DOES THE FIRST AMENDMENT PROTECT FOSSIL FUEL COMPANIES' PUBLIC SPEECH?

by Katherine G. Horner

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SUMMARY

Numerous cities, states, and counties have sued fossil fuel companies, with claims based on evidence found in the companies' own internal documents and statements. These companies have argued their public statements are protected by the First Amendment's freedom of speech and right to petition clauses. This Article describes the current litigation, discusses the companies' statements disseminated through various sources, and summarizes U.S. Supreme Court precedent and caselaw on commercial speech. It analyzes (1) whether the fossil fuel companies' statements should be classified as commercial speech, (2) whether they constitute false and misleading commercial speech, and (3) whether their statements merit First Amendment protection. It concludes that some categories of statements may be found not to rise to the level of protected speech.

When *Inside Climate News* and the *Los Angeles Time*s published stories in 2015 exposing fossil fuel companies' decades-long public campaign promoting climate change denial,[1] they lit a fuse that would lead to a national blowout: cities, states, and counties bringing suit against the companies in state and federal courts. The legal claims—ranging from nuisance to trespass to violation of consumer protection statutes[2]—responded to evidence presented by the companies' own internal documents. Within these documents was recorded a strategy of denial and deceit, wherein the companies would disseminate false or misleading public statements concerning the

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1. *See generally* Neela Banerjee et al., Exxon: The Road Not Taken (2015); Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. Times (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/.
2. Complaint at 73-81, State v. American Petroleum Inst., No. 62-CV-20-3837 (D. Minn. June 24, 2020) (alleging violation of Minnesota's Prevention of Consumer Fraud Act, strict liability and negligent failure to warn, fraud and misrepresentation, deceptive trade practices in violation of Minnesota statute, and violation of Minnesota's False Statement in Advertising Act); First Amended Complaint at 89-92, King Cnty. v. BP P.L.C., No. 2:18-cv-00758-RSL (W.D. Wash. Aug. 17, 2018) (alleging public nuisance and trespass); First Amended Complaint for Public Nuisance at 51-53, City of Oakland v. BP P.L.C., No. 3:17-cv-06011-WHA (N.D. Cal. Apr. 3, 2018) (alleging federal common-law and state-public nuisance); Amended Complaint at 68-72, City of New York v. BP P.L.C., No. 1:18-cv-00182-JFK (S.D.N.Y. Mar. 16, 2018) (alleging public and private nuisance and trespass); Complaint at 150-65, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021) (alleging public and private nuisance, strict liability and negligent failure to warn, trespass, and violation of Maryland's Consumer Protection Act); Complaint at 145-60, City of Annapolis v. BP P.L.C., No. C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021) (alleging public and private nuisance, strict liability and negligent failure to warn, trespass and violation of Maryland's Consumer Protection Act); Complaint at 120-32, County of Maui v. Sunoco LP, No. 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020) (alleging public and private nuisance, strict liability and negligent failure to warn, and trespass); Complaint at 198-209, State v. BP Am. Inc., No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020) (alleging negligent failure to warn, trespass, nuisance, and violation of Delaware's Consumer Fraud Act); Complaint at 120-33, City of Charleston v. Brabham Oil Co., Inc., No. 2020CP1003975 (S.C. C.P. Sept. 9, 2020) (alleging public and private nuisance, strict liability and negligent failure to warn, trespass, and violation of South Carolina's Unfair Trade Practices Act); Complaint and Jury Demand at 118-38, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-003179-20 (N.J. Super. Ct. Law Div. Sept. 2, 2020) (alleging public and private nuisance, trespass, negligence, and violation of New Jersey's Consumer Fraud Act); Plaintiff's Complaint at 107-28, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018) (alleging public and private nuisance, strict liability and negligent failure to warn, strict liability for and negligent design defect, trespass, and violation of Maryland's Consumer Protection Act); Plaintiff's Complaint at 115-38, State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018) (alleging public nuisance, strict liability and negligent failure to warn, strict liability for and negligent design defect, trespass, impairment of public trust resources in violation of the Rhode Island Constitution, and violation of Rhode Island's State Environmental Rights Act); Amended Complaint and Jury Demand at 101-13, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., No. 2018CV30349 (Colo. Dist. Ct. June 11, 2018) (alleging public and private nuisance, trespass, unjust enrichment, violation of Colorado's Consumer Protection Act, and civil conspiracy); Complaint at 99-121, County of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017) (alleging public and private nuisance, strict liability and negligent failure to warn, strict liability for design defect, negligence, and trespass); Complaint at 78-96, County of San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. Super. Ct. July 17, 2017) (alleging public and private nuisance, strict liability and negligent failure to warn, strict liability for design defect, negligence, and trespass).

credibility of climate change science, and counteracting claims that fossil fuel emissions were to blame.[3]

In doing so, fossil fuel companies were not breaking new ground. They merely proceeded down a well-worn path forged by previous corporate entities that, facing public controversy over the safety of their products and a threat to sales, chose to protect their pocketbooks by veiling the harm and clouding the public's—and policymakers'—judgment.[4] One example—perhaps the most emblematic—is that of the tobacco companies, whose efforts to deny the health harms associated with smoking and perpetuate the fallacy of a "healthier" cigarette[5] denied consumers the knowledge to make an intelligent choice and to protect their health. Numerous lives were lost[6] as these companies reaped the rewards of billions of dollars in profit.[7] The success of this scheme prompted its use by numerous industries in the years to come, including those dealing in opioids,[8] asbestos,[9] and, the subject of this Article, fossil fuels.

As with the fossil fuel industry, tobacco companies were made to account for their actions following the disclosure of internal documents chronicling the scheme to deceive the public.[10] Federal and state actors filed suit seeking restitution for the harm perpetuated on their citizens.[11] In an effort to thwart liability, the companies argued that the First Amendment protected their public statements asserting the harmlessness of their product.[12] Despite the tobacco industry's limited success on this front,[13] fossil fuel companies have followed suit, arguing their public statements are protected by the First Amendment's freedom of speech and right to petition clauses.[14]

This Article seeks to determine whether their argument holds any water: does the First Amendment shield fossil fuel companies from liability for their public statements promoting their products and delegitimizing the climate change crisis?

Part I introduces the current litigation brought by states, cities, and counties seeking to hold fossil fuel companies accountable for their public disinformation campaign, and details the extent of the companies' knowledge of the dangers posed by the continued use of fossil fuels. Part II discusses the fossil fuel companies' campaign and their public statements disseminated through various news and media sources, company reports, and conferences. Part III summarizes the First Amendment's protection of speech as interpreted by U.S. Supreme Court precedent.

Part IV discusses courts' interpretations of the First Amendment protection of commercial speech, and analyzes (1) whether the fossil fuel companies' statements should be classified as commercial speech, (2) whether they constitute false and misleading commercial speech, and (3) whether their statements should merit protection under the First Amendment's freedom of speech clause. Part V discusses the *Noerr-Pennington* doctrine on the right to petition, and how courts have interpreted and applied that doctrine. Part VI analyzes whether the fossil fuel companies' public campaign warrants immunity from liability under the *Noerr-Pennington* doctrine. Part VII concludes.

I. State/Local Government Litigation Alleging a Climate Disinformation Campaign

Since 2017, various states, cities, and counties have initiated lawsuits against fossil fuel companies[15] alleging, among other things, that the companies perpetuated a

3. *See* Complaint at 79, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021) (summarizing fossil fuel companies' "sustained and widespread campaign of denial and disinformation about the existence of climate change and their products' contribution to it").
4. The Union of Concerned Scientists calls these tactics "the Disinformation Playbook," in which industries engage in a five-part scheme to discredit the science criticizing their products and to rewrite the public narrative to promote their interests: (1) "The Fake: Conduct counterfeit science and try to pass it off as legitimate research"; (2) "The Blitz: Harass scientists who speak out with results or views inconvenient for industry"; (3) "The Diversion: Manufacture uncertainty about science where little or none exists"; (4) "The Screen: Buy credibility through alliances with academia or professional societies"; and (5) "The Fix: Manipulate government officials or processes to inappropriately influence policy." *The Disinformation Playbook: How Business Interests Deceive, Misinform, and Buy Influence at the Expense of Public Health and Safety*, Union Concerned Scientists (May 18, 2018), https://www.ucsusa.org/resources/disinformation-playbook.
5. *See* United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 4 (D.D.C. 2012) (listing the "five topics on which . . . [the tobacco companies] had made false and deceptive statements" as including:
   > (a) the adverse health effects of smoking; (b) the addictiveness of smoking and nicotine; (c) the lack of any significant health benefit from smoking "low tar," "light," "ultra light," "mild," and "natural," cigarettes; (d) [tobacco companies'] manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (e) the adverse health effects of exposure to secondhand smoke)

   (quoting United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 938-39 (D.D.C. 2006).
6. *See Philip Morris USA, Inc.*, 449 F. Supp. 2d at 854-55 (estimating the number of lives lost annually as "440,000" or "[a]pproximately one out of every five deaths that occur in the United States").
7. In 1994, five years before the United States brought its case against Philip Morris and eight other cigarette manufacturers, *id.* at 26, Philip Morris reported $1.23 billion in revenue. *Profits on Rise: Philip Morris Cos. Inc. . . .*, Chi. Trib. (July 12, 1994), https://www.chicagotribune.com/news/ct-xpm-1994-07-12-9407130277-story.html.
8. *See generally Purdue Pharma's Use of Hospital, Academic Ties Helped Fuel Opioid Crisis*, Union Concerned Scientists (Apr. 9, 2019), https://www.ucsusa.org/resources/disinformation-playbook-purdue-pharma.
9. *See generally How Georgia-Pacific Knowingly Published Fake Science on the Safety of Asbestos*, Union Concerned Scientists (Oct. 10, 2017), https://www.ucsusa.org/resources/how-georgia-pacific-knowingly-published-fake-science-safety-asbestos.
10. *See Philip Morris USA, Inc.*, 449 F. Supp. 2d at 164 (noting that "[i]nternal documents reveal that [the tobacco companies'] knowledge of the potential harm caused by smoking was markedly different from their public denials on the same subject").
11. *See generally Philip Morris USA, Inc.*, 449 F. Supp. 2d 1.
12. *See id.* at 886 (discussing tobacco companies' argument that their public statements were merely opinions communicated for the purposes of petitioning the government, and thus were protected by the First Amendment).
13. *See id.* (holding that "[t]he First Amendment [d]oes [n]ot [p]rotect [tobacco companies'] [f]alse and [m]isleading [p]ublic [s]tatements").
14. *See infra* notes 79-80 and accompanying text.
15. For the purposes of this Article, "fossil fuel companies" will include those defendant companies who were members of the American Petroleum Institute at the time the *Anne Arundel Cnty. v. BP P.L.C.* complaint was filed: BP, Shell, Marathon, Chevron, ExxonMobil, Mobil, and ConocoPhillips.

disinformation campaign with the goal of misleading the public as to the true cause and consequences of climate change.[16] For purposes of this Article, the discussion of this litigation will refer primarily to the claims made in one of the most recent cases, *Anne Arundel County v. BP P.L.C.*, which presents the most comprehensive summary of the allegations. The companies' allegedly false and misleading statements were published in advertisements directed to consumers, as well as in press releases and other commentary directed to members of the U.S. Congress for the purpose of delaying enactment of laws to control fossil fuel use and emissions.

In arguing that the public statements were false or, at the very least, misleading, the plaintiffs referred to the discrepancy between the statements and the companies' internal knowledge of the subject, acquired from research conducted by their own scientists as well as those they commissioned from universities and other independent groups. This Article does not seek to prove the veracity of the states', cities', and counties' claims, but rather examines the validity of the companies' legal argument that the First Amendment protects their public statements regardless of whether they were false or misleading. To do so, the Article will (1) assume, arguendo, that all of the allegations are true, and (2) begin by providing an overview of those factual claims, including the fossil fuel companies' climate change research and the content of their challenged speech.

Fossil fuel companies were informed about the threat of climate change as early as the 1950s. In 1954, scientists from the California Institute of Technology informed the American Petroleum Institute (API)—which funded the research, and of which all of the fossil fuel companies were members—that archived data from tree rings indicated that "fossil fuels had caused atmospheric carbon dioxide levels to increase by about 5% since 1840."[17] Then, in 1959, at an API event attended by fossil fuel companies' representatives, nuclear physicist Edward Teller presented on the impact of increased carbon dioxide (CO_2) in the atmosphere, including melting of the ice caps and a rise in ocean levels that would "submerge . . . [a]ll coastal cities."[18]

Six years later, API President Frank Ikard relayed to petroleum industry leaders the findings from a report by President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel, which found that "a 25% increase in carbon dioxide concentrations could occur by the year 2000, that such an increase could cause significant global warming, that melting of the Antarctic ice cap and rapid sea level rise could result, and that fossil fuels were the clearest source of the pollution."[19] In 1968, Stanford Research Institute (SRI) scientists—commissioned by API to provide it with current information on environmental pollutants—reported to API findings similar to that of President Johnson's panel. Specifically, the scientists stated, "Significant temperature changes are almost certain to occur by the year 2000, and . . . there seems to be no doubt that the potential damage to our environment could be severe."[20] A supplemental research report sent to API a year later projected that CO_2 levels would reach 370 parts per million by 2004,[21] and "that 90% of this increase could be attributed to fossil fuel combustion."[22]

In 1978, James Black of Exxon's Products Research Division wrote to the vice president of Exxon Research and Engineering, summarizing his research on the greenhouse effect and his conclusion that "current scientific opinion overwhelmingly favors attributing atmospheric carbon dioxide increase to fossil fuel combustion," and that the doubling of atmospheric CO_2 would "produce a mean temperature increase of about 2°C to 3°C."[23] A year later, W.L. Ferrall of Exxon's Research and Engineering Company reported in an internal company memo:

> The most widely held theory [about global warming] is that: The increase [in carbon dioxide] is due to fossil fuel combustion; [i]ncreasing CO_2 concentration will cause a warming of the earth's surface; [t]he present trend of fossil fuel consumption will cause dramatic environmental effects before the year 2050[; and t]he potential problem is great and urgent.[24]

16. Complaint at 78-79, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021); Complaint at 77, City of Annapolis v. BP P.L.C., No. C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021); Complaint at 99, County of Maui v. Sunoco LP, No. 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020); Complaint at 109, State v. BP Am. Inc., No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020); Complaint at 111, City of Charleston v. Brabham Oil Co., No. 2020CP1003975 (S.C. C.P. Sept. 9, 2020); Complaint at 56, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-003179-20 (N.J. Super. Ct. Sept. 2, 2020); Complaint at 42, State v. American Petroleum Inst., No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020); Complaint at 73, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018); Complaint at 73, State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018); Complaint at 45, King Cnty. v. BP P.L.C., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); Complaint at 21, 23, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy, No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); Complaint at 58-59, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018); Complaint at 4-5, City of New York v. BP P.L.C., No. 1:18-cv-00182-JFK (S.D.N.Y. Jan. 9, 2018); Complaint at 62, City of Santa Cruz v. Chevron Corp., No. 17CV03243 (Cal. Super. Ct. Dec. 20, 2017); Complaint at 62, County of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017); Complaint at 23, State v. BP P.L.C., No. CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017); Complaint at 50, County of San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. Super. Ct. July 17, 2017); Complaint at 50-51, County of Marin v. Chevron Corp., No. CIV1702586 (Cal. Super. Ct. July 17, 2017); Complaint at 49, City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. Super. Ct. July 17, 2017).

17. Complaint at 51, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
18. *Id.*
19. *Id.* at 52.
20. *Id.* at 53.
21. *Id.* at 54.
22. Complaint and Jury Demand at 41, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-001379-20 (N.J. Super. Ct. Law Div. Sept. 2, 2020).
23. Complaint at 55, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021); *see also* Complaint and Jury Demand at 2, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-001379-20 (N.J. Super. Ct. Law Div. Sept. 2, 2020) (quoting Black's statement in 1977 to Exxon's Corporate Management Committee: "[C]urrent scientific opinion overwhelmingly favors attributing atmospheric carbon dioxide increase to fossil fuel combustion.").
24. Complaint at 57, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).

In 1982, Exxon's environmental affairs manager distributed a primer on climate change to Exxon management, which "confirmed fossil fuel combustion as a primary anthropogenic contributor to global warming."[25] The primer went on to detail the various consequences of climate change—including global sea-level rise, drought, and the collapse of modern agriculture—and noted that other greenhouse gases, such as methane, would contribute significantly to global warming.[26]

That same year, in an internal summary of Exxon's research on climate modeling, Roger Cohen, director of Exxon's Theoretical and Mathematical Sciences Laboratory, affirmed that "over the past several years a clear scientific consensus has emerged regarding the expected climatic effects of increased atmospheric CO_2 . . . [including] a doubling of atmospheric CO_2 from its pre-industrial revolution value [and] an average global temperature rise of (3.0 ± 1.5)°C."[27] He went on to state that "[t]here is unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alterations of the biosphere[, and that t]he time required for doubling of atmospheric CO_2 depends on future world consumption of fossil fuels."[28]

Time and again, fossil fuel companies' internal documents acknowledged the existence and threat of climate change.[29] From this certainty came calls for action and proposals for policy measures to address the emergency. As early as 1965, fossil fuel companies were aware that climate change would require a revolution in energy production and emancipation from dependence on fossil fuels.[30] In fact, an internal memo from Exxon reported that keeping atmospheric CO_2 to a safe level would require that "[e]ighty percent of fossil fuel resources . . . be left in the ground," and that "[c]ertain fossil fuels, such as shale oil, [ ] not be substantially exploited at all."[31]

Without the use of fossil fuels, how could society satisfy citizens' ample energy needs? Fossil fuel company researchers' resounding answer was, consistently, "renewables."[32] For instance, Exxon's "Scoping Study on CO_2," prepared and distributed in 1981, discussed "options for reducing CO_2 build-up in the atmosphere."[33] After first rejecting carbon capture as the best option due to its high energy cost, it concluded that "energy conservation or shifting to renewable energy sources[ ] represent the only option that might make sense."[34] This transition could not be postponed, the companies concluded. As the Shell Greenhouse Effect Working Group declared in 1988: "[T]he potential implications for the world are . . . so large that policy options need to be considered much earlier[; research should be] directed more to the analysis of policy and energy options than to studies of what we will be facing exactly."[35]

II. The Public Campaign Against Climate Science and the Existence of Climate Change

As seen above, assuming as true the allegations made by the plaintiff states, cities, and counties, fossil fuel companies' own research confirmed the existence of climate change, and suggested that mitigation of the threat would necessitate transitioning away from fossil fuel use. The companies did not dispute these findings and continued to be pioneers in climate change research.[36] In the mid-1990s, however, they developed a new strategy—a public campaign of misinformation and climate change denial—that was prompted by a growing international response to climate change and policymaking that threatened the continued viability of fossil fuels, and, thus, the companies' profits.[37]

In 1988, Exxon announced its leadership in developing the petroleum industry's position on climate change, and summarized the central tenets of "Exxon's Position": (1) "[e]mphasize the uncertainty in scientific conclusions

25. *Id.* at 66.
26. *Id.* at 67-68.
27. *Id.* at 68.
28. *Id.*
29. *Id.* at 72 (citing a film produced by Shell in 1991 called "Climate of Concern," which stated that the consequences of climate change—abnormal weather, sea-level rise—was a "warning" that was "endorsed by a uniquely broad consensus of scientists"); *see also* Complaint and Jury Demand at 51, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-001379-20 (N.J. Super. Ct. Law Div. Sept. 2, 2020) (detailing Shell's internal "confidential" report on "the greenhouse effect," which was issued in 1988 and affirmed the "reasonable scientific agreement that increased levels of greenhouse gases would cause global warming," as well as the fact that "the major source of CO_2 in the atmosphere" is a result of fossil fuel combustion); *and* Amended Complaint and Jury Demand at 86, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., No. 2018CV30349 (Colo. Dist. Ct. June 11, 2018) ("An internal industry memo from 1995—drafted by a former Mobil employee and shared with API—said clearly that '[t]he scientific basis for the Greenhouse Effect and the potential impact of human emissions of greenhouse gases such as CO_2 on climate is well established and cannot be denied.'").
30. Complaint at 53, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021) (quoting President of API Ikard's summary of the research conducted by President Johnson's Environmental Pollution Panel that concluded that "the pollution from internal combustion engines is so serious, and is growing so fast, that an alternative nonpolluting means of powering automobiles, buses, and trucks is likely to become a national necessity").
31. *Id.* at 58.
32. *Id.* at 66, 71 (discussing fossil fuel companies' various research, which concluded that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion" and "a shift towards solar, hydrogen, and safe nuclear power").
33. *Id.* at 63-64.
34. *Id.* at 64.
35. *Id.* at 71, 73 (adding that Shell's 1991 film "Climate of Concern" also warned: "Global warming is not yet certain, but many think that the wait for final proof would be irresponsible. Action now is seen as the only safe insurance.").
36. *Id.* at 74 (noting that "[t]he fossil fuel industry was at the forefront of carbon dioxide research for much of the latter half of the 20th century").
37. *Id.* at 76-78 (identifying the following world events as instigating fossil fuel companies' disinformation campaign: the widely publicized 1988 National Aeronautics and Space Administration's presentation to Congress confirming anthropogenic global warming; the introduction in 1988 of several U.S. Senate bills proposing regulation of fossil fuels and President George H.W. Bush's pledge to "combat the greenhouse effect with 'the White House effect'"; the formation of the United Nations' (U.N.'s) Intergovernmental Panel on Climate Change (IPCC) in 1988; publication of the IPCC's First Assessment Report in 1990; and the formation of the U.N. Framework Convention on Climate Change in 1992).

regarding the potential enhanced Greenhouse Effect"; and (2) "[r]esist the overstatement and sensationalization [sic] of potential greenhouse effect which could lead to non-economic development of non-fossil fuel resources."[38] This position directly contradicted Exxon's internal knowledge based on its own scientists' research findings.

