15-1504-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and NATIONAL ASSOCIATION OF MANUFACTURERS,
Plaintiffs-Appellants,

v.

WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER SHUMLIN, in his official capacity as Governor of Vermont; JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management; and HARRY L. CHEN, in his official capacity as the Commissioner of the Vermont Department of Health,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Vermont
Case No. 5:14-cv-117-cr (Honorable Christina Reiss)

**BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC.
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

(counsel listed on inside cover)

August 31, 2015

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc. is a non-profit organization that has no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. It advocates for the public interest on a range of issues, including consumer protection and food safety.

/s/ Julie A. Murray
Julie A. Murray

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a nonprofit organization with members and supporters nationwide, is devoted to research, advocacy, and education on a wide range of issues, including public health, consumer safety, and financial services. Public Citizen has long advocated reasonable disclosure requirements to inform consumers about the characteristics of goods and services, such as food and drugs. It has also supported mandatory disclosure requirements that provide information about public companies to investors.

In addition, Public Citizen has substantial interest and expertise in commercial speech doctrine. Its lawyers argued, among other cases, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993). Public Citizen has also participated as amicus curiae, or its lawyers have participated as counsel, in numerous recent cases involving the appropriate application of First Amendment review under *Zauderer*. *See Nat'l Ass'n of Mfrs. v. SEC*, _ F.3d __, No. 13-5252, Slip Op., *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf (D.C. Cir. Aug. 18, 2015); *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *R.J.*

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst.*, 760 F.3d 18; *CTIA-Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

All parties have consented to the filing of this brief. *See* Joint Letter of Consent, Doc. 43, *Grocery Mfrs. Ass'n v. Sorrell*, No. 15-1504 (2d Cir. filed June 15, 2015).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2014, the Vermont legislature passed Act 120, a statute requiring, among other things, that food offered for sale in Vermont and produced entirely or in part from genetic engineering (GE) carry a label stating "partially produced with genetic engineering"; "may be produced with genetic engineering"; or "produced with genetic engineering," as appropriate given the underlying method and knowledge of production. 2014 Vt. Acts & Resolves No. 120, § 2, *codified at* 9 V.S.A. § 3043(a), (b). The legislature noted broad public demand for such labeling and that labeling was necessary "to serve the [State's] interests, . . . to prevent inadvertent consumer deception, prevent potential risks to human health, protect religious practices, and protect the environment." *Id.* § 1.

Plaintiffs-appellants Grocery Manufacturers Association and other trade groups sued Vermont government officials to enjoin enforcement of Act 120,

contending that the statute violates the First Amendment and is otherwise unlawful. The district court declined to preliminarily enjoin the labeling requirement, concluding, as relevant here, that the "disclosure requirement is constitutional" under the First Amendment rational-basis review established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). *Grocery Mfrs. Ass'n v. Sorrell*, No. 14-117, _ F. Supp. 3d __, 2015 WL 1931142, at *38 (D. Vt. Apr. 27, 2015). It did not dismiss the challenge to the labeling requirement altogether "because the appropriate level of scrutiny is a contested question of law and because the factual record is undeveloped," but it did determine, based on its analysis of *Zauderer*, that plaintiffs' First Amendment claims do not entitle them to preliminary injunctive relief because plaintiffs are unlikely to succeed on those claims. *Id.*

On appeal, plaintiffs contend that *Zauderer* review does not apply to the labeling requirement because the requirement is "controversial" and does not advance a government interest to which *Zauderer* applies. Opening Br. at 26, 35-36. Plaintiffs argue that the labeling requirement should be reviewed using intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Opening Br. at 26.

Plaintiffs fundamentally misread *Zauderer* and its progeny, urging this Court to adopt a legal standard that is at odds with existing case law and that would

render *Zauderer* a dead letter. Amicus curiae Public Citizen submits this brief to address two aspects of plaintiffs' argument.

