[*EN BANC* 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.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF AGRICULTURE, et al.,

Defendants-Appellees,

UNITED STATES CATTLEMEN'S ASSOCIATION, et al.,

Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR FEDERAL APPELLEES

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INTRODUCTION

This brief responds to the Court's order of April 4, 2014, which directed the parties to file supplemental briefs on the following question:

> 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 v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), or whether such compelled disclosure is subject to review under *Central Hudson Gas & Electric v. PSC of New York*, 447 U.S. [557] (1980).

The panel correctly concluded that the regulation at issue here, which requires retailers to disclose the country of origin of certain meat, was subject to review under the *Zauderer* standard.

STATEMENT

This is a challenge to the U.S. Department of Agriculture's implementation of a statutory requirement that retailers "inform consumers . . . of the country of origin" of certain meat products. 7 U.S.C. § 1638a(a)(1). The statute was first implemented through a Final Rule issued in 2009. *See* 2009 Final Rule, 74 Fed. Reg. 2658 (Jan. 15, 2009) [JA 202]. Country-of-origin labels have thus appeared on the relevant products for approximately five years.

In 2013, the Department of Agriculture issued a regulation that altered the content of the required labels. *See* Final Rule, 78 Fed. Reg. 31367, 31368 (May 24, 2013) [JA 510]. Plaintiffs—various organizations whose members participate in the meat industry in the United States, Canada, and Mexico—challenged the new rule as both inconsistent with the governing statute and contrary to the First Amendment. The district court denied plaintiffs' motion for a preliminary injunction, and plaintiffs appealed.

The panel affirmed the district court's decision, agreeing with the district court that plaintiffs could not establish a likelihood of success on the merits. On the First Amendment issue, the Court began by noting that "the rule involves commercial speech," that "it restricts speech only in the sense of requiring a disclosure," and that

"the disclosure is purely factual and non-controversial." Panel Op. 10. The panel further observed that plaintiffs "ha[ve] not articulated an objection to the content of the message conveyed by the mandated speech." *Id.*

The panel concluded that the mandated disclosure of country-of-origin information should be reviewed under the standard set out in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), rather than the standard formulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Panel Op. 9. "In the case of a rule mandating [a purely factual and non-controversial] disclosure, *Zauderer* found *Central Hudson* review—particularly its 'least restrictive alternative' element—to be unnecessary." *Id.* at 11 (citing *Zauderer*, 471 U.S. at 651 & 651–52 n.14). "Reasoning that commercial speech warrants protection mainly due to its information-producing function, the Supreme Court found that a commercial actor has only a 'minimal' First Amendment interest in *not* providing purely factual information with which the actor does not disagree." *Id.* (emphasis in original) (citing *Zauderer*, 471 U.S. at 651).

The panel rejected plaintiffs' contention that *Zauderer* applies only when the government's articulated interest is "preventing deception of consumers"—the interest that was at issue in *Zauderer* itself, *see Zauderer*, 471 U.S. at 651. The panel reasoned that "*Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as 'minimal' seems inherently applicable beyond the problem of deception." Panel Op. 12. The panel thus held "that *Zauderer* is best read

as applying not only to mandates aimed at curing deception but also to ones for other purposes," joining the First and Second Circuits in reaching that conclusion. *Id.* at 13–14; *see Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (joint opinion of Boudin, C.J. & Dyk, J, that spoke for the court on this issue); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009).

The panel determined that this Court's decisions in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), and *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), did not constrain the panel to conclude "that *Zauderer* applied *only* to disclosure mandates aimed at correcting deception." Panel Op. 12 (emphasis in original). Rather, the portions of those decisions upon which plaintiffs relied were not "correctly construed as holdings." *Id.* "[B]oth decisions pointed to features of those cases that render wholly inapplicable *Zauderer*'s characterization of the speaker's interest as 'minimal': they rejected any idea that the mandated disclosures were of 'purely factual and uncontroversial' information." *Id.*

Applying the *Zauderer* standard, the panel noted that the regulation serves several interests, including "enabl[ing] a consumer to apply patriotic or protectionist criteria in the choice of meat," and "enabl[ing] one who believes that United States practices and regulation are better at assuring food safety than those of other countries, or indeed the reverse, to act on that premise." *Id.* at 14. The panel concluded that those goals "justify the 'minimal' intrusion on [plaintiffs'] First Amendment interests." *Id.*

Because "reasonable judges may read *Reynolds* as holding that *Zauderer* can apply only where the government's interest is in correcting deception," however, the panel suggested that the case be heard *en banc*. *Id.* at 14 n.1. The full Court voted to rehear the case *en banc*, vacated the panel opinion, and ordered the parties to file supplemental briefs addressing whether *Zauderer* applies when the government requires disclosure of purely factual and uncontroversial information for a reason other than to prevent deception. *See* Order, Apr. 4, 2014. (The parties were also instructed to refile their original briefs, which address the other issues in the case.)

SUMMARY OF ARGUMENT

In *Zauderer*, the Supreme Court recognized that a commercial actor's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal," though the Court recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis in original).

The applicability of the *Zauderer* standard does not depend upon the government's justification for the required disclosure. Instead, the *Zauderer* decision was premised on the Court's conclusion that a commercial actor has only a minimal First Amendment interest in declining to provide a particular piece of factual information. That conclusion does not depend on the government's reasons for requiring such factual information.

Plaintiffs provide no reason to believe that their expressive activity will be affected in any way by a regulation requiring retailers to disclose the country of origin of meat products. Far from chilling protected speech, the regulation at issue here implicates only the interest in "*not* providing . . . factual information." There is no basis for applying a heightened standard of First Amendment review to protect that "minimal" interest.