In his congressional testimony, Prof. Martin Hoffert, a past consultant for Exxon, expressed regret over what he termed "the climate science denial program campaign":

> [O]ur research [at Exxon] was consistent with findings of the United Nations Intergovernmental Panel on Climate Change on human impacts of fossil fuel burning which is that they are increasingly having a perceptible influence on Earth's climate. . . . If anything, adverse climate change from elevated CO_2 is proceeding faster than the average of the prior [Intergovernmental Panel on Climate Change] mild projections and fully consistent with what we knew back in the early 1980's at Exxon. . . . Exxon was publicly promoting views that its own scientists knew were wrong, and we knew that because we were the major group working on this.[39]

As discussed below, the publicity campaign was directed at two major audiences—consumers and policymakers—and sought to discredit climate change science, sow doubt about the threat of climate change, disparage the utility of renewable energy, and reinforce the indispensability of fossil fuels. Notably, fossil fuel companies' public statements refuting the truth of global warming and climate science were disseminated at the same time that the companies were taking active measures to protect their production facilities from the consequences of climate change.[40] In 1996, for instance, Mobil, Shell, and Imperial Oil (owned by Exxon) "designed and built a 'collection of exploration and production facilities along the Nova Scotia coast that made structural allowances for rising temperatures and sea levels.'"[41] Thus, while inducing governments to delay the regulation of CO_2 emissions and the mitigation of life-threatening risks associated with climate change, fossil fuel companies were secretly employing research they publicly denounced in order to protect their facilities and sustain profits.

The plaintiff state and local governments present various examples of fossil fuel companies' public statements on climate change, all of which either directly contradict the companies' own internal communications and research findings, or, at the very least, are misleading as to the facts. In determining whether these statements are protected under the First Amendment—and, if so, to what degree—a careful examination of the words, phrases, and illustrations used is imperative. Thus, this section will present a compilation of fossil fuel companies' statements that will then be used in the ensuing First Amendment analysis.

Many of the fossil fuel companies' statements appear to be directed to consumers, to influence their perspective on the climate change issue and promote their continued use of fossil fuels. For instance, in 1996, Exxon released a publication titled, "Global Warming: Who's Right? Facts About a Debate That's Turned Up More Questions Than Answers."[42] This publication is riddled with false or misleading statements that contradicted Exxon's own research. A few of the more glaring contentions, presented in an introduction by Exxon Chief Executive Officer (CEO) Lee Raymond, are provided below:

- "Today, . . . a multinational effort, under the auspices of the United Nations, is under way to cut the use of fossil fuels, based on the unproven theory that they affect the earth's climate."[43]
- "Proponents of the global warming theory say that higher levels of greenhouse gases—especially carbon dioxide—are causing world temperatures to rise and that burning fossil fuels is the reason. . . . Yet scientific evidence remains inconclusive as to whether human activities affect global climate."[44]
- "Unfortunately, huge economic consequences and scientific uncertainty have not prevented activists from politicizing the issue and trying to stir up unreasonable fears. . . . [Their] stance overlooks the need for longer-term research to determine whether human activity impacts global climate."[45]
- "Taking drastic action immediately is unnecessary since many scientists agree there's ample time to better understand climate systems and develop the best long-term strategies."[46]

This is not the only example of Exxon's false or misleading statements on the topic of climate change. In a 2004

38. *Id.* at 80.
39. *Id.*
40. *See* Brief of Amici Curiae Robert Brulle et al. in Support of Plaintiffs-Appellants and Reversal at 34, City of Oakland v. BP P.L.C., No. 18-16663 (9th Cir. Mar. 20, 2019) (describing the 1994 Europipe project jointly owned and operated by Shell, Exxon, Conoco, Total, and Statoil, for which the companies "noted the impacts of sea level rise and the likely increase in frequency of storms as a result of climate change"); *see also* Amended Complaint and Jury Demand at 86, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., No. 2018CV30349 (Colo. Dist. Ct. June 11, 2018) ("In 1996, while building offshore exploration facilities in Canada, Mobil Oil 'made structural allowances for rising temperatures and sea levels.' The engineering consultant hired for the project admitted he 'used the engineering standards of the day to incorporate potential impacts of [g]lobal warming on sea-level rise.'").
41. Brief of Amici Curiae Robert Brulle et al. in Support of Plaintiffs-Appellants and Reversal at 35, City of Oakland v. BP P.L.C., No. 18-16663 (9th Cir. Mar. 20, 2019) (noting that the design specifications stated that "'[a]n estimated rise in water level, due to global warming, of 0.5 meters may be assumed' for the 25-year life of the Sable gas field project").
42. *See generally* Exxon Corporation, Global Warming: Who's Right? Facts About a Debate That's Turned Up More Questions Than Answers (1996).
43. Lee R. Raymond, *Climate Change: Don't Ignore the Facts*, *in id.* at 2.
44. *Id.*
45. *Id.*
46. *Id.* at 3.

newspaper ad the company stated, "Scientific uncertainties continue to limit our ability to make objective, quantitative determinations regarding the human role in recent climate change or the degree and consequences of future change."[47]

Other fossil fuel companies also contributed public statements about climate change that were patently false or misleading. For instance, in a 1997 *New York Times* advertorial, Mobil advocated against the United States' proposals for regulating CO_2 emissions,[48] arguing that "[t]he science of climate change is too uncertain to mandate a plan of action that could plunge economies into turmoil," and that "[w]e still don't know what role man-made greenhouse gases might play in warming the planet."[49] In the 1998 *Imperial Oil Review*, "A Cleaner Canada," Imperial Oil stated that the "issue [of climate change] has absolutely nothing to do with pollution and air quality. There is absolutely no agreement among climatologists on whether or not the planet is getting warmer, or, if it is, on whether the warming is the result of man-made factors or natural variations in the climate."[50] As recently as 2018, a blog post on Shell's website stated: "[T]he potential extent of change in the climate itself could now be limited. In other words, the prospect of runaway climate change may have passed."[51]

Even fossil fuel companies' CEOs have directly participated in this campaign. In 2017, Chevron CEO and Chairman of the Board John Watson said on a podcast, "There's no question there's been some warming; you can look at the temperatures data and see that. The question and debate is around how much, and how much is caused by humans."[52] At the 15th World Petroleum Congress, Exxon CEO Raymond took to the stage to present the company's position on climate change: "It is highly unlikely that the temperature in the middle of the next century will be affected whether policies are enacted now or 20 years from now."[53]

In a 2013 television interview, Rex Tillerson, Exxon's then-CEO, stated:

> [T]he facts remain there are uncertainties around the climate, climate change, why it is changing, what the principal drivers of climate change are. And I think the issue that I think is unfortunate in the public discourse is that the loudest voices are what I call the absolutist, the people who are absolutely certain that it is entirely man-made and you can attribute all of the climate change to nothing but man-made burning of fossil fuels. . . . [T]here are other elements of the climate system that may obviate this one single variable that we are concentrating on because we are concentrating on a single variable in a climate system that has more than 30 variables. We are only working on one. And so that's that uncertainty issue.[54]

In 2015, Ken Cohen, ExxonMobil vice president for public and government affairs, wrote in a blog post that "[w]hat we have understood from the outset—and something which over-the-top activists fail to acknowledge—is that . . . climate [change] and mankind's connection to it are among the most complex topics scientists have ever studied, with a seemingly endless number of variables to consider over an incredibly long timespan."[55]

In 2001, Exxon ran an advertorial in the *New York Times* promoting the use of "advanced technology" in reducing CO_2 emissions, and touting its use of "cogeneration units" to reduce emissions and save energy:

> Among the more promising approaches to addressing the risks of climate change are those that rely upon economically attractive actions and advanced technology. . . . The overall efficiency of [cogenerating units] can be twice as high as older approaches . . . [and] since natural gas is usually the fuel of choice, carbon dioxide and other emissions are inherently lower.[56]

While the statements made in this advertorial are not explicitly false, they potentially mislead the reader in two important ways. First, they imply that fossil fuel use is unavoidable, and thus climate change must be addressed through improvements in technology that reduces rather than eliminates fossil fuel emissions. Second, they suggest that natural gas is more climate-friendly than CO_2 emissions when, in fact, methane released from the pro-

47. *A Range of Opinions on Climate Change at Exxon Mobil*, N.Y. Times (Nov. 6, 2015), https://www.nytimes.com/interactive/2015/11/06/science/exxon-mobil-global-warming-statements-climate-change.html.
48. *See generally* Mobil, *Reset the Alarm*, N.Y. Times (Oct. 30, 1997), https://www.documentcloud.org/documents/705561-mob-nyt-1997-oct-30-reset alarm.html.
49. *Id.*
50. Complaint at 85, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
51. *Id.* at 138.
52. *Id.* at 137.
53. *A Range of Opinions on Climate Change at Exxon Mobil*, *supra* note 47. Raymond offered several clearly false statements to the public: in a 2001 speech, he stated, "We need good, and better, climate science . . . if we cannot forecast the weather a week from now, I would be suspect of our ability to forecast the climate 100 years from today"; in a 2002 speech, he stated, "We in ExxonMobil do not believe that the science required to establish this linkage between fossil fuels and warming has been demonstrated—and many scientists agree . . . [T]his is because of incomplete data and methodology and the overarching role of natural variability"; in a 2005 television interview, he stated,
> > There is a natural variability that has nothing to do with man . . . It has to do with sun spots . . . with the wobble of the Earth . . . [T]he science is not there to make that determination [as to whether global warming is human-caused] . . . [T]here are a lot of other scientists that do not agree with [the National Academy and IPCC] . . . [T]he data is not compelling.
>
> Geoffrey Supran & Naomi Oreskes, *Addendum to "Assessing ExxonMobil's Climate Change Communications (1977-2014)" Supran and Oreskes (2017 Environ. Res. Lett. 12 084019)*, 15 Env't Rsch. Letters 119401, at 1, 10 (2020), https://doi.org/10.1088/1748-9326/ab89d5.
54. Supran & Oreskes, *supra* note 53, at 11 (noting that Tillerson also stated in a 2013 television interview that
> > the facts remain there are uncertainties around the climate, climate change, why it is changing, what the principal drivers of climate change are[, a]nd I think the issue that I think is unfortunate in the public discourse is that the loudest voices are what I call the absolutist, the people who are absolutely certain that it is entirely man-made.
55. *A Range of Opinions on Climate Change at Exxon Mobil*, *supra* note 47.
56. ExxonMobil, *Action, Not Talk: Cogeneration and Climate*, N.Y. Times (July 19, 2001), https://energyindepth.org/wp-content/uploads/2017/09/01.7.19.jpg.

duction and deployment of natural gas "has a warming impact that is 86 times that of carbon dioxide over a 20-year time horizon."[57]

Fossil fuel companies' advertisements also present misleading claims as to the greater sustainability of their particular products or as to energy alternatives that may, in reality, *exacerbate* the climate crisis. For instance, in 2008, ConocoPhillips published a series of advertisements titled "Tomorrow begins today," which assert that "because [ConocoPhillips] believe[s] we're responsible for finding long-term solutions for future generations, [we are] exploring new sources of secure, stable energy."[58] The company then gives examples of these "new sources": "[A]s one of North America's leading producers of natural gas, ConocoPhillips is providing clean-burning fuel to homes"; and "ConocoPhillips is working to provide clean, efficient technology to turn coal into clean-burning fuel."[59]

BP's advertisements have also implied that natural gas, oil, and gas can be "clean" fuels or produced in ways that will not contribute to climate change. For instance, in a series of advertisements BP presented on Facebook, it made the following claims: "natural gas can become the centerpiece of a net zero carbon economy"; that BP's oil and gas products are "cleaner and better"; and that "[w]e agree—the world needs fewer emissions."[60]

Finally, fossil fuel companies have claimed that they are sustainable and, in fact, leading the charge for a solution to climate change. Through alleged "greenwashing" campaigns, they have sought to convince consumers that fossil fuels are necessary to further economic growth, and thus that the only options to prevent climate change are through greater innovation, consumer choices, and improved efficiency—not through a transition away from fossil fuels. But the companies' talk greatly outpaces their walk: behind every new advertisement celebrating their investments in renewables, support for environmentally conscious legislation, and concern for a sustainable environment, their actions were often telling a completely different story.

For instance, in 2007, BP rebranded itself from "British Petroleum" to "BP," adopted the slogan "Beyond Petroleum," and introduced a new green corporate logo.[61] Unfortunately, its investments in alternative energy included investments in natural gas, as well as reinvestments in Canadian tar sands projects, which are "some of the most carbon-intensive oil extraction projects in the world."[62] Further, in 2019, BP launched an advertising campaign in which it stated, "At BP, we're working to make our energy cleaner and better [and] . . . finding new ways to produce and deliver it with fewer emissions"[63]; yet, from 2010 to 2018, BP spent only 2.3% of its total capital on low-carbon energy sources.[64]

Another example is Marathon Petroleum, which stated, "We have invested billions of dollars to make our operations more energy efficient[and] reduce our emissions," yet invested only 1% of its capital spending from 2010 to 2018 into low-carbon energy sources.[65] Exxon, too, has asserted it is "'pioneering' technologies to reduce emissions and increase fuel efficiency," and investing "up to $100 million over the next 10 years towards research in emissions reduction technologies." However, these statements, publicized in Facebook advertisements in 2018 and 2019, deflected from the percentage of capital spending that Exxon actually committed to such endeavors: "From 2010 to 2018, Exxon spent only 0.2% of its capital expenditures on low-carbon energy systems,"[66] and "has invested more than *$20 billion* . . . at its open-pit tar sands mining operation."[67]

From 2007 to 2008, Chevron ran two advertising campaigns, both of which misleadingly promoted the company as a leader in renewable energy and suggested that changes in consumer choices—not the elimination of fossil fuel emissions—would lead to a climate change solution.[68] For instance, in one advertisement, printed over the image of an ordinary consumer is the statement, "I will leave the car at home more. And we [at Chevron] will too."[69] Its 2010 publicity campaign focused on the company's alleged championing of renewable energy.[70] In one advertisement, the company stated, "It's time oil companies get behind the development of renewable energy. We agree. We're not just behind renewables. We're tackling the challenge of making them affordable and reliable on a large scale."[71] As with BP, Marathon, and Exxon, however, Chevron's actual capital investment in renewables was minuscule: "only 2% of Chevron's capital spending from 2010 to 2018 was in low-carbon energy sources."[72]

Fossil fuel companies' statements on their commitment to renewable energy development have been misleading in light of their meager capital spending on the issue. In the same way, their public statements supporting enactment of legislation engendering more sustainable energy sources

57. Complaint at 112, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
58. *Id.* at 125.
59. *Id.* at 125-26.
60. *Id.* at 120.
61. *Id.* at 106.
62. *Id.* at 115; *see also* Amended Complaint and Jury Demand at 89, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., No. 2018CV30349 (Colo. Dist. Ct. June 11, 2018) (describing the extremely carbon-intensive practice of processing tar sands to be used as energy: first, bitumen is extracted from the tar sands; second, the bitumen is refined into useable fuel, which, when burned, "creates enormous CO_2 emissions—around 3.2 to 4.5 times the emissions generated from conventional oil produced in North America"; and, third, petroleum coke, a byproduct of the refining process, is then also sold as fuel, which, when burned, "produces even more CO_2 than coal—5-10 percent more CO_2 than coal relative to the energy provided—and is one of the dirtiest fuels around in terms of air quality").
63. Complaint at 120, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
64. *Id.* at 110.
65. *Id.* at 111.
66. *Id.* at 115.
67. *Id.* at 115 n.181 (emphasis added).
68. *Id.* at 122.
69. *Id.* at 123.
70. *Id.*
71. *Id.* at 123-24.
72. *Id.* at 124.

falter in the face of their actual reported lobbying efforts.[73] For instance, on ExxonMobil's website, it states that its "lobbying and political contributions are aligned" with its "positions on many key issues."[74]

Those positions include "support[ing] the goals of the Paris Agreement on climate," and "actively engag[ing] with government officials to encourage remaining in the Paris Agreement."[75] In order to "achieve the Paris Agreement goals at the lowest cost to society," the website advocates for "a coordinated and transparent economy-wide price on carbon such as a carbon tax."[76] These statements mislead consumers as to the company's true actions: from 2015 to 2021, out of the company's 1,543 total instances of legislative lobbying, ExxonMobil "reported only one instance of lobbying on the Paris Agreement, [ ] none on any of the 28 bills related to the Paris Agreement[, and] only 18 on bills related to carbon pricing."[77]

III. First Amendment Protection of Speech

In response to the plaintiff governments' claims that fossil fuel companies perpetrated a disinformation campaign in which they publicized statements that their own research proved was false or misleading, the companies argue that their public statements are protected by the First Amendment. Specifically, they make the following claims: (1) that their statements concern a matter of public interest, and thus represent speech for which the First Amendment provides the utmost protection[78]; and (2) that their challenged publicity campaign is, in fact, lobbying activity for which the Supreme Court grants complete immunity from liability regardless of whether "the campaign employs unethical and deceptive methods."[79] The following sections consider the validity of these claims in light of the evidence that the companies knew that climate change was real, dangerous, and primarily caused by fossil fuel emissions[80]; and that they made public statements denying these facts, promoting doubt, and disparaging climate science.[81]

Developing a comprehensive understanding of the scope of and rationale for commercial speech protection requires a survey of the Supreme Court's interpretation of First Amendment freedoms generally. The Court's First Amendment doctrine rests not on a fixed foundation, unresponsive to the unique factual patterns of new cases, but rather requires a fact-intensive inquiry balancing the state's constitutionally authorized police power with the First Amendment's preservation of unrestricted public discourse free from governmental interests. This inquiry is one of "proximity and degree," and requires a determination of whether the circumstances and words used will "bring about the substantive evils that Congress has a right to prevent."[82] As the Court famously stated in *Schenck v. United States*, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[83] However, only in limited circumstances will a state's interest in "provid[ing] for the public health, safety, and morals"[84] of its citizens override the First Amendment's broad protection of speech.[85]

The Supreme Court has taken great care in affirming the values espoused by the First Amendment and protecting them against encroachment. In enacting the First Amendment, the Framers saw democratic governance as being inexorably dependent upon preserving an open forum for public discourse,[86] in which individuals could express their criticism of "public men and measures,"[87] and through the

73. Chevron's website states, "Carbon pricing should be the primary policy tool to achieve greenhouse gas emissions reduction goals." However, Chevron dedicated only 0.4% of its lobbying efforts—from 2011 to 2021—to carbon pricing legislation. Further, BP states on its website that it "support[s] the goals of the 2015 Paris Agreement on climate change," and that "ambitious climate policies will be essential to enable the world to meet the Paris climate goals." Yet, since negotiations on the Paris Agreement began in 2015, BP has directed only 0.2% of its lobbying efforts toward the Paris Agreement and bills related to the Agreement. Memorandum from the Majority Staff to the Members of the Committee on Oversight and Reform (Oct. 28, 2021).
74. ExxonMobil, 2020 Lobbying Report 5 (2020), https://corporate.exxonmobil.com/-/media/global/files/policy/lobbying/exxonmobil_2020-lobbying-report.pdf.
75. *Id*. at 6.
76. *Id*. at 7.
77. Memorandum from the Majority Staff, *supra* note 73.
78. *See* Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc. at 109, Anne Arundel Cnty. v. BP P.L.C., No. 1:21-cv-01323 (D. Md. May, 27, 2021) (arguing that "freedom of speech is 'most seriously implicated . . . in cases involving disfavored speech on important political or social issues,' chief among which in the contemporary context is the question of '[c]limate change,' which 'is one of the most important public issues of the day'") (quoting National Rev., Inc. v. Mann, 140 S. Ct. 344, 344 (2019)); *see also* Defendants' Motion to Dismiss First Amended Complaint [12(B)(6)]; Memorandum of Points and Authorities at 28, King Cnty. v. BP P.L.C., No. 2:18-cv-00758-RSL (W.D. Wash. Aug. 31, 2018) (arguing that the speech plaintiffs challenge—advertising on fossil fuels, funding scientific research, "downplaying global warming risks," and "media attacks"—is "speech [that] is constitutionally protected"); Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities at 15, City of Oakland v. BP P.L.C., No. 3:17-cv-06011-WHA (N.D. Cal. Apr. 19, 2018) (arguing that "[p]laintiffs may disagree with the point of view allegedly expressed by some [d]efendants, but '[d]iscussion of public issues . . . [is] integral to the operation of [our] system of government'") (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)).
79. Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc. at 96, Anne Arundel Cnty. v. BP P.L.C., No. 1:21-cv-01323 (D. Md. May, 27, 2021); Memorandum of Law in Support of Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 52, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. Feb. 7, 2020); Defendants' Motion to Dismiss First Amended Complaint [12(B)(6)]; Memorandum of Points and Authorities at 28, King Cnty. v. BP P.L.C., No. 2:18-cv-00758-RSL (W.D. Wash. Aug. 31, 2018); Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities at 6, City of Oakland v. BP P.L.C., No. 3:17-cv-06011-WHA (N.D. Cal. Apr. 19, 2018).
80. See discussion *supra* Part I.
81. See discussion *supra* Part II.
82. Schenck v. United States, 249 U.S. 47, 52 (1919).
83. *Id*.
84. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991); *see also* Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707 (1931) ("In maintaining [the guaranty of fundamental rights of person and property], the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted.").
85. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72-73 (1963) (Douglas, J., concurring) ("[T]he Bill of Rights was designed to fence in the Government and make its intrusions on liberty difficult and its interference with freedom of expression well-nigh impossible.").
86. Thomas v. Collins, 323 U.S. 516, 530 (1945) (affirming a "tradition [of] allow[ing] the widest room for discussion[and] the narrowest range for its restriction").
87. Cohen v. California, 403 U.S. 15, 26 (1971) (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)); *see also Near*, 283 U.S. at 722:

"marketplace of ideas"[88] promote a more informed electorate.[89] That, however, does not mean an electorate shielded from speech that "include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government."[90] On the contrary, the Supreme Court has declared that "debate on public issues should be uninhibited, robust, and wide-open,"[91] and remain unfettered by a government's paternalistic assumptions about what speech and subject matter may be appropriate for its citizens to hear.[92]

For instance, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court considered a state law that prohibited pharmacists from advertising their drug prices, partly to protect consumers from making purchasing decisions based on the persuasiveness of the advertisements rather than on a pharmacist's merits.[93] In striking down the law, the Court presented an alternative to the state's "highly paternalistic approach" to safeguarding its citizens—wherein speech is banned to protect against individuals' misguided reactions to the speech.[94] It stated that "th[e] alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[95]

In other words, the Court reaffirmed its interpretation of the First Amendment as prohibiting a state from "unduly suppress[ing] free communication of views . . . under the guise of conserving desirable conditions."[96] Instead, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection,"[97] and guarantees all citizens the "privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[98] Protecting such speech preserves "some breathing room around the electoral 'marketplace' of ideas, . . . the marketplace in which the actual people of this Nation determine how they will govern themselves."[99]

Without this "breathing room," the Court contends, individuals will be unable to cultivate self-government and self-expression—two ideals that the Court regularly refers to in its discussions on the importance of First Amendment freedoms.[100] These ideals recognize not only the speaker's interest in being heard and contributing to the free debate of public issues, but also the listener's interest in unfiltered "access to discussion . . . and the dissemination of information and ideas."[101] Thus, in affirming a corporation's First Amendment right to freedom of speech, the Court has emphasized "[t]he inherent worth of the [corporation's political] speech *in terms of its capacity for informing* the public"; "speech [which is] indispensable to decisionmaking in a democracy."[102]

That First Amendment protection of speech against state interference must be broad and sweeping does not mean that all speech is immune from regulation[103]; but

> To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct.

