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Federal Trade Commission
Office of the Secretary,
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Re: Green Guides Review (16 CFR Part 260) (Matter No. P952501)

I. Introduction

Boyden Gray & Associates is pleased to submit comments on behalf of Consumers' Research in response to the Federal Trade Commission's ("FTC") request for public input on its Guides for the Use of Environmental Marketing Claims ("Green Guides"), 87 Fed. Reg. 77,766 (Dec. 20, 2022). As an independent educational 501(c)(3) nonprofit organization, Consumers' Research's mission is to enhance consumer knowledge and understanding of various issues, policies, products, and services. Consumers' Research strives to promote the freedom to act upon this knowledge, ultimately improving the cost, quality, availability, and variety of goods and services in both private and public sectors.

Consumers' Research shares FTC Chair Lina Khan's belief that protecting consumers from deceptive advertising practices is paramount, especially when it comes to false and misleading environmental claims. Today, many American consumers consider environmental factors before making a purchase. They rely on the information provided by businesses to make informed choices that align with their values. This allows for "bottom up" solutions that empower consumers to use their spending choices to reduce negative externalities. For these choices to be meaningful, however, it is crucial for companies to be truthful in their claims, as deceptive advertising practices distort the market for products produced in an environmentally responsible manner by good stewards of the environment, putting honest businesses at a competitive disadvantage and conning consumers in their decision-making.

Unfortunately, such cons are easy to pull off because environmental claims often do not concern the products themselves but their purported upstream impacts on the environment of their manufacturing or powering, impacts that are often difficult or impossible to measure or independently verify. The growth in demand for products

and services labeled as environmentally friendly has unsurprisingly brought about an explosion of deceptive environmental marketing claims—“greenwashing”—as some businesses exploit consumer goodwill and lack of understanding for their own gain.

Electric vehicles, for example, are frequently labeled as “zero-emissions” despite being powered by electrical grids which produce emissions while generating the power used to power those vehicles. *See* Part III.A, *infra*. Consider GM’s new electric Hummer—a 9,000 pound, 1,000 horsepower behemoth. Phil Brook, then-head of GMC marketing explained that “The Hummer EV has incredible capability with zero emission, it really is the best of both worlds.” Vince Bond, *GMC Wants to Make a Statement with Hummer EV*, *Automotive News* (Feb. 2, 2020), <https://www.autonews.com/marketing/gmc-wants-make-statement-hummer-ev-lebron-james>. In reality, the electric Hummer is responsible for more emissions from the electricity it uses than a typical internal-combustion engine car. *See, e.g.*, Sam McEachern, *GMC Hummer EV Pollutes More Than a Chevy Malibu, Study Claims*, GM Authority (July 8, 2022). Marketers similarly tout wind and solar energy sources as “net-zero” or “sustainable” despite not making any effort to offset the lifecycle emissions of these sources or to consider their negative effects beyond greenhouse-gas emissions. *See* Part III.B, *infra*. And businesses increasingly use “renewable energy credits” or carbon offsets as justification for claiming that they operate without using fossil fuels, even when the energy they actually use is drawn from grids powered primarily by coal, natural gas, and oil. *See* Part III.C, *infra*. These deceptive practices undermine environmental progress and hinder consumers from making genuinely informed choices about environmental attributes or performance.

Worse still, unscrupulous corporations collude under cover of these misleading labels—reinforcing each other’s claims—to better attract customers and gain a competitive edge over their rivals. For example, RE100, the “gold standard” global corporate climate group, allows its members to meet their commitments to “use” 100% renewable energy, without requiring or even asking for information about actual energy use or emissions reductions. Such deceptive behavior creates an unlevel playing field, putting pressure on honest businesses to either remain silent or to resort to similar tactics to avoid falling behind in the marketplace. This perpetuates a cycle of deception, ultimately enriching unscrupulous business interests and undermining the entire purpose of the environmental claims by confusing consumers and making it increasingly difficult for them to differentiate between genuinely environmentally preferable products and those disguised with greenwashing tactics.

The FTC is well positioned to stop this, and Consumers’ Research is committed to supporting the FTC’s regulatory review of the Green Guides and ensuring that businesses provide accurate information, allowing consumers to make educated decisions in line with their environmental values.

II. The Green Guides Should Be Guidance, Not a Rule.

It is important that the FTC approach this issue using only the tools Congress has given it. As the request for public comment indicates, the FTC has only very limited authority to issue rules. Section 18(a)(1) of the FTC Act, 15 U.S.C. § 57a(a)(1), provides that the Commission may promulgate: “(A) interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices . . . , and (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices[.]” Further, section 18(b)(1) directs that “[w]hen prescribing a rule under subsection (a)(1)(B),” the FTC “shall proceed in accordance with” the notice and comment requirements of the Administrative Procedure Act in 5 U.S.C. § 553, and shall also follow the more extensive procedures set forth in section 18 of the FTC Act that often are referred to as “Magnuson-Moss” rulemaking.

In the current context, the FTC is not pursuing these procedures. Instead, the Commission is seeking public comment on whether it should initiate rulemaking related to environmental-benefit claims under its FTC Act authority. Consumers’ Research thinks that pursuing a separate formal rulemaking—particularly considering the proliferation of greenwashing claims—may be wise. But even in its current revision of the Green Guides, the FTC should be mindful of its authority and how any attempt to regulate in this area should be approached.

First, despite the current Green Guides’ claim to being only a guidance document, they read like binding regulations under section 18(a)(1)(B) of the FTC Act and are often treated that way. The current Green Guides classify certain acts and practices as “deceptive” and describe what marketers “should” and “should not” do when making environmental claims to comply with the FTC Act. By stating categorically and definitively that a particular act “is deceptive,” that particular conduct “would be deceptive,” or that under specified circumstances, marketers “must” or “should” act in a particular way, the document has “defined with specificity,” 15 U.S.C. § 57a(a)(1)(B), a deceptive act or practice.

It is therefore unsurprising that, despite only being a guidance document, the current Green Guides are often treated as binding by states, courts, and companies.