First, *Zauderer*'s reference to "purely factual and uncontroversial information," 471 U.S. at 651, on which plaintiffs heavily rely, is descriptive in nature; it does not create a legal standard. To the extent the phrase has precedential value, it stands for the proposition that commercial disclosure requirements must compel only truthful, accurate information, not opinions—a standard that Act 120's labeling provision easily meets. Plaintiffs' contention that the factual disclosure relates to a controversial *topic* is legally irrelevant in determining whether *Zauderer* applies. In addition, plaintiffs are incorrect that *Zauderer* is inapplicable because compelled disclosure of a fact conveys an implicit message that renders the disclosure controversial. If taken to its logical endpoint, plaintiffs' position would require heightened First Amendment scrutiny for any commercial disclosure requirement, no matter how well supported by science, history, or common sense.

Second, this Court should reject plaintiffs' contention that preventing consumer deception is the only government interest sufficient to support a commercial disclosure requirement to which *Zauderer* review applies. As plaintiffs concede, their position would require this Court to overrule its own clear precedent, and neither *Zauderer*, nor the Supreme Court's subsequent decision in

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010), requires such a result. Were this Court to conclude otherwise, it would create a circuit split with recent rulings in two other courts of appeals and cast doubt on a slew of mandatory disclosure requirements intended to inform consumers, investors, and others.

ARGUMENT

I. *Zauderer*'s Reference to "Purely Factual And Uncontroversial Information" Does Not Set a Legal Standard, And in Any Event, Act 120's Disclosure Requirement Would Meet Any Standard That Applies.

Plaintiffs contend that the rational-basis review set forth in *Zauderer*, 471 U.S. 626, applies only to purely factual and uncontroversial commercial disclosures and that, because the disclosure required by Act 120 is controversial, a more stringent level of First Amendment scrutiny applies. Opening Br. at 26. Plaintiffs err by elevating merely descriptive language to a legal standard. Under a proper understanding of the law applicable to commercial disclosure requirements, Act 120 passes muster because it compels no more than a truthful, accurate statement.

A. *Zauderer* uses the phrase "purely factual and uncontroversial information" to characterize the particular information subject to disclosure in that case, not to articulate a legal test. 471 U.S. at 651. In *Zauderer*, the Supreme Court upheld a state mandate requiring an attorney who advertised contingent-fee

services to disclose that clients might still be responsible for certain expenses if they lost. *Id.* at 650. The Court described the state requirement at issue as one under which the plaintiff must "include in his advertising purely factual and uncontroversial information about the terms under which his services [would] be available." *Id.* at 651. In a separate, later paragraph of the opinion, the Court "h[e]ld that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest," which in that case was preventing consumer deception. *Id.* The Court then determined that the state requirement at issue "easily passe[d] muster under *this standard*." *Id.* at 652 (emphasis added).

As the Sixth Circuit has concluded, the context in which the phrase "purely factual and uncontroversial information" appears does not suggest that the phrase "describ[ed] the characteristics that a disclosure must possess for a court to apply *Zauderer*'s rational-basis rule." *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (Stranch, J., for majority). Rather, *Zauderer*'s reference to purely factual and uncontroversial information "merely describes the disclosure the Court faced in that specific instance." *Id.*

That *Zauderer*'s language in this respect was descriptive is further evidenced by the Supreme Court's subsequent decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). *Milavetz* applied *Zauderer*'s rational-basis

review to a disclosure requirement, yet never used the term "purely factual and uncontroversial information." The *Milavetz* opinion serves as "clear[]" evidence that a disclosure need not be "purely factual and uncontroversial" for *Zauderer* to apply. *Discount Tobacco*, 674 F.3d at 559 n.8 (Stranch, J., for majority).

B. To the extent that *Zauderer*'s reference to "purely factual and uncontroversial information" informs the legal analysis, it suggests only that a commercial disclosure subject to *Zauderer* should be factual in nature (as opposed to a statement of opinion) and that the disclosure should be *accurate* and hence not "controversial" in the sense that its *truth* should not be open to substantial dispute.

