ORAL ARGUMENT SCHEDULED FOR MAY 19, 2014

No. 13-5281

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN MEAT INSTITUTE, *et al.*,

Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Appellees,

UNTIED STATES CATTLEMEN'S ASSOCIATION, *et al.*,

Intervenors for Appellees.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:13-cv-1033, Judge Ketanji Brown Jackson

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES, AND BUSINESS ROUNDTABLE SUPPORTING APPELLANTS AMERICAN MEAT INSTITUTE *ET AL.*

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STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), counsel for amici certify that a separate brief is necessary. Amici have a unique interest in this case, because the issue that the en banc court set for supplemental briefing—whether compelled commercial disclosures not related to preventing consumer deception are subject to review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), or *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)—has also been raised in *National Association of Manufacturers v. SEC*, No. 13-5252, 2014 WL 1408274 (D.C. Cir. Apr. 14, 2014), in which amici are the appellants. To counsel's knowledge, no other amicus brief supporting appellants in this case will raise the same arguments as this brief, including this brief's discussion of *Zauderer*'s requirement that the compelled disclosure be "purely factual and uncontroversial." 471 U.S. at 651.

Under Federal Rule of Appellate Procedure 29(c), amici state that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants:

Amici for Appellants: The National Association of Manufacturers; the Chamber of Commerce of the United States of America; Business Roundtable; Grocery Manufacturers Association

Amici for Appellees: American Grassfed Association; Food and Water Watch; Fox Hollow Farm; Fulton Farms; Marshy Meadows Farm; Organization for Competitive Markets; Ranchers Cattlemen Action Legal Fund; United Stockgrowers of America; South Dakota Stockgrowers Association; The Humane Society of the United States; United Farm Workers of America; Western Organization of Resource Councils; Tobacco Control Legal Consortium; Campaign for Tobacco-Free Kids; Advocates for Environmental Human Rights; American Cancer Society Cancer Action Network; American Lung Association; American Public Health Association; Americans for Nonsmokers' Rights; Center for Health, Environment & Justice; the Center for Science in the Public Interest; Essential Information; National Association of Consumer Advocates; National Association of County and City Health Officials; National Association of Local Boards of Health; Public Good Law Center; Public Health Law Center; Center for Food Safety; Animal Legal Defense Fund

Amici for Neither Party: Canada

References to the rulings at issue and related cases appear in the Brief for Appellants.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable respectfully submit this Corporate Disclosure Statement and state as follows:

1. The National Association of Manufacturers (NAM) states that it is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

2. The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

3. Business Roundtable (BRT) states that it is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than

16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders and generate more than $540 billion in sales for small and medium-sized businesses annually. BRT companies give more than $9 billion a year in combined charitable contributions. BRT has no parent corporation, and no publicly held company has 10% or greater ownership in BRT.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTE AND REGULATION

GLOSSARY

BRT	Business Roundtable
NAM	The National Association of Manufacturers
Principal USDA Br.	Brief for Federal Appellees, *Am. Meat Inst. v. USDA*, No. 13-5281 (D.C. Cir. filed Apr. 16, 2014)

INTEREST OF AMICI CURIAE

The National Association of Manufacturers, the Chamber of Commerce, and Business Roundtable have a strong interest in the issue set for supplemental briefing because it also has been raised in *National Association of Manufacturers v. SEC*, No. 13-5252, 2014 WL 1408274 (D.C. Cir. Apr. 14, 2014), in which amici are the appellants, as well as in many other cases that impact the interests of amici and their members. Indeed, amici frequently appear as parties and amici in cases involving compelled commercial speech issues. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); Brief of Amici Curiae Chamber of Commerce of the United States of America in Support of Plaintiffs-Appellees, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (No. 11-5332).

In *National Association of Manufacturers v. SEC*, plaintiffs (amici in this case) argued that the "conflict minerals" statute, 15 U.S.C. § 78m(p), and the Securities and Exchange Commission rule implementing that statute, 77 Fed. Reg. 56,274 (Sept. 12, 2012), violate the First Amendment. The statute and rule compel companies to state on their websites and in public reports filed with the Commission that certain of their products have not been found to be "DRC conflict free," a reference to the violent civil war in the Democratic Republic of the Congo. Amici contended in that case that strict scrutiny applies to the speech compelled by the statute and rule; or, at a minimum, the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service*

Commission, 447 U.S. 557 (1980), applies.[1] The standard set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), is inapplicable, amici argued, both because the statute and rule are not aimed at preventing consumer deception and because the compelled disclosures are not purely factual and uncontroversial.