See Robin M. Rotman, et al., *Greenwashing No More: The Case for Stronger Environmental Marketing*, 72 Admin. L. Rev. 417, 428 (2020). Some states have further incorporated the Green Guides into their own consumer protection acts, affording them binding status.¹

Even where they are not binding, courts and litigants have often used the definitions in the Green Guides to support or dismiss environmental marketing claims, and the Commission’s views are often accorded great deference by courts. For example, in a recent case brought against Keurig the plaintiff alleged that the company had improperly labeled its coffee pods as recyclable, relying on the fact that the pods did not satisfy the Green Guides’ definition of recyclable. Complaint at 2, *Downing v. Keurig Green Mountain, Inc.*, No. 1:20-cv-11673-IT (D. Mass. Sep. 9, 2020), ECF No. 1. The Court’s Order denying the motion to dismiss relied on the Green Guides to determine that the plaintiffs had plausibly alleged deception. Other companies have relied on the Green Guides to defend against allegations that they have made deceptive green marketing claims. For example, Niagara Bottling recently defended a false advertising claim by relying on its compliance with the Green Guides definition of the term “recyclable.” *Duchimaza v. Niagara Bottling, LLC*, 2022 WL 3139898, at *8 (S.D.N.Y. Aug. 5, 2022) (“The parties agree that the term ‘recyclable’ is a term of art and that the FTC’s Green Guides inform its meaning.”).

Because the Green Guides are often treated as binding by courts, the FTC should respond accordingly. One of two approaches would likely help to address this perception. The first option is to replace the current format of the Green Guides with a more generalized document consistent with guidance, which would help businesses understand the broader principles governing environmental claims without being overly prescriptive. This would allow for greater flexibility and adaptability in response to the rapidly evolving landscape of environmental claims and consumer

¹ See, e.g., Cal. Bus. & Prof. Code § 17580.5(a) (“It is unlawful for a person to make an untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. For the purpose of this section, ‘environmental marketing claim’ shall include any claim contained in the ‘Guides for the Use of Environmental Marketing Claims’ published by the Federal Trade Commission.”); Minn. Stat. § 325E.41 (“(a) Environmental marketing claims made by a manufacturer, packager, wholesaler, or retailer for a product sold or offered for sale or distribution in this state, including those related to the product’s packaging, must conform to the standards or be consistent with the examples contained in Code of Federal Regulations, title 16, part 260, ‘Guides for the Use of Environmental Marketing Claims’ regarding general environmental benefits claims, claims that a product or package is degradable, compostable, recyclable, or contains recycled content, and claims relating to source reduction, refillability, or ozone safety.”).

perceptions. Alternatively, the FTC could begin the Magnuson-Moss rulemaking process to formally establish rules related to environmental-benefit claims. This would provide businesses with clearly defined terms in formal regulations to follow and ensure that the enforcement of environmental claims is consistent and transparent.

There probably is no “best” way to address this area. A guidance approach may require more enforcement to be effective while a more prescriptive approach through regulation requires more front-end work, is less flexible, and, based on experience to date, is likely to create perverse incentives. The current approach of regulation in the form of guidance, however, cannot be continued. Candor, transparency, and respect for the rule of law are even more important for regulators than the regulated. As the Supreme Court recently reminded us, “[M]en must turn square corners when they deal with the Government.’ But it is also true, particularly when so much is at stake, that ‘the Government should turn square corners in dealing with the people.’” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (quoting *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920); *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961)).

III. New Green Guides Must be Based in Reality.

Chair Khan is exactly right: “[I]t’s so important for companies making [environmental] claims to tell the truth.” Whether there is “a continuing need for the Guides” thus depends entirely on whether they help or hurt this goal. Unfortunately, the current Green Guides are harmful insofar as they provide cover for false claims about renewable energy, and the current proposal is taking comment on what are misleadingly called “zero-emission vehicles.” Any new guidance or standards must reverse and avoid these errors, respectively.

A. Electric vehicles are not “zero-emissions” vehicles.

Electric vehicles are rapidly growing in market share and are often touted for their environmental benefits. But they aren’t perfect. Most misleading are the claims of dozens of auto manufacturers and others that electric vehicles are zero emissions. See, for example:

- “Mustang Mach-E® SUV gives you 0–60 thrills, expansive range and zero emissions.” *2023 Ford Mustang Mach-E*, Ford, <https://www.ford.com/suvs/mach-e/?intcmp=hp-cta-vhp-mache> (last accessed Apr. 24, 2023).

- “We are aggressively going after every aspect of what it takes to put everyone in an EV because we need millions of EVs on the road to make a meaningful impact toward building a zero-emissions future.” *Our Path to an All-Electric Future*, General Motors, <https://www.gm.com/electric-vehicles> (last accessed Apr. 24, 2023).
- “Roadtripping in your EV is not only zero emissions, it’s zero-limits.” *Going EV*, Nissan, <https://www.nissanusa.com/vehicles/electric-cars.html> (last accessed Apr. 24, 2023).
- “Audi e-tron vehicles have zero direct emissions.” *Electric Education Hub*, Audi, <https://www.audiusa.com/us/web/en/why-e-tron.html> (last accessed Apr. 24, 2023).
- “Pre-order your own all-electric, zero-emissions Fisker Ocean.” *Fisker Ocean*, Fisker, <https://www.fiskerinc.com/ocean> (last accessed Apr. 24, 2023).
- “The Golf Style eHybrid means you can drive with zero emissions.” *Way to Zero*, Volkswagen, <https://www.volkswagen.co.uk/en/electric-and-hybrid/sustainability/way-to-zero.html> (last accessed Apr. 24, 2023).

While it is true that all-electric vehicles have no tailpipe emissions—they have no tailpipes!—it is completely false to claim that they are “zero-emissions” vehicles. Imagine a car that carried its engine in a trailer. The “car” itself produces no emissions, but the trailer, which provides all the car’s motive power, still emits greenhouse-gases and other pollutants. It would be absurd for this type of vehicle to be labeled “zero-emissions.”