(quoting 4 Report on the Virginia Resolutions, Madison's Works 549).

88. Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986).
89. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147 (1967) (affirming "that freedom of discussion 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period'") (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) (declaring the Framers' belief that freedom of speech and the press "lies at the foundation of free government by free men"); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").
90. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
91. *Id.*
92. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). In concurring with the Supreme Court's decision to deny a state's right to restrain an individual from soliciting membership to labor unions while addressing a meeting of workers, Justice Robert H. Jackson stated this principle succinctly:

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. . . . This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society.

Thomas v. Collins, 323 U.S. 516, 545 (1945).
93. *Virginia State Bd. of Pharmacy*, 425 U.S. at 749-50, 768-69.
94. *Id.* at 770.
95. *Id.*
96. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
97. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (confirming the Court's hypothesis that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies") (quoting Dennis v. United States, 341 U.S. 494, 503 (1951)).
98. *New York Times*, 376 U.S. at 269 (quoting Bridges v. California, 314 U.S. 252, 270 (1941)).
99. Citizens United v. Federal Election Comm'n, 558 U.S. 310, 473 (2010) (Stevens, J., concurring in part and dissenting in part).
100. *See* Snyder v. Phelps, 562 U.S. 443 (2011) (reaffirming that "speech concerning public affairs is more than self-expression; it is the essence of self-government") (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)); *Citizens United*, 558 U.S. at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); McDonald v. Smith, 472 U.S. 479, 489 (1985) (Brennan, J., concurring) ("The Speech and Press Clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance."); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) (discussing the First Amendment's role "in fostering individual self-expression").
101. *First Nat'l Bank*, 435 U.S. at 783.
102. *Id.* at 777 (emphasis added).
103. *See* Near v. Minnesota ex rel. Olson, 283 U.S. 697, 733 (1931) (Butler, J., dissenting):

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, . . . is a supposition too wild to be indulged by any rational man. . . . It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, prop-

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn."[104] Separation of "legitimate from illegitimate speech[thus] calls for . . . sensitive tools."[105] Specifically, the Court relies on the facts of each case to identify speech that is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[106] In making this determination, however, the Court has "rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'"[107]

The Court has identified only a few categories of speech that are so without expressive value as to no longer warrant First Amendment protection, such as fraud.[108] For all other challenged speech, the Court has upheld state regulation "only to the degree necessary to meet the particular problem at hand."[109] In order to determine the degree of restriction that is constitutionally permissible based on the significance of the governmental interests at stake, the Court has developed various tests. While a comprehensive review of these tests is beyond the scope of this Article, two examples serve to highlight state interests for which the Court gives considerable deference.

First, the Supreme Court has permitted state regulation of speech that prevents a "clear and present danger of riot, disorder, . . . or other immediate threat to public safety, peace, or order."[110] Second, the Court has declared that there is inherently less value to intentional falsity in public discourse,[111] and, until relatively recently,[112] states had interpreted such declarations as removing constitutional protection for all "calculated falsehood[s]."[113] The Court's statement in *Chaplinsky v. New Hampshire* provides just one example of the Court intimating this absence of protection for intentionally false speech: "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, *knowingly and deliberately* published . . . should enjoy a like immunity."[114]

However, the theory that the First Amendment provides no reprieve from liability for actors charged with disseminating calculated falsehoods changed when, in 2012, the Supreme Court decided *United States v. Alvarez*, which concerned a challenge to a statute that criminalized false statements claiming receipt of a military medal. In that opinion, the Court, for the first time, expressly rejected a general exception for intentionally false statements from constitutional protection.[115] As the Court noted:

> [The quotations the government uses] to support its contention that false statements have no value . . . all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. See Brief for United States 18-19. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like [the challenged statute], that targets falsity and nothing more.[116]

Thus, falsity alone will not suffice to remove constitutional protection from challenged speech. The speech must be sufficiently egregious to satisfy the requirements of a "legally cognizable harm"—like fraud or defamation—for the U.S. Constitution to afford no protection from liability.

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erty, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government.

(quoting 3 Joseph Story, Commentaries on the Constitution of the United States §1874 (1833)).

104. Speiser v. Randall, 357 U.S. 513, 525 (1958).
105. *Id.*
106. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
107. United States v. Alvarez, 567 U.S. 709, 717 (2012) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).
108. *See id.* (listing the categories as including "advocacy intended, and likely, to incite imminent lawless action"; "obscenity"; "defamation"; "speech integral to criminal conduct"; "fighting words"; "child pornography"; "fraud"; "true threats"; "and speech presenting some grave and imminent threat the government has the power to prevent").
109. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 265 (1986).
110. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (affirming the state's power to enact "a statute narrowly drawn to define and punish specific conduct [or communication] as constituting a clear and present danger to a substantial interest of the state"); *see also* Schenck v. United States, 249 U.S. 47, 49-50, 52 (1919) (upholding a law prohibiting the "causing and attempting to cause insubordination, &c., in the military and naval forces" because, as the nation was at war, there was such a "clear and present danger that [the speech would create a] hindrance to [the war] effort that no Court could regard [it] as protected by any constitutional right"); Stromberg v. California, 283 U.S. 359, 369 (1931) (upholding a law that prohibits "display[ing] a red flag and banner in a public place . . . as a sign . . . of opposition to organized government," because of the state's interest in preventing "utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means"); *cf.* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (limiting a state's right to prohibit "advocacy of the use of force" to speech that is not merely an "abstract teaching . . . of the . . . moral necessity for a resort to force and violence," but rather is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").
111. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").
112. *See infra* notes 115-16 and accompanying text.
113. *See* Time, Inc. v. Hill, 385 U.S. 374, 388, 390 (1967) (upholding a liability "standard of knowing or reckless falsehood" when "redress[ing] false reports of matters of public interest" and concerning private individuals); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (upholding constitutionality of a statute that prohibits "a defamatory falsehood [against public officials, when] made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) ("We . . . hold that a 'public figure' . . . may . . . recover damages for a defamatory falsehood . . . , on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.").
114. 315 U.S. 568, 572 (1942) (emphasis added).
115. 567 U.S. 709, 718-19 (2012) (holding that "falsity alone may not suffice to bring the speech outside the First Amendment").
116. *Id.*

In contrast to known falsehoods, a lie innocently told retains complete protection from state regulation, as "[t]he First Amendment recognizes no such thing as a 'false' idea."[117] Rather, it appreciates that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[118] Thus, the Supreme Court's First Amendment precedent instructs that "[t]he remedy for speech that is false is speech that is true,"[119] and that "the best test of truth" comes not from paternalistic assumptions made by the state, but by "the power of the thought to get itself accepted in the competition of the market."[120]

While refusing to subscribe to an ad hoc balancing test in analyzing First Amendment freedoms, the Court clearly does consider state policy interests in determining whether specific speech may be regulated. Such interests are given particular weight in the area of commercial speech, where the Court has declared lesser protection is warranted due to its unique attributes. With a firm grasp of the fundamental values securing our freedom of speech under the First Amendment, the next section turns to a discussion on the scope of commercial speech protection, and whether fossil fuel companies' public speech does indeed warrant such protection.

IV. First Amendment Protection of Commercial Speech

Unlike most other forms of speech, First Amendment protection of commercial speech is a relatively new phenomenon: the Supreme Court declared its right to a degree of protection for the first time in the mid-1970s. Prior to that, the Court considered commercial speech to be wholly without protection and vulnerable to state regulation. In 1942, the Supreme Court stated in *Valentine v. Chrestensen* that "the Constitution imposes no . . . restraint on government as respects [the regulation of] purely commercial advertising."[121] For the next 30 years, the Supreme Court would conform to this seemingly unqualified statement.

Then, in 1975, in deciding the constitutionality of a Virginia statute that deemed the "sale or circulation of any publication" encouraging procurement of an abortion to be a crime, the Court struck down its past pronouncement and erected its first shield protecting commercial speech from state regulation. Dismissing the *Valentine* Court's opinion as "a distinctly limited one" that held merely that a state could institute "reasonable regulation of the manner in which commercial advertising [can] be distributed,"[122] the Court clarified that "[t]he existence of 'commercial activity, in itself is no justification for narrowing the protection of expression secured by the First Amendment.'"[123] Thus, with *Bigelow v. Virginia*, the Court introduced the first strands of what would become the complex web of First Amendment commercial speech protection.

Section IV.A below discusses the Supreme Court's decision granting lesser First Amendment protection to commercial speech because of its value to public discourse and democratic governance. Section IV.B details how the Court determines whether challenged speech is commercial speech meriting lesser constitutional protection, particularly where the speech includes elements of both commercial and noncommercial speech. Section IV.C introduces the Supreme Court's *Bolger* test and how the Court and lower courts have applied it since its inception. Section IV.D defines false and misleading commercial speech, which is afforded no First Amendment protection. Finally, Section IV.E examines whether fossil fuel companies' speech constitutes commercial speech, and, if so, whether that speech is false and/or misleading.

A. The Court Affirms the Value of Commercial Speech

In *Bigelow*, the Court introduced an exception for commercial speech from what had been categorically forbidden in other forms of speech: content-based distinctions in First Amendment protection.[124] Though the challenged speech in *Bigelow* came from a newspaper advertisement, the Court emphasized that it "did more than simply propose a commercial transaction"; rather, the speech contributed information of interest to the general public—beyond just potential consumers—including what was of constitutional importance: the right to abortion.

The fact that an advertisement may include speech that involves "the exercise of the freedom of communicating information and disseminating opinion" supported the Court's conclusion that "[a]dvertising [may] not [be] stripped of all First Amendment protection."[125] The Court

117. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51 (1988).
118. *New York Times*, 376 U.S. at 271-72.
119. *Alvarez*, 567 U.S. at 727; *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (affirming the "hypothesis that [where calculated falsehood is not involved] speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies") (quoting Dennis v. United States, 341 U.S. 494, 503 (1951)); Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) (explaining that "the Court's rejection of the mere falsity criterion in *New York Times*" came from recognition of "the inevitability of some error in the situation presented in free debate especially when abstract matters are under consideration"; and "recognition that in many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship").
120. *Alvarez*, 567 U.S. at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).
121. 316 U.S. 52, 54 (1942).
122. Bigelow v. Virginia, 421 U.S. 809, 818 (1975).
123. *Id.* at 819 (quoting Ginzburg v. United States, 383 U.S. 463, 474 (1966)).
124. *See id.* at 831 (Rehnquist, J., dissenting) (reminding the Court that it "ha[s] always refused to distinguish for First Amendment purposes on the basis of content"); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 776 (1976) (Stewart, J., concurring) (reaffirming that "it is a cardinal principle of the First Amendment that 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'") (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).
125. *Bigelow*, 421 U.S. at 826. The *New York Times* Court applied similar reasoning when it denied the contention that, as the challenged speech was published "as part of a paid, 'commercial' advertisement," it warranted no First Amendment protection. 376 U.S. 254, 265 (1964). While not denying that

left unanswered the question of how much First Amendment protection would be afforded to statements in advertisements.[126] Instead, it implied that courts would need to engage in a fact-intensive inquiry to determine the degree to which the particular speech was "commercial" and would warrant protection from state regulation.[127]

One year later, in *Virginia State Board*, the Court not only reaffirmed that advertisements may qualify for First Amendment protection, it held that "[i]f there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content."[128] Thus, the Court endorsed the consideration of content-based distinctions of commercial speech in order to delineate the degree of protection. These content-based distinctions, however, must go beyond mere labels; speech that simply concerns a commercial subject is insufficient by itself to deny protection.[129]

Indeed, as the Court opined, the speech of an advertiser and his or her consumer audience should not be granted less protection simply because the transaction proposed in the advertisement relates to commercial or purely economic interests.[130] On the contrary, 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."[131] Considering, for example, advertisements communicating pharmacists' drug prices, as those challenged in *Virginia State Board*, an individual with fewer resources—both in time and money—may rely on such ads to more efficiently find less expensive drugs.[132] The "dissemination of information as to who is producing and selling what product, for what reason, and at what price" better informs the public as to how those resources are being allocated and regulated; "[t]herefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy," the free flow of commercial information serves that goal.[133]

Of course, like all speech, commercial speech may be subject to state regulation if its content lacks the value for which it receives First Amendment protection. As the value of commercial speech rests on its capacity to promote a better-informed public, as well as more intelligent decisionmaking by both citizens and state actors, untruthful commercial speech—be it false, deceptive, or misleading—receives no protection and may be subject to regulation.[134] Additionally, advertisements that promote illegal activity or purchase of an illegal product also may be regulated.[135]

Further, the Supreme Court has explained that, although truthful commercial speech is protected by the First Amendment, it receives lesser protection than other speech.[136] The lesser protection afforded commercial speech reflects "its subordinate position in the scale of First Amendment values," and prevents the dilution of noncommercial speech protections that would inevitably result if no differentiation was prescribed.[137] As the case law shows, this is justified for three reasons: (1) commercial speech occurs in areas traditionally subject to government regulation; (2) commercial speech is more durable and hardy, in that its value as a means of increasing profits is sufficient to reduce the risk that such speech will be chilled by regulations; and (3) commercial speech is more easily verifiable, as it generally concerns the speaker's own product or services for which he or she has specialized knowledge.

First, the Supreme Court has made clear that the government's traditional role in regulating commerce grants it a greater degree of freedom in regulating commercial speech.[138] As the Court stated in *Friedman v. Rogers*, "[C]ommercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech 'a limited measure of protection,' it is also true that 'the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.'"[139] Thus, when confronted with a challenge "to economic legislation that serves legitimate regulatory interests,"[140] the Court frames its decision

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the speech was part of an advertisement, the Court argued that the fact that such speech was paid for was "immaterial" where it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* at 266. In such a case, denying all First Amendment protections would deter newspapers "from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.*

126. *Bigelow*, 421 U.S. at 826 ("We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.").
127. *Id.* (suggesting that in "assessing the First Amendment interest at stake and weighing it against the public interest," a court would need to consider "[t]he diverse motives, means, and messages of advertising . . . [that] make[s] speech 'commercial' in widely varying degrees").
128. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761.
129. *See id.*
130. *See id.* at 762-63; *see also* Thomas v. Collins, 323 U.S. 516, 531 (1945) ("The idea is not sound . . . that the First Amendment's safeguards are wholly inapplicable to business or economic activity.").
131. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763.
132. *Id.* at 763-64.
133. *Id.* at 765. The Court reiterated this point in *Edenfield v. Fane*, where it stated:
> 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.

507 U.S. 761, 767 (1993).
134. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761 ("The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."); *see also* Bigelow v. Virginia, 421 U.S. 809, 828 (1975) (confirming protection of the challenged advertisement as "[n]o claim [was] made . . . that the advertisement was deceptive or fraudulent").
135. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 772; *Bigelow*, 421 U.S. at 828.
136. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) (affirming that "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression").
137. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); *see also* Florida Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995) (noting that "[w]e have always been careful to distinguish commercial speech from speech at the First Amendment's core").
138. *See Ohralik*, 436 U.S. at 456 ("We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.").
139. 440 U.S. 1, 10 (1979) (quoting *Ohralik*, 436 U.S. at 456).
140. *Id.*

narrowly,[141] applying an "intermediate standard of review" in which the statute need only be "tailored in a reasonable manner to serve a substantial state interest."[142]

Second, the greater durability and hardiness of commercial speech allows for lesser First Amendment protection. In cases concerning noncommercial speech, the Court is careful to prohibit state regulation of speech when there is a significant risk that the regulation will also chill constitutionally protected speech,[143] and thus infringe on the "breathing room" necessary for free and uninhibited public discourse.[144] However, in the area of commercial speech, this risk is significantly reduced, since "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'"[145] In fact, the Court presumes the profit motive to be so strong a motivator for the perpetuation of commercial speech that it exempts this area of expression from the traditional prohibition against prior restraints.[146]

Third, "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired," because the speaker has a greater ability to verify its veracity.[147] Commercial speech is generally concerned with promoting a product or service of which the speaker has specialized knowledge. As Justice Potter Stewart explained in *Virginia State Board*:

> In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them.[148]

Thus, the greater objectivity and verifiability of commercial speech permits "governmental regulation of false or misleading price or product advertising," without the risk that such regulation "will chill accurate and nondeceptive commercial expression."[149]

B. Defining Commercial Speech

Of course, whether a statement is commercial or noncommercial is not a clear-cut determination. On one side of the spectrum is pure commercial speech,[150] which the Court has defined as "speech proposing a commercial transaction."[151] To fall within this category, there must be more than simply "speech [made] for a profit"; otherwise, as the Court in *Board of Trustees of State University of New York v. Fox* argued, the definition would be overly broad and incorporate examples epitomizing fully protected speech, such as for-profit job counseling.[152] On the other side of the spectrum rests noncommercial speech, or speech that is unrelated to the promotion of products or services.[153] Importantly, whether or not speech is identified as an "advertisement" is not determinative.[154]

While there are certainly cases where the challenged speech sits squarely in one of these categories, other cases involve speech that includes elements of both classic commercial and noncommercial speech. In these cases, as the Court commented in *City of Cincinnati v. Discovery Network, Inc.*, the question of whether the speech should be classified as commercial—and thus receive lesser First Amendment protection—is "a matter of degree."[155] In certain cases, the Court appears to make this determination by simply comparing the amount of commercial and noncommercial speech. Where the amount of content on one side of the spectrum overwhelms the other,[156] the Court