In *Zauderer*, the Court used the phrase "purely factual and uncontroversial" to contrast the disclosures at issue there with unconstitutional speech-compulsion requirements that "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 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The contrast posits a distinction between, on the one hand, requirements that commercial speakers disclose accurate, factual information and, on the other, requirements that they subscribe to disputed matters of political, religious, or other forms of opinion. As the Sixth Circuit observed in *Discount Tobacco*, *see* 674 F.3d at 559 n.8, this reading is confirmed by other language in the same part of *Zauderer* referring to the disclosure requirement at issue as

applying to "factual information" and "accurate information," 471 U.S. at 651 & n.14, as well as from *Milavetz*, where the Court's affirmance of a commercial disclosure requirement rested on the disclosure's "factual" and "accurate" nature, 559 U.S. at 250.

This Court's precedent is consistent with this reading. *National Electrical Manufacturers Association v. Sorrell* (*NEMA*), relying on *Zauderer*, held that lenient First Amendment review applies to the disclosure of "accurate, factual, commercial information." 272 F.3d 104, 114 (2d Cir. 2001); *see also id.* at 114 ("To the extent commercial speakers have a legally cognizable interest in withholding accurate, factual information, that interest is typically accommodated by the common law of property and its constitutional guarantors."). And *New York State Restaurant Association v. New York City Board of Health* asked only whether a compelled commercial disclosure of calorie information was "factual" and bore a rational relationship to the government's interest. 556 F.3d 114, 133-34 (2d Cir. 2009); *see also Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 263 (2d Cir. 2014) (equating "purely factual and uncontroversial information" with "accurate, factual information" but applying intermediate First Amendment scrutiny because a disclosure requirement did not concern the company's own product (internal quotation marks omitted)).

Like the disclosure requirements in *NEMA* and *New York Restaurant Association*, Act 120 requires companies to convey factual, accurate information. Under Act 120, companies must state only whether their products are produced using "genetic engineering," where that term is defined by statute using objective criteria. 2014 Vt. Acts & Resolves No. 120, § 2, *codified at* 9 V.S.A. § 3042(4). Companies need not state that genetic engineering and resulting foods are desirable or undesirable. They do not have to convey any statement about what consumers "should" do with respect to the information. Under these circumstances, Act 120's labeling requirement easily satisfies *Zauderer*.

The D.C. Circuit's recent decision in *National Ass'n of Manufacturers v. SEC*, __ F.3d __, No. 13-5252, Slip Op. (Aug. 18, 2015), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf, does not support plaintiffs' position that the disclosure requirement here conveys an opinion rather than a statement of fact. In that case, the court of appeals concluded—in a tertiary alternative holding and over a strong dissent—that whether a disclosure is "uncontroversial" is part of *Zauderer*'s legal standard. *Id.* at 19. Although the panel expressed puzzlement about what "uncontroversial" might mean in this context, it held that the disclosure at issue required a company to subscribe to a value-laden description of its products as contributing to armed conflict in Africa, and it concluded that requiring a company to "convey[] moral responsibility for the Congo war" and "confess

blood on its hands" was not uncontroversial. *Id.* at 19-21, 24 (internal quotation marks omitted). Regardless of the correctness of the panel's holding in this regard, *but see id.*, Slip Op. Dissent at 12-21 (Srinivasan, J., dissenting), no similar complaint could be leveled at Act 120's disclosure requirement.[2] Vermont does not require foods to be labeled as "genetically tainted" or "genetically damaged," but requires use of an entirely neutral and factual term—"produced with genetic engineering." Companies that use that term on labels will not be required to "publicly condemn" themselves or adopt an ideological "metaphor that conveys moral responsibility." *Id.*, Slip Op. at 24 (internal quotation marks omitted). Rather, they will label foods using one of their own preferred descriptions of the technology used to produce it: genetic engineering. *See, e.g.*, Monsanto, Commonly Asked Questions About the Food Safety of GMOs, http://www.monsanto.com/newsviews/pages/food-safety.aspx#q1 ("We use agricultural biotechnology, or *genetic engineering* of plants, to develop new varieties of plant seeds with a range of desirable characteristics . . . ." (emphasis added)).

