EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 19, 2014

No. 13-5281

United States Court of Appeals
For the District of Columbia Circuit

AMERICAN MEAT INSTITUTE, *et al.*,
Plaintiffs–Appellants,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Defendants–Appellees,
and
UNITED STATES CATTLEMEN'S ASSOCIATION, *et al.*,
Intervenors for Defendants–Appellees.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:13-cv-1033-KBJ (Hon. Ketanji Brown Jackson)

SUPPLEMENTAL BRIEF FOR INTERVENORS FOR DEFENDANTS-APPELLEES UNITED STATES CATTLEMEN'S ASSOCIATION, NATIONAL FARMERS UNION, AMERICAN SHEEP INDUSTRY ASSOCIATION, AND CONSUMER FEDERATION OF AMERICA

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INTRODUCTION

On March 28, 2014, the panel issued its opinion in *American Meat Institute v. United States Department of Agriculture*, affirming the district court's denial of a preliminary injunction. No. 13-5281, slip op. at 15 (D.C. Cir. Mar. 28, 2014), ECF No. 1485877 ("*AMI*"). The panel concluded, *inter alia*, that the relaxed standard of review declared in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), also applied to compelled disclosures serving purposes other than just the prevention of deception.

On April 4, 2014, this Court ordered that the panel's judgment be vacated and that the case be reheard *en banc*. *AMI*, No. 13-5281, Order, April 4, 2014, ECF No. 1487010. This Court also ordered that the parties submit supplemental briefs addressing:

> Whether, under the First Amendment, judicial review of mandatory disclosure of 'purely factual and uncontroversial' commercial information, compelled for reasons other than preventing deception, can properly proceed under [*Zauderer*,] or whether such compelled disclosure is subject to review under *Central Hudson Gas & Electric v. PSC of New York*, 447 U.S. 56 (1980).

Id.

United States Cattlemen's Association, National Farmers Union, American Sheep Industry Association, and Consumer Federation of America (collectively, "Intervenors") respectfully submit this supplemental brief in response to the Court's Order.

SUMMARY OF THE ARGUMENT

Because *Zauderer*, by its own terms, applies to purely factual and uncontroversial mandatory commercial disclosures aimed at addressing misleading and/or confusing commercial speech, and the record here demonstrates that the measure at issue addresses consumer confusion, this Court need not decide whether *Zauderer* extends to disclosures aimed at addressing other governmental interests. Nonetheless, if the Court addresses this question, it should conclude that *Zauderer* applies to factual and uncontroversial compelled commercial disclosures that address government interests beyond the prevention of deception to resolve this case. Such an interpretation of *Zauderer* has not been foreclosed by the U.S. Supreme Court and is consistent with the Supreme Court's treatment of the First Amendment protections afforded to commercial speech. In addition, the prior cases of this Circuit involving relevant challenges to compelled commercial disclosures of purely factual and uncontroversial information have applied *Zauderer* without limiting it to commercial disclosures that address government interests in the prevention of deception. To the extent that two decisions of this Circuit have suggested any preclusive effect, they should not be followed by the *en banc* Court because the disclosures required in those cases were not of purely factual and uncontroversial information. Finally, a number of other Circuits have

read *Zauderer* as extending to factual commercial disclosures that address government interests beyond the prevention of deception.

ARGUMENT

I. The Question of Whether *Zauderer* Applies to Compelled Disclosures Addressing Issues Other Than Deception Need Not Be Decided Here.

Zauderer, by its own terms, applies to compelled disclosures beyond those that address "deception," to the extent that deception implies intent of the speaker to trick or deceive consumers. In referring to deception, *Zauderer* appears to address the more general notion of commercial speech that is misleading or confusing to consumers. "Deception" is defined as "[t]he action of deceiving or cheating; deceived condition" and "[s]omething which deceives; a piece of trickery." The New Shorter Oxford English Dictionary 607 (Oxford Univ. Press, Thumb Index Ed. 1993). In contrast, "misleading" is defined as something "[t]hat leads someone astray, that causes error; imprecise, confusing, deceptive." *Id.* at 1791. As the Supreme Court noted, its prior commercial speech decisions have indicated that disclosures may be needed "to dissipate the *possibility of consumer confusion or deception*." *Zauderer*, 471 U.S. at 651 (quoting *In re R.M.J.*, 445 U.S. 191, 201 (1982)) (emphasis added).