Yet this is exactly what happens with electric vehicles—the wires are just a bit longer. Instead of being directly powered by gasoline, electric vehicles are powered by electricity flowing over the power grid. But this electricity does not come emissions free. There is no point on the grid powered entirely by wind, solar, or hydro energy. Even in California, where renewable energy is a priority, daily evening peak load is still routinely supplied by approximately 70 percent fossil fuels. *See e.g., Today’s Outlook*, California ISO, <https://www.caiso.com/TodaysOutlook/Pages/supply.html#section-supply-trend> (data from Aug. 4, 2022, showing more than 70 percent of energy from natural gas, coal, and imports). According to a report by the California Energy Commission, demand from residential and nonresidential EV chargers could amount to more than 1 GW by 2025, causing significant impacts at the local level. Gavin Bade,

CEC: California EV Chargers Will Add 1 GW of Peak Demand by 2025, Utility Dive (Mar. 20, 2018), <https://www.utilitydive.com/news/cec-california-ev-chargers-will-add-1-gw-of-peak-demand-by-2025/519517/>. Worse still, the presence of DC fast charging creates a “bumpy” load profile that increase the need for plant ramping or load management (a phenomenon researchers have labeled the “Dragon Curve”) that requires almost all additional demand to be met by firing up new just-in-time natural gas plants. *Id.* As a result, the charge for many electric vehicles is reasonably attributed *entirely* to fossil-fuels.

Furthermore, manufacturing an electric vehicle produces a significant amount of greenhouse-gas emissions—usually much more than is required to produce a conventional vehicle—before the vehicle drives even one mile. The production process involves extracting raw materials, assembling components, and fabricating the vehicle’s body, all of which contribute to the vehicle’s overall carbon footprint. Much of this is very carbon intensive. In particular, the mining and processing of materials for heavy electric vehicle batteries, such as lithium, cobalt, and nickel, can be energy-intensive and significantly and directly damaging to the environment. The supply chain for these minerals is highly dependent on China, which uses more coal power than any other country.² As a result, the initial environmental impact of electric vehicles is typically higher than that of their conventional counterparts.

Additionally, the electricity production, transmission, and distribution supply chain associated with electric vehicles, including chargers and operation and maintenance, can be greenhouse-gas intensive. Key components of the electrical infrastructure, such as copper and grain-oriented electrical steel, require energy-intensive extraction and processing, which contribute to the overall carbon emissions. As electric vehicles become increasingly common, the necessary infrastructure will balloon. One recent study from the electricity and gas utility National Grid projects that by 2030, the typical passenger plaza along a highway will demand as much power—with all the wiring, transformer, and substation upgrades that requires—as a sports arena during its busiest times. National Grid, *Electric Highways Study* (2022),

² See International Energy Agency, *Global Supply Chain of EV Batteries* (2022), <https://iea.blob.core.windows.net/assets/4eb8c252-76b1-4710-8f5e-867e751c8dda/GlobalSupplyChainofEVBatteries.pdf> (“China produces three-quarters of all lithium-ion batteries and is home to 70% of production capacity for cathodes and 85% for anodes (both are key components of batteries)”); Andrew Hayley, *China Leans on Coal Amid Energy Security Push*, Reuters (Mar. 6, 2023), <https://www.reuters.com/business/energy/china-underlines-key-role-coal-amid-energy-security-drive-2023-03-05> (“The world’s second-biggest economy relied on coal to generate 56.2% of its electricity last year.”).

<https://www.nationalgrid.com/us/EVhighway>. By 2035, a single larger charging station serving could need to provide 19 megawatts of peak power, roughly what a small town uses. *Id.* And by 2045, that kind of truck stop may require 30 megawatts of capacity, approaching the peak usage of a large industrial plant.

The current claims of electric vehicle manufacturers resemble the fake “clean” claims that led to the Commission’s enforcement action against Volkswagen in 2016. Ironically, Volkswagen’s push of new—and equally if not more false and misleading claims—are part of their Way to Zero campaign that emerged out of the consent decrees from their last set of false environmental claims.

B. Wind and solar energy are not “net zero” and are often not harnessed “sustainably.”

Wind and solar energy are rapidly developing technologies that are of increasing importance in our electrical grid. But businesses often extol their benefits in a way that goes beyond mere puffery into outright deception. Wind and solar energy are often touted as “100% clean,” “net zero,” “pollution free,” “sustainable,” or other similar claims. See, for example:

- “We sell only 100% clean energy from renewable sources like wind and solar.” *Switch to Clean Renewable Energy*, CleanChoice Energy, <https://cleanchoiceenergy.com/> (last accessed Apr. 24, 2023).
- “The benefits of wind energy are: Sustainable[;] . . . Wind turbines do not release any emissions[.]” *Other Renewables*, Pepco, <https://www.pepco.com/SmartEnergy/MyGreenPowerConnection/Pages/OtherRenewables.aspx> (last accessed Apr. 24, 2023).
- “Since the sun will continue shining for hundreds of billions of years, calling solar a truly sustainable power supply is a safe bet.” *How Solar Energy is a Cornerstone to Sustainability*, Forme Solar, <https://formesolar.com/how-solar-energy-is-a-cornerstone-to-sustainability/> (last accessed Apr. 24, 2023).
- “A renewable and sustainable resource is vital when powering your home, no one has to go mine for solar, it isn’t going anywhere. As opposed to finite resources used by power companies, solar is infinite, uses much fewer materials, and produces zero pollution. The sun is a free, clean, and consistent source of energy that has been producing energy for billions of years. Renewable energy helps with energy security, ensuring

our energy is bountiful while reducing the risk of fuel spills and other hazards.” *Is Solar Power Sustainable?*, Everlight Solar, <https://everlightsolar.com/is-solar-sustainable/> (last accessed Apr. 24, 2023).

- “Renewable energy is a homegrown energy source, helping secure America’s energy future and decrease our dependence on foreign energy.” *How it Works*, Tomorrow Energy, <https://tomorrowenergy.com/cleaner-energy/how-it-works/> (last accessed Apr. 24, 2023).
- “Our green electricity plans are made by 100% clean and renewable by using energy credits from [sic] sources like wind and solar.” *Why Green?*, Spark Energy, <https://www.sparkenergy.com/green-energy/why-green/> (last accessed Apr. 24, 2023).