On April 14, 2014, the panel issued its decision, holding that the compelled disclosures violate the First Amendment. The panel applied *Central Hudson*, after finding *Zauderer* inapplicable based on this Court's ruling in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), that "*Zauderer* is 'limited to cases in which disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'" *Nat'l Ass'n of Mfrs. v. SEC*, 2014 WL 1408274, at *9 (quoting *R.J. Reynolds*, 696 F.3d at 1213). Because "[n]o party has suggested that the conflict minerals rule is related to preventing consumer deception," and indeed, "[i]n the district court the Commission admitted that it was not," the Court held *Zauderer* inapplicable on that basis. *Id.* The Court separately stated that "it is far from clear that the description at issue—whether a product is 'conflict-free'—is factual and nonideological." *Id.*

[1] Because the question set for supplemental briefing here is whether mandatory disclosures of commercial information for reasons other than preventing deception are subject to review under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), or *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), amici do not address in this brief their arguments that strict scrutiny should apply in all circumstances of compelled speech, including the speech at issue in *National Association of Manufacturers v. SEC*.

The panel decided not to "hold the First Amendment portion of our opinion in abeyance" for this en banc decision, because "[i]ssuing an opinion now provides an opportunity for the parties in this case to participate in the court's en banc consideration of this important First Amendment question." *Id.* at *8 n.9.

SUMMARY OF ARGUMENT

In *R.J. Reynolds*, this Court correctly recognized that *Zauderer* review of compelled commercial speech is applicable only where the disclosure requirements are designed to serve "the State's interest in preventing deception of consumers." 696 F.3d at 1213 (quoting *Zauderer*, 471 U.S. at 651). Indeed, the Supreme Court held precisely that in *Zauderer*, 471 U.S. at 651, following *Central Hudson*'s holding that heightened scrutiny does not apply to misleading commercial speech, 447 U.S. at 563-64. To make the constitutional standard turn instead solely on whether the compelled disclosure is "purely factual and uncontroversial," as the government urges, would be contrary to both *Central Hudson* and *Zauderer*. Moreover, it would be contrary to Supreme Court cases holding that the First Amendment provides no less protection to factual speech than to ideological speech.

Applying *Central Hudson* to compelled disclosures not aimed at preventing deception would not, as the government contends, result in routine regulatory programs being called into question. Most of the compelled disclosures the government points to are aimed at protecting the public's health and safety, and would easily pass *Central Hudson* review. As for regulations aimed simply at providing

additional information that some consumers could find relevant, the same governmental interests could be served either by governmental dissemination of the information or by voluntary labeling regimes backed by existing governmental requirements that labeling cannot be false or misleading.

The government contends that, under *Zauderer*, compelled disclosures need only be "reasonably related" to *any* government interest—even an interest in merely providing additional information that some consumers may find of interest. But every compelled disclosure will necessarily provide additional information to consumers, so under the government's interpretation the "reasonably related" test would provide no meaningful limit. Companies could be forced to include any government-mandated messages on their labels or in their advertisements—such as identifying for customers those competitors that sell cheaper products, or detailing the number of their products that need repairs every year—subject only to a finding that the message is "purely factual and uncontroversial." A product's label could become a cacophony of government-mandated messages, drowning out the company's own messages about the product.

If this Court nonetheless concludes that *Zauderer* is *not* limited to preventing consumer deception, it is even more critical to require close review of whether a compelled disclosure is "*purely* factual and *uncontroversial*" before applying *Zauderer*'s more permissive standard. Some compelled disclosures strongly imply that the product at issue is inferior or morally tainted, thus forcing companies to denounce

themselves and disseminate a government message with which they fundamentally disagree. For instance, companies could be compelled to state that their products were not produced with "fair labor," or are not "green," or, as in *National Association of Manufacturers v. SEC*, not "conflict free," even though the companies disagree with the governmental message that their products are tainted. Such laws are repugnant to the First Amendment, and require searching judicial review.