That the Supreme Court used these terms interchangeably is demonstrated by its description of the effect of the advertisement at issue: "The assumption that substantial numbers of potential clients would be so misled is hardly a speculative

one. . . . When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the public . . . before it [may] determine that the [advertisement] had a tendency to mislead.'" *Id.* at 652-53 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965)); *see Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229, 250 (2009) (explaining that the required disclosures at issue both in that case and in *Zauderer* were "intended to combat the problem of inherently misleading commercial advertisements"); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 414 (D.C. Cir. 2012) (applying *Zauderer* and finding that a rule aiming to "prevent consumer confusion" was "reasonably related to that interest").

Here, evidence on the record demonstrates that, prior to the implementation of the new country of origin labeling ("COOL") regulations in 2013, consumers were being or could be confused, and country of origin labeling requirements help address this confusion. *See Am. Meat Inst. v. U.S. Dep't of Agric.*, No. 13-CV-1033 (KBJ), slip op. at 14-17 (D.D.C. Sept. 11, 2013).[1] Accordingly, *Zauderer* applies here, and the Court need not decide whether *Zauderer* applies to compelled

[1] *See also United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302-03 (1940) (explaining that the purpose of U.S. customs labeling requirements was to allow consumers to, "by knowing where the goods were produced, be able to buy or refuse to buy them . . ." and that inaccurate labeling could cause a consumer to "be deceived in buying as the product of one country the product of another which he did not want").

disclosures aimed at addressing interests other than prevention of "deception" to resolve the present case.

II. Applying *Zauderer* to Factual and Uncontroversial Mandatory Commercial Disclosures Compelled for Reasons Other Than Preventing Deception Is Consistent with Supreme Court Cases Concerning, and the Policy Underlying, First Amendment Protections for Commercial Speech.

The Supreme Court has recognized that the differences between commercial and noncommercial speech, and the interests implicated by their regulation, justify the application of a lower level of scrutiny when examining measures affecting commercial speech. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("*Virginia Pharmacy*") (noting that the differences between commercial and noncommercial speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired").

In the context of the First Amendment protections afforded to commercial speech, the Supreme Court has developed two tests. First, having recognized the reduced First Amendment concerns with respect to commercial speech, the Supreme Court in *Central Hudson* explained that regulations on commercial speech generally receive "intermediate" scrutiny, *i.e.*, the measure at issue must directly advance a substantial government interest and be no more extensive than

necessary to serve that interest.[2] 447 U.S. at 563-66. Second, recognizing the differences between restrictions on commercial speech and certain compelled commercial disclosures, the Supreme Court in *Zauderer* applied an even lower rational basis standard of review having found that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 650-51.

The Supreme Court has not explicitly defined the scope of *Zauderer* or the types of compelled commercial disclosures it encompasses and has directly addressed *Zauderer* in only one other case (which involved a functionally equivalent measure). Nonetheless, the Supreme Court's opinions reviewing restrictions on commercial speech provide insight into the policy reasons underlying the treatment of commercial speech. The same hierarchical structure that led the Supreme Court to apply a lower level of scrutiny to commercial speech informs the treatment of factual and uncontroversial compelled commercial disclosures. As the Supreme Court recognized, the nature of any interests implicated by purely factual and uncontroversial compelled commercial disclosures distinguishes such measures from restrictions on commercial speech

[2] An initial question addressed by *Central Hudson* is whether the commercial speech concerns a lawful activity and is not misleading. 447 U.S. at 566. It is "well settled" that the government can "prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Zauderer*, 471 U.S. at 638.

and from other compelled disclosures. *See id*. These characteristics remain the same regardless of the governmental interest the disclosure seeks to address. Thus, the application of *Zauderer* to factual and uncontroversial compelled commercial disclosures, whether aimed at preventing deception or serving other governmental interests, is both a logical and reasonable application of the Supreme Court's treatment of commercial speech under the First Amendment.

A. The nature of commercial speech merits more limited First Amendment protection than that accorded to noncommercial speech.

The Supreme Court has recognized "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." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983) (quoting *Ohralik v. Ohio*, 436 U.S. 447, 455-56 (1978)). The Supreme Court has typically considered "commercial speech" to be that which does nothing but propose a commercial transaction. *See id.* at 66. Advertisements as well as speech otherwise associated with a good or service have been treated as commercial speech. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (applying *Central Hudson* to a measure that banned the inclusion of alcohol content on beer labels); *see also R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012)

("*Reynolds*") (assuming that "marketing efforts (packaging, branding, and other advertisements) can be properly classified as commercial speech").

The Supreme Court has acknowledged that commercial speech is afforded First Amendment protection, but its "jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik*, 436 U.S. at 456); *accord Central Hudson*, 447 U.S. at 563 n.5 (explaining that prior decisions on commercial speech "have rested on the premise that such speech, although meriting some protection, is of lesser constitutional moment than other forms of speech").