The panel thus properly concluded that this Court should join the First and Second Circuits in declining to impose searching First Amendment review on the "literally thousands" of regulations requiring "routine disclosure" of information in the commercial context, *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (joint opinion of Boudin, C.J., and Dyk, J., which represents the opinion of the court on this point); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (declining to impose "searching scrutiny by unelected courts" on "[i]nnumerable federal and state regulatory programs [that] require the disclosure of product and other commercial information").

As the panel recognized, no prior case from this Court or the Supreme Court declined to apply the *Zauderer* standard to mandatory disclosures of purely factual and uncontroversial commercial information. Cases in which a heightened standard has applied to compelled commercial speech have involved circumstances in which the speech at issue was found not to be purely factual and uncontroversial. Such cases have little bearing on this case.

ARGUMENT

THE *ZAUDERER* STANDARD APPLIES TO REQUIRED DISCLOSURES OF PURELY FACTUAL AND UNCONTROVERSIAL INFORMATION REGARDLESS OF THE NATURE OF THE GOVERNMENT'S INTEREST

A. *Zauderer*'s rationale extends beyond cases in which the government seeks to prevent deception.

1. The panel correctly concluded that the *Zauderer* standard applies to all requirements that a commercial actor disclose factual and uncontroversial information. In *Zauderer*, disclosures were mandated to prevent consumer deception, and the Supreme Court thus assessed whether the required disclosure was "reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). If the government provides a different justification for a disclosure requirement, the *Zauderer* standard requires an assessment of whether the required disclosure is reasonably related to that interest. But the nature of the government's reason for requiring disclosure does not affect whether the *Zauderer* standard applies.

The applicability of the *Zauderer* standard is premised on the "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650. Unlike restrictions on commercial speech, disclosure requirements do not prevent sellers "from conveying information to the public"; they merely require sellers to provide "more information than they might otherwise be inclined to present." *Id.* The Supreme Court recognized in *Zauderer* that "[b]ecause

the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," a commercial actor's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal." *Id.* at 651 (emphasis in original). The strength of the interest in not providing particular factual information in no way depends on the government's reasons for requiring disclosure.

The rationale for a disclosure requirement also has no bearing on the requirement's effect on protected speech. Disclosures of factual and uncontroversial information do not "attempt[] 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.'" *Id.* at 651 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Accordingly, regardless of the government's justification, "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* at 651 & n.14.

Factual and uncontroversial disclosures can become constitutionally problematic only if they interfere with the speaker's ability to engage in its own protected speech. The Supreme Court thus acknowledged in *Zauderer* that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* at 651. But nothing in the inquiry about whether a requirement chills protected speech depends on the nature of the government's asserted interest.

2. As the panel explained, "*Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of [factual and uncontroversial] information as 'minimal' seems inherently applicable beyond the problem of deception." Panel Op. 12. The *Zauderer* decision was premised on the Supreme Court's conclusion "that commercial speech warrants protection mainly due to its information-producing function," and on the Court's finding "that a commercial actor has only a 'minimal' First Amendment interest in *not* providing factual information with which the actor does not disagree." *Id.* at 11 (emphasis in original).

The Supreme Court's decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 233 (2010), demonstrates that mandated disclosures need not be limited to disclosures designed to counteract specific misimpressions, but rather may more generally address incomplete information provided to consumers. In *Milavetz*, the Court applied the *Zauderer* standard and rejected the contention that it should apply *Central Hudson* to a requirement that attorneys providing consumer bankruptcy services include in their advertisements the statement: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.'" *Milavetz*, 559 U.S. at 233 (quoting 11 U.S.C. § 528(a)(4)).

The "deception" at issue in *Milavetz* related to advertisements that held out "the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs." *Id.* at 250. That concern was directly and completely addressed by the portion of the required disclosure declaring that "We help people file

for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4). But the plaintiffs in *Milavetz* separately challenged the other portion of the required disclosure: "We are a debt relief agency." According to the plaintiffs, "the term 'debt relief agency' is confusing and misleading and . . . requiring its inclusion in advertisements cannot be 'reasonably related' to the Government's interest in preventing consumer deception, as *Zauderer* requires." *Milavetz*, 559 U.S. at 251. The Supreme Court turned aside this contention on the ground that this portion of the required disclosure "provides interested observers with pertinent information about the advertiser's services and client obligations." *Id.* This holding that a government interest in supplying "pertinent information" was sufficient cannot be reconciled with plaintiffs' view in this case that each required statement must be tailored to counteract a particular misconception.

As the panel recognized, in cases not involving a deception rationale, courts of appeals have applied the *Zauderer* standard by requiring a reasonable fit between the disclosure and the government interest actually asserted. The Second Circuit explained that "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," and that "[s]uch disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) (footnote and internal quotation marks

omitted). "Innumerable federal and state regulatory programs require the disclosure of product and other commercial information," and "expos[ing] these long-established programs to searching scrutiny by unelected courts" would be "neither wise nor constitutionally required." *Id.* at 116. The First Circuit has similarly observed that there are "literally thousands" of regulations requiring "routine disclosure" of information in the commercial context, and concluded that "[t]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (joint opinion of Boudin, C.J., and Dyk, J., which represents the opinion of the court on this point).

3. In other contexts, the Supreme Court has confirmed that disclosure requirements are subject to First Amendment scrutiny only insofar as they threaten to chill protected speech. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), the Supreme Court observed that "[t]he compelled-speech violation in each of [the Court's] prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." The Court thus saw no First Amendment problem with a requirement that a law school arrange for interviews between its students and military recruiters, even if doing so required the law school to speak in service of the government's objectives. "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a

student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in [*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943),] and *Wooley* [*v. Maynard*, 430 U.S. 705 (1977