C. Plaintiffs advance two theories to explain why Act 120's disclosure requirement is "controversial" and therefore subject to heightened First Amendment scrutiny. Even if the word "controversial" were part of the legal standard, neither of plaintiffs' theories holds water.

[2] The time to petition for rehearing en banc in the case has not yet passed.

1. Plaintiffs first suggest that the disclosure requirement is controversial because the issue of genetic engineering is "hotly debated." Opening Br. at 26. But even under the broadest possible reading of *Zauderer*'s reference to "purely factual and uncontroversial information," the relevant question cannot be whether the topic to which a disclosure relates is controversial. "Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions. … [W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy." *Discount Tobacco*, 674 F.3d at 569 (Stranch, J., for the majority); *see also Conn. Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir. 2010) (upholding mandatory disclosures about bankruptcy services as constitutional under *Zauderer* despite recognizing that "bankruptcy and the process attending it are frequent subjects of public debate" (internal quotation marks omitted)); *Nat'l Ass'n of Mfrs.*, Slip Op. at 21-22 (recognizing that D.C. Circuit precedent precludes a holding that a disclosure is controversial merely because it relates to a controversial topic).

Indeed, much of the value of factual information in a commercial setting is that it enables market participants to act on their own opinions about whether, how, and to what extent that information is relevant to marketplace decisions.

Commercial speakers may have legitimate objections to being required to espouse opinions they do not share, but not to providing the factual information on which others who may disagree with their opinions may legitimately act. *See Zauderer*, 471 U.S. at 651; *see also NEMA*, 272 F.3d at 114 (stating that disclosure of "accurate, factual, commercial information" "contributes to the efficiency of the marketplace of ideas" (internal quotation marks omitted)). Just as companies cannot "immunize false or misleading product information from government regulation simply by including references to public issues," *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983), they cannot avoid government disclosure requirements by demonstrating that non-controversial, factual disclosures have some relationship to a matter of controversy.

For example, requiring a disclosure that a ramen noodle package contains more than 900 milligrams of sodium, *see* 21 U.S.C. § 343(q)(1)(D), is surely permissible under *Zauderer* even if people hold strong, conflicting opinions about how much sodium a healthy diet should contain, whether other considerations outweigh sodium content in determining whether ramen noodles are good for them, or whether it is morally repugnant to market products containing added sodium. *Compare*, *e.g.*, U.S. Department of Agriculture, Dietary Guidelines for Americans 2010, at 21 (stating that "[v]irtually all Americans consume more sodium than they need" and recommending that nearly half the U.S. population cut

sodium intake to less than 1,500 milligrams per day), *with* Salt Institute, NYC Health Department Wrong on High-Sodium Warnings, June 10, 2015, *available at* http://www.saltinstitute.org/news-articles/nyc-health-department-wrong-on-high-sodium-warnings (contending that "[r]esearch shows Americans already eat within the safe range of sodium consumption and population-wide sodium reduction strategies are unnecessary and could be harmful").