The Supreme Court first squarely addressed the protections afforded to commercial speech in *Virginia Pharmacy*. While the Supreme Court recognized that commercial speakers have First Amendment interests, it characterized these interests as economic. *Virginia Pharmacy*, 425 U.S. at 762. By contrast, the Supreme Court explained: "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. ... Generalizing, society also may have a strong interest in the free flow of commercial information." *Id.* at

762-64. The Supreme Court noted that, because commercial speakers are likely those that know the most about the product or service being advertised, and advertising is the "[s]ine qua non of commercial profits," there is "little likelihood" that commercial speech would be "chilled by proper regulation and foregone entirely." *Id.* at 770-71 & n.24.

These differences were again emphasized when the Supreme Court set forth the test to be utilized when examining restrictions on commercial speech in *Central Hudson*. 447 U.S. 557. The Supreme Court reiterated that the differences between commercial and noncommercial speech resulted in commercial speech being accorded "lesser protection" as compared to "other constitutionally guaranteed expression," and that the main First Amendment concern in providing protection to commercial speech is "the informational function of advertising." *Id.* at 563. Based on this understanding, the Supreme Court explained that its jurisprudence had developed such that regulations on commercial speech were reviewed under a lesser, "intermediate" scrutiny. *Id.* at 565.

Since *Central Hudson*, the Supreme Court has repeatedly affirmed that the differences between commercial speech and "speech at the First Amendment's core" warrant the application of a lesser level of scrutiny. *See, e.g., Fl. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). The Supreme Court has also identified disclosures as a potential alternative to restrictions on speech. *See Central*

Hudson, 447 U.S. at 571 (noting that a disclosure requirement may have been a less restrictive alternative compared to an advertising ban for achieving the government's interest); *Bates v. State Bar of Az.*, 433 U.S. 350, 375 (1977) (stating that in regulating commercial speech, "the preferred remedy is more disclosure, rather than less").

B. The nature of compelled commercial disclosures warrants lower First Amendment scrutiny than restrictions on commercial speech.

The differences between restrictions on and compelled disclosures of commercial speech were identified in *Zauderer*, which was the first time the Supreme Court was faced with the question of the First Amendment protections that should be afforded to mandatory disclosures of commercial speech. In that case, the Supreme Court reviewed a disclosure requirement concerning attorney advertisements mentioning contingent-fee rates. *Zauderer*, 471 U.S. at 632. In making its determination, the Supreme Court rejected the argument that "the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial government interest other than preventing deception" because this approach "overlook[ed] material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Noting that the compelled speech at issue was "purely factual and uncontroversial," and "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers

of the information such speech provides," the Supreme Court found that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651. The *Zauderer* Court also rejected the application of a "least restrictive means" analysis, explaining, "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized." *Id.* at 651 n.14.

The Supreme Court found instead that a reasonable relationship test should be applied to determine whether the disclosure at issue passed constitutional muster. *Id.* at 651. It explained that the speaker's rights "are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

The holding, while referring to the government interest of preventing deception at stake in that case, does not mandate a narrow reading that no other government interest can justify analyzing a compelled commercial disclosure under the rational relationship test. The only other case in which the Supreme Court has squarely considered *Zauderer* is *Milavetz*. The Supreme Court there agreed with the Government that, because the measure was directed at misleading

commercial speech, "and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech," *Zauderer* review applied. *Milavetz*, 559 U.S. at 249. Because the measure at issue in *Milavetz* "share[d] the essential features of" the measure at issue in *Zauderer* — a required disclosure of factual information for the purpose of combating misleading advertisements, *id.* at 250 — the Supreme Court had no reason to consider whether *Zauderer* review would apply to compelled disclosures for other reasons. Thus, *Milavetz* provides no indication that *Zauderer* should be limited in scope. *Accord Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 520 (2012) ("'[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.'" (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821)).

Appellants have also pointed to *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), stating that the Supreme Court "declined to apply *Zauderer*" in that case because *Zauderer* is limited to "voluntary advertising." Appellants' Br. at 28, Sept. 23, 2013, ECF No. 1457879. In that case, however, the Supreme Court was not faced with the question of whether to apply *Zauderer*, as the measure at issue was compelled subsidization of speech with which the speaker disagreed. *United Foods*, 533 U.S. at 410. The Supreme Court referenced *Zauderer* only to point out that its decision was not "inconsistent" with *Zauderer*. *Id.* at 416. Thus,

United Foods does not limit the application of *Zauderer* in any manner. *See New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) ("*NYSRA*") (rejecting the argument that the language in *United Foods* recognizing the facts in *Zauderer* was intended to be a holding that *Zauderer* applied only to such facts).