141. *Id.*
142. Edenfield v. Fane, 507 U.S. 761, 767 (1993).
143. *See* Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 n.9 (2003) ("The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected."); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) (holding that "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value"); Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 604 (1967) (holding that "[t]he danger of [a] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [speakers] what is being proscribed").
144. *See supra* Part III.
145. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977)).
146. *See id.* at 571 n.13 (reaffirming the Court's allowance of prior restraints in the area of commercial speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976) (noting that "the greater objectivity and hardiness of commercial speech . . . may . . . make inapplicable the prohibition against prior restraints").
147. Friedman v. Rogers, 440 U.S. 1, 10 (1979) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24).
148. *Virginia State Bd. of Pharmacy*, 425 U.S. at 778 (Stewart, J., concurring).
149. *Id.* (Stewart, J., concurring).
150. *See* Nike, Inc. v. Kasky, 539 U.S. 654, 678 (2003) ("purely 'commercial speech'"); Zauderer v. Office of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985) ("advertising pure and simple"); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (speech falling "within the core notion of commercial speech").
151. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); *see also Bolger*, 463 U.S. at 66 (identifying core commercial speech as that "which does 'no more than propose a commercial transaction'") (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762). In *Central Hudson*, the Court introduced a new definition of "pure commercial speech": "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. However, Justice Stevens in his concurrence argued that this definition was too broad and presented too great a risk of also encompassing noncommercial speech, which "is entitled to the maximum protection afforded by the First Amendment." *Id.* at 579. It appears that the Court has not employed this definition since *Central Hudson*, *see* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993), so for the purposes of this Article, pure commercial speech will only include that which "does 'no more than propose a commercial transaction.'" *Id.* (quoting *Bolger*, 463 U.S. at 66).
152. Board of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) (providing additional examples of constitutionally protected speech that is also speech for a profit: "tutoring, legal advice, and medical consultation . . . (for a fee)").
153. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 9 (1986) (defining speech that "receives the full protection of the First Amendment" as that which includes "discussion of 'matters of public concern'") (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)).
154. *See Bolger*, 463 U.S. at 67 (noting that "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech").
155. 507 U.S. 410, 423 (1993).
156. *See Pacific Gas*, 475 U.S. at 9 (finding that an electric company's newsletter "extends well beyond speech that proposes a business transaction" as its

classifies the speech as such. For instance, in *Discovery Network*, the Court concluded that the challenged speech was "'core' commercial speech," because even though the advertisements "include[d] *some*" information of public interest, they "consist[ed] *primarily* of promotional material."[157]

Where noncommercial speech is present but merely peripheral to the advertisement's main content, the Court denies it full First Amendment protection and assigns it lesser protection as commercial speech. In doing so, the Court often refers to its statements in *Central Hudson Gas & Electric Corp.*, in which it warned against affording full protection to promotional advertising simply because it also includes speech relevant to a public debate:

> Although this approach responds to the serious issues surrounding our . . . [federal] policy . . . , we think it would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns.[158]

Thus, where an advertisement includes noncommercial speech that merely "links a product to a current public debate," the Court will not elevate its First Amendment protection to that afforded to speech that is exclusively noncommercial. This is because commercial entities are free to speak directly on issues of interest to the public, and will enjoy full First Amendment protection when they do.[159] However, when they choose—"choose" being the operative word—to contribute such information as part of a commercial advertisement, the Court has concluded that "the State retains the power to 'insur[e] that the stream of commercial information flow[s] cleanly as well as freely.'"[160]

The only exception to this rule is when the noncommercial speech is "inextricably intertwined" with commercial speech.[161] In such cases, where the Court cannot "parcel out the speech, applying one test to one phrase and another test to another phrase," it has held that the "test for fully protected expression" must be applied.[162] Following *Riley*, the Court clarified that to be "inextricably intertwined," there must be a requirement—like one under state law—that the commercial and noncommercial speech be presented together; it cannot simply be the result of a commercial entity choosing to present an advertisement that includes both noncommercial and commercial elements.[163]

In *Fox*, a commercial entity sought to hold "Tupperware parties" for students in which a commercial transaction was proposed—the purchase of Tupperware—and noncommercial information was provided, including how to run a home and be financially responsible.[164] The Court expressly rejected the entity's argument that these commercial and noncommercial statements were "inextricably intertwined," and thus were entitled to full First Amendment protection.[165] In doing so, it highlighted the fact that in *Riley* the commercial speech was a state-law requirement. Here, in contrast, "[n]o law of man or of nature ma[de] it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."[166]

In an environmental case, the District Court for the Northern District of California, in *Association of National Advertisers, Inc. v. Lungren*,[167] reinforced the distinction identified in *Fox*. In *Lungren*, several trade associations challenged the constitutionality of a statute that made it "unlawful for any person to represent that any consumer good which it manufacturers or distributes is 'ozone friendly,' . . . 'biodegradable,' 'photodegradable,' 'recyclable,' or 'recycled' unless that consumer good meets the definitions contained in this section."[168] The trade associations argued that the statute would inevitably chill any noncommercial speech on environmental issues that was "inextricably intertwined" with their regulated commercial advertisements.[169]

In rejecting this argument, the *Lungren* court first held that, unlike the statute at issue in *Riley*, the challenged statute did not compel speech.[170] It then analogized the case to *Fox* where, similarly, the speaker was not required to combine its commercial and noncommercial speech:

> The noncommercial elements contained in plaintiffs' editorial and informational advertisements are not absolutely necessary to sell the product at issue. While statements that a firm supports recycling, for instance, are undoubtedly included in advertisements as a marketing tool and may in fact augment sales, firms can nevertheless sell their wares without editorializing about the environment.[171]

C. *The* Bolger *Test*

Where an advertisement includes both pure commercial speech and noncommercial speech in equal measure, the Supreme Court engages in a more careful deliberation

"contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes").

157. *Discovery Network*, 507 U.S. at 412-13 (emphasis added).
158. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 n.5 (1980).
159. *Id.*
160. *Id.*; *see also Discovery Network*, 507 U.S. at 426 n.21 ("The interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications.").
161. Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988).
162. *Id.*
163. Board of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989).
164. *Id.* at 473-74.
165. *Id.* at 474.
166. *Id.* ("Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.").
167. 809 F. Supp. 747, 753, 23 ELR 20720 (N.D. Cal. 1992).
168. *Id.* at 750.
169. *Id.* at 752.
170. *Id.*
171. *Id.* at 753.

"to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."[172] The Court in *Bolger v. Youngs Drug Products Corp.* considered just such an advertisement.[173] There, the challenged speech was included in a condom manufacturer's informational pamphlets.[174] One included descriptions of the corporation's specific brand of condoms, as well as descriptions concerning "the use, manufacture, desirability, and availability" of condoms generally.[175] The second pamphlet did not discuss the corporation's products at all, but rather provided information on venereal disease and the utility of condoms in preventing transmission of the disease; the only reference to the corporation was at the bottom of the last page, where it stated "that the pamphlet has been contributed as a public service by [the corporation], the distributor of Trojan-brand prophylactics."[176]

In deciding whether the speech should be considered commercial for purposes of analyzing its First Amendment protection, the Court focused on three elements of the advertisements, finding that the combination of all three rendered the advertisement commercial:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. . . . Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. . . . Finally, the fact that [the corporation] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. . . . The combination of *all* these characteristics, however, provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.[177]

The Court cautioned lower courts against assuming that all three elements were absolutely necessary to classify speech as commercial. On the contrary, it clarified that "we [do not] mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial," and that "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech."[178]

1. Application by Lower Courts

Since this decision, the *Bolger* factors have been used by lower courts to determine whether challenged speech should be classified as commercial speech and afforded lesser constitutional protection. For instance, in *Semco, Inc. v. Amcast, Inc.*, the U.S. Court of Appeals for the Sixth Circuit found that a magazine article written by the defendant company explaining a new method used to manufacture plunger tips was commercial speech.[179] Though the company denied that the article constituted advertising, the court found that the article's references to the company, its general references to the company's products, and the company's economic motivation for publishing such an article as a means of advertising its products[180] were sufficient to classify the article as commercial speech.[181]

The *Semco* court cited *Bolger* in holding that the article represented commercial speech despite the fact that the magazine editor had removed specific references to the company's products.[182] As the Supreme Court stated in *Bolger*, "That a product is referred to generically does not . . . remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand name."[183]

The District Court for the District of Columbia came to a similar conclusion in examining whether a company's promotion of speech in medical seminars, peer-reviewed medical journals, and textbooks constituted commercial speech.[184] While conceding that the academic literature by itself would be afforded the highest degree of First Amendment protection, the court determined that when that speech is promulgated by a company in order to promote its product, the speech is transformed into commercial speech and receives lesser protection.[185] Here, the defendant manufacturer presented evidence that by distributing research to physicians and other medical professionals that showcased the efficacy of its products, those physicians were more likely to prescribe its products; thus, increasing its sales.[186]

The court concluded that "as long as the manufacturer seeks to disseminate information centered upon its product," the first *Bolger* prong is satisfied and the speech qualifies as an "advertisement," even if that speech originated from "textbook excerpts, article reprints, and symposia."[187]

172. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983)).
173. *Bolger*, 463 U.S. at 62 n.4.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 67-68.
178. *Id.* at 68 n.14.
179. 52 F.3d 108, 110 (6th Cir. 1995).
180. *Id.* at 114 ("The phrase 'free advertising,' far from being an oxymoron, aptly describes the publicity manufacturers may receive in press releases, news interviews, or trade publications.").
181. *Id.* at 111-12.
182. *Id.* at 112.
183. *Bolger*, 463 U.S. at 67 n.13; *but see* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 533 (6th Cir. 2012):
> Because the [statutory] restriction applies to consumer-directed claims regarding a manufacturer's specific products, there is no reason to believe that it touches upon [p]laintiffs' non-commercial speech "in the public-health debate concerning tobacco harm reduction . . . in scientific symposia, regulatory releases, or news programming such as *60 Minutes*," or that [it] applies "when [p]laintiffs limit their speech to discussions of *generic* product categories like smoke-free tobacco products."

(emphasis added).
184. Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 62 (D.D.C. 1998).
185. *Id.* at 62-63 (noting that the proposal of a commercial transaction "usually involves a manufacturer making a claim about its product that encourages the purchase of the product," but that "there are certainly instances in which a manufacturer promotes and induces the purchase of its product by directing attention to favorable information generated by wholly independent organizations").
186. *Id.* at 63.
187. *Id.* at 64.

In other words, the speech itself was not the defining factor, but rather the identity of the speaker and its motivation for speaking: where the speaker is a commercial entity and it seeks to disseminate speech for the purpose of promoting the purchase of its product, the speech should be classified as commercial speech.[188]

More than 10 years later, in *United States v. Philip Morris USA Inc.*, the U. S. Court of Appeals for the District of Columbia (D.C.) Circuit also made its determination based not on the speech itself, but rather whether the speech concerned—even generally—the company's product, and whether the company's motivation for speaking was to encourage consumption of its product.[189] According to that court, the content of the speech can be classic examples of speech proposing a commercial transaction, "such as price, [*or*] it can include material representations about the efficacy, safety, and quality of the advertiser's product."[190] The court found:

> Defendants' various claims—denying the adverse effects of cigarettes and nicotine in relation to health and addiction—constitute commercial speech [as claims] about the safety of their products, both in formats that do and those that do not explicitly propose a particular commercial transaction, . . . [and] attempt[ ] to persuade the public to purchase cigarettes.[191]

Further, commercial speech remains commercial even though it may include references to public issues. In *National Commission on Egg Nutrition v. Federal Trade Commission*, the U.S. Court of Appeals for the Seventh Circuit considered a trade association's allegedly false and misleading news advertisements denying that egg consumption raises cholesterol and increases the risk of certain diseases.[192] The importance of the issue in public discourse did not persuade the court that the advertisements required full First Amendment protection; rather, the court considered the public's interest in and concern for the issue as support for its determination that the speech constituted commercial speech. As the court concluded, "the commercial character of the publication . . . is not altered by self-serving professions of eleemosynary intent, e.g. 'Brought to you in the public interest.' If anything the misleading effect of respondents' advertisements is enhanced by casting them in the guise of a 'public service message.'"[193]

In differentiating between speech on public issues warranting full First Amendment protection and commercial speech, the *Egg Nutrition* court ruled that speech "not phrased as statements of opinion but categorically and falsely den[ying] the existence of evidence that in fact exists," and seeking to persuade the public as to the harmlessness of the speaker's product in order to promote sales, would be considered commercial speech.[194] Thus, a commercial entity may not receive full First Amendment protection for its statements on public issues when those statements are included in speech promoting the consumption of its products. As the Supreme Court stated in *Bolger*, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."[195]

2. *Kasky v. Nike* and the Supreme Court's Silence on *Bolger*

In *Kasky v. Nike, Inc.*, the California Supreme Court likewise held that the inclusion of statements on matters concerning a public debate along with commercial speech does not render the commercial speech immune from state regulation. Rather, the court "assume[d] that speech frequently and even normally addresses matters of public concern."[196] The speech at issue involved statements made by Nike in press releases, a letter to the presidents and athletic directors of colleges that sponsored Nike products, and letters to the editor for the purpose of rebutting allegations that working conditions in the company's Asian factories violated local regulations.[197] In determining whether this speech constituted commercial speech, the court formulated three elements to consider, inspired by the *Bolger* factors—which it simplified as "advertising format, product references, and commercial motivation"—as well as other U.S. Supreme Court precedent.[198] The three elements were "the speaker, the intended audience, and the content of the message."[199]

188. *Id.* at 65.
189. 566 F.3d 1095, 1144 (D.C. Cir. 2009).
190. *Id.* at 1143.
191. *Id.* at 1144.
192. 570 F.2d 157, 159 (7th Cir. 1977).
193. *Id.* at 163.
194. *Id.*:
> [A]s to the intended scope of the Supreme Court's expressions on the subject of commercial speech, we believe they were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product.

195. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980)); *see also Central Hudson Gas*, 447 U.S. at 562 (concluding that as businesses "enjoy the full panoply of First Amendment protections for their direct comments on public issues[,] [t]here is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions").
196. Kasky v. Nike, Inc., 45 P.3d 243, 259 (Cal. 2002).
197. *See* Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 856-57 (Cal. Ct. App. 2000); *see also* Nike, Inc. v. Kasky, 539 U.S. 654, 672 (2003) (Breyer, J., dissenting) (listing the challenged speech as including:
> (1) a letter from Nike's Director of Sports Marketing to university presidents and athletic directors presenting "facts" about Nike's labor practices; (2) a 30-page illustrated pamphlet about those practices; (3) a press release (posted on Nike's Web site) commenting on those practices; (4) a posting on Nike's Web site about its "code of conduct"; (5) a document on Nike's letterhead sharing its "perspective" on the labor controversy; (6) a press release responding to "[s]weatshop [a]llegations"; (7) a letter from Nike's Director of Labor Practices to the Chief Executive Officer of YWCA of America, discussing criticisms of its labor practices; (8) a letter from Nike's European public relations manager to a representative of International Restructuring Education Network Europe, discussing Nike's practices; and (9) a letter to the editor of The New York Times taking issue with a columnist's criticisms of Nike's practices.

198. *Kasky*, 45 P.3d at 254.
199. *Id.* at 256.

First, the *Kasky* court held that commercial speech involves a speaker who is "someone engaged in commerce . . . or someone acting on behalf of a person so engaged," and an intended audience of "actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers."[200] Second, it held that the content of commercial speech should be "commercial in character," in that it "consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services."[201] It similarly defined the *Bolger* factor of "product references" as not only including the price and description of the particular products being sold, but also "statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product."[202]

The court then proceeded to apply these three factors to the case at hand. It easily found the first factor—a commercial speaker—to be satisfied, given Nike's commercial activities.[203] It then found that the second factor—an intended commercial audience—to be satisfied, as the college presidents and athletic departments were major purchasers of Nike's products.[204] As for the letters to the editor, the court accepted plaintiffs' argument that they were intended for consumers and to increase sales and profits, based on a quotation from one such letter that stated that "[c]onsumers are savvy and want to know they support companies with good products and practices," and that "[d]uring the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."[205] Finally, the court found that the content of the speech satisfied the third factor—"representations of fact of a commercial nature"—as it described working conditions where Nike's products were made and the company's labor policies, all of which were within its personal knowledge.[206]

Though the court identified Nike's speech as including commercial speech intermingled with noncommercial speech, it rejected the argument that the speech was "inextricably intertwined."[207] Specifically, the court reiterated the U.S. Supreme Court's holding in *Fox* that "commercial and noncommercial speech are not 'inextricable' unless there is some legal or practical compulsion to combine them"; in Nike's case, "[n]o law required [it] to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately."[208] Consequently, the court proceeded to "parcel out the speech, applying one test to one phrase and another test to another phrase."[209]

Since the alleged false and misleading statements were included in the commercial portions of the speech—"the description of actual conditions and practices in factories that produce Nike's products"—that speech warranted the lesser protection afforded commercial speech, and thus could permissibly be regulated.[210] Had the challenged speech addressed "policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic 'globalization' generally," those statements would have constituted noncommercial speech, and been afforded full First Amendment protection.[211]

The U.S. Supreme Court initially granted a writ of certiorari, but then dismissed it as being improvidently granted. In doing so, however, several justices opined on the merits of the case. Justices John Paul Stevens, Ruth Bader Ginsburg, and David H. Souter concurred in the dismissal, but noted the "novel First Amendment questions" presented in the case.[212] Because it presented a "blending of commercial speech, noncommercial speech and debate on an issue of public importance," the case required a close analysis balancing competing interests: "[t]he regulatory interest in protecting market participants from being misled," and the preservation of the freedom to participate in "ongoing discussion[s] and debate[s] about important public issues . . . without fear of unfair reprisal."[213]

Justices Stephen G. Breyer and Sandra Day O'Connor, however, in their dissent, concluded that the facts presented warranted application of the First Amendment's "public-speech principle, rather than the . . . commercial-speech principle."[214] Specifically, in considering what protection to afford Nike's letter to university presidents and athletic directors, the justices conceded that the letter contained commercial characteristics, but found that it also included "predominant noncommercial characteristics

200. *Id.*
201. *Id.*
202. *Id.* at 257 (explaining that a broad definition of "product references" is necessary because the Supreme Court's reason for denying First Amendment protection to false and misleading speech—that it is more easily verifiable, hardy, and less likely to be chilled due to the speaker's strong economic motivation for speaking—"assumes that commercial speech consists of factual statements . . . [that] describe matters within the personal knowledge of the speaker . . . and are made for the purpose of financial gain").
203. *Id.* at 258.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 260-61.
208. *Id.*
209. Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988).
210. *Kasky*, 45 P.3d at 260.
211. *Id.*
212. Nike, Inc. v. Kasky, 539 U.S. 654, 663 (2003) (Stevens, J., concurring).
213. *Id.* at 663-64 (Stevens, J., concurring).
214. *Id.* at 676 (Breyer, J., dissenting).

with which the commercial characteristics are 'inextricably intertwined.'"[215]

The justices identified those noncommercial characteristics based on their divergence from the characteristics included within "purely commercial" speech[216]: (1) "the letter appears outside a traditional advertising format"; (2) "[i]t does not propose the presentation or sale of a product"; (3) "it seeks to convey information to 'a diverse audience,' including individuals who have 'a general curiosity about, or genuine interest in,' the public controversy surrounding Nike"; and (4) "[it] describes Nike's labor practices and responds to criticism of those practices, and it does so because those practices themselves play an important role in an existing public debate . . . in which [Nike] advocated, or opposed, public collective action."[217]

These justices also highlighted the fact that the letter's statements on an issue in public debate were central, not peripheral to the letter's main content; in other words, that the noncommercial characteristics were "predominant."[218] Finally, they discussed in detail the unique regulatory context in which the controversy was brought: California's regulatory regime authorizes private attorneys general "to impose 'false advertising' liability even though they themselves have suffered no harm."[219] These differences of "form and content," and a regulatory context in which "the burden imposed [on speech] is disproportionate" to the government interest at stake,[220] supported the conclusion that the letter warranted heightened scrutiny under the First Amendment.[221]

The dissenting justices' analysis did not utilize the *Bolger* factors. Instead, it comprised a comparison between the letter and characteristics of "purely commercial" speech. By doing so, the dissent seemed to narrow the scope of commercial speech to encompass no more than those characteristics included in "the core notion of commercial speech," or speech that does no more than propose a commercial transaction.[222] Unlike the California Supreme Court, it appears that these justices considered the noncommercial speech content to outweigh the commercial speech content to such an extent as to uphold heightened First Amendment scrutiny without engaging the careful analysis involved in *Bolger*.

Moreover, the dissent declared the noncommercial and commercial elements of the letter to be "inextricably intertwined," without any further discussion as to the Court's previous comments on the limits of the "inextricably intertwined" denomination. Indeed, by identifying the letter's speech as including "inextricably intertwined" commercial and noncommercial speech, the dissent appeared to reject the condition that "inextricably intertwined" define only speech for which there is a *requirement* that noncommercial and commercial speech be combined. What this portends for the continued viability of the test for "inextricably intertwined" speech is uncertain.

D. False and Misleading Commercial Speech

The First Amendment does not protect commercial speech that is false, deceptive, or misleading.[223] This is because such speech does not serve the constitutional interest in protecting commercial speech generally: "the informational function of advertising."[224] The greater durability and verifiability of commercial speech makes it less likely that the regulation of false and misleading speech will deter speakers from engaging in protected speech.[225] Moreover, as Justice Stevens stated in *Rubin v. Coors Brewing Co.*, "[T]he consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised."[226] The state has legitimate, and constitutionally permissible, authority to prevent these harms through the regulation of such speech.