These claims are at best misleading and often entirely false.

i. “Net zero” and “100% clean”

As with electric cars, the production, installation, and decommissioning of wind turbines and solar panels involve significant emissions as compared to many other generation technologies. This is due to the energy-intensive processes required to extract raw materials, manufacture components, and transport and install solar and wind equipment. For example, silicon production, a critical component of solar panels, is predominantly conducted in China, a country heavily reliant on coal for its energy production. “Today, China’s share in all the manufacturing stages of solar panels (such as polysilicon, ingots, wafers, cells and modules) exceeds 80%. This is more than double China’s share of global PV demand. In addition, the country is home to the world’s 10 top suppliers of solar PV manufacturing equipment.” International Energy Agency, *Solar PV Global Supply Chains* (2022), <https://www.iea.org/reports/solar-pv-global-supply-chains/executive-summary>. And the decommissioning and disposal of wind turbines and solar panels at the end of their lifecycle also generate emissions, as recycling and repurposing processes—if the panels and blades aren’t simply shipped to a landfill—is energy intensive.

Analyses such as the National Renewable Energy Laboratory’s Life Cycle Assessment Harmonization Project attempt to account for the emissions associated with the entire lifecycle of renewable energy sources like wind and solar. But even these assessments often overestimate the lifetime of wind turbines and solar panels, leading to an inaccurate understanding of their overall environmental impact. For instance, in Minnesota, the Next Generation Energy Act mandated that 25 percent of the

state’s electricity come from renewable energy sources by 2025, leading to a building boom of wind turbines between 2007 and 2021. But despite a 25-year assumed useful life, many of these turbines are already being refurbished or “repowered.” One example is the Nobles wind farm, which underwent repowering after just 12 years in service. *Xcel Completes Nobles Wind Farm Upgrades*, EnergyCentral (Jan. 3, 2023), <https://energycentral.com/news/xcel-completes-nobles-wind-farm-upgrades>. This early repowering more than doubles the carbon intensity per megawatt-hour generated.

Solar panels also face challenges related to deterioration and susceptibility to storm damage. The rate of solar cell deterioration varies, but generally they lose efficiency at a rate of between 0.5 and 1 percent every year. Benjamin Mow, *STAT FAQs Part 2: Lifetime of PV Panels*, NREL (Apr. 23, 2018), <https://www.nrel.gov/state-local-tribal/blog/posts/stat-faqs-part2-lifetime-of-pv-panels.html>. The fragile nature of photovoltaic panels also makes them particularly vulnerable to adverse weather events. For example, at the end of February earlier this year the WEC Energy Group paid \$250 million for an 80 percent stake in the 250 megawatt Samson I Solar Energy Center, located 140 miles northeast of Dallas, Texas. But just days later, a windstorm struck, causing damage to approximately 40% of the facility. WEC Energy Group, *Investor Presentations*, (Apr. 2023), <https://investor.wecenergygroup.com/investors/presentations/default.aspx>.

ii. “Sustainable”

Nor are wind and solar energy “sustainable” as they are consistently marketed. In 2012 the Commission determined it lacked a basis to give specific guidance on how consumers interpret “sustainable” claims. But the public understanding of the term is straightforward enough: Sustainable means capable of being sustained. The UN gives somewhat more texture to phrase, explaining that sustainability is “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” *Sustainability*, United Nations, <https://www.un.org/en/academic-impact/sustainability> (last accessed Apr. 24, 2023).

While we will not deplete future generations’ supply of wind or sunlight by using it in the present, the way these resources are being harnessed is far from sustainable in the short and long term. Wind and solar can generate electricity at a low marginal cost, but they cannot generate electricity all the time. Wind energy generates on average about 35 percent of its total nameplate capacity and solar less than 25 percent. And because the lack of generation for wind and solar is largely dependent

on the weather, this lack of capacity isn't randomly distributed, but tends to happen all at once, like when the sun goes down. When power supply drops but demand doesn't, other generation sources must fill the gap. Natural gas has been a natural fit. Natural gas plants can be quickly spun up as wind or solar generation drop to keep the grid stable by balancing supply and demand. As a result, the development of natural gas generation and wind and solar generation go hand in hand, as more wind and solar are built, more natural gas generation is also built. One study found that for each 0.88 percent increase in solar or wind production, a 1 percent growth in natural-gas-generation capacity resulted. Elena Verdolini et al., *Bridging the Gap: Do Fast Reacting Fossil Technologies Facilitate Renewable Energy Diffusion?*, National Bureau of Economic Research (July 2016), <https://www.nber.org/papers/w22454>.

But this increased dependence on natural gas comes at a cost. In regions with higher penetration of wind and solar energy, wholesale electricity prices are much higher. Severin Borenstein & James Bushnell, *The US Electricity Industry After 20 Years of Restructuring*, 7 Annual Rev. Econ. 437 (2015), https://www.annualreviews.org/doi/full/10.1146/annurev-economics-080614-115630#_i2. These regions are also much more exposed to high natural gas prices. *Id.* As a result, consumers in markets with high wind and solar penetration have seen an average price increase of 8.0 percent and annual loss to consumers of \$11.7 billion from 2006 to 2016. Alexander MacKay & Ignacia Mercadal, *Deregulation, Market Power, and Prices: Evidence from the Electricity Sector*, Harvard Business School Working Paper (Jan. 31, 2022). In 2022, electricity prices in every region except Texas were higher than in 2021, and even Texas saw prices on an upward trend after excluding the spike caused by Winter Storm Uri in February 2021. *Wholesale U.S. Electricity Prices Were Volatile in 2022*, Energy Information Administration (Jan. 10, 2023), <https://www.eia.gov/todayinenergy/detail.php?id=55139>.