In short, the different interests implicated by restrictions on commercial speech versus compelled commercial disclosures support the conclusion that a more relaxed level of scrutiny should be applied when reviewing the latter measures regardless of the government interest being addressed.

C. The First Amendment interests implicated by purely factual and uncontroversial compelled commercial disclosures are lesser than those implicated by other forms of compelled speech.

An additional distinction can be drawn between purely factual and uncontroversial commercial disclosures — the type of disclosure at issue in *Zauderer* and here — as compared to other forms of compelled disclosures. As purely factual and uncontroversial compelled commercial disclosures do no more than require commercial speakers to provide accurate, verifiable, objective, and viewpoint-neutral information about goods or services, a commercial speaker has only a minimal interest in not providing this information. *See Zauderer*, 471 U.S. at 650-51. This is in stark contrast to other types of compelled disclosures, which

may require a speaker to carry a biased message or an implicit non-factual message and which may implicate the same or similar interests as restrictions on speech.

In certain circumstances, requirements to speak can raise the same constitutional concerns as restrictions on speech. *Id.* at 650. For example, in the noncommercial speech context, similar interests are implicated when addressing measures that restrict and compel speech. As the Supreme Court has explained, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1976) (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

This is not the case for purely factual and uncontroversial compelled commercial disclosures. As recognized in *Zauderer*, the compelled disclosure at issue did not implicate the same interests as other compelled speech because it did not seek 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.'" 471 U.S. at 651 (quoting *Barnette*, 319 U.S. at 642). Instead, the interests implicated by the compelled disclosure of factual and uncontroversial

commercial speech are the "minimal" interests of the commercial speaker in "*not* providing any particular factual information[.]" *Id.*

The Supreme Court has recognized that distinctions may be drawn between different types of compelled speech in other contexts as well. For example, in *Pacific Gas & Electric Co. v. Public Utility Communication of California*, 475 U.S. 1 (1986), the Supreme Court reviewed a measure requiring a utility company to allow another entity to utilize extra space in a billing envelope. Finding that the measure could result in the utility company being forced to either agree with the other entity's view or respond, the Supreme Court explained that it could not withstand First Amendment scrutiny absent a compelling government interest. *Id.* at 16-17 (plurality opinion). The Supreme Court noted, however, that the compelled speech at issue was distinct from other types of compelled speech, explaining that the measure at issue is

> readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has *substantial leeway* in determining appropriate information disclosure requirements for business corporations. *See Zauderer*[, 471 U.S. at 651]. Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.

Id. at 15-16 & n.12 (emphasis added). *Compare United Foods*, 533 U.S. at 410-11 ("First Amendment concerns apply here because of the requirement that producers

subsidize speech with which they disagree."), *with Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470-73 (1997) (distinguishing the measure at issue from other compelled subsidization of speech cases because "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience [and] [n]one of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit").

Because compelled commercial disclosures that involve purely factual and uncontroversial information do not implicate any significant First Amendment concerns, it is logical that a lesser burden be imposed on the government to support such a measure. Similarly, because these types of disclosures implicate lessened interests than restrictions on speech, it is logical to impose a lesser burden on such disclosures than restraints on commercial speech. These underlying concepts have been recognized by the Supreme Court in other contexts, and as discussed below, a number of Circuit Courts have recognized that the unique nature of purely factual and uncontroversial compelled commercial disclosures justifies the application of the rational basis test expounded in *Zauderer*, even where the speech is compelled for reasons other than the prevention of deception.

III. This Court Has Applied *Zauderer* to Challenges to Purely Factual and Uncontroversial Commercial Disclosure Requirements and Should Not Limit *Zauderer* Only to Such Requirements Aimed at Preventing Deception.

This Court has only twice addressed First Amendment challenges to required commercial disclosures of purely factual and uncontroversial information — in *Spirit Airlines* and the panel decision here. In both cases, this Court applied *Zauderer* and did not limit the application of *Zauderer* to disclosures aimed at preventing deception. *See AMI*, slip op. at 9-14; *Spirit Airlines*, 687 F.3d at 412-15.[3]

While divided panels of this Court suggested in *Reynolds* and *National Association of Manufacturers v. SEC*, No. 13-5252, slip op. (D.C. Cir. Apr. 14, 2014) ("*NAM v. SEC*"), that *Zauderer* might be so limited, the disclosures at issue in those cases apparently did not consist of *purely* factual and uncontroversial information. As those disclosures apparently did not satisfy a fundamental prerequisite for the *Zauderer* analysis, such an analysis would not have been warranted regardless of whether the government interest in the disclosures was related to preventing deception. To the extent those decisions categorically limited *Zauderer* to disclosures preventing deception before analyzing whether the