As another example, federal law requires that items of fur apparel bear a label identifying the type of animal that produced the fur and the country of origin of imported fur and stating that the apparel contains used fur (if it does). 15 U.S.C. § 69b. Some consumers undoubtedly use this information to assess whether the apparel's quality warrants the price and to ensure that fur products are produced with real fur. Others may use it to avoid fur produced in countries with reputations for brutal production practices, to seek recycled fur, or to avoid fur products altogether. *See, e.g.*, Federal Trade Commission, Press Release, *Retailers Agree to Settle FTC Charges They Marketed Real Fur Products as Fake Fur*, Mar. 19, 2013 (recounting settlement between the Federal Trade Commission and Neiman Marcus and other companies to resolve claims that the retailers misled consumers by labeling real fur as "faux fur").[3] Either way, the labeling requirement conveys factual, accurate information designed to hold companies accountable and inform

[3] Available at https://www.ftc.gov/news-events/press-releases/2013/03/retailers-agree-settle-ftc-charges-they-marketed-real-fur.

consumers. It easily passes muster under *Zauderer*, even though the ethics of wearing fur are a topic of considerable public debate and have been associated with aggressive activism. *See, e.g.*, Alex Williams, *Fur Is Back in Fashion and Debate*, N.Y. Times, July 3, 2015, *available at* http://www.nytimes.com/2015/07/05/fashion/fur-is-back-in-fashion-and-debate.html?_r=0.

Evergreen Association, Inc. v. City of New York, 740 F.3d 233 (2d Cir. 2014), on which plaintiffs rely, did not hold that the relationship of a commercial disclosure requirement to a controversial topic rendered *Zauderer* inapplicable. *Evergreen* held that the government could not require "pregnancy services centers to disclose whether or not they provide or provide referrals for abortion, emergency contraception, or prenatal care." *Id.* at 249. In so doing, *Evergreen* suggested that *Zauderer* might not apply to this disclosure because the requirement forced centers to "mention controversial services." *Id.* at 245 n.6. However, *Evergreen*'s discussion of *Zauderer* was restricted to a footnote and premised on the possibility that the services disclosure might be viewed as "regulat[ing] commercial speech." *Id. Evergreen* ultimately concluded that the disclosure requirement "alter[ed] the centers' political speech." *Id.* at 249; *see also id.* (stating, in a discussion of the services disclosure, that "[e]xpression on public issues . . . rest[s] on the highest rung on the hierarchy of First Amendment values" (internal quotation marks omitted)). As further evidence that *Evergreen*'s holding

with respect to the disclosure requirement was premised on treating the disclosure as political speech, *Evergreen* likened the services disclosure to the charitable contribution disclosure requirement in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), which applied strict scrutiny to what the Supreme Court considered "fully protected"—rather than commercial—speech. *Id.* at 796.

2. Plaintiffs also contend that, by requiring companies to reveal that their products are produced in full or in part with genetic engineering, Act 120 forces companies to convey an implicit message "that manufacturers attach relevance to information that is scientifically irrelevant" or—worse—"a politically motivated warning." Opening Br. at 30; *see also* Chamber of Commerce Amicus Br. at 24, 26. Yet as this Court's case law makes clear, reporting information to comply with a government requirement is not the same as admitting that the information is important or that consumers should consider the information to be material in making particular choices. Thus, this Court in *New York State Restaurant Association* upheld under *Zauderer* the constitutionality of a calorie count disclosure, notwithstanding that the plaintiff disputed that "disclosing calorie information would reduce obesity," that is, it disputed "the significance of the facts" to be disclosed, and objected "to cram[ming] calorie information down the throats of [restaurant] customers." 556 F.3d at 133 (internal quotation marks omitted). Similarly, *NEMA* upheld a mercury disclosure requirement applicable

only to certain consumer products, such as lamps, 272 F.3d at 107 n.1, despite assuming that lamps were not the largest source of mercury contamination, *id.* at 115-16. In neither case did this Court view debate over the significance of the disclosures as having any impact on whether the disclosures were "controversial," as *Zauderer* used that term. *See also Conn. Bar Ass'n*, 620 F.3d at 95 (holding that a requirement that a debt relief agency make mandatory disclosures about its bankruptcy services did not force the company "to communicate its own views on public issues associated with the bankruptcy system").