ARGUMENT

I. *ZAUDERER* APPLIES ONLY TO COMPELLED DISCLOSURES INTENDED TO PREVENT CONSUMER DECEPTION.

A. *R.J. Reynolds* Correctly Held That Supreme Court Precedent Limits *Zauderer* Review To Compelled Disclosures Intended To Prevent Deception.

In *Zauderer*, the Supreme Court held that compelled commercial disclosures are permissible where they are "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651; *see id.* (holding that compelled disclosures could "be appropriately required in order to dissipate the possibility of consumer confusion or deception" (internal alteration omitted) (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)). This circuit correctly concluded in *R.J. Reynolds* that "by its own terms, *Zauderer*'s holding is limited to cases" in which the compelled disclosure is intended to prevent deception. *R.J. Reynolds*, 696 F.3d at 1213; *see also Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d at 959 n.18.

As the panel opinion in this case noted, "[n]either party has called our attention to any Supreme Court case extending *Zauderer* beyond mandates correcting deception, and we have found none." *Am. Meat Inst. v. USDA*, No. 13-5281, 2014 WL 1257959, at *6 (D.C. Cir. Mar. 28, 2014). Rather, both *United States v. United Foods*, 533 U.S. 405 (2001), and *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), refused to apply *Zauderer* on the ground that the disclosures at issue were not "necessary to make voluntary advertisements non-misleading for consumers." *United Foods, Inc.*, 533 U.S. at 416; *see Ibanez*, 512 U.S. at 146 (refusing to apply *Zauderer* because the required disclosure was not "an appropriately tailored check against deception or confusion"). *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010), likewise held that one of "the essential features" of *Zauderer* is that the "required disclosures are intended to combat the problem of inherently misleading commercial advertisements."

This interpretation of *Zauderer* is also required by *Central Hudson* itself. *Central Hudson* holds that "commercial messages that do not accurately inform the public" are not entitled to heightened scrutiny, but "[i]f the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed." 447 U.S. at 563-64. *Central Hudson* and *Zauderer* should be read not as conflicting standards, but rather as two parts of the same doctrinal whole: when commercial speech is inaccurate or misleading, it may be banned or additional factual disclosures may be compelled to combat consumer confusion or deception; commercial speech

laws aimed at other ends must "directly advance" a "substantial interest" in a narrowly tailored fashion. *Id.*

The government contends that the dividing line between *Zauderer* and *Central Hudson* is instead solely whether the compelled disclosure was "purely factual and uncontroversial." Principal USDA Br. 24. However, "[t]he right against compelled speech is not, and cannot be, restricted to ideological messages." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d at 957. "That a disclosure is factual, standing alone, does not immunize it from scrutiny." *Nat'l Ass'n of Mfrs. v. SEC*, 2014 WL 1408274, at *9. Indeed, the Supreme Court has repeatedly held that "th[e] general rule, that the speaker has the right to tailor the speech, applies ... equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573-74 (1995); *see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) ("cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

The dividing line between *Zauderer* and *Central Hudson* also cannot be that *Zauderer* involved compelled speech, while *Central Hudson* involved speech restrictions. The Supreme Court has held on numerous occasions that "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as "regulations that suppress, disadvantage, or impose

differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (First Amendment protection "includes both the right to speak freely and the right to refrain from speaking"). The reasoning of these cases—"[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech"—applies equally in the commercial and the non-commercial context. *Riley*, 487 U.S. at 795; *see Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion) ("Compelled access ... forces speakers to alter their speech to conform with an agenda they do not set."). *Zauderer* can be reconciled with these cases only by limiting it to laws reasonably designed to prevent deception, which, as Appellants argue, satisfy *Central Hudson* as well as *Zauderer*.

B. Extending *Zauderer* To All Compelled Factual, Non-Ideological Commercial Disclosures Would Permit Severe Intrusions Upon Freedom Of Speech.

Extending *Zauderer*, as the government urges, beyond its narrow confines to apply to compelled speech supported by *any* governmental interest would render its test meaningless. "Were consumer interest," rather than the risk of consumer deception, "alone sufficient, there is no end to the information that states could require manufacturers to disclose." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). Because all compelled disclosures result in additional information being disclosed, the test would provide no limits.