[3] This Court has also previously cited with approval *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104, 113-16 (2d Cir. 2001), which upheld a mercury hazard labeling law under *Zauderer*. *See UAW-Labor Empl. & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003).

particular disclosures were disclosures of purely factual and uncontroversial information that could trigger *Zauderer* in the first instance, they put the cart before the horse, and they should not be followed by the *en banc* Court. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc) ("An *en banc* court may . . . set aside its own precedent if . . . it decides that the panel's holding on an important question of law was fundamentally flawed."). Doing so would also be consistent with the Court's suggestions in cases in other contexts that *Zauderer* is not limited to disclosure requirements preventing deception.

A. In the only two cases from this Circuit involving purely factual and uncontroversial commercial disclosures, this Court has applied Zauderer *without limiting it to disclosures aimed at preventing deception.*

Spirit Airlines and the panel decision here are the only cases in this Circuit addressing First Amendment challenges to mandatory commercial disclosures of *purely* factual and uncontroversial information. This Court applied *Zauderer* in both cases. The panel here held that *Zauderer* applies "not only to mandates aimed at curing deception but also to ones for other purposes." *AMI*, slip op. at 13. *Spirit Airlines* did not foreclose the application of *Zauderer* for such "other purposes."

Indeed, in *Spirit Airlines*, this Court stated that disclosure requirements "are not the kind of limitations that the [Supreme] Court refers to when invoking the *Central Hudson* standard of review." 687 F.3d at 413. *Spirit Airlines* stressed the

distinction in Supreme Court cases between disclosure requirements, which are generally subjected to the *Zauderer* analysis, and restrictions on commercial speech, which are generally subjected to *Central Hudson* review. *Id.* at 412-14. While *Spirit Airlines* at times refers to *Zauderer* as applying to "'*misleading* commercial speech'" and "'preventing deception,"' it also includes much broader language relating to "consumer confusion" and disclosure requirements in general. *Id.* at 412, 414-15 (citations omitted).

In *Spirit Airlines*, this Court specifically upheld under the *Zauderer* standard a Department of Transportation rule requiring airlines to explicitly and most prominently disclose the total price of the fare. *Id.* at 408-09. The COOL rule here, like the rule at issue in *Spirit Airlines*, is a disclosure requirement "aimed at providing accurate information, not restricting it," *id.* at 414, and provides for disclosures of purely factual and uncontroversial information. Accordingly, this Court may, and should, apply the *Zauderer* standard to the COOL rule.

B. **Reynolds *did not involve purely factual and uncontroversial disclosures and did not hold that* Zauderer *is limited to disclosures preventing deception.***

As the panel here concluded, the language referencing prevention of deception in *Reynolds* is not properly construed as a holding. *AMI*, slip op. at 12. Indeed, as the panel here noted, *Reynolds* involved features "that render wholly inapplicable *Zauderer*'s characterization of the speaker's interest as 'minimal,'" as

it "rejected any idea that the mandated disclosures were of 'purely factual and uncontroversial' information." *Id.* (citation omitted).

Reynolds involved regulations requiring cigarette manufacturers to include on cigarette packages "inflammatory" and "graphic" images selected by the Food and Drug Administration intended to evoke emotion or embarrassment or even "shock the viewer," as well as a "provocatively-named hotline" (1-800-QUIT-NOW). 696 F.3d at 1216-17. The *Reynolds* majority made clear that the case involved "the scope of the government's authority to force the manufacturer of a product to *go beyond* making purely factual and accurate commercial disclosures and undermine its own economic interest," in particular "by making 'every single pack of cigarettes in the country [a] mini billboard' for the government's anti-smoking message." *Id.* at 1212 (emphasis added) (quoting *FDA*, Tobacco Strategy Announcement (Nov. 10, 2010)); *see also id.* (asking "how much leeway should this Court grant the government when it seeks to compel a product's manufacturer to convey the state's subjective — and perhaps even ideological — view that consumers should reject this otherwise legal, but disfavored, product?"). The *Reynolds* Court noted that "[t]he question . . . is whether the graphic warnings actually *do* constitute the type of disclosure requirements that are reviewable under *Zauderer*'s relaxed standard . . . or whether they are more akin to attempts to

'prescribe what shall be orthodox in . . . matters of opinion.'" *See id.* at 1211 n.5 (quoting *Zauderer*, 471 U.S. at 651).