In addition, consumers undoubtedly understand that companies do not provide disclosures because they want to do so or because the disclosures reflect the companies' views, but because the companies are required to do so. Were there any doubt in this case, nothing would stop companies from pointing out that the genetic-engineering disclosure is required by law and from stating their opinion that genetically engineered foods are not materially different from other foods. *See* Vermont Attorney General Consumer Protection Rule 121.02(c)(ii), *available at* http://ago.vermont.gov/assets/files/PressReleases/Consumer/Final%20Rule%20CP%20121.pdf.

Plaintiffs' contention that a disclosure requirement compels a company to adopt a point of view as to the relevance of the disclosure has significant implications. One could always say that disclosing a fact—whether it be a client's

responsibility for costs in litigation, the calorie count of a hamburger, or the mercury content of a lightbulb—suggests that the fact is important or relevant in a particular way. If that alone were sufficient to convey an implicit message precluding *Zauderer*'s application, there could be no distinction in the standard of review between, on the one hand, compelled commercial disclosures and, on the other, restrictions on commercial speech (and likely even compelled disclosures in the context of fully protected speech). That, of course, is not the law. *See*, *e.g.*, *N.Y. State Restaurant Ass'n*, 556 F.3d at 136.

Plaintiffs' theory is doubly dangerous because it would apply—contrary to plaintiffs' suggestion (Opening Br. at 30)—no matter how much a disclosure requirement is backed by scientific certainty, demonstrated need, or just plain common sense. If requiring a company to reveal a fact conveys not just the fact but an "implicit message" attributed to the company about the fact's importance, *id.* at 28, the existence of scientific evidence supporting the disclosure requirement—which plaintiffs dispute here—would be irrelevant to the analysis. After all, the First Amendment protects the right "to hold a point of view different from the majority," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), or from every last scientist in the world. If disclosing a fact truly conveys a point of view about a fact's importance, there is no stopping point to plaintiffs' theory that leaves *Zauderer* intact.

The sweeping implication of plaintiffs' position is best illustrated by reference to existing disclosure requirements.

- Federal law directs vehicle manufacturers to label, in accordance with regulations issued by the Environmental Protection Agency, each vehicle with the vehicle's fuel economy. 49 U.S.C. § 32908(b). Does such a label convey that a manufacturer believes fuel economy is important for the environment or that the cost of fuel should be more material to consumers than the vehicle's other attributes, or that the consumer should consider a competitor's car with better gas mileage?

- With limited exceptions, the Food, Drug, and Cosmetic Act requires that a food product containing artificial coloring or flavoring bear a label so stating. 21 U.S.C. § 343(k). Does this requirement force manufacturers to voice an opinion about whether the presence of food additives is an important fact about the product, or to agree, for example, that a natural food coloring is superior to an artificial one?

- The Securities and Exchange Commission compels a securities issuer to disclose whether the issuer has a code of ethics, 17 C.F.R. § 229.406, and information about certain officers' executive compensation, *id.* § 229.402. Do these disclosures convey to investors that the issuers believe these factors are relevant to investment decisions or that issuers

endorse the opinion that, for example, high executive compensation is a reason not to invest in the company?

- Connecticut requires nursing homes and certain other institutions that offer special programs for residents with Alzheimer's to disclose the "nature and extent of staff coverage, including staff to patient ratios and staff training and continuing education." Conn. Gen. Stat. Ann. § 19a-562(b)(4). Does this requirement force companies to espouse an opinion that staffing ratio or a particular kind of training is a critical factor in selecting a nursing home or that other nursing homes with different ratios or training are better?

