https://perma.cc/5UJA-BPSQ]. Moreover, the principal investment concern with social media posts is their short-term effects on stock prices. But so-called high-frequency traders overwhelmingly dominate short-term investment strategies. Those traders use complex computer algorithms and high-speed trading systems that should be sophisticated enough to assess the value and truth of Twitter and other social-media postings. *See generally* Jerry W. Markham, *High-Speed Trading on Stock and Commodity Markets From Courier Pigeons to Computers*, 52 SAN DIEGO L. REV. 555 (2015).

237. *See supra* notes 130 135 and accompanying text.

238. 7 F.3d 357, 371 (3d Cir. 1993); *see also* Alan Horwich, *A Call for the SEC to Adopt More Safe Harbors That Limit the Reach of Rule 10b-5*, 74 BUS. LAW. 53, 64 71 (2018) (describing various SEC-created safe harbors and advocating for the broader use of such arrangements).

speech. Investors would be advised by such an SEC regulation that they should rely on only a company's SEC-filed statements in making investment decisions.[239] Non-filed statements that a public company's officers made on social media could not be the basis of a claim that such statements misled shareholders.[240] If an officer is speaking officially for a public company and the speaker wishes investors to consider that information in their investment decisions, the company would have to file the statement with the SEC.[241] Otherwise, the statement simply becomes a matter of debate just like any other aspect of protected free speech in the United States.[242]

CONCLUSION

Gagging Musk's unfiltered responses to critics by requiring that securities lawyers apply SEC censorship rules through prior review of Musk's viewpoint-driven tweets conflicts with basic First Amendment protections. The public's right to hear Musk's uncensored viewpoint-driven tweets about Tesla's role in combating climate change should not be suppressed under the guise of commercial-speech regulation. Protecting investors from erroneous or even false viewpoint-driven

239. Turning the settlement order in the Elon Musk contempt proceeding on its head provides a template for such an exemption. That order requires prior review of Musk's communications relating to a long list of Tesla activities, including production and sales, new business lines and forecasts that Tesla had not previously publicly disclosed or which deviate from prior forecasts that are "made in any format, including, but not limited to, posts on social media (*e.g.*, Twitter), the Company's website (*e.g.*, the Company's blog), press releases, and investor calls; and . . . any written communication." Order Amending Final Judgment as to Defendant Elon Musk at 1, No. 1:18-cv-8865-AJN-GWG, SEC v. Elon Musk (S.D.N.Y. April 30, 2019), ECF No. 47.

240. The benefit bestowed by an SEC license or reporting requirement would be limited to public filings at the SEC that are equally available to all on the SEC's "EDGAR" system. *See Filings and Forms*, SECS. & EXCH. COMM'N, https://www.sec.gov/edgar.shtml [https://perma.cc/A83C-9TDR] (last modified Jan. 9, 2017).

241. 15 U.S.C. § 78r(a) (2012).

242. There is already precedent for such a limitation in Section 18(a) of the Securities Exchange Act of 1934. It provides a private right of action for persons relying on and damaged by an intentionally false statement made "in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder." *Id. See generally* THOMAS LEE HAZEN, FED. JUDICIAL CTR., FEDERAL SECURITIES LAW 112 (3d ed. 2011), *available at* https://www.fjc.gov/sites/default/files/2012/FedSec3d.pdf [https://perma.cc/CGW4-DZYU] (describing Section 18(a) and noting that courts have applied an "eyeball" test requiring a plaintiff to have actually relied on filed materials and not similar information in other documents published by an issuer).

speech on social media should be up to the same free press that protects us in our everyday political and social lives.