Ultimately, the *Reynolds* majority found that the graphic warnings "do not constitute the type of 'purely factual and uncontroversial' information" or 'accurate statement[s]' to which the *Zauderer* standard may be applied," and the images and the hotline "cannot rationally be viewed as pure attempts to convey information to consumers." *Id.* at 1216-17 (citations omitted). Accordingly, they "fall outside the ambit of *Zauderer*." *Id.* at 1217.

The *Reynolds* majority stated that *Zauderer* and subsequent Supreme Court cases "establish that a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident — or at least potentially real — danger that an advertisement will mislead consumers." *Id.* at 1213-14 (internal quotation marks and citation omitted). This discussion, however, appears to simply set the stage for its conclusion that the warnings there were not justified in light of statutory limitations on statements indicating that a product may be less harmful and on descriptors such as "light" and other similar statements and "in the absence of any congressional findings on the misleading nature of cigarette packaging itself." *Id.* at 1214-15.

C. NAM v. SEC *also apparently did not involve purely factual and uncontroversial disclosures.*

The *NAM v. SEC* majority characterized *Reynolds* as holding "that *Zauderer* is limited to cases in which disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *NAM v. SEC*, slip op. at 18-19 (internal quotation marks and citation omitted). The panel majority in *NAM v. SEC* held that a statute and rule requiring securities issuers to state on their websites and in mandatory reports to the Securities and Exchange Commission ("SEC") "that any of their products have 'not been found to be "DRC conflict free"'" violate the First Amendment, and declined to apply *Zauderer* because the requirement was not related to preventing consumer deception. *Id*. at 17-19, 21, 23.

Nonetheless, the *NAM v. SEC* majority stated that "it is far from clear that the description at issue—whether a product is 'conflict free'—is factual and nonideological," as:

> The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. . . . By compelling an issuer to confess blood on its hands, the statute interferes with th[e] exercise of the freedom of speech under the First Amendment.

Id. at 20. This statement is a strong suggestion that the disclosure is not purely factual and uncontroversial, and thus likewise does not fall within the ambit of *Zauderer*. *See id.* at p.3 of concurring opinion of Srinivasan, J.

D. The en banc *Court should not follow* Reynolds *or* NAM v. SEC *to limit application of* Zauderer *here.*

While the disclosures at issue in *Reynolds* and *NAM v. SEC* may present significant First Amendment concerns, those concerns can be characterized as arising from disclosures that are not purely factual and uncontroversial and thus do not satisfy a fundamental prerequisite of *Zauderer*. By contrast, the disclosures required in the *AMI* case are purely factual and uncontroversial. Accordingly, the *en banc* Court should not follow language from *Reynolds* or *NAM v. SEC* to limit the application of *Zauderer* here.

Unlike the measures at issue in those cases, the COOL rule simply requires disclosure of accurate, purely factual, and uncontroversial information. *See AMI*, slip op. at 10. The COOL rule does not compel Appellants to endorse a particular viewpoint, ideological opinion, or non-factual message, either implicitly or explicitly. Appellants have not expressed any disagreement with the content of the disclosure, except for the term "slaughtered," and even then they have not expressed any disagreement with the alternative term "harvested" permitted under the rule. *Id.*

Although country of origin labeling may influence consumer purchasing choices, there is nothing inherently stigmatizing or pejorative about it. Unlike the measures at issue in *Reynolds* and *NAM v. SEC*, the COOL rule does not in any way compel Appellants to denounce their own products, discourage consumers from buying them, or otherwise make a statement against their own economic interests — which are the linchpin of First Amendment protection for commercial speech. *See Virginia Pharmacy*, 425 U.S. at 762.

E. Cases involving other contexts have also indicated that this Circuit has not limited application of Zauderer *to disclosure requirements preventing deception.*

This Circuit has also suggested that disclosure requirements for reasons other than preventing deception do not foreclose application of *Zauderer* or trigger heightened First Amendment scrutiny in several cases involving disclosures in other contexts. *See, e.g.*, *UAW-Labor*, 325 F.3d at 365 (stating that "an employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks").

For example, in *SEC v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365 (D.C. Cir. 1988), which involved a disclosure requirement in the securities regulation context, this Court noted that "disclosure requirements have been upheld in regulation of commercial speech *even when* the government has not shown that 'absent the required disclosure, [the speech would be false or deceptive] or that the

disclosure requirement serves some substantial government interest other than preventing deception.'" *Id.* at 373-74 (alteration in original; emphasis added) (quoting *Zauderer*, 471 U.S. at 650). That case also reaffirmed the Supreme Court's warning that it is "'impermissibly paternalistic' for courts to challenge such disclosure requirements because 'zeal to protect the public from "too much information" could not withstand First Amendment scrutiny.'" *Id.* at 374 (quoting *Meese v. Keene*, 481 U.S. 465, 482 (1987) (upholding a political propaganda labeling requirement)). In *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011), this Court also cited *Zauderer* to support an SEC disclosure requirement that was only a "rational means" of achieving the government's goal. *Id.* at 1109.