The answer to these questions is surely "no," which explains why this Court and others have routinely applied *Zauderer* to uphold similar disclosure requirements in the face of First Amendment challenges. *See, e.g.*, *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1062-63 (8th Cir. 2014) (requirement that medical referral service disclose the type of license held by providers in service's network); *Am. Meat Inst.*, 760 F.3d at 20 (country-of-origin labeling requirement for meat); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 412-13 (D.C. Cir. 2012) (requirement that airlines prominently disclose total price, rather than the price without government fees and taxes, of airfare); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 299 (1st Cir. 2005) (per curiam) (requirement

that pharmacy benefit managers disclose "certain of their financial arrangements with third parties"); *NEMA*, 272 F.3d at 115 (disclosure of mercury in lightbulbs), *N.Y. State Restaurant Ass'n*, 556 F.3d at 132 (calorie count disclosure). And "[t]here are literally thousands of similar regulations on the books." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 316 (Boudin, C.J., for the majority). There is no telling where challenges to these regulations would end if this Court were to conclude that disclosure of factual information conveys an implicit message rendering *Zauderer* inapplicable.

II. *Zauderer*'s Application Is Not Limited to a State Interest in Preventing Deception.

A. Plaintiffs contend that because *Milavetz*, 559 U.S. 229, described certain "essential features" that the disclosure provisions in that case shared with the challenged rule in *Zauderer*, including that the disclosures were "intended to combat the problem of inherently misleading commercial advertisements," *id.* at 250, *Milavetz* implicitly limited *Zauderer*'s reach to instances in which the government has an interest in preventing deception. Opening Br. at 35-36. As plaintiffs concede, *see id.* at 34, however, their position is contrary to this circuit's established law. *See NEMA*, 272 F.3d at 115 (applying *Zauderer* to a law based on a state "interest in protecting human health and the environment from mercury poisoning"); *N.Y. State Restaurant Ass'n*, 556 F.3d at 133 (reaffirming *NEMA*'s

holding that *Zauderer*'s scope "was broad enough to encompass nonmisleading disclosure requirements"); *see also* Response Br. at 31.

Plaintiffs' position also conflicts with the careful decisions of other circuits that have considered this issue since *Milavetz*. In *American Meat Institute*, the D.C. Circuit convened en banc to overturn by a 9-2 margin circuit precedent that had wrongly circumscribed *Zauderer* to disclosures based on a government interest in preventing consumer deception.[4] It concluded that *Milavetz*'s focus—like *Zauderer*'s—"on remedying misleading advertisements" did not resolve the question whether *Zauderer* review extends to government interests beyond the prevention of consumer deception. 760 F.3d at 21-22. The D.C. Circuit noted that, "[g]iven the subject of both cases,"—and given that the government invoked remedying misleading speech as its "sole interest" in *Milavetz*—"it was natural for the Court to express the rule in such terms." *Id.* at 22. It concluded that *Milavetz* did not alter the more general principle emerging from *Zauderer* that *Zauderer*

[4] The separate opinions of Judges Kavanaugh and Rogers, who supplied the eighth and ninth votes to overturn circuit precedent, make clear that these judges agreed with the seven-judge majority that interests beyond preventing consumer deception may suffice as the foundation for disclosure requirements to which *Zauderer* applies. *See Am. Meat Inst.*, 760 F.3d at 28 (Rogers, J., concurring in part) (agreeing with the majority that *Zauderer* applies to interests beyond preventing consumer deception); *id.* at 32 (Kavanaugh, J., concurring in the judgment) (concluding that an "interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers" was sufficient to support the labeling requirement).

review "sweeps far more broadly than the interest in remedying deception." *Id.* The D.C. Circuit then upheld a country-of-origin meat-labeling requirement justified by government interests in "enabl[ing] consumers to choose American-made products, the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak." *Id.* at 23.