The increased penetration of wind and solar has also led to increasing concerns about grid reliability. MISO's Renewable Integration Impact Assessment found that "integration complexity increases sharply after 30% renewable penetration" and "the grid's ability to maintain stable operation is adversely impacted" by the addition of renewables." <https://www.misoenergy.org/planning/policy-studies/Renewable-integration-impact-assessment> (last accessed Apr. 24, 2023). "[M]ultiple technologies – such as high-voltage direct current (HVDC) lines, synchronous condensers, motor-generator sets and emerging technology such as grid-forming inverters—are needed to provide support, along with operational and market changes to identify and react

to this risk as it occurs.” *Id.* MISO also found that renewables increase “long-distance power transfers” creating “regional challenges” for planning and operational issues and “the system becomes more dependent on the stability of the remaining convention [fossil fuel] generators.” *Id.* These impacts and solutions to maintaining reliability have enormous costs, like the devastating blackouts in Texas during Winter Storm Uri. The North American Electric Reliability Corporation (NERC)’s Long-Term Risk Assessment for 2023–2027 found that most of the country is at elevated risk of blackouts, with the Midwest and California having a high-risk of adequacy shortfall during even normal peak conditions. *2022 Long-Term Reliability Assessment*, NERC (Dec. 2022), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2022.pdf.

The most vulnerable region may be the Midwest. That region is projected to face a 1,300 megawatt shortfall starting summer 2023 that will continue “to grow throughout the 10-year assessment period as coal, nuclear and natural gas generation retire faster than replacement resources are connecting.” *Id.* Problems are similar in California. Aggressive resource additions have helped to eliminate capacity risks, but shortfall risks remain. NERC explained that “[a]s solar decreases as sunset approaches, the total of all available resources can fall short of the demand, especially [during] higher demand levels.” *2022 Long-Term Reliability Assessment*, NERC (Dec. 2022), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2022.pdf.

This is exactly what happened during the heatwave of August 2022 that required California Governor Gavin Newsom to declare a state of emergency and order reduced electricity use to avoid blackouts. *Proclamation of a State of Emergency*, Executive Department State of California (Aug. 31, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/08/8.31.22-Heat-Proclamation.pdf?emrc=78e3fc>. As part of this order, Newsom instructed the public utility commission to pay customers \$75 to \$2000 per megawatt-hour not to consume electricity (as compared to national average prices of \$30 to 40 per megawatt-hour). Ratepayers covered all the costs. California also eliminated permitting restrictions and air regulations on the use of existing backup fossil-fuel-fired generators, including auxiliary engines on ships, likely leading to a surge in criteria pollutants like NOx and PM.

Nor has the rapid growth in wind and solar been as effective in achieving net zero energy goals. The proliferation of wind and solar have driven larger power plants with high fixed costs—like low-carbon nuclear sources—out of business. For example, New York’s in-state electricity generation was 46 percent more carbon intensive per

unit of energy in its first full month after the closure of Indian Point Nuclear Plant, compared to before the shutdown. *Indian Point*, Environmental Progress, <https://environmentalprogress.org/indian-point> (last accessed Apr. 24, 2023). The closure of three nuclear facilities, one each in Massachusetts, New York, and Pennsylvania, caused greenhouse-gas emissions from electric generation in those states to rise 12, 15, and 3 percent, respectively, since 2019. Benjamin Storrow, *3 States with Shuttered Nuclear Plants See Emissions Rise*, E&E News (Feb. 17, 2022), <https://www.ee-news.net/articles/3-states-with-shuttered-nuclear-plants-see-emissions-rise/>.

Every new addition of wind and solar generation into the increasingly decarbonized United States grid produces a decreased environmental return on investment. A solar array added to a grid that was 100 percent coal powered *does* avoid significant emissions. But new wind and solar installations are now much more likely to replace lower carbon-intensive sources than the coal plants which only make up 19 percent of current generation.

And all these claims leave out other very real harms associated with these technologies, to which a blind eye is turned in pursuit of the most marketable emissions reductions goals. The supply chain for solar power and electric batteries is deeply immersed in ongoing human rights violations in China and other nations. The mining of critical minerals often leads to dramatic environmental harms as waste from their production is dumped into water ways in their countries of origin. And solar panels, electric batteries, and wind turbine blades are being manufactured at an unprecedented rate, with no developed plan for safely recycling their toxic components at the end of their lifecycle. Technologies manufactured with slave labor, or which permanently destroy local lakes, cannot be described as sustainable.³

C. Renewable energy credits and carbon offsets do not deliver what they claim.

Probably the most pernicious of greenwashing claims is one of the most subtle. Increasingly corporations have been adopting pledges to be “100% renewable” or “net zero” across all their operations. But many of these claims rely on renewable energy

³ See Laura T. Murphy & Nyrola Elima, *In Broad Daylight: Uyghur Forced Labour and Global Solar Supply Chains*, Sheffield Hallam Univ. (2021). <https://www.shu.ac.uk/helena-kennedy-centre-international-justice/research-and-projects/all-projects/in-broad-daylight>; Maeve Campbell, *In Pictures: South America’s ‘Lithium Fields’ Reveal the Dark Side of Our Electric Future*, EuroNews (Nov. 21, 2022), <https://www.euronews.com/green/2022/02/01/south-america-s-lithium-fields-reveal-the-dark-side-of-our-electric-future>.

credits or carbon offsets to meet these goals. As currently administered, a company claiming to be “renewable” on the basis of these accounting tricks alone is blatantly lying.

i. Renewable energy credits

Electricity is the largest source of emissions and energy use for many companies, and the reporting of their emissions data should reflect this. Investors often use this information to assess a company’s environmental performance, which in turn factors into their decision-making about what companies to buy from and what companies to invest in. But rather than actually using renewable energy, many companies claiming to be “100 percent renewable” base their claim on the purchase of renewable energy credits (RECs).

RECs are tradable certificates commonly used as “proof” that some amount of electric power came from an eligible renewable energy source. Renewable energy companies, like wind or solar farms, generate certificates based on the energy they generate. The generators feed this energy directly into their local grid and sell the REC in an open market.

Companies prefer RECs to actual electricity conversions for a few reasons. First, RECs offer much more flexibility than investing in self-generation or even purchasing long-term contracts from utilities, because RECs can easily be purchased ad hoc in the market to match changes in energy use. More importantly, RECs are very cheap to buy. EPA estimates that RECs are usually less than \$1 per megawatt-hour compared with the electricity itself, which costs around \$30 and 40 per megawatt-hour. *Green Power Pricing*, EPA, <https://www.epa.gov/green-power-markets/green-power-pricing> (last accessed Apr. 24, 2023). And because companies can claim renewability for only pennies on the dollar compared to *actually* converting to low-carbon electricity sources, REC purchases don’t drive any real changes in greenhouse-gas emissions.