As with defining commercial speech generally, determining whether speech is misleading requires a fact-intensive inquiry into the advertisement as a whole and its capacity to mislead.[227] In *Donaldson v. Read Magazine*, the Supreme Court held that an advertisement promoting readers' participation in a puzzle contest was so misleading as to constitute fraud.[228] Specifically, it found that while the advertiser knew the puzzle contest was so easy that its resolution would require that contestants complete a tie-breaking letter-essay, the letter-essay was mentioned as only a "remote possibility" and printed in small type in the lower left corner.[229]

In upholding the postmaster general's determination that the "advertisement[ ] had been deliberately contrived to divert readers' attention from material but adroitly obscured facts," the *Donaldson* Court concluded that "such

215. *Id.* at 677 (Breyer, J., dissenting).
216. *See supra* notes 150-51 and accompanying text.
217. *Nike, Inc.*, 539 U.S. at 677 (Breyer, J., dissenting).
218. *Id.* at 677-78 (Breyer, J., dissenting).
219. *Id.* at 678 (Breyer, J., dissenting).
220. *Id.* at 679-80 (Breyer, J., dissenting):

> The delegation of state authority to private individuals authorizes a purely ideological plaintiff . . . to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm[; thus, presenting a threat that] can easily chill a speaker's efforts to engage in public debate.

221. *Id.* at 678 (Breyer, J., dissenting).
222. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983).
223. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it."); Friedman v. Rogers, 440 U.S. 1, 9-10 (1979) ("Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.").
224. *Central Hudson Gas*, 447 U.S. at 563.
225. See discussion *supra* Part III.
226. 514 U.S. 476, 496 (1995) (Stevens, J., concurring).
227. *See* National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 161 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (quoting Beneficial Corp. v. Federal Trade Comm'n, 542 F.2d 611, 617 (3d Cir. 1976) ("Whether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law.")).
228. 333 U.S. 178, 188 (1948).
229. *Id.* at 187.

conduct falls far short of that fair dealing of which fraud is the antithesis."[230] Similarly, the Court found the speech to be misleading because it "unduly emphasize[d] trivial or 'relatively uninformative fact[s]' . . . or offer[ed] overblown assurances of client satisfaction."[231]

The *Donaldson* Court offered several factors to be used in cases raising fraud claims in the context of commercial speech. The Court first declared that in analyzing such claims, a court must "consider all the contents of the advertisements and letters" in context, rather than particular statements in isolation.[232] It further affirmed that "[a]dvertisements as a whole may be completely misleading although every sentence separately considered is literally true[,] . . . [either] because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead."[233] In determining whether the challenged speech is misleading, a court considers the speech through the eyes of an ordinary consumer.[234] "That exceptionally acute and sophisticated readers might . . . [be] able by penetrating analysis to [ ] decipher[ ] the true nature of" the advertisement's meaning, and avoid being misled, is not sufficient to find that the speech is not misleading.[235] Rather, "[p]eople have a right to assume that fraudulent advertising traps will not be laid to ensnare them."[236]

The degree to which the government may regulate misleading speech depends on the degree to which it is misleading. Challenged speech is "actually misleading"[237] when "the record indicates that a particular form or method of advertising has in fact been deceptive."[238] Thus, to find that speech is actually misleading, there must be evidence in the record showing that consumers have been misled.[239] Commercial speech may also be "inherently misleading"[240] where it is "inherently likely to deceive," such as where "the possibility of 'fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct"' [is] so likely . . . that such [speech] could be prohibited,"[241] or where the "speech . . . is devoid of intrinsic meaning," as in the case of trade names.[242] The state may completely prohibit actually and inherently misleading commercial speech. However, "potentially misleading" speech may not be proscribed "if narrower limitations could be crafted to ensure that the information is presented in a nonmisleading manner."[243]

In *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, though the majority opinion held that the speech at issue—a certification included on an attorney's letterhead—was not misleading,[244] five justices in concurring and dissenting opinions found the speech to be at least potentially misleading. In coming to this conclusion, these justices stressed that the ordinary consumer of legal services would not understand the statement "Certified Civil Trial Specialist By the National Board of Trial Advocacy," and would likely mistakenly assume that (1) the National Board of Trial Advocacy was a governmental agency, (2) that all lawyers were considered for certification, and (3) that the attorney's certification demonstrated his superior skills as a trial lawyer or his higher success rate than others in the field.[245] They also cautioned against conflating facts with verifiability.[246] Though the certification was factually accurate, the justices argued that it would be difficult, if not impossible, for an ordinary consumer to verify the underlying meaning of the claim of certification, and thus the statement was too likely to mislead the reader as to the attorney's skills.[247]

The idea of an individual's reasonable interpretation of speech as the barometer by which courts determine the degree to which that speech is misleading has also been applied by the lower courts. The Seventh Circuit, for instance, found that the trade association's use of the words "there is no evidence," in advertisements refuting the health harms associated with egg consumption, would be "reasonably subject to the interpretation that 'there do not exist competent and reliable scientific studies from which well-qualified experts could reasonably hypothesize that eating eggs increases the risk of heart disease.'"[248] As such an interpretation would be false and misleading, the court

230. *Id.* at 188-89.
231. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 480 (1988) (quoting In re R.M.J., 455 U.S. 191, 205 (1982)).
232. *Donaldson*, 333 U.S. at 186.
233. *Id.* at 188.
234. *Id.* at 189.
235. *Id.*
236. *Id.*
237. Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 111 (1990) (Marshall, J., concurring).
238. In re R.M.J., 455 U.S. 191, 202 (1982).
239. *See* Friedman v. Rogers, 440 U.S. 1, 13 (1979) (finding actually misleading speech where "[t]he concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar").
240. *Peel*, 496 U.S. at 111 (Marshall, J., concurring).
241. *R.M.J.*, 455 U.S. at 202 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978)); *see also* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 67 (D.D.C. 1998) (defining inherently misleading speech as that which is "more likely to deceive the public than to inform it") (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980)).
242. *Peel*, 496 U.S. at 111 (Marshall, J., concurring).
243. *Id.* at 203 (Marshall, J., concurring); *see also R.M.J.*, 455 U.S. at 202-03 (noting that states may not prohibit "potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive" such as through "a requirement of disclaimers or explanation").
244. *Peel*, 496 U.S. at 110-11 (finding that the letterhead was "neither actually nor inherently misleading" as "[t]here [was] no dispute about the bona fides and the relevance of [National Board of Trial Advocacy] certification" and that "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment").
245. *Id.* at 112-15 (Marshall, J., concurring).
246. *Id.* at 121-22 (O'Connor, J., dissenting) ("A statement, even if true, could be misleading."); *see also* Kraft, Inc. v. Federal Trade Comm'n, 970 F.2d 311, 322 (7th Cir. 1992) (conceding that the statements that cheese slices "are made from five ounces of milk and . . . do have a high concentration of calcium" are literally true, but still holding the advertisements to be misleading as "the average consumer is not likely to know that much of the calcium in five ounces of milk (30%) is lost in processing").
247. *See Peel*, 496 U.S. at 115 (Marshall, J., concurring) (suggesting that "[t]he potential for misunderstanding might be less if the [National Board of Trial Advocacy] were a commonly recognized organization and the public had a general understanding of its requirements").
248. National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 161 (7th Cir. 1977).

held that the challenged commercial speech was misleading.[249] In doing so, it affirmed the Federal Trade Commission's principle that in matters of false advertising, "where an advertisement conveys more than one [reasonable] meaning, one of which is false, the advertiser is liable for the misleading variation."[250]

Even if commercial speech encompasses no more than the speaker's opinion, a court may still find that the speech is misleading and subject to state regulation. For instance, in a case concerning opinions stated in a securities registration statement, the Court noted that "a reasonable [person] may . . . understand an opinion statement to convey facts about how the speaker has formed the opinion . . . [a]nd if the real facts are otherwise, but not provided, the opinion statement will mislead its audience."[251] Specifically, the reasonable person may assume "that the speaker 'knows facts sufficient to justify him in forming' the opinion, or that he at least knows no facts 'incompatible with [the] opinion.'"[252] This is particularly the case where the speaker is one with specialized knowledge in the area to which his statement refers.[253] When these assumptions are incorrect and the speaker omits facts essential to correcting the misrepresentation, he or she should be held liable.[254]

E. Does Fossil Fuel Companies' Speech Constitute False and Misleading Commercial Speech?

Given the above discussion, what does this mean for plaintiff governments' claims that fossil fuel companies' speech constitutes false and misleading commercial speech that should not be afforded First Amendment protection? In general, the companies' challenged speech falls into three categories: (1) statements that promote—in traditional advertising formats—their specific products as renewable and the company itself as environmentally friendly[255]; (2) statements in editorial-style ads that downplay the role of fossil fuels in contributing to climate change and tout the company's contribution to climate change mitigation, such as its use of advanced technology and improved efficiency[256]; and (3) statements that deny the threat of climate change, argue that climate science is unsettled, and question legislation or policies that seek to mitigate climate change.[257]

All three categories clearly involve intermingled commercial and noncommercial speech. However, a court would most likely find that they are not "inextricably intertwined." There was no requirement that the fossil fuel companies include in their commercial speech commentary on matters of public importance. While inclusion of such statements on issues related to climate change and renewable energy may have augmented sales—and were likely included for the purpose of doing so—there was no law

249. *Id.*

250. *Id.* at 161 n.4; *see also* Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51, 65 (D.D.C. 1998) (finding that as manufacturers are likely to disseminate to physicians only those scientific research articles that "present[ ] their product in a favorable light"—and as manufacturers' considerable financial resources would allow them to aggressively promote those favorable research findings and curtail physicians' access to conflicting information—"[t]he *potential to mislead*, and the harm that could result, convinces this court that it is permissible to 'depart from the rigorous review that the First Amendment generally demands'") (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996)) (emphasis added).

251. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 188 (2015).

252. *Id.* at 191 (quoting Restatement (Second) of Torts §539 at 85 (Am. L. Inst. 1976)).

253. *Id.* at 192 ("When 'the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best . . . impliedly states that [the speaker] knows facts which justify his opinion'") (quoting Smith v. Land & House Prop. Corp. [1884] 28 Ch. D. 7, 15 (App. Cas.) (appeal taken from Eng.) (opinion of Bowen, L.J.)).

254. *Id.* at 191.

255. Examples include the following:
    1. BP's rebranding in 2007—which included adoption of the slogan "Beyond Petroleum" and "a conspicuously green corporate logo" of a sunburst—as well as its 2019 Facebook advertisements claiming that "BP is helping lower emissions" and is making its oil and gas products "cleaner and better." Complaint at 106, 119-20, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
    2. Exxon's "advertisement in the *Baltimore Sun* promoting its 'New Exxon Plus' gasoline as having 'high performance and lower emissions' and a 'unique clean engine formula.'" *Id.* at 113.
    3. ConocoPhillips's 2008 advertisements informing readers that "as one of North America's leading producers of natural gas, [it] is providing clean-burning fuel to homes." *Id.* at 125.
    4. Chevron's 2019 Facebook advertisements where it stated that it "is 'innovating [its] operations in the [P]ermian basin' through 'advanced data analytics to help develop more productive wells' and make its energy sources 'ever-cleaner.'" *Id.*

256. Examples include the following:
    1. A 1998 publication in the *Imperial Oil Review* written by Robert Peterson, chairman of Imperial Oil (an Exxon subsidiary), in which he celebrates improvement in the quality of the environment, partly due to companies like Imperial implementing and financing pollution-reduction strategies. The publication also includes comments on the necessity of fossil fuels in stimulating economic growth, the doubt surrounding the threat of climate change, and scientists' uncertainty as to whether the world is warming. He concludes by stating, "I feel very safe in saying that the view that burning fossil fuels will result in global climate change remains an unproved hypothesis." Robert Peterson, *A Cleaner Canada*, *in* Imperial Oil Review 26-29 (1998).
    2. ExxonMobil's 2001 *New York Times* advertorial in which it touts its use of "cogeneration units" to improve efficiency and reduce carbon emissions. ExxonMobil, *supra* note 56.
    3. ExxonMobil's 2005 *New York Times* advertorial in which it argues that "economies will long be highly dependent on fossil fuels," and that the answer to climate change can only be "*commercially viable* technologies with the potential to *dramatically reduce global emissions* of greenhouse gases"; and then lauds its investment in the Global Climate and Energy Project, which conducts research on new sources of renewable energy. ExxonMobil, *Research Into Climate Solutions*, N.Y. Times (Aug. 4, 2005), https://energyindepth.org/wp-content/uploads/2017/09/05.8.4.jpg.

257. An example is Mobil's 1997 *New York Times* advertorial in which it discussed the upcoming deadline for the policy and legislative decisions related to the Kyoto Protocol; the uncertainty of climate science; and the proposals for "emissions" reductions being considered by the United States and European Union, which, it argued, in the face of increasing energy demand, will only increase prices and displace jobs. The advertorial concluded, "Let's not rush to a decision at Kyoto. Climate change is complex; the science is not conclusive; the economics could be devastating. And the world's not ready for it. Reset the alarm and take the time to get it right." Mobil, *supra* note 48.

    A second example is Exxon CEO Raymond's statements in the introduction to the Exxon publication "Global Warming: Who's Right? Facts About a Debate That's Turned Up More Questions Than Answers," in which he questions the United States' efforts to initiate an international agreement to curb fossil fuel emissions and argues against scientists' findings that fossil fuels are contributing to climate change. *See generally* Raymond, *supra* note 43.

or rule that prevented the companies from "sell[ing] their wares without editorializing about the environment."[258]

Because the challenged speech did include elements of both commercial and noncommercial speech, the next step requires an analysis as to whether the speech warrants First Amendment protection at the level of commercial speech. To do so, a court would likely employ the *Bolger* factors. For present purposes, the *Bolger* factors will be delineated as they were in *Kasky v. Nike, Inc.*: (1) "advertising format"; (2) "product references"; and (3) "commercial motivation."[259]

1. Fossil Fuel Companies' Speech and the First *Bolger* Factor

In *Bolger*, the Court found that the first factor—"advertising format"—was satisfied because both parties conceded that the challenged speech did, indeed, constitute advertisements.[260] Here, fossil fuel companies do not classify their challenged speech as advertisements, but rather assert that the states are "target[ing] speech on matters of public concern."[261] However, speech may constitute an advertisement even without such a concession. The court in *Washington Legal Foundation v. Friedman*, for instance, held that the first *Bolger* factor was satisfied as the company, through its speech, sought "to disseminate information centered upon its product."[262]

However, this appears to be the exception to the rule. In most case law, courts faced with speech not classified as advertisements usually focused their inquiry, instead, on the second and third *Bolger* factors. Thus, this discussion will assume that the first *Bolger* factor is not satisfied for any of the three categories of fossil fuel companies' speech. As speech need not satisfy every *Bolger* factor to be considered commercial speech,[263] we proceed to the subsequent *Bolger* factors.

2. Fossil Fuel Companies' Speech and the Second *Bolger* Factor

The second *Bolger* factor asks whether the speech refers to the speaker's product. These references need not be to the company's specific product.[264] Indeed, "a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand name."[265] Further, courts have broadly interpreted this factor to not only include references to the product name, but also to statements concerning the manner in which it is "manufactured, distributed, or sold,"[266] as well as its "efficacy, safety, and quality."[267]

The first category of fossil fuel companies' speech either directly referred to the companies' specific products or referenced the sustainability of their production facilities, and would clearly satisfy this factor. Similarly, the second category of speech—advertorials referring directly either to fossil fuels or to the sustainability of their facilities—would likely satisfy this *Bolger* factor.

It is likely, however, that the fossil fuel companies would argue that these advertorials did not refer to their own products as a means of proposing a commercial transaction, but merely discussed fossil fuels and sustainability generally as essential elements of the broader issue of climate change. However, as the Supreme Court declared in *Central Hudson Gas & Electric Corp.*, First Amendment protection is not granted to all speech that merely "links a product to a current public debate," for "many, if not most, products may be tied to public concerns."[268] This seems particularly true where one's product is actively causing an international crisis of potentially apocalyptic proportions.

Moreover, the Court originally developed the *Bolger* factors in response to speech that could not "be characterized merely as proposals to engage in commercial transactions."[269] There, the challenged speech included an informational pamphlet on venereal disease and how condoms, generally, may help to prevent it. The pamphlet did not refer to the company's specific brand of condoms, nor did it refer to the company itself until the very last page of the pamphlet. Still, the Court determined that the pamphlet constituted commercial speech. Similarly, the fossil fuel companies' general references to their products—particularly given their large share of the market, thanks to which specific product references are likely unnecessary to generate consumer interest—are sufficient to satisfy the second *Bolger* factor.

The third category of fossil fuel companies' speech, however, does not refer to the companies' products, even generically. Rather, the speech involves a discussion solely on an issue of public debate: climate change. While the lack of reference to the companies' products would seem to fail the second *Bolger* factor, there could be an argument that climate change represents the harm caused by their products; thus, fossil fuel companies' statements denying the climate change crisis serve to refute claims that their products are dangerous and, in so doing, reference those products. But in the case law, courts have found commer-

258. Association of Nat'l Advertisers, Inc. v. Lungren, 809 F. Supp. 747, 753, 23 ELR 20720 (N.D. Cal. 1992).
259. 45 P.3d 243, 254 (Cal. 2002).
260. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983).
261. Defendants-Appellants' Opening Brief at 33, City of Hoboken v. Exxon Mobil Corp., No. 21-2728 (3d Cir. Nov. 15, 2021); Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc. at 108, Anne Arundel Cnty. v. BP P.L.C., No. 1:21-cv-01323 (D. Md. May 27, 2021); Defendants' Answering Brief in Opposition to Plaintiff's Motion to Remand at 5, State v. BP Am. Inc., No. 1:20-cv-01429-LPS (D. Del. Mar. 5, 2021).
262. 13 F. Supp. 2d 51, 64 (D.D.C. 1998).
263. *See Bolger*, 463 U.S. at 68 n.14 ("Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.").
264. *See id.* at 68 n.13 ("That a product is referred to generically does not . . . remove it from the realm of commercial speech.").
265. *Id.*
266. Kasky v. Nike, Inc., 45 P.3d 243, 257 (Cal. 2002).
267. United States v. Philip Morris USA Inc., 566 F.3d 1095, 1144 (D.C. Cir. 2009) (finding commercial speech where the speech concerned the safety of the cigarettes, in particular their effects on "health and addiction").
268. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 n.5 (1980).
269. *Bolger*, 463 U.S. at 66.

cial speech based on the *Bolger* test only when the product was at least generally referred to in the speech.[270] A court would likely find that the third category of fossil fuel companies' speech fails the second *Bolger* factor.

3. Fossil Fuel Companies' Speech and the Third *Bolger* Factor

Moving to the third *Bolger* factor—"commercial motivation"—it would appear that fossil fuel companies have an "economic motivation"[271] for promoting the speech in at least the first two categories. Their first category of speech directly promotes the utility of their product and the conscientiousness of their corporate brand, both of which inevitably appeals to consumers.

Though the second category of speech includes general statements concerning climate change and the efficiency of the companies' production practices, these statements are peripheral to the central message of the speech: the promotion of the company's products. Quite like the cigarette companies in *Philip Morris USA*—whose statements on the addictiveness of and health risks associated with cigarettes were claims concerning the safety of its products, and thus represented "attempts to persuade the public to purchase cigarettes"[272]—the fossil fuel companies referenced climate change and sustainability only in terms of refuting claims that their products were unsafe and their production methods unsound, with the goal of preserving profits. As *Bolger* stated, "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."[273]

The third category of fossil fuel companies' speech presents a closer question. The speech at issue here concerns climate change to one degree or another—either directly or in reference to legislation and policymaking on the issue. As climate change represents the danger associated with fossil fuel use, one could argue that the companies have an economic motivation for disseminating speech related to climate change, in that they seek to allay consumers' fears or promote themselves as environmentally conscious producers of fossil fuels, and thus assuage consumers' guilt and maintain sales.

A counterargument might be that the companies have a right to comment on a matter of public debate and should be constitutionally protected in these efforts for the good of a better-informed public and sounder policymaking. That this speech necessarily relates to the safety of the companies' products might not be sufficient to withdraw it from full First Amendment protection. Here, a court would likely find the converse to the Supreme Court's holding in *Discovery Network*: even though the speech "include[s] some" promotional material, it "consist[s] primarily" of matters of public concern.[274] To attempt to define such speech as commercial would require stretching the commercial speech doctrine too far.

Thus, a court would likely find that the third category of fossil fuel companies' speech does not satisfy the *Bolger* factors and constitutes noncommercial speech. That the speech is afforded full First Amendment protection, however, does not mean that it is immune from regulation, for the Supreme Court has consistently held that fraud retains no constitutional protection. If, given fossil fuel companies' internal knowledge on the issue of climate change and the role of fossil fuels, a court finds that their speech in this category constituted fraud, the First Amendment's freedom of speech provision would still provide no shelter from liability.[275]

On the other hand, the first and second categories of speech would likely satisfy at least two of the *Bolger* factors and would warrant lesser constitutional protection as commercial speech. And if this commercial speech is false or misleading, it would potentially warrant no protection at all, even if it includes references to matters of public concern. The next question, then, is whether fossil fuel companies' commercial speech in the first and second categories is false and/or misleading.

4. Is Fossil Fuel Companies' Commercial Speech False and/or Misleading?

Fossil fuel companies' speech on climate change and fossil fuels addresses scientific claims, with their goal being to inject doubt into the public's perception of those claims. In public issues underpinned by scientific inquiry, the identification of absolute truths may be impractical for, as the Supreme Court noted in its 1902 opinion *American School of Magnetic Healing v. McAnnulty*, science presents "no exact standard of absolute truth."[276] Thus, those who oppose a scientific theory might assume that their speech cannot be interpreted as anything more than opinion, which, under the Freedom of Speech Clause, warrants full constitutional protection from liability.