Likewise, in *Discount Tobacco*, the Sixth Circuit held that "*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception." 674 F.3d at 556 (Stranch, J., for the majority) (citing *NEMA*, 272 F.3d 104). Its conclusion followed three paragraphs in which it analyzed in detail the Supreme Court's decision in *Milavetz*, which the Sixth Circuit read to "reaffirm[] the central principles of *Zauderer*." *Id.*

B. Disavowal of this circuit's precedent, and creation of a split with the Sixth and D.C. Circuits on this point, would be unwise for three reasons. First, commercial disclosure requirements are common in federal, state, and local laws, and they may rest only in part or not at all on a government interest in preventing deception. *See, e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (identifying Congress's "fundamental purpose" in adopting the securities statutes "to substitute a philosophy of full disclosure for the philosophy of caveat emptor"). Disclosure requirements that provide important information

about commercial goods and services, like disclosure requirements aimed at outright deception, advance the First Amendment interest in conveying valuable information to consumers while implicating only a "minimal" First Amendment interest of the commercial speaker in not providing such information—exactly the situation in *Zauderer*. 471 U.S. at 651; *see also NEMA*, 272 F.3d at 115 (recognizing that a statutory "goal of increasing consumer awareness of the presence of mercury in a variety of products" was not "inconsistent with the policies underlying First Amendment protection of commercial speech").

Act 120 unquestionably provides useful information to consumers about the food they eat. Although consumers may have a wide variety of motivations for focusing on whether a product was produced through genetic engineering, including health, environmental, and religious considerations, it cannot seriously be questioned that, "[t]o some consumers, processes . . . matter." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 889 (Cal. 2011); *see also, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976) (recognizing that when "a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals," society has a "strong interest" in that information); *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 201 (2d Cir. 2012) (upholding against Establishment Clause and free-exercise challenges a law requiring "sellers and

manufacturers that market their food products as 'kosher' to label those foods as kosher and to identify the individuals certifying their kosher nature"). Indeed, plaintiffs and their amici appear to concede as much by emphasizing existing demand for non-GE foods in the marketplace and the availability of tools—including GE-free "seal[s] of approval," shopping guides, websites, and cell phone apps—that aim to assist consumers who wish to avoid GE foods. *See* Opening Br. at 2, 45; Washington Legal Fdn. Amicus Br. at 26. Plaintiffs may believe that whether food is produced using genetic engineering should be irrelevant to consumers' purchasing decisions, but the buying public clearly has more than a mere "curiosity," *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996), about the substance of the disclosures.

Second, as in *Zauderer*, the speakers' First Amendment interest in keeping consumers in the dark—here, about whether food has been produced using genetic engineering—is minimal. Act 120 does not affect a company's right to "proselytize religious, political, and ideological causes" or its "concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714. It does not force companies to carry expressive messages comparable to "Live Free or Die" license plates, *see id.* at 715, or to engage in speech on a par with a compulsory flag salute, *see W. Va. State Bd. of Educ.*, 319 U.S. at 642; *see also Evergreen*, 740 F.3d at 249. Nor does it force companies to advertise their competitors' products. *See Safelite*, 764 F.3d

at 264. Rather, under Act 120, companies must simply disclose accurate, factual information about the nature of their own products. In this commercial context, speakers do not have the same kind of expressive interest as they do on matters of politics, religion, or ideology or with respect to other forms of pure speech.

Third, applying *Zauderer* to any commercial disclosure requirement in which the government has a permissible interest ensures the distinctive treatment of disclosure requirements and prohibitions in the commercial speech context—that is, that intermediate scrutiny will be applied only to prohibitions on commercial speech as opposed to disclosure requirements affecting such speech. This differential treatment is in accord with the well-established principle in the commercial speech context that disclosure is "constitutionally preferable to outright suppression." *Pearson v. Shalala*, 164 F.3d 650, 657 (D.C. Cir. 1999) (citing, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990)).

CONCLUSION

For the foregoing reasons, the district court's decision denying plaintiffs' motion for a preliminary injunction of Act 120's labeling requirement should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface, type style, and length limitations of Federal Rules of Appellate Procedure 29 and 35. The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 5,656 words.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on August 31, 2015, I caused the foregoing brief to be filed using the Court's CM/ECF filing system, which will give notice of the filing to all ECF users registered in the case.

/s/ Julie A. Murray
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