Although one labor case, *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) ("*NAM v. NLRB*"), referenced *Zauderer* and deception, the panel here correctly observed that that case "did not apply the First Amendment at all" and only addressed *Zauderer* in "a footnote response to a party's footnote," which "altogether lacks the earmarks of a constitutional holding." *AMI*, slip op. at 13 (citing *NAM v. NLRB*, 717 F.3d at 955, 959 n.18). Additionally, as the panel here observed, the required notice at issue in *NAM v. NLRB* did not consist of "'purely factual and uncontroversial' information," but rather endorsed a "one-sided," pro-unionization viewpoint because it made no

mention of other highly relevant worker rights. *AMI*, slip op. at 12-13; *NAM*, 717 F.3d at 958.

IV. The Views of Other Circuits Are Consistent with a Broad Application of *Zauderer*.

Other Circuits have also addressed the question of where *Zauderer* applies and have held on a number of occasions that review of purely factual and uncontroversial commercial disclosure requirements falls under *Zauderer* even when the disclosures are compelled for reasons other than preventing consumer deception. These decisions recognize, and some explore in detail, that the policies underlying the protection of commercial speech compel the broad application of the rational relationship test for factual commercial disclosures under *Zauderer*.

A. Other Circuits have applied Zauderer *to disclosures aimed at a number of governmental interests.*

The Second Circuit has repeatedly addressed the question of the application of *Zauderer* and has held that *Zauderer* is not limited to disclosure requirements aimed at preventing deception. The Second Circuit has reasoned:

> Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. … Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.

Sorrell, 272 F.3d at 113-14. The First Amendment is satisfied "by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." *Id.* at 115. In *Sorrell*, the Second Circuit reviewed a labeling requirement for mercury-containing products and recognized that "the compelled disclosure at issue here was not intended to prevent 'consumer confusion or deception' *per se.* …" but instead "to better inform consumers about the products they purchase." *Id.* But the close relationship between the goals of the First Amendment and commercial disclosure requirements directed the application of the *Zauderer* test, the court held, while the "*Central Hudson* test should be applied to statutes that *restrict* commercial speech." *Id.* (emphasis in the original).

The Second Circuit has also recognized that, while *Zauderer* addressed a factual situation where the disclosure was "necessary to prevent deception of consumers[,] [*Zauderer*] does not provide that all other disclosure requirements are subject to heightened scrutiny." *NYSRA*, 556 F.3d at 133-34 (applying *Zauderer* to required disclosures of calories on restaurant menus as "factual and uncontroversial" and reasonably related to the government's "interest in preventing obesity"); *see also CTFC v. Vartuli*, 228 F.3d 94, 108 (2d Cir. 2010) (applying *Zauderer* to governmental interests in preventing both deception and "inefficiencies in the commodities markets"); *Conn. Bar Ass'n v. United States*,

620 F.3d 81, 104 (2d Cir. 2010) (applying *Zauderer* when the government interest was in "minimizing [consumer] ignorance" about the bankruptcy process as well as confusion and deception).

The Second Circuit has also remarked on the "potentially wide-ranging implications" of applying a deception-only limit to *Zauderer*. *Sorrell*, 272 F.3d at 116. Such a restriction would endanger "[i]nnumerable" beneficial disclosure requirements, from securities disclosures to nutritional labeling to notifications of workplace hazards. *Id.* Limiting the legitimacy of government interests "would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required." *Id.*; *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J. & Dyk, J.) (indicating "literally thousands" of regulations would be threatened by limiting *Zauderer*).

Other Circuits have also recognized the broad applicability of *Zauderer*. The First Circuit has upheld under *Zauderer* disclosures reasonably related to "Maine's interest in preventing deception of consumers and increasing public access to prescription drugs." *Rowe*, 429 F.3d at 310 (per curiam). Addressing the claim that *Zauderer* is limited to non-deception, the First Circuit found that "[n]one of the cases [the plaintiff] cites, however, support this proposition, and we have found no cases limiting *Zauderer* in such a way." *Id.* at 310 n.8.

The Sixth Circuit has also stated "that *Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception." *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556, 565 (6th Cir. 2012) (upholding warning labels as "reasonably related to promoting greater understanding of tobacco-related risks" and preventing deception). The Sixth Circuit has explained, "the principal justification for protecting commercial speech under the First Amendment [is] protecting the flow of accurate information, which is furthered by factual disclosures." *Id.* at 558 (citing *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010)).