However, the Court's 1949 opinion in *Reilly v. Pinkus* clarified that statements concerning scientific "fields where

270. *See id*. at 62 n.4 (finding commercial speech where the speech did not mention the corporation's particular brand of condoms, but did refer to condoms generally); *Philip Morris USA*, 566 F.3d at 1144 (finding commercial speech where the company disseminated claims that cigarettes generally were not harmful to health, without referring to its own particular products); Semco, Inc. v. Amcast, Inc., 52 F.3d 108, 110, 112 (6th Cir. 1995) (finding commercial speech where a company wrote a published article analyzing a new method of manufacturing plunger tips, even though the specific references to its own brand of plunger tips were removed).

271. *Bolger*, 463 U.S. at 66 (finding commercial speech where the company—which sells condoms—had an economic motivation for mailing the informational pamphlets discussing venereal disease and the efficacy of condoms in preventing it).

272. *Philip Morris USA, Inc.*, 566 F.3d at 1144.

273. *Bolger*, 463 U.S. at 68.

274. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 412-13 (1993).

275. The fossil fuel companies also contend that their speech "directed towards lawmakers and regulators" for the purpose of influencing legislation was "quintessential lobbying activity" immune from liability under the Supreme Court's *Noerr-Pennington* doctrine founded on the First Amendment's Right to Petition Clause. The validity of this claim will be addressed in the next section. See discussion *infra* Part V.

276. 187 U.S. 94, 104-05 (1902).

knowledge has not yet been crystallized in the crucible of experience"—as in *McAnnulty*—may be distinguished from speakers "who blindly adhere to [a belief] thoroughly discredited by reliable scientific experiences."[277] The "universality of scientific belief that advertising representations are wholly unsupportable," then, can support a determination that the challenged speech is false.[278] In analyzing First Amendment challenges to speech on scientific issues, lower courts have also proposed a correlation between the degree of genuine controversy in a particular area of research and the likelihood that speech in that area will be treated as opinion and thus afforded full First Amendment protection.[279]

Taking this distinction into consideration, then, statements made by the fossil fuel companies and their representatives that wholly denied the existence of anthropogenic climate change and that fossil fuel combustion was an aggravating factor were false.[280] The *Anne Arundel County v. BP P.L.C.* complaint cites statements made as early as 1968 to or by the fossil fuel companies, accepting and affirming the "scientific consensus" that climate change was real and/or directly related to fossil fuel use. Surveying the complaint for the words "consensus" and "no doubt" reveals at least seven instances in which fossil fuel companies were informed that there was no doubt of, or a scientific consensus on, the existence of anthropogenic climate change.[281]

This certainty was echoed by the international scientific community. In 2001, the Intergovernmental Panel on Climate Change "drew upon more than 1,200 scientists and approximately 120 countries" to release its second report laying "out the mounting and consistent scientific evidence of global warming."[282] That same year, Donald Kennedy, the editor of *Science*, noted, "Consensus as strong as the one that has developed around [global warming] is rare in science."[283] Similarly, Ralph Cicerone, president of the National Academy of Sciences, stated during a congressional hearing in 2006, "I think we understand the mechanisms of CO_2 and climate better than we do of what causes lung cancer. . . . In fact, it is fair to say that global warming may be the most carefully and fully studied scientific topic in human history."[284]

However, fossil fuel companies' statements that did not outright deny the threat of climate change or the role of fossil fuels in its development are less likely to be false; thus, a court would consider to what degree they were misleading. To reiterate, actually and inherently misleading commercial speech warrants no protection under the First Amendment; potentially misleading speech is protected, but only to the extent necessary to ensure that regulations do no more than require that the speech be disseminated in

277. 338 U.S. 269, 274 (1949).

278. *Id.* at 276. In his article *Evaluating Corporate Speech About Science*, Prof. Robert S. Kerr Jr., argues that "[l]egal doctrine should be based on [the] basic understanding of the inherent nature of scientific knowledge rather than on inapplicable notions of absolute truth versus falsity." That "inherent nature" requires "a basic understanding of the process of scientific inquiry and the ultimate objective of scientific understanding, which is not truth per se, but something that approximates truth and is always open to revision through the processes of confirmation." With the understanding, then, that absolute truths are not, in fact, the objective of scientific inquiry, courts need not shy away from "a statement that purports to represent the state of scientific evidence or knowledge on a given issue . . . [as an inviolable,] subjective opinion, but [rather recognize it as] a factual representation of the state of scientific knowledge" that may be false or misleading. 106 Geo. L.J. 447, 471, 482 (2018).

279. *See* Original Cosmetics Prods., Inc. v. Strachan, 459 F. Supp. 496, 503 (S.D.N.Y. 1978) (finding that 70 years of consideration in medical and pharmacological texts "indicate[d] sufficient exploration of the sexual stimulus value of these ingredients to take it out of the area of 'new ideas' contemplated by *McAnnulty* and *Reilly*"); *compare* Ony, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490, 497 (2d Cir. 2013):

> Where, as here, a statement is made as part of an ongoing scientific discourse about which there is considerable disagreement, the traditional dividing line between fact and opinion is not entirely helpful. It is clear to us, however, that . . . statements about contested and contestable scientific hypotheses . . . are more closely akin to matters of opinion.

with Eastman Chem. Co. v. Plastipure, Inc., 775 F.3d 230, 236 (5th Cir. 2014) (distinguishing *Ony* as only relating to "statements made within the academic literature and directed at the scientific community," and holding that while "[t]he First Amendment ensures a robust discourse in the pages of academic journals, . . . it does not immunize false or misleading commercial claims").

280. See discussion *supra* Part II.

281. These include the following:

- 1968: API receives report from SRI that states, "Significant temperature changes are almost certain to occur by the year 2000, and . . . there seems to be no doubt that the potential damage to our environment could be severe." Complaint at 53, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
- 1980: Dr. John Laurmann presents at an API meeting in which he informs fossil fuel company representatives of the "scientific consensus on the potential for large future climatic response to increased CO_2 levels" and that there was "strong empirical evidence that [the CO_2] rise [was] caused by anthropogenic release of CO_2, mainly from fossil fuel burning." *Id.* at 59-60.
- 1980: Imperial Oil Limited (a Canadian ExxonMobil subsidiary) reports to managers and environmental staff that "[t]here is no doubt that increases in fossil fuel usage and decreases in forest cover are aggravating the potential problem of increased CO_2 in the atmosphere." Imperial Oil Ltd., Review of Environmental Protection Activities for 1978-1979 (1980), http://www.documentcloud.org/documents/2827784-1980-Imperial-Oil-Review-of-Environmental.html.
- 1982: API report "acknowledge[s] that despite differences in climate modelers' predictions, there [is] scientific consensus that 'a doubling of atmospheric CO_2 from [ ] pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5)°C [5.4 ± 2.7 °F].'" Complaint at 65, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
- 1982: Director of Exxon's Theoretical and Mathematical Sciences Laboratory, Roger Cohen, reports that "the results of our research are in accord with the scientific consensus on the effect of increased atmospheric CO_2 on climate." *Id.* at 69.
- 1991: Shell's film, "Climate of Concern," states that the same warning—one of "an increasing frequency of abnormal weather, and of sea level rise" due to climate change—was "endorsed by a uniquely broad consensus of scientists in their report to the UN at the end of 1990." *Id.* at 72-73.
- 1997: Group executive for BP America, John Browne, speaks at Stanford University in which he declares, "[T]here is now an effective consensus among the world's leading scientists and serious and well informed people outside the scientific community that there is a discernible human influence on the climate, and a link between the concentration of carbon dioxide and the increase in temperature." *Id.* at 99.

282. Union of Concerned Scientists, Smoke, Mirrors & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science 29 (2007), https://www.ucsusa.org/sites/default/files/2019-09/exxon_report.pdf.

283. *Id.* at 30.

284. *Id.*

a non-misleading manner.[285] To find that challenged speech is actually misleading, the record must include evidence that consumers have, in fact, been misled.[286]

The governments' complaints include several polls reporting the percentage of Americans who believed that climate change posed a serious threat. In 1991, one opinion poll reported that 60% of people believed that "global warming is a serious environmental problem."[287] By 1992, this percentage had risen to 88% of the population.[288] Only five years later, however, the percentage of Americans who believed global warming was a serious problem had plummeted to "42 percent (with only 28 percent of Americans thinking immediate action was needed)."[289] This percentage continued to fall: based on a 2009 Pew Research Center poll, only 35% of people thought the issue of climate change was "very serious."[290]

The initial increase in the percentage of people concerned about climate change—peaking in 1992—parallels the major policy and legislative developments that spurred fossil fuel companies into commencing their public disinformation campaign.[291] It would not be illogical, then, to conclude that the sudden drop in the number of people who accepted the seriousness of climate change was directly correlated with the success of the companies' efforts. At least for the second category of the companies' speech—in which they discuss their products in relation to the uncertainty of climate change—a court could find that this shift in the public's perception proves that they were actually misled by the speech.

The first category of the fossil fuel companies' speech, however, focuses on their specific products and the sustainability of their operations. The polls that show Americans' growing doubt concerning the seriousness of climate change would not support a claim that they were actually misled by these advertisements. However, even if the first category of speech fails to satisfy the "actually misleading" standard, a court would likely find that the speech constituted inherently or, at the very least, potentially misleading speech.

In *Peel*, three Supreme Court justices dissented and argued that the attorney's letterhead was inherently misleading where the statement—"Certified Civil Trial Specialist By the National Board of Trial Advocacy"[292]—was not "on its face [ ] readily understandable to the average consumer of legal services," and thus was "inherently likely to deceive the public."[293] At the same time, however, two others in a separate opinion *rejected* the claim that the speech was inherently misleading—finding the speech to be, instead, only potentially misleading—stating that "[t]he Court has upheld [speech as inherently misleading] only when the *particular method* by which the information is imparted to consumers is inherently conducive to deception and coercion."[294] In doing so, they cited *Ohralik v. Ohio State Bar Ass'n*, where the Court found that a lawyer's in-person solicitation of clients presented such a danger of overreaching as to warrant a prophylactic ban on such speech.[295]

Nonetheless, under both criteria, the fossil fuel companies' first category of speech would likely be considered inherently misleading. Under the dissent's criterion, the speech was "inherently likely to deceive the public," as it misleadingly presented as fact that oil, gas, and natural gas could be environmentally friendly sources of energy; that fossil fuel companies were making significant capital expenditures in renewable energy; and that they were investing significant time and energy into lobbying for legislation proposing climate change mitigation and sustainability measures. In this way, the speech was "more likely to deceive the public than to inform it."[296]

Looking to the second criterion, it is true that the companies' speech was not communicated in person, but rather through print advertising, which the Supreme Court in *Shapero v. Kentucky Bar Ass'n* held did not present the level of coercion necessary to constitute inherently misleading speech.[297] However, in *Shapero*, there was no contention that the content of the letter under scrutiny was either false or deceptive.[298] The Court left open the possibility that such a letter could be found to be inherently misleading. In doing so, it implied that speech that is deceptive in its content may constitute a "particular method" of dissemination that is inherently misleading.

A final argument pursued by fossil fuel companies is that states' claims relating to their public statements seek to silence a "point of view" or opinion—speech meriting the highest protection under the First Amendment[299]—an assertion with which the states disagree.[300] However, even

285. Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 111 (1990) (Marshall, J., concurring).
286. In re R.M.J., 455 U.S. 191, 202 (1982).
287. Complaint at 81, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).
288. Amended Complaint and Jury Demand at 94 n.26, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., No. 2018CV30349 (Colo. Dist. Ct. June 11, 2018).
289. *Id.*
290. *Id.* at 100.
291. *See supra* note 37 and accompanying text.
292. Peel v. Attorney Registration & Disciplinary Com'n of Ill., 496 U.S. 91, 97 (1990).
293. *Id.* at 122 (O'Connor, J., dissenting).
294. *Id.* at 112 (Marshall, J., concurring) (emphasis added).
295. *Id.* (Marshall, J., concurring); *see also* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475 (1988) ("In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference.").
296. Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51 (D.D.C. 1998) (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980)).
297. *See Shapero*, 486 U.S. at 475:
> Like print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation."

(quoting Zauderer v. Office of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 642 (1985).
298. *See id.* at 479-80.
299. *See supra* notes 86-102 and accompanying text.
300. Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities at 15, City of Oakland v. BP P.L.C., No. 3:17-cv-06011-WHA (N.D. Cal. Apr. 19, 2018) (arguing that "[p]laintiffs

to the extent that the fossil fuel companies' commercial speech—those statements identified in the first and second categories—represent mere opinion, their statements should still not warrant protection. As the Court stated in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, "[A] reasonable [person] may . . . understand an opinion statement to convey facts about how the speaker has formed the opinion . . . [a]nd if the real facts are otherwise, but not provided, the opinion statement will mislead its audience."[301]

The *Omnicare* Court also referred to the Restatement of Contracts' discussion on misrepresentations in its determination of what issuers' opinion statements may imply: "'[T]he recipient of an assertion of a person's opinion as to facts not disclosed' may sometimes 'properly interpret it as an assertion (a) that the facts known to that person are not incompatible with his opinion, or (b) that he knows facts sufficient to justify him in forming it.'"[302] Clearly, under this standard, the fossil fuel companies' speech—even if classified as statements of opinion—would still constitute misleading speech: their statements were made in light of facts that were known to the companies and that directly contradicted their assertions. And as with noncommercial speech, if a court finds that the companies' commercial speech constituted fraud, liability would attach regardless of whether the speech also included statements of opinion.

V. The *Noerr-Pennington* Doctrine and First Amendment Right to Petition

Fossil fuel companies not only seek to limit liability for their public speech through the First Amendment's freedom of speech provision. They also allege that their statements are immunized under the Supreme Court's *Noerr-Pennington* doctrine—a doctrine rooted in the First Amendment's right to petition provision, which protects even deceptive and unethical conduct if it is in pursuit of soliciting "governmental action with respect to the passage and enforcement of laws."[303] Specifically, the companies allege that their public statements on climate change and the role played by fossil fuels represent "quintessential lobbying activity," directed to governmental officials for the purpose of influencing regulations addressing fossil fuel use and production.[304] This section will consider the applicability of *Noerr-Pennington* to the companies' challenged speech.

A. *Origins of the* Noerr-Pennington *Doctrine*

The *Noerr-Pennington* doctrine is founded in two Supreme Court cases: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*[305] and *United Mine Workers of America v. Pennington*.[306] In *Noerr*, truckers alleged that railroad companies had violated the Sherman Act's prohibition against "combination[s] . . . in restraint of trade" by engaging in a smear campaign—utilizing "vicious, corrupt, and fraudulent" conduct—that promoted laws antithetical to the truckers' interests and damaged their relationship with customers and the general public.[307]

The Supreme Court first noted that the Sherman Act's reach was not so extensive as to burden associations of persons whose goal is to "persuade the legislature or the executive to take particular action with respect to a law."[308] Such activities, the Court noted, "bear very little if any resemblance to the combinations normally held violative of the Sherman Act" that seek to inhibit trade through "such devices as price-fixing agreements, boycotts, [and] market-division agreements."[309] Further, "[t]he proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena," where "Congress has traditionally exercised extreme caution in legislating."[310] Thus, Congress' purpose and intent in passing the Sherman Act advised against expanding it to cover the petitioning activity at issue in *Noerr*.

The Court also found that to apply the Sherman Act to the railroad companies' conduct would be to impermissibly deprive them of their constitutional right to petition—a deprivation that could not be "lightly imputed to [congressional] . . . intent."[311] The Court, thus, concluded that "insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had."[312] In fact, the Court noted that in many instances the

may disagree with the point of view allegedly expressed by some [d]efendants," but the First Amendment prevents state regulation of viewpoints in public discourse).

301. 575 U.S. 175, 188 (2015).

302. *Id.* at 191 n.10 (quoting Restatement (Second) of Contracts §168 at 455 (Am. L. Inst. 1979)).

303. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

304. Memorandum of Law in Support of Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 52, Mayor & City Council of Balt. v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. Feb. 7, 2020); *see also* Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc. at 96, Anne Arundel Cnty. v. BP P.L.C., No. 1:21-cv-01323 (D. Md. May 27, 2021) (arguing that "[p]laintiff's claims target[ing their] statements . . . are barred by the First Amendment" since "lobbying activity is protected from civil liability"); Defendants' Motion to Dismiss First Amended Complaint [12(B)(6)]; Defendants' Answering Brief in Opposition to Plaintiff's Motion to Remand at 61, State v. BP Am. Inc., No. 1:20-cv-01429-LPS (D. Del. Mar. 5, 2021) ("[T]o the extent [p]laintiff's claims target [d]efendants' statements to federal and state regulators, they are barred by the First Amendment."); Memorandum of Law in Support of Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 54, State v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. Jan. 13, 2020) ("The First Amendment and *Noerr-Pennington* doctrine foreclose [p]laintiff's claims to the extent they are based on [d]efendants' lobbying . . . statements."); Memorandum of Points and Authorities at 28-29, King Cnty. v. BP P.L.C., No. 2:18-cv-00758-RSL (W.D. Wash. Aug. 31, 2018) (arguing that the companies' "communication campaigns" are "plainly protected by *Noerr-Pennington*"); Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities at 6, City of Oakland v. BP P.L.C., No. 3:17-cv-06011-WHA (N.D. Cal. Apr. 19, 2018) (arguing that the companies' "communications campaigns" are "plainly immunized by *Noerr-Pennington*").

305. 365 U.S. 127.

306. 381 U.S. 657 (1965).

307. *Noerr*, 365 U.S. at 129.

308. *Id.* at 136.

309. *Id.*

310. *Id.* at 141.

311. *Id.* at 138.

312. *Id.* at 139-40.

issues for which people may be most interested in lobbying are those that affect their financial interests and present opportunities for their personal advantage.[313] Along with protecting the right to petition—regardless of the underlying intent—the Court also held that immunizing such speech from liability preserved an open avenue of communication through which citizens could provide valuable information to government officials and secure better-informed decisionmaking.[314]

Addressing the truckers' contention that the railroad companies' publicity campaign and petitioning injured the truckers' business and relationship with the public, the Court emphasized that any direct injury was merely "incidental" to the campaign.[315] The fact that the railroad companies may have been pleased by, or even intended to inflict such harm, did not convert their constitutionally protected petitioning activity into an illegal restraint on trade.[316] Indeed, injury to the party whose interests conflict with the regulation or law for which a party petitions is often inevitable.[317] The Court concluded that "[t]o hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns."[318]

However, the *Noerr* Court also acknowledged that in some cases an individual may engage in petitioning, not with the goal of influencing legislation, but rather as "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[319] In such a case, the injury inflicted is not incidental but essential, and would justify application of the Sherman Act.[320] Only where the party is "making a genuine effort to influence legislation and law enforcement practices" can such efforts be immunized from liability as constitutionally protected petitioning.[321] Thus, the Supreme Court established what would be referred to as the "sham exception."[322]

Four years later, in *Pennington*, the Court affirmed that "a concerted effort to influence public officials" was immune from liability under the Sherman Act "*regardless of intent or purpose*."[323] This exception applied to even those efforts "intended to eliminate competition."[324] Thus, as long as petitioning is genuinely aimed at influencing the passage of laws or regulations, it is protected from liability even if, "either standing alone or as part of a broader scheme[, it is] violative of the Sherman Act."[325]

Since its inception, the *Noerr-Pennington* doctrine has evolved to protect the right to petition not only the legislative and executive branches, but also administrative agencies and courts.[326] However, to reflect the differences in First Amendment principles between classic political policymaking and adjudication, the Court has tailored the protection afforded by *Noerr-Pennington* in cases challenging a party's petitioning of the courts.

For instance, in *California Motor Transport Co. v. Trucking Unlimited*, the Court considered highway carriers' allegation that their competitors had instituted court proceedings "with or without probable cause," with the intent to bar the highway carriers from "meaningful access to adjudicatory tribunals."[327] If true, the Court declared that the competitors' conduct would fall within the "sham exception" of the *Noerr-Pennington* doctrine, as "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[328] Specifically, unlike the political arena, where deception and unethical conduct is endured to preserve the "breathing space" required for democratic governance, "unethical conduct in the setting of the adjudicatory process often results in sanctions," such as when a witness commits perjury or an individual obtains a patent by fraud.[329] Thus, where "a pattern of baseless, repetitive claims . . . emerge[s,] . . . the factfinder [may] conclude that the administrative and judicial processes have been abused" and that the party's conduct "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'"[330]

313. *Id.* at 139.
314. *Id.*
315. *Id.* at 143.
316. *Id.*
317. *Id.*
318. *Id.* at 143-44.
319. *Id.* at 144.
320. *Id.*
321. *Id.*
322. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 507 n.10 (1988) (identifying the "sham exception" established in *Noerr* as "cover[ing] activity that was not genuinely intended to influence governmental action"); Professional Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51 (1993) (applying the "sham exception" to petitioning of the courts, rather than the legislative or executive branches); BE & K Constr. Co. v. National Lab. Rels. Bd., 536 U.S. 516, 527 (2002) (determining when the "sham exception" may apply to completed, rather than ongoing, lawsuits).
323. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) (emphasis added).
324. *Id.*
325. *Id.*
326. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (holding that "the right to petition extends to all departments of the Government"); *but see Allied Tube*, 486 U.S. at 509-10 (holding that in cases where an "economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants," that party "enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace"); *and* Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056, 1059 n.3 (9th Cir. 1998) ("[S]ince the Petition Clause mentions only the right 'to petition the *Government* for a redress of grievances,' U.S. Const. amend. I, cl. 6 (emphasis added), the *Noerr-Pennington* doctrine does not protect lobbying efforts directed at private organizations.").
327. *California Motor Transp.*, 404 U.S. at 509, 512.
328. *Id.* at 513.
329. *Id.* at 512-13.
330. *Id.* at 513. Since *California Motor Transport*, the Court has developed a two-part definition of "sham" litigation:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr*, *supra*, 365 U.S., at 144, 81 S. Ct., at 533 (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni*, 499 U.S., at 380, 111 S. Ct., at 1354.