The government contends that such a broad power to compel disclosure of "purely factual and uncontroversial" information is no reason for concern, quoting *Zauderer* for the proposition that "a commercial actor's 'constitutionally protected interest in not providing any particular factual information ... is minimal.'" Principal USDA Br. 23 (omission in original) (quoting *Zauderer*, 471 U.S. at 651). But that statement in *Zauderer* turned upon the factual context of that case, which concerned consumer deception. Zauderer's First Amendment interest in withholding the information at issue was indeed "minimal": He was required to clarify that contingent-fee customers would be charged for legal costs even if they did not prevail, "in order to dissipate the possibility of consumer confusion or deception" about "the terms under which [Zauderer's] services will be available." *Zauderer*, 471 U.S. at 651.

It does not follow, however, that the First Amendment interests of *all* commercial actors in being free from compulsion to state *any* factual information for *any* reason is also "minimal." Far from it. Because, as discussed above, the government's theory provides no limits, it could be used to justify the compelled public disclosure of an endless array of information. Companies have limited time and space to disseminate their own messages, and consumers have limited attention to give to any product. The government's interpretation of *Zauderer* therefore presents a serious risk that a company's own message about its products or services could be drowned out by a cacophony of government-mandated messages that the company is forced to disseminate.

The mandated inclusion of a government message thus reduces companies' ability to convey their own messages about the attributes of the product that they consider important. *See Riley*, 487 U.S. at 795. For instance, a government requirement that a company discuss the energy use or environmental impact of the manufacturing processes used to create a product in all television advertisements would reduce the company's ability to use the advertisements to convey its own messages about the product, such as its price or superior performance. Moreover, the very act of disseminating a particular piece of information conveys a value judgment that the information *should* be important to consumers.

On the other hand, limiting *Zauderer* review to compelled disclosures intended to prevent consumer deception or confusion would not, as the government asserts, call into question "thousands of routine regulations." Principal USDA Br. 23-24 (quoting *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (noting that "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information"). Many of these regulations require disclosure of factual information to the *government*, not the public, and are thus not commercial speech at all. *See Rowe*, 429 F.3d at 316 (referring to "the requirement to file tax returns"). The appropriate constitutional test for these regulations is therefore neither *Central Hudson* nor *Zauderer*, and the decision in this case will have no impact upon them. Most of the remaining examples given in *Rowe* and *Sorrell* are disclosures

intended to protect public health and safety by warning consumers of physical dangers that products pose to them. In general, such regulations would easily satisfy *Central Hudson*, as requiring companies to disseminate accurate warnings about the physical dangers of using their products directly advances the government's interest in public health and safety in a narrowly tailored way.

Finally, regulations that are not intended to protect public health and safety, but merely to provide additional information that could be relevant to some consumers' purchasing decisions, could be easily replaced by less speech-restrictive means of accomplishing the same goals. For instance, the government always has the option of speaking itself, rather than requiring private companies to carry its message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) ("the Government's own speech ... is exempt from First Amendment scrutiny"). Additionally, "those consumers interested in such information [can] exercise the power of their purses by buying products from manufacturers who voluntarily reveal it." *Amestoy*, 92 F.3d at 74. Such voluntary disclosures (for instance, that a product is "organic," "free range," or "free trade"), are backed as necessary by laws against false or misleading labeling, thus providing consumers with information they desire without intruding upon companies' rights to present their own messages rather than messages mandated by the government.

II. IF THE COURT HOLDS THAT *ZAUDERER* APPLIES BEYOND LAWS AIMED AT PREVENTING DECEPTION, IT SHOULD EMPHASIZE THAT COMPELLED DISCLOSURES MUST BE BOTH "PURELY FACTUAL" AND "UNCONTROVERSIAL."