It is very unlikely this system is what consumers perceive when they read that a company is “100 percent renewable.” Instead, if companies were telling the truth, it is literally impossible for any company that buys energy on the grid to use 100 percent wind, solar, or hydropower electricity. There is no point on the U.S. grid that does not receive at least some of its power from fossil fuel sources and nearly every U.S. power consumer receives the majority of its power from fossil fuels. This includes many corporations making “100 percent renewable” energy claims. And even if using 100 percent renewable energy were possible, wind and solar are not truly net-zero or

sustainable, as described above, further undermining the claim. Moreover, the mismatch between the times when these credits are generated and when companies actually use electricity exacerbates this issue. High-demand periods often coincide with increased fossil-fuel consumption, while renewable energy generation may occur during periods of low demand. This means that despite purchasing credits and claiming to be renewable, companies often exacerbate greenhouse gas emissions by purchasing power from the grid during high demand periods.

Many organizations, including the Clean Air Task Force, have recognized the misleading nature and perverse incentives RECs cause. Roger Ballentine et al., *Modernizing How Electricity Buyers Account and Are Recognized for Decarbonization Impact and Climate Leadership*, Clean Air Task Force (Aug. 2022), <https://cdn.catf.us/wp-content/uploads/2022/08/16103856/corporate-electricity-procurement-report.pdf>. The following excerpts are illustrative:

- “RECs have the same ‘value’ (a zero-emissions rate for a [megawatt-hour] of generation) regardless of the actual climate impact of that [megawatt-hour]. For example, a REC from an additional [megawatt-hour] of wind generation in wind-saturated West Texas has the same ‘value’ as a [megawatt-hour] of new solar in fossil-intensive Alabama, even though the amount of carbon emissions avoided by each are radically different.” *Id.*
- “[R]eporting entities may apply a REC (assigned a zero emissions rate in Scope 2 market-based accounting), either purchased or retired on an entity’s behalf, toward a [megawatt-hour] of their actual electricity use (which typically would otherwise have a positive emissions rate based on the carbon intensity of the grid in which they had load).” *Id.*
- “Yet ownership of a REC/EAC does not necessarily reflect any change in the buyer’s electricity use (including the consumption of carbon-intensive generation sources that are part of the grid mix at its place of load) and may not reflect any change to a buyer’s climate risk exposure associated with energy use. . . . A buyer can calculate a reduced Scope 2 inventory even when nothing about the nature of the electricity it consumes has changed.” *Id.*
- “Accuracy and relevance would be enhanced by changes to Scope 2 location and market-based reporting that yield inventories that better reflect the emissions resulting from a company’s actual electricity consumption. Incentivizing and rewarding transactions that contribute to grid decarbonization could be

achieved by the reporting of avoided emissions impact arising from transactions and disclosing the extent to which carbon-free electricity (CFE) supply matches the timing and location of a buyer’s consumption.” *Id.*

These misrepresentations are not a secret. Many companies and some of the “gold standard” organization in corporate environmental performance—including S&P Global’s Corporate Sustainability Assessment, RE100, and the GHG Protocol—are aware that RECs do not actually track corporate emissions, but they continue to make these false claims or facilitate others in making these false claims at the ultimate expense of individual consumers. See, for example:

- “S&P Global’s Corporate Sustainability Assessment allows companies to use either location-based or market-based approaches to report Scope 2 emissions (consistent with guidance from the Protocol). It also requests that companies disclose their purchases of renewable energy, but without requiring additional information on the underlying transaction mechanisms (e.g., [Power Purchase Agreement] PPA vs. unbundled RECs), or making any assessment as to the actual emissions impact of such transactions.” *Id.*
- “RE100, referred to as the ‘gold standard for ambition’ by CDP, requires participating companies to adopt goals to source renewable electricity to match an increasing share of their electricity consumption over time (at minimum 60% by 2030, 90% by 2040, 100% by 2050). The RE100’s Technical Criteria explains that companies can meet RE100 commitments through the production and procurement of renewable electricity through purchase options that include direct power purchase agreements, green tariffs, retail agreements and utility standard supply backed by RECs, and unbundled REC purchases. While RE100 refers to its required pledges as commitments to ‘use’ 100% renewable energy, RE100 neither requires nor asks for any information on the relation between such procurements and actual emissions reductions, nor does it require any relationship between procured renewable supply or RECs and the actual timing of the buyer’s consumption from the grid.” *Id.*
- “Although the [GHG] Protocol’s Corporate Standard and Scope 2 Guidance were designed to help companies prepare a GHG inventory that represents ‘a true and fair account of their emissions’ and help companies ‘identify and understand the risks and opportunities associated

with emissions from purchased and consumed electricity,’ it may be that inventories prepared under current rules do not effectively accomplish either goal. . . . Inventories constructed under current rules do not accurately reflect either the actual emissions or the risks associated with the supply that serves a buyer’s electricity demand. . . . Particularly in light of the SEC’s proposed rule – an important basis of which is to disclose climate-related risks to investors – and despite the fact that the Protocol intends Scope 2 inventories to ‘enhance stakeholder information . . . through transparent public reporting,’ disclosures should seek to communicate information about risks associated with reliance on fossil generation. . . . As noted above, the Protocol acknowledges that it was not *designed or intended to represent the emissions caused by the purchaser’s consumption of electricity.*” *Id.* (emphasis added).

These REC misrepresentations come directly at the expense of consumer. It is the ratepayers and taxpayers who actually pay for these wind and solar projects, which are often subsidized in double digit percentages of their actual costs and whose installation costs are rolled into their power bills. But the benefits of the REC—and any claimed emissions reductions—accrue entirely to the companies that turn around and use these same credits to mislead the people that subsidized them in the first place.

ii. Carbon offsets

Carbon offsets have repeatedly been exaggerated. Although these offsets are intended to compensate for greenhouse-gas emissions through actions such as planting trees or supporting renewable energy projects, many have failed to do anything to reduce emissions.