The Tenth Circuit has upheld disclosures related to the "government's interest in preventing deception and achieving more open securities markets." *United States v. Wenger*, 427 F.3d 840, 851 (10th Cir. 2005). And the Ninth Circuit has upheld EPA regulations on stormwater discharge disclosures as consistent with the goals of the Clean Water Act, such as "[i]nforming the public about safe toxin disposal." *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849-50 (9th Cir. 2003). These various Circuit decisions have all recognized that there is no need to limit *Zauderer* to only non-deception interests, contrary to what Appellants here argue.

B. Other cases do not establish that Zauderer *is limited to preventing consumer deception.*

Appellants rely on *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), to suggest other Circuits have set a limit on *Zauderer*. *See* Appellant's Br. 31-32. In *Amestoy*, the Second Circuit rejected under the *Central Hudson* substantial interest test the required disclosure of the use of a hormone (rBST) in the production of dairy products when there was no recognized health risk from the use. *Amestoy* held that there was no government interest in the disclosure of the use of a hormone with no demonstrable effect and that "consumer curiosity" was an insufficient interest under *Central Hudson*. *Amestoy*, 92 F.3d at 74.

As the panel here has explained, the issues in *Amestoy* were not limited to whether there was consumer deception. *AMI*, slip op. at 10-11. The disclosure implied possible health risks, a statement of opinion outside the scope of *Zauderer* regardless of the governmental interest involved. The plaintiffs in *Amestoy* had specifically challenged the disclosure as compelling them to "convey a message regarding the significance of rBST," and not as purely factual. *Amestoy*, 92 F.3d at 71. The Second Circuit has repeatedly held that *Amestoy* is "expressly limited" to its facts, *Sorrell*, 272 F.3d at 115 n.6; *NYSRA*, 556 F.3d at 134, and has explained that the holding was due to "no state interest" in the disclosures, *Conn. Bar Ass'n*, 620 F.3d at 96 n.16. As the panel here recognized, there is no need for this Court to reach the same result as *Amestoy* because there are legitimate governmental

interests rationally related to the disclosure requirements of COOL. *See AMI*, slip op. at 11, 14.

Other decisions from the other Circuits likewise do not support a general limitation on *Zauderer*. Some other decisions have declined to apply *Zauderer* to certain situations for reasons other than whether the government asserted a non-deception interest. For example, in *Allstate Insurance Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), the Fifth Circuit distinguished *Zauderer* as "the potential for customer confusion here is minimal." *Id.* at 166. The Fifth Circuit was not holding that *Zauderer* was inapplicable where the potential for confusion was minimal, but was applying the *Central Hudson* test to a speech restriction and mentioned *Zauderer* to highlight that the government's interest in the restriction was not substantial; whether *Zauderer* applied was not at issue. *Id.* at 166-68; *see also, e.g.*, *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-53 (7th Cir. 2006) (concluding that *Zauderer* was not applicable to disclosures on the maturity rating of video games because the rating was opinion, not purely factual). These cases do not provide support for limiting *Zauderer*; they did not address that question.

As decisions from other Circuits do show, there has been wide recognition that the *Zauderer* rational relationship test is not limited to disclosures intended to prevent deception. These decisions have agreed that a high level of free speech

protection is not needed when considering purely factual commercial disclosures. Instead, governmental intrusion on the minimal interest commercial speakers have in not disclosing factual information to their consumers is justified by a rational relationship to a range of government interests. Other Circuits have also recognized the broad consequences that limiting *Zauderer* would have on numerous beneficial disclosure requirements. For the same reasons recognized by other Circuits, this Court should likewise hold in this appeal that *Zauderer* review is not limited to disclosures intended to address consumer confusion and deception.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court hold that *Zauderer* applies to purely factual and uncontroversial compelled commercial disclosures aimed at addressing governmental interests other than the prevention of consumer deception.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

AMI v. USDA, Court No. 13-5281

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Supplemental Brief for Intervenors for Defendants-Appellees complies with the 7,500 world count limitation in the Order of this Court of April 4, 2014. The foregoing Brief contains 7,145 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

I further certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The foregoing Brief has been prepared in Microsoft Word 2010 using Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

AMI v. USDA, Court No. 13-5281

I hereby certify that on April 21, 2014, the foregoing Supplemental Brief for Intervenors for Defendants-Appellees was electronically filed using the CM/ECF system, which will send notification of the filing by electronic mail to the following. Pursuant to the Order of this Court of April 4, 2014, 30 copies of this Brief were also hand delivered to the Court.

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