Professional Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61 (1993).

Along with expanding the *Noerr-Pennington* doctrine's reach to encompass all branches of government, the Court has also extended its protection to statutes beyond the Sherman Act.[331] Lower courts have followed suit, extending *Noerr* immunity to claims under the National Labor Relations Board,[332] tort claims,[333] §1983 claims and other civil rights violations,[334] claims under the Fair Housing Act,[335] claims under the Racketeer Influenced and Corrupt Organizations Act (RICO),[336] and even to requests for police aid.[337] As the District Court of the Southern District of New York commented, "[T]he First Amendment interest in protecting legitimate petitioning activity is no less important just because of the subject matter, content, or viewpoint of the petition."[338]

B. *Limitations on* Noerr-Pennington *Protection*

The scope of the *Noerr-Pennington* doctrine is dictated by the degree of protection available to all First Amendment rights. "The right to petition is cut from the same cloth as the other guarantees of th[e] Amendment, and . . . was inspired by the same ideals of liberty and democracy."[339] As "[t]hese First Amendment rights are inseparable, . . . there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."[340]

In *McDonald v. Smith*, for instance, the Supreme Court was faced with a libel action against an individual who wrote a letter to the president "contain[ing] false, slanderous, libelous, inflammatory and derogatory statements" concerning the respondent in the hopes of preventing his appointment as U.S. attorney.[341] The individual argued that the First Amendment afforded him absolute immunity in his petitions to the president.[342] The Court, however, noted that in its 1845 case *White v. Nichols*, which involved an analogous libel action concerning an individual's petition to the president, it had rejected an absolute privilege to petition, allowing, instead, for a showing of "express malice" to remove constitutional protection.[343] The *McDonald* Court agreed, arguing that to create an absolute privilege to petition "would [impermissibly] elevate the Petition Clause to special First Amendment status."[344]

The Court has made clear that the First Amendment does not afford an absolute privilege for petitioning; similarly, the *Noerr-Pennington* doctrine's protection is not absolute. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Court considered a claim that a producer of steel conduit had violated the Sherman Act by "packing" a standard-setting association's annual meeting with new members "whose only function would be to vote against . . . [a] proposal" that it opposed to revise the association's National Electrical Code.[345]

In asserting that its conduct represented constitutionally protected petitioning, the producer argued that as the anticompetitive effect of its actions resulted, for the most part, from the adoption of the association's code by state and local governments, its conduct constituted "a valid effort to influence governmental action."[346] The Court acknowledged that the association's code was "the most influential electrical code in the nation" and was routinely adopted by governments nationwide.[347] However, it held that "*Noerr* immunity of . . . activity intended to influence the government depends *not only* on its impact, but also on the context and nature of the activity."[348]

Here, the activity occurred in the context of standard-setting by a private association whose members included "consumers, distributors, and manufacturers of electrical conduit."[349] Thus, in contrast to petitioning of a governmental body, petitioning the association more closely

331. *See California Motor Transp.*, 404 U.S. at 509 (applying the *Noerr-Pennington* doctrine to a claim under the Clayton Act); Bill Johnson's Rests., Inc. v. National Lab. Rels. Bd., 461 U.S. 731 (1983) (applying the *Noerr-Pennington* doctrine and sham exception to a National Labor Relations Act claim); Federal Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 414 (1990) (considering the applicability of *Noerr* immunity to a claim that the party's "concerted conduct violated . . . the Federal Trade Commission Act").

332. *See* Venetian Casino Resort, L.L.C. v. National Lab. Rels. Bd., 793 F.3d 85, 87 (D.C. Cir. 2015) ("The *Noerr-Pennington* doctrine originated in the antitrust context but has also been applied in labor cases.").

333. *See* Whelan v. Abell, 48 F.3d 1247, 1260 (D.C. Cir. 1995) (considering the *Noerr-Pennington* doctrine in the context of malicious prosecution, abuse of process, and tortious interference claims); Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) ("There is simply no reason that a common-law tort doctrine can anymore permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust."); Friends of Rockland Shelter Animals, Inc. v. Mullen, 313 F. Supp. 2d 339, 343 (S.D.N.Y. 2004) (affirming that "courts apply the *Noerr-Pennington* doctrine to state law claims for tortious interference").

334. *See* Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1092 (9th Cir. 2000) (affirming that "*Noerr-Pennington* immunity applies to claims under 42 U.S.C. §1983 that are based on the petitioning of public authorities"); *Video Int'l Prod.*, 858 F.2d at 1084 (holding that "any behavior by a private party that is protected from antitrust liability by the *Noerr-Pennington* doctrine is also outside the scope of section 1983 liability"); Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 701 F. Supp. 2d 568, 596 (S.D.N.Y. 2010) ("The Court concurs with the view of the majority of circuit courts that the framework of the *Noerr-Pennington* doctrine can be applied in the context of civil rights actions.").

335. *See* White v. Lee, 227 F.3d 1214, 1220, 1231 (9th Cir. 2000) (applying the *Noerr-Pennington* doctrine to a Fair Housing Act claim and affirming that "[w]hile the . . . doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts").

336. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1105 (D.C. Cir. 2009) (applying *Noerr-Pennington* to RICO claims); Feld Ent. Inc. v. American Soc'y for the Prevention of Cruelty to Animals, 873 F. Supp. 2d 288, 300, 307 (D.D.C. 2012) (applying *Noerr-Pennington* to RICO claims).

337. *See Venetian Casino Resort*, 793 F.3d at 90 ("[W]e conclude that the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection under the *Noerr-Pennington* doctrine."); Forro Precision, Inc. v. International Bus. Machs. Corp., 673 F.2d 1045, 1060 (9th Cir. 1982) (holding that "the *Noerr-Pennington* doctrine applies to citizen communications with police").

338. *Mosdos Chofetz Chaim*, 701 F. Supp. 2d at 596.

339. McDonald v. Smith, 472 U.S. 479, 482, 485 (1985).

340. *Id.* at 485.

341. *Id.* at 480-81.

342. *Id.* at 482-83, 485.

343. *Id.* at 484.

344. *Id.* at 485.

345. 486 U.S. 492, 496 (1988).

346. *Id.* at 502.

347. *Id.* at 495.

348. *Id.* at 504 (emphasis added).

349. *Id.* at 504-05.

resembled "the type of commercial activity that . . . traditionally had its validity determined by the antitrust laws."[350] The Court concluded, "Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is 'political,' we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact."[351] Thus, in the same way that "antitrust laws should not regulate political activities 'simply because those activities have a commercial impact,' . . . so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact."[352]

In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, on the other hand, the Court denied a lawyers' association's contention that its efforts to influence legislative action by refusing to act as court-appointed counsel to indigent criminal defendants until the government increased their compensation were protected under *Noerr-Pennington*.[353] In contrast to the steel producer in *Allied Tube*, the nature and context of the lawyers' activities—including "efforts to publicize the boycott, to explain the merits of its cause, and to lobby [governmental] officials to enact favorable legislation"—constituted conduct protected under the First Amendment.[354]

However, even though the *means* of achieving the end result was petitioning activity within the meaning of *Noerr-Pennington*, the anticompetitive *effect* of the boycott would have occurred regardless of whether its lobbying efforts were successful.[355] Thus, as the harmful "impact"[356] or "end result"[357] of the challenged activity came not from governmental action, but from private action, it did not warrant immunity.[358] Again, the Court affirmed that application of *Noerr-Pennington* immunity was appropriate only when the nature, context, and impact of the challenged activity constituted petitioning of the government to influence the passage or enforcement of laws.

The *Allied Tube* opinion represents the potential for actors to employ the *Noerr-Pennington* doctrine as a shield to avoid liability under numerous statutes, simply by asserting that their challenged activity was part and parcel of constitutionally protected petitioning activity whenever their efforts—even indirectly—prompt governmental action. The Court in *California Motor Transport*, seemingly anticipating the implications of such a scenario, explicitly delineated the limits of protection afforded the right to petition as being no greater than those afforded the First Amendment's other rights[359]:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. . . . First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP v. Button*, 371 U.S. 415, 444) which the legislature has the power to control. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful.[360]

The reach of the *Noerr-Pennington* doctrine's protection, then, relies on an examination of the context, nature, and outcome of the activity to determine whether it meets the Court's definition of "political petitioning" or whether it better represents the expression of some other activity, such as commercial activity. However, the activity that a court may consider for protection under *Noerr-Pennington* is only what is challenged in the case. Consequently, lower courts have sometimes needed to separate the activity asserted as constituting protected petitioning activity from the activity that actually underlies the legal claim.

C. *Restricting* Noerr-Pennington *to Only Those Acts Constituting Petitioning of the Government*

In *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, a freight forwarder alleged that a rate bureau for trucking companies had filed baseless protests with the International Chamber of Commerce (ICC) in opposition to the freight forwarder's proposed reduction in shipping rates.[361] The freight forwarder argued that the protests fell within the sham exception of the *Noerr-Pennington* doctrine, as they were not initiated as part of a genuine effort to influence government action, but rather were "[b]aseless protests, instituted without regard to merit," and "intended only to delay competitive action."[362] While the court acknowledged that intent was irrelevant in the *Noerr-Pennington* analysis, the fact that the protests were initiated without regard to or expectation of their success brought them within the sham exception.[363]

The freight forwarder also alleged that the rate bureau "engaged in a rate fixing conspiracy, part of which involved

350. *Id.* at 505.
351. *Id.* at 507.
352. *Id.* (quoting Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 141 (1961)).
353. 493 U.S. 411, 416, 428 (1990).
354. *Id.* at 426.
355. *Id.* at 425.
356. *See Allied Tube*, 486 U.S. at 504.
357. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514-15 (1972).
358. *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 424-25.
359. In support, the Court cited its opinion in *Giboney v. Empire Storage & Ice Co.*, in which it stated:
> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

336 U.S. 490, 502 (1949).
360. *California Motor Transp.*, 404 U.S. at 514-15.
361. 690 F.2d 1240, 1246, 1253 (9th Cir. 1982).
362. *Id.* at 1253-54.
363. *Id.* at 1256.

[the rate bureau's] protests to the ICC, . . . [which] constitute[d] a separate violation of the antitrust laws independent of any petitioning activity that might enjoy *Noerr* immunity."[364] In consideration of this claim, the court held that "[e]ven if the protests to the ICC were legitimate, if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws."[365]

The lower court thus affirmed the Supreme Court's holding in *California Motor Transport* that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."[366] The freight forwarder's conspiracy claim was concerned with the bureau's general attempts to "conspire[ ] to fix rates and allocate customers"; its protests to the ICC were merely an "element" of that conspiracy.[367] As the court concluded, the anticompetitive activities identified in the conspiracy claim "do not enjoy immunity, even though a part of the actions may have involved protected [F]irst [A]mendment petitioning. The reach of the *Noerr-Pennington* doctrine is not that extensive, and the antitrust laws are not that impotent."[368]

Similarly, in *United States ex rel. Wilson v. Maxxam, Inc.*, the District Court for the Northern District of California considered a claim that a logging company had violated the False Claims Act by intentionally making false statements to the United States to defraud it into approving a sustained yield plan (SYP).[369] Though the court rejected the logging company's argument that its negotiations with the United States constituted petitioning, it held that even assuming that they did, the company still would not receive immunity under the *Noerr-Pennington* doctrine.[370] Contrary to the company's contention, the "[p]laintiffs [were] not assert[ing] that [it] violated the False Claims Act by 'petitioning' the government[, but rather] by submitting during the course of the negotiations an SYP in which they presented false information to the United States."[371]

The "critical distinction," the court declared, was that "[p]laintiffs [sought] to impose liability, not for the act of 'petitioning' the government, but for specific acts committed *in the course of* 'petitioning' the government."[372] As these "specific acts" did not constitute petitioning (i.e., were not directed toward influencing governmental action) and were acts explicitly proscribed by Congress through the False Claims Act, the First Amendment posed no barrier to liability.[373]

Thus, the fact that certain elements of an actor's challenged conduct constitute protected petitioning activity does not automatically immunize the actor from all liability. Rather, a court must assess every element of the challenged conduct individually; where the conduct is not directed toward influencing the government to pass or enforce laws, the court may refuse protection under the *Noerr-Pennington* doctrine and consider the merits of the claim.

In other words, a court must both consider whether the challenged conduct was, in fact, genuinely directed at petitioning (i.e., whether the "sham exception" applies), as well as whether elements of the challenged conduct did not constitute petitioning and should not warrant *Noerr-Pennington* immunity. The U.S. Court of Appeals for the First Circuit, for instance, has held that where the claim alleges a statutory violation perpetuated through both petitioning and non-petitioning activity, to preserve liability, the non-petitioning activity "need not be the 'sole cause' of [the] injury, so long as it was a 'material cause.'"[374]

In a case concerning a pharmaceutical company's alleged "illegal scheme to monopolize the market for [epinephrine auto-injector] devices," the District Court for the District of Kansas rejected the defendant's assertion that its alleged antitrust activities constituted "legitimate state and federal lobbying efforts to allow schools to participate in [its 'EpiPen4Schools' program]."[375] The court did acknowledge the fact that the company engaged in successful lobbying efforts to encourage enactment of the School Access to Emergency Epinephrine Act.[376]

However, the court clarified that plaintiffs' antitrust claims were directed not at this petitioning activity, but rather at the company's "conduct in offering free and discounted EpiPens to school districts but making those offers contingent on the school districts entering into illegal exclusive dealing agreements with [the company]."[377] The defendant made no effort to argue that this activity constituted petitioning activity, and the court did not apply *Noerr-Pennington* immunity to it.[378] Thus, the court reaffirmed the concept that if an actor engages in genuine petitioning activity alongside non-petitioning activity that violates a statute, the actor may be afforded immunity *only* as to its lobbying activity.

Of course, even when a court immunizes an actor's conduct under the *Noerr-Pennington* doctrine, it does not mean that the court may not still consider that conduct as evidence proving the existence of other illegal activity. As the Supreme Court noted in *Pennington*, "It would of

364. *Id.* at 1263.
365. *Id.* at 1264.
366. *Id.* at 1263 (quoting California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972)).
367. *Id.* at 1263-64.
368. *Id.* at 1265.
369. No. C 06-7497 CW, 2009 WL 322934, at *1 (N.D. Cal. Feb. 9, 2009).
370. *Id.* at *6.
371. *Id.*
372. *Id.* (emphasis added); *but see* Gamble v. Kaiser Found. Health Plan, Inc., 348 F. Supp. 3d 1003, 1027 (N.D. Cal. 2018) (holding that the portion of plaintiffs' racial discrimination claim that defendants' sought to strike—in which they allege that the defendants engaged in "'unlawful and unreasonable litigation tactics' and demand[for] certain settlement terms"—were "directed at [defendants'] petitioning activity . . . so as to bring them within the scope of *Noerr-Pennington*").
373. *Wilson*, 2009 WL 322934, at **6, 8.
374. Amphastar Pharms. Inc. v. Momenta Pharms., Inc., 850 F.3d 52, 58 (1st Cir. 2017) (quoting Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)).
375. In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 336 F. Supp. 3d 1256, 1277, 1291 n.5 (D. Kan. 2018).
376. *Id.* at 1279.
377. *Id.* at 1291 n.5.
378. *Id.*

course still be within the province of the trial judge to admit [the] evidence, if he deemed it probative and not unduly prejudicial . . . if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.'"[379] Aligning with this principle, the District Court for the Northern District of California held that the *Noerr-Pennington* doctrine would not impede plaintiffs' attempt to admit evidence of the defendant's lobbying activity as proof of "knowledge and intent to participate in [a] RICO enterprise."[380]

The *Noerr-Pennington* doctrine presents actors with the prospect of complete immunity from liability. Consequently, some actors may seek to assert that all of their conduct constitutes petitioning activity. It is the province of the court, then, to determine what should and should not be considered constitutionally protected petitioning. As the Supreme Court has made clear, however, this deliberation rests not only on whether the activity epitomizes direct lobbying of government; petitioning may also include indirect attempts to influence the passage of laws, such as through a publicity campaign.[381]

Whether conduct or speech is petitioning activity, then, requires careful analysis of each element of the challenged activity. In *Venetian Casino Resort, L.L.C. v. National Labor Relations Board*, the D.C. Circuit considered a casino resort's assertion that its activity in blocking union protesters from trespassing on its property was protected petitioning activity.[382] While the court applied *Noerr-Pennington* immunity to the resort's request for police aid—finding that such conduct constituted direct petitioning of the government—it denied immunity for the resort's "broadcast of an anti-trespass message and its attempted citizen's arrest."[383]

Similarly, the Seventh Circuit considered a hospital's publicity campaign aimed at preventing the opening of a competing physician center.[384] First, it held that the *Noerr-Pennington* doctrine immunized the hospital's "public relations campaign [aimed at] encourag[ing] the public to urge the [Village] Board to disapprove [its competitor's] plans to develop [the land]." However, the court then separated from the public relations campaign the hospital's statements "warning [its competitor's business partner] to stay out of the Hospital's territory" and "disparag[ing] either [its competitor] . . . or the services it offered."[385] The court found that these communications were more reflective of statements made in the commercial context, and thus fell outside of the *Noerr-Pennington* doctrine's protection.[386]

D. *A Case Study in* Noerr-Pennington *Protection of Publicity Campaigns:* United States v. Philip Morris

On the eve of the 21st century, the United States brought a lawsuit against cigarette manufacturers, alleging that they had engaged in a 50-year-long public disinformation campaign in which they falsely and fraudulently denied the health harms associated with cigarette smoke to the public, consumers, and government officials.[387] The facts of this alleged conspiracy are strikingly similar to those of the fossil fuel industry's public relations campaign denying the threat of climate change and the role of fossil fuels—a similarity stressed by the plaintiff states, cities, and counties bringing these cases.[388] Court decisions analyzing the merits of the cigarette manufacturers' arguments, then, are relevant to the analysis of the contentions made by fossil fuel companies.

Cigarette manufacturers disseminated their public statements refuting health warnings and promoting doubt through advertisements in national periodicals, publication of brochures, and interviews.[389] In response to the United States' claim that the manufacturers violated RICO in doing so, they argued that these public statements were "statements of opinion, made in the course of petitioning the government," and immune from liability under the *Noerr-Pennington* doctrine.[390] To assess the legitimacy of their argument, the District Court for the District of Columbia first had to determine whether these public statements represented protected petitioning activity.

Recognizing that "not every public relations campaign qualifies under *Noerr-Pennington* as petitioning," since

379. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 n.3 (1965).
380. In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs. & Prods. Liab. Litig., 295 F. Supp. 3d 927, 973 n.7 (N.D. Cal. 2018); *see also* In re JUUL Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig., 497 F. Supp. 3d 552, 614 (N.D. Cal. 2020) (holding that even if defendants' statements to Congress and the Food and Drug Administration are immune from liability under *Noerr-Pennington*, "they are nonetheless evidence of the alleged overall scheme to defraud").
381. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 511-12 (1988) (White, J., dissenting) (noting that the activity at issue in *Noerr* "for the most part involved a public relations campaign rather than direct lobbying of the lawmakers"); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 140-41 (1961) (holding that "a publicity campaign to influence governmental action falls clearly into the category of political activity").
382. 793 F.3d 85, 87 (D.C. Cir. 2015).
383. *Id.* at 87, 89.
384. Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 837-38 (7th Cir. 2011).
385. *Id.* at 850-51.
386. *Id.*
387. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 26-27 (D.D.C. 2006).
388. Complaint at 88-89, 132-33, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021) (asserting that fossil fuel companies' public relations campaign included tactics taken from cigarette manufacturers' strategic denial of cigarettes' harms to human health, such as (1) alleging that the Advancement of Sound Science Coalition—"a fake grassroots citizens group created by the tobacco industry to sow uncertainty by discrediting the scientific link between exposure to second-hand cigarette smoke and increased rates of cancer"—became the front group for the fossil fuel industry to perfect its efforts in "spread[ing] doubt about climate science"; and (2) alleging that fossil fuel companies' attempts to convince consumers that fossil fuels were "safe" and "clean" was "reminiscent of the tobacco industry's effort to promote 'low-tar' and 'light' cigarettes as an alternative to quitting smoking after the public became aware of the life-threatening health harms associated with smoking").
389. *See Philip Morris USA, Inc.*, 449 F. Supp. 2d at 172, 193, 788-89 (detailing cigarette manufacturers' publication of brochures, newspaper advertisements, and radio and television interviews denying the potential dangers of cigarette smoke).
390. *Id.* at 886.

otherwise it "would extend to virtually all activities," the court held "that only those statements . . . made *directly* to legislative bodies merit *Noerr-Pennington* immunity."[391] Thus, it found that the majority of the manufacturers' alleged racketeering activities—those that included "statements that target smokers, potential smokers, and the general public"—did not constitute lobbying activity.[392] Only the manufacturers' testimony before Congress and a letter "from Philip Morris to [Representative] Waxman" received protection under *Noerr-Pennington*.[393] The district court's findings were later affirmed by the D.C. Circuit, which held that those statements directed to the public were "intended to defraud consumers," and that, consequently, "*Noerr-Pennington* protection [did] not apply."[394]

VI. Does Fossil Fuel Companies' Speech Warrant Immunity Under *Noerr-Pennington*?

Based on the case law, fossil fuel companies' speech would be afforded *Noerr-Pennington* immunity if that speech constitutes genuine petitioning activity. To the extent that plaintiffs' claims implicate fossil fuel companies' direct statements to legislative and executive officials,[395] those statements would quite clearly be defined as lobbying activity and protected under *Noerr-Pennington*. However, in terms of the companies' statements made as part of their public relations efforts, there is a legitimate question as to whether those statements would qualify as "indirect" petitioning[396] as part of a publicity campaign, or as speech more akin to traditional commercial speech that has a "political impact."[397] This determination requires careful analysis, for as the Supreme Court has noted, "[i]t is admittedly difficult to draw the precise lines separating . . . political activity that is immunized despite its commercial impact from . . . commercial activity that is unprotected despite its political impact."[398] This section seeks to distinguish these precise lines.