One particularly egregious example is a Delta Air Lines purchase of carbon offsets from a wind farm in Tuppadahalli, India. Shane Shifflett, *Companies are Buying Large Numbers of Carbon Offsets that Don’t Cut Emissions*, Wall St. J. (Sep. 8, 2022), <https://www.wsj.com/articles/renewables-carbon-credits-do-not-cut-emissions-united-nations-verra-gold-standard-11662644900>. Built in 2011, the wind farm sold Delta 300,000 credits for an undisclosed price, representing about 300,000 metric tons of carbon output that “would have been added to India’s air pollution had the wind farm’s energy production come instead from traditional power generation.” *Id.* But nothing about this transaction actually avoided any future emissions. The wind farm had already been operating profitably for nearly a decade, and Delta’s purchase

did not contribute to any increase in the farm’s power capacity, electricity distribution, or lifespan.

Another recent investigation looking at rainforest carbon-offset claims found that more than 90 percent of the credits likely represent no genuine carbon reductions. *The Carbon Con*, SourceMaterial (Jan. 18, 2023), <https://www.source-material.org/vercompanies-carbon-offsetting-claims-inflated-methodologies-flawed/> (“The world’s biggest companies, from Netflix to Ben & Jerry’s, are pouring billions into an offsetting industry whose climate claims appear increasingly at odds with reality.”). The investigation, conducted by the Guardian, Die Zeit, and Source Material, focused primarily on Verra, the leading carbon standard for the more \$2 billion voluntary offsets market. By analyzing scientific studies and conducting interviews with scientists, industry insiders, and indigenous communities, the investigators found that only a few of Verra’s rainforest projects actually showed evidence of *any* deforestation reductions on which the carbon offsets were based. Of the 94.5 million carbon credits claimed, only about 5.5 represent real emissions reductions. *Id.*

Yet another study by CarbonPlan, a San Francisco nonprofit, revealed that California’s Air Resources Board has generated up to 39 million carbon offsets without achieving real carbon savings. Lisa Song & James Temple, *The Climate Solution Actually Adding Millions of Tons of CO2 Into the Atmosphere*, ProPublica (Apr. 29, 2021). The state’s forest offset program, established a decade ago to reduce emissions by preserving trees, has produced over 130 million credits worth \$1.8 billion. *Id.* However, the program’s design allows developers to exploit regional averages, leading to the creation of “ghost credits.” *Id.* These credits did not preserve additional carbon in forests but enabled polluters to emit more CO₂, undermining the state’s long-term emissions goals.

And sometimes these carbon offsets literally go up in smoke. Sheila Flynn, *Carbon Offset Programs of Companies Like Microsoft, BP Go Up in Smoke as Wildfires Decimate Forests*, Independent (Aug. 4, 2021), <https://www.independent.co.uk/climate-change/news/carbon-offsets-microsoft-bp-forests-wildfires-b1897012.html>. Many corporations—including Microsoft and BP—have purchased carbon offsets throughout California, Oregon, and Washington, based on promises that trees would not be logged and would continue to serve as carbon sinks. But thanks to decades of forest mismanagement, these areas are now prone to frequent forest fires. Elizabeth Willmott, Microsoft’s carbon program manager explained, “We’ve bought forest offsets that are now burning.” *Id.* While the protocols associated with these programs are “supposed to be designed to anticipate these kinds of risks,

. . . what we’re seeing, basically, is that the life on the ground is looking a lot worse than [what] the protocol standards for generating these credits anticipated.” *Id.*

With this string of failures in carbon offset projects being publicized, it is increasingly apparent that corporations may be knowingly making false claims about their carbon offset initiatives. In cases where a corporation knew or should have known that a project would not achieve the offsetting goal, they should be held to account for false claims.

D. Large businesses and financial institutions are encouraging these false claims.

All of the above have been exacerbated as large businesses, financial institutions, and activist organizations collude to promote these false claims. This deceptive behavior harms consumers by misleading them and exploiting their good will while fostering an unhealthy market in which the only way to get ahead is to lie.

As Consumers’ Research has discussed at length in its ESG report, market manipulation using these false claims involves several distinct groups working in tandem:

Activists use their rights as shareholders to put ESG items on the agendas of target corporations and funds. Coordinators establish and maintain networks that connect activists with financial market actors and help to coordinate activists’ initiatives. Principals are the institutions that exercise direct or delegated control over the investment and proxy voting rights of securities. Consumers’ Research, *Defeating the ESG Attack on the American Free Enterprise System*, (Mar. 2023), https://consumersresearch.org/wp-content/uploads/2023/03/CR-Report_Defeating-ESG-Final.pdf.

A prime example of this collusion is when businesses pressure their suppliers to make false net-zero commitments—often relying on RECs and carbon offsets—and threaten to sever business relationships with anyone who does not comply. These collusive campaigns often start at the top. For example:

The Net Zero Asset Managers Initiative (NZAMI) is a network of asset managers committed to using their investment management to support the goal of net-zero global greenhouse emissions by 2050 or sooner. Notable signatories include BlackRock, State Street Global Advisors, J.P. Morgan Asset Management, T. Rowe Price Group, UBS Asset Management, and Federated Hermes Limited. Signatories commit to “[i]mplement a stewardship and engagement strategy, with a

clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner.” The network sets its own policy positions, which it “expects” signatories to also adopt, including a position in support of “fossil fuel phase out” that refuses to finance or support the construction of new coal power plants.

[And t]he Glasgow Financial Alliance for Net Zero (GFANZ) coordinates the practices of signatory banks, insurance companies, and investors to align with net-zero emissions targets. One of its affiliated sector-specific alliances, the Net-Zero Banking Alliance (NZBA), is convened by the United Nations and focuses on the efforts of banking-sector financial institutions. Notable members include Bank of America, Citi, JPMorgan Chase, the Goldman Sachs Group, Inc., and Wells Fargo & Co. Members commit to align their lending and investment portfolios with efforts to reduce emissions to net zero by 2050 or sooner. *Id.*

These asset managers and banks use this cooperation to pressure corporations to adopt these policies, and these corporations turn around and use their own commitments to pressure their suppliers. Blake Morgan, *101 Companies Committed to Reducing Their Carbon Footprint*, *Forbes* (Aug. 26, 2019), <https://www.forbes.com/sites/blakemorgan/2019/08/26/101-companies-committed-to-reducing-their-carbon-footprint/> (“Walmart stores use 100% renewable energy sources, and the company even cut ties with suppliers that had manufacturing or distribution practices that added to carbon emissions.”; “[Volkswagen] recently introduced sustainability ratings for all of its suppliers so it can better pinpoint environmental concerns and create a carbon-neutral manufacturing process.”; “The grocery delivery service [Good Eggs] limits its carbon footprint by only sourcing local, sustainably grown food and requiring a completely transparent supply chain”). Because the only way to cost-effectively comply is by using cheap and dubious RECs and carbon offsets, these suppliers either participate in the deception, or fold to the competition. This creates a chain of deceit that extends beyond any individuals operations and perpetuates a massive myth of zero-emission endeavors.

Small businesses are among those most impacted by this corporate collusion. When large corporations make renewable energy commitments, they drive up the price of delivered electricity for other ratepayers. This creates a more challenging environment for small businesses with limited resources, which cannot afford to purchase the façade of zero emissions and face higher energy costs while trying to

compete with larger companies that claim to be environmentally responsible. And ultimately, it is consumers who pay for this.

Ironically, at least some of the organizations coordinating false renewable energy claims also have their fingers in climate nuisance suits alleging major players in the fossil fuel industry misled the public about the dangers of *their* products. For example, Michael Bloomberg, who co-chairs GFANZ and has donated significant money to coordinating and advancing many of the renewable and net-zero claims discussed above (and who makes millions in ESG consulting services), has also donated millions of dollars to groups providing financing for cities and states to pursue damages for misleading claims from fossil fuel companies. *See Bloomberg Publishes 2022 Impact Report*, Bloomberg (Apr. 20, 2023), <https://www.bloomberg.com/company/press/bloomberg-publishes-2022-impact-report/>; Laura S. Jarrell, *Attorneys General for Hire*, Am. Tort Reform Ass’n (June 15, 2022), https://www.atra.org/white_paper/attorneys-general-for-hire-a-disturbing-usurpation-of-traditional-state-police-powers-by-private-political-activists/.

Greater accountability in the corporate world is crucial to addressing this issue. Ensuring that zero-emission, net-zero, and sustainability claims and pledges are genuine and verifiable can help prevent businesses from misleading consumers and harming smaller competitors for their own advantage. Without proper oversight, corporate collusion will continue to erode trust and negatively impact the market.

IV. Permitting False Speech in a Regime that Punishes True Speech Raises Serious First Amendment Problems.

Environmental disclosures in an environmental, social, governance (ESG) framework have become a daily fact of life for most businesses. Many large passive investors (e.g., Blackrock), institutional investors (e.g., CALPERS), and proxy advisory firms (e.g., ISS) have pressured corporations to disclose their environmental performance in the name of reducing climate-related financial risk. These corporations, as mentioned above, in turn pressure their supply chains to disclose the same information to be used in the corporation’s own disclosures.

These disclosures are increasingly receiving government imprimatur. The SEC has proposed an extensive climate-risk disclosure policy for publicly traded corporations. 87 Fed. Reg. 21,334 (Apr. 11, 2022). The Federal Acquisition Regulatory Council has likewise proposed a similar disclosure program for all major suppliers of the

federal government. 87 Fed. Reg. 68,312 (Nov. 14, 2022).⁴ Most of these requirements are seeking two pieces of information: the volume of greenhouse-gas emissions associated with the company, and the company’s plan for reducing and achieving net-zero emissions going forward.

“[F]reedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). In *National Institute of Family & Life Advocates v. Becerra* (“*NIFLA*”), 138 S. Ct. 2361 (2018), the Supreme Court held that a compelled disclosure is subject to strict scrutiny (as a content-based regulation) *unless* it falls into one of two categories: (1) “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’”; or (2) regulation of “professional conduct, even though that conduct incidentally involves speech.” *Id.* at 2372.

As detailed above, environmental disclosures are not “factual” in their current form. Nor are they “incidental” to “conduct,” because they “regulat[e] the communication of [environmental information] rather than [environmental behaviors] themselves.” *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017). Defining terms in a manner that would pressure or require businesses to disseminate false environmental claims—like misrepresenting emissions of electric vehicles, “net zero” emissions of wind and solar projects, or emissions reductions from RECs and carbon offsets—would be subject to strict scrutiny and violate the First Amendment. And if the SEC mandating those disclosures would only heighten the First Amendment violation.

If nothing else, permitting false speech directly undermines the marketplace of ideas. The Supreme Court has often explained that the First Amendment is animated by the conviction that a thriving “marketplace of ideas” facilitates the truth through vigorous debate. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market[.]”); *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (describing the marketplace of ideas as “the theory of our Constitution” and concluding that our “[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982)

⁴ Both the SEC’s and the Federal Acquisition Regulatory Council’s proposed rules relate their “net-zero” disclosures and goal setting to limits in the Paris Agreement. The Paris Agreement is non-binding and has never been ratified by the Senate. Coercing companies to make false disclosures to comply with agreements falsely represented as binding seems doubly duplicitous.

“Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.” (cleaned up); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (“The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail[.]”).

By blessing false environmental claims, the current Green Guides subvert this marketplace, permitting or pressuring businesses to engage in deceptive speech and depriving consumers of the accurate information necessary for informed decision-making. The few companies who do refuse to participate in dishonest advertising suffer competitive disadvantage and pressure to avoid making any environmental claims whatsoever. This situation engenders a form of compelled silence, where businesses are effectively barred from expressing their authentic beliefs about their products or services. *Cf. Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (“There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.”)

All of this is particularly true because the Commission does not have authority to independently define or redefine industry terms. *Cf. 15 U.S.C. § 57a(a)*. At most, then, the Commission can only require entities to use language that accurately conveys their products and operations. *Cf. Expressions Hair Design*, 581 U.S. at 47–48. It also cannot authorize, pressure, or support the use of terms that would mislead consumers.

Chair Khan has rightly noted that this harms competition, consumers, and the environment. The Commission should remember this while it revisits the guides.