If the Court were to hold that *Zauderer* extends beyond the interest in preventing consumer deception, it would be even more critical that courts then review closely whether any compelled disclosures are both "*purely* factual *and* uncontroversial." *Zauderer*, 471 U.S. at 651 (emphasis added). As discussed above, there is an inherent danger that compelled disclosures (even purely factual and uncontroversial disclosures), will be viewed as value judgments. This risk is sharply heightened when the compelled disclosure is not "purely factual" or "uncontroversial," but instead conveys an express or implied message with which the speaker disagrees. As the Supreme Court has explained, "we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns of similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget." *Riley*, 487 U.S. at 798. Although this is "factual information" that "might be relevant to the listener," compelling its disclosure would "clearly and substantially burden the protected speech" by effectively forcing the speaker to criticize his own position. *Id.*

Similarly, compelled disclosures in the commercial realm can be a way of forcing companies to denounce their own products as inferior or morally tainted, a

conclusion with which the company may strongly disagree. For instance, a Vermont statute compelled dairy manufacturers to label milk as deriving from "rBST-treated cows." *Amestoy*, 92 F.3d at 70. Although this is "factual" information, compelling its inclusion on labels implies that the milk is somehow dangerous or inferior, even though the FDA had "concluded that rBST has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns associated" with it. *Id.* at 73. A San Francisco ordinance similarly compelled cell phone distributors to disseminate statements that "cell phones emit radio-frequency energy," a "possible carcinogen," with suggestions of ways to "reduce your exposure." *CTIA—The Wireless Ass'n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054, 1058 (N.D. Cal. 2011), *aff'd*, 494 F. App'x 752 (9th Cir. 2012). These allegedly "factual" disclosures at a minimum implied that cell phones are dangerous to health, even though FCC has concluded that cell phone radiofrequency emissions are safe. *Id.* at 1062. Far from "dissipat[ing] the possibility of consumer confusion or deception," *Zauderer*, 471 U.S. at 651, these types of compelled disclosures themselves present a high risk of misleading or deceiving consumers. Likewise, in *National Association of Manufacturers v. SEC*, compelling manufacturers to state that certain of their products "have not been found to be 'DRC conflict free,'" "requires an issuer to tell consumers that its products are ethically tainted" and bear "moral responsibility for the Congo war," a highly controversial and ideological message with which many issuers, including those "who condemn[] the atrocities of the Congo war in the

strongest terms," fundamentally disagree. *Nat'l Ass'n of Mfrs v. SEC*, 2014 WL 1408274, at *9.

Although *Zauderer* found heightened scrutiny unnecessary because the State had "attempted only to prescribe what shall be orthodox in commercial advertising," without a strict application of *Zauderer*'s "purely factual and uncontroversial" requirement, compelled commercial speech may instead become a mechanism for the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Zauderer*, 471 U.S. at 651, (quoting *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Companies could be forced, for instance, to disclose whether their products are "socially conscious," or support "family values"—where those terms were defined by a statute in seemingly "factual" terms—or even to report publically on "the political ideologies of their board members," *Nat'l Ass'n of Mfrs. v SEC*, 2014 WL 1408274, at *10, or their views on hot-button social issues such as abortion or same-sex marriage. Such compelled disclosures, even if claimed to be "factual," would operate as a shaming mechanism, forcing companies to denounce their own products, services, or organizations as ethically tainted.

Nothing in the First Amendment, of course, prevents the government from taking positions on social and moral issues and disseminating those views to the public. *Johanns*, 544 U.S. at 553. But it is repugnant to the First Amendment for the government to force private companies to disseminate these messages. *Pac. Gas*, 475

U.S. at 9 (plurality opinion). The Court should hold that *Zauderer* is limited to compelled disclosures aimed at preventing consumer deception. If it does not, the Court should strongly reaffirm that *Zauderer* is limited to "*purely* factual *and* uncontroversial" disclosures, where the company has no objection to the message conveyed by the compelled speech. *Zauderer* review has no place in evaluating statutes that force companies to bear scarlet letters denouncing their own products.

CONCLUSION

For the foregoing reasons, the Court should rule that mandatory disclosure of commercial information compelled for reasons other than preventing consumer deception is not subject to review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Dated: April 23, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Garamond Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 3,587 words exclusive of the statement regarding separate briefing, certificate as to parties, rulings, and related cases, Rule 26.1 disclosure statement, table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The words of the Reply Brief of Appellants do not exceed 3,750 words, as mandated by Fed. R. App. P. 29(d). The undersigned used Microsoft Word 2007 to compute the count.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Peter D. Keisler
Peter D. Keisler