To begin, it is worth revisiting the various ways in which courts have defined "petitioning." The Supreme Court has described genuine petitioning activity as including "mere solicitation of governmental action with respect to the passage and enforcement of laws"[399]; "a concerted effort to influence public officials"[400]; "[a] publicity campaign directed at the general public, seeking legislation or executive action"[401]; and conduct that "conveys the special concerns of its author to the government and, in its usual form, request[s] action by the government to address those concerns."[402] Other courts have volunteered their own definitions, including "bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions"[403]; a "public relations campaign[ ] designed to encourage the public to urge the [governmental body to pursue certain action]"[404]; and "conduct that constitutes a direct petition to government."[405]

Where statements are not made directly to government officials, as in the case of a publicity campaign, these definitions suggest that there still must be a close nexus between the speech and the government action sought. Indeed, in cases concerning a publicity campaign, the actor's challenged speech or conduct was clearly directed at soliciting public support to compel particular governmental action.

For instance, in rejecting the district court's holding that the railroads' conduct violated the Sherman Act, the *Noerr* Court emphasized that, contrary to the lower court's findings, "[t]here [were] no specific findings that the railroads attempted to persuade anyone not to deal with the truckers."[406] Rather, "all of the evidence in the record . . . deal[t] with the railroads' efforts to influence the passage and enforcement of laws."[407] In doing so, the Court implied that had the publicity campaign included conduct directed at encouraging the public not to enter into business with the truckers, such conduct would not have constituted petitioning and would not have warranted First Amendment protection. Thus, even though publicity campaigns are considered examples of "indirect" petitioning, they cannot be so indirect as to in no way concern the passage or enforcement of laws.

391. *Id.* at 886-87 (emphasis added).
392. *Id.* at 887.
393. *Id.*
394. United States v. Philip Morris USA Inc., 566 F.3d 1095, 1124 (D.C. Cir. 2009).
395. *See* Supran & Oreskes, *supra* note 53, at 11 (citing 2010 congressional testimony by ExxonMobil's CEO, Tillerson, in which he stated,
> [T]here is no question climate is changing, that one of the contributors to climate change are greenhouse gases that are a result of industrial activities—and there are many greenhouse gases besides CO_2. . . [T]he real challenge I think for all of us is understanding to what extent and therefore what can you do about it.

citing 2017 congressional testimony by Tillerson in which he stated, "I understand these [greenhouse] gases [due to 'combustion of fossil fuels'] to be a factor in rising temperature, but I do not believe the scientific consensus supports their characterization as the 'key' factor").
396. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 (1988) (citing the *Noerr* Court's protection of "indirect" petitioning, which included "a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action").
397. *Id.* at 507.
398. *Id.* at 507 n.10.
399. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961); *see also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (affirming *Noerr* immunity as applying to "mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement").
400. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965).
401. *Allied Tube*, 486 U.S. at 499.
402. Borough of Duryea v. Guarnieri, 564 U.S. 379, 388-89 (2011).
403. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1251 (9th Cir. 1982).
404. Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 849 (7th Cir. 2011).
405. Venetian Casino Resort, L.L.C. v. National Lab. Rels. Bd., 793 F.3d 85, 87 (D.C. Cir. 2015).
406. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 142 (1961).
407. *Id.* at 142-43:
> Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry.

As with the discussion on whether the fossil fuel companies' speech should be considered false and misleading commercial speech,[408] this section will use the same three categories of the companies' speech for application of the *Noerr-Pennington* doctrine.[409]

A. Does the Companies' First Category of Speech Constitute Petitioning Activity?

In terms of the first category—speech that promotes the company's brand or its specific products—a court would find that such speech does not constitute petitioning. The speech in this category seeks to advertise the efficiency and efficacy of the company's products or to convince consumers of the sustainability and responsibility of its brand. Its purpose is to promote sales and attract customers. It in no way advocates for governmental action, nor urges the public to persuade its elected representatives to legislate in a particular way.

While there might be an argument that these advertisements indirectly address a matter of public concern for which policy measures are considered (i.e., climate change), such an argument stretches the *Noerr-Pennington* doctrine well beyond its capacity. Far from being an example of commercial speech with a political impact, this category of fossil fuel companies' speech more accurately represents commercial speech with minimal political impact.

B. Does the Companies' Second Category of Speech Constitute Petitioning Activity?

The second category of speech—speech rebutting the role of fossil fuels in climate change and praising the sustainability of the company's operations—presents a closer question. These statements appear to address the growing international response at the time to the climate change crisis and the recognition of their consumers' interest in supporting responsible companies—companies that are aware of and respond to societal problems. However, as with the discussion of whether the companies' speech represents commercial speech, the same issue presents itself: when a company's speech serves dual purposes—promotion of its products to consumers and commentary on a public policy issue—should the First Amendment or consumer protection prevail?

The district court in *United States v. Philip Morris* seemed to respond to this dilemma by classifying tobacco companies' lobbying conduct as only what got communicated directly to government officials; public statements made to customers as part of the publicity campaign were exempt from protection under *Noerr-Pennington*.[410] In circumstances where the alleged harm caused by a company's product also represents an issue of public importance, this determination may represent the only way a court can protect a speaker's First Amendment right to lobby for government action, without rendering consumer protection statutes effectively toothless.

Indeed, this is the reason why the Supreme Court has repeatedly emphasized that commercial speech that links a product to an issue of public concern is not thereby immune from regulation, for "many, if not most, products may be tied to public concerns."[411] The same should be said for cases concerning the right to petition. To hold otherwise would present an absurd situation whereby the more severe and widespread the harm caused by a company's product—and, thus, the more likely the public would be concerned about the product—the more easily the company could assert *Noerr-Pennington* immunity and evade liability.

If a court analyzes fossil fuel companies' speech under the same test as the district court in *Philip Morris*, it will likely find that this second category of speech would not constitute petitioning activity that warrants First Amendment protection. For those that do not, however, it is worth considering how a court may proceed through its analysis. The statements in the second category of speech promote the utility, essentiality, and benefits of fossil fuel use to individuals, as well as the world economy. They also present the particular company's actions in improving its efficiency and sustainability in order to better protect the environment and produce "cleaner" fossil fuels. The key difference between the second and third categories of the companies' speech is that the second category does not include statements addressing the merits of proposed legislation or policies. Rather, statements in the second category seek to endear the company and its products to consumers.

It is true that in promoting the importance of fossil fuels in the eyes of the public, the companies' speech would inevitably influence the public's perception of what governmental action should be taken concerning fossil fuel use. Like the impact of the speech at issue in *Allied Tube*,[412] one can assume that the impact of the speech at least partly affected governmental action as a result of changes in the public's perception of fossil fuel use. The context and nature of the fossil fuel companies' speech, however, is less decisive in analyzing whether it constitutes petitioning than that of the producer of steel conduit in *Allied Tube*.

As discussed above, the second category includes speech that promotes fossil fuels and publicizes the companies' sustainability initiatives. The context of the speech includes statements made in interviews, published in advertorials, and presented in company reports. This context is common to both publicity campaigns used as indirect petitioning and to commercial advertisements. However, the nature of the speech is more representative of classic commercial speech.

408. See discussion *supra* Section IV.E.
409. *See supra* notes 255-57 and accompanying text.
410. 449 F. Supp. 2d 1, 886-87 (D.D.C. 2006).
411. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 n.5 (1980); *see also supra* notes 158-60 and accompanying text.
412. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502, 504 (1988).

Consider, for example, the speech at issue in *National Commission on Egg Nutrition*. There, a trade association sought to refute scientific claims that eating eggs increased the risk of high cholesterol and heart disease.[413] To do so, it placed newspaper advertisements as part of a publicity campaign to convince the public that "eggs [were] harmless and . . . needed in human nutrition," and that there was, in fact, an "absence of scientific evidence that eating eggs" caused health harms.[414] The Seventh Circuit found that, contrary to the association's claims, its advertisements constituted commercial speech despite their connection to a public health issue, as their purpose was purely to "persuad[e] the people who read them to buy eggs."[415] Commercial speech, the court concluded, included not only the proposal of a commercial transaction, but also "false claims as to the harmlessness of the advertiser's product."[416]

Similarly, the fossil fuel companies' statements in the second category of speech attempted to counteract scientists' claims that fossil fuel emissions were contributing to and exacerbating climate change. The companies lauded their efforts to make their operations and products more sustainable, while emphasizing the necessity of fossil fuels in maintaining economic stability and growth.

The purpose of these claims was to encourage consumers to continue purchasing fossil fuels and seed doubt as to whether the alleged harm caused by these products—climate change—was a real threat. They did not attempt to connect their assertions with proposed legislative initiatives or urge the public to compel their government to act in a certain way. The absence of explicit language "seeking legislation or executive action"[417] should place these public statements in the realm of commercial speech, not genuine lobbying activity.

C. *Does the Companies' Third Category of Speech Constitute Petitioning Activity?*

The third category of fossil fuel companies' speech does include public statements explaining, affirming, or denigrating proposed legislative and executive action. Specific initiatives or legislation were explicitly mentioned. This speech is much more representative of the type of speech involved in a publicity campaign seeking public support for particular government action.

While these statements undoubtedly served to encourage and promote continued use of the companies' products, they did so by connecting the benefits of fossil fuel use with the companies' position on proposed policy measures or legislation. Here, the commercial elements were ancillary to the petitioning activity. In other words, one could identify these slight differences between the companies' second and third categories of speech as representing the "precise lines separating . . . political activity that is immunized despite its commercial impact from . . . commercial activity that is unprotected despite its political impact."[418]

D. *Do Exceptions to* Noerr-Pennington *Apply? The Sham Exception and Fraudulent Speech*

The final hurdle remaining before fossil fuel companies could claim *Noerr-Pennington* immunity is the doctrine's "sham exception."[419] The purpose of this exception is to prevent actors from avoiding liability for statutory violations by falsely claiming that their conduct was directed at lobbying the government. Thus, where "private action . . . is not genuinely aimed at procuring favorable government action[, it] is a mere sham that cannot be deemed a valid effort to influence government action."[420] The Supreme Court has described "sham" petitioning as that which "use[s] the governmental *process*—as opposed to the *outcome* of that process—as a[ ] weapon."[421]

In *City of Columbia v. Omni Outdoor Advertising*, for instance, the Court rejected an argument that the petitioner's anticompetitive purpose in lobbying for zoning ordinances that would inhibit its competitor's ability to provide advertising services rendered its conduct a sham and ineligible for *Noerr-Pennington* immunity.[422] On the contrary, the Court found that it was only through the city's enactment of these zoning ordinances (i.e., through the success of petitioner's lobbying efforts) that its competitor suffered the harm for which it had sought relief.[423] As the harm stemmed from the outcome of petitioning activity and not from the activity itself, the sham exception did not apply[424] regardless of the defendant's underlying intent.[425] Finally, it is important to note that in cases con-

413. National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 159 (7th Cir. 1977).
414. *Id.*
415. *Id.* at 162-63.
416. *Id.* at 163.
417. *Allied Tube*, 486 U.S. at 499.
418. *Id.* at 507 n.10.
419. *See supra* note 322.
420. *Allied Tube*, 486 U.S. at 500 n.4.
421. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991).
422. *Id.* at 368, 381.
423. *Id.* at 381; *but see* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1253-54 (9th Cir. 1982) (finding that a rate bureau for common carriers filed "baseless" protests with the Interstate Commerce Commission that were "prosecuted without regard to their merit, [and] intended only to delay competitive action, not to influence governmental action," and, thus, its conduct "[fell] within the sham exception as a matter of law").
424. *See Omni Outdoor Advert.*, 499 U.S. at 382:
> Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act.

see also Forro Precision, Inc. v. International Bus. Machs. Corp., 673 F.2d 1045, 1060 (9th Cir. 1982) (finding that IBM's request for police aid constituted petitioning and warranted protection under *Noerr-Pennington*, but noting that had it "provided the police with deliberately false information [for the search], solely for the purpose of harassing [the company it believed misappropriated its trade secrets] or of achieving other ends unrelated to law enforcement, its conduct would unquestionably come within the sham exception").
425. *See Omni Outdoor Advert.*, 499 U.S. at 381 ("Although [the petitioner] indisputably set out to disrupt [its competitor's] business relationships, it

cerning petitions to the legislature, "'the sham exception is extraordinarily narrow' and the activity enjoys a broader scope of immunity."[426]

It is important to first keep in mind that the present cases concern the question of whether fossil fuel companies' speech constituted petitioning of the *legislature*; consequently, the reach of the sham exception is substantially restricted. In terms of the third category of speech—the category most likely to warrant *Noerr-Pennington* immunity—it would be difficult to argue that the companies did not genuinely intend to influence governmental action. Indeed, the threat to the continued marketability of their product was the federal government's consideration of national and international policy proposals to curb fossil fuel use in an effort to mitigate climate change.[427]

That the companies' strategy for generating favorable governmental action involved disseminating patently false information is not an element of the "sham exception" calculus. As the Supreme Court noted in *California Motor Transport*, the publicity campaign that the *Noerr* Court afforded First Amendment protection "employed deception and misrepresentation and unethical tactics."[428] Consequently, a court would likely find that the companies' conduct in this category did not fall within the sham exception.

The Supreme Court has affirmed time and again the unity of First Amendment rights and the consistency with which courts should apply their protections.[429] The Court has also asserted that "the First Amendment does not shield fraud."[430] Thus, to the extent that the fossil fuel companies' speech constitutes fraudulent speech, one would assume that the *Noerr-Pennington* doctrine—a doctrine founded in the First Amendment's right to petition provision—would provide no reprieve from liability.

However, lower courts have rendered contradictory opinions on this front. In cases concerning petitioning of the courts or administrative agencies, they have confirmed that fraudulent conduct places that petitioning within the sham exception.[431] In cases considering petitioning activity directed to the *legislature*, however, courts' interpretations of the scope of *Noerr-Pennington* in regard to fraudulent conduct have run the gamut, from upholding immunity,[432] to denying protection based on the sham exception,[433] to failing to come to either conclusion.[434]

Thus, a final decision may not be attainable until the Supreme Court addresses this circuit split. However, given the Court's declarations affirming the equality of First Amendment protections and the uniformity with which those protections should be applied,[435] it follows that those categories of speech that do not warrant protection under the freedom of speech provision, such as fraud,[436] should also not be afforded protection under the provision establishing a right to petition. To hold otherwise would potentially also undermine judicial precedent in which the right to petition was restricted to reflect the protection afforded freedom of speech and the press.[437]

VII. Conclusion

This Article seeks to present an objective critique of the arguments being submitted by fossil fuel companies and plaintiff states, counties, and cities in litigation across the country. In doing so, it explored how these courts might analyze the merits of both sides' arguments and reach decisions. Based on a comprehensive examination of the case law, it concludes that only the third category of fossil fuel companies' speech—speech specifically directed to legislative or executive action—should merit full First Amend-

sought to do so not through the very process of lobbying, . . . but rather through the ultimate product of that lobbying . . . ."); *see also* Professional Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 59 (1993) ("Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.").

426. United States ex rel. Wilson v. Maxxam, Inc., No. C 06-7497 CW, 2009 WL 322934, at *6 (N.D. Cal. Feb. 9, 2009).

427. *See supra* note 37.

428. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972).

429. *See supra* notes 339-44 and accompanying text.

430. Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003); *see also* United States v. Alvarez, 567 U.S. 709, 747 (2012) (Alito, J., dissenting) ("Laws prohibiting fraud, perjury, and defamation . . . were in existence when the First Amendment was adopted, and their constitutionality is now beyond question."); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978) ("[P]rotection of the public from . . . [fraudulent] solicitation is a legitimate and important state interest.").

431. *See* Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 843-44 (7th Cir. 2011) (noting that "the fraud exception is based on the Supreme Court's desire to protect the integrity of non-political governmental proceedings"); Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995) (finding "no reason to believe that the right to petition includes a right to file deliberately false complaints" in court); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body."); Friends of Rockland Shelter Animals, Inc. v. Mullen, 313 F. Supp. 2d 339, 343 (S.D.N.Y. 2004) ("Fraudulent acts are not protected by the *Noerr-Pennington* doctrine when they occur in the adjudicatory process or where false information is filed with an administrative agency with deceptive intent."); *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965) (upholding liability for a Sherman Act violation where a patent was obtained by fraud).

432. *See Mercatus Grp.*, 641 F.3d at 848-49 (finding that, in the case of a hospital's petitions to a village board acting in a "legislative capacity," "[b]ecause the fraud exception does not apply to legislative proceedings, guided as they are by political considerations, *Noerr-Pennington* immunity applies"); Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056, 1061 (9th Cir. 1998) ("[T]he sham exception for intentional fraud on a court cannot lightly be taken to apply in a legislative context because, as the Supreme Court has observed, the political arena has a higher tolerance for outright lies than the judicial arena does.").

433. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. Cir. 2009) ("[N]either the *Noerr-Pennington* doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation.") (quoting Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267 (D.C. Cir. 1995)).

434. *See* In re JUUL Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig., 497 F. Supp. 3d 552, 614 (N.D. Cal. 2020) ("Plaintiffs concede that [e-cigarette manufacturers] genuinely sought to influence the government through the[ir] statements . . . , even if the information they used to achieve those ends was fraudulent. It is unclear whether the sham exception stretches to cover this scenario.").

435. *See supra* notes 339-44 and accompanying text.

436. *See supra* note 108 and accompanying text.

437. *See* McDonald v. Smith, 472 U.S. 479, 484-85 (1985) (denying absolute immunity to petitions to the president where absolute immunity was not afforded to speech in an analogous libel action as doing so "would [impermissibly] elevate the Petition Clause to special First Amendment status").

ment protection. This speech does not meet the definition of "commercial speech," and is more indicative of speech immunized under *Noerr-Pennington*—that is, speech representing "quintessential lobbying activity."[438]

There is, however, a strong likelihood that courts may find even this speech to have been fraudulent, given the extensive documentary evidence detailing the companies' exhaustive knowledge of the climate change threat and their products' role in causing the crisis. Can this be sufficient to remove the First Amendment's shield against liability? When it comes to the Freedom of Speech Clause, the Supreme Court has answered "yes." As to the Right to Petition Clause, the judicial waters remain murky. But to protect fraudulent speech only because it was presented in the context of petitioning the government would reject the Court's affirmation of the inseparability of First Amendment rights. There is no reason why "the Petition Clause . . . [should receive] special First Amendment status" when it comes to fraudulent speech.[439]

The first and second categories of the fossil fuel companies' speech, related to their products, brand, and reputation, should be classified as false and misleading commercial speech that does not warrant First Amendment protection. A court should find unavailing any argument seeking to protect this speech merely because of its relevance to the debate on climate change. Climate change is irrefutably an issue of immense public importance. But the significance of the public debate surrounding challenged speech should not affect the rigor with which a court considers the degree of constitutional protection afforded to it. For it is not only the companies' First Amendment rights that are at stake in these cases; the courts are also responsible for safeguarding the rights afforded to consumers.

As consumers continue to prioritize purchasing products that are safe, ethical, and sustainable, companies will continue to seek to promote sales through speech that addresses their consumers' concerns—concerns linked to public issues. Consumers should not be punished for becoming better-informed and seeking to spend their money responsibly. The First Amendment should not render consumer protection statutes obsolete.

Companies will continue to evolve the ways in which they attract consumers and advertise their products, so courts will need to evolve the ways in which they apply the First Amendment and the *Noerr-Pennington* doctrine to companies' public speech. The lines separating speech that may legitimately be regulated by the state from speech immunized by the First Amendment will only get narrower. Yet, courts are often tasked with legal questions requiring careful analysis and fact-specific determinations; this topic is no different. Companies should not be rewarded for the skill with which they distort the truth and disguise their deceit. Consumers demand more, and their elected representatives and judicial processes should have the authority to meet those demands.

438. *See supra* note 304.
439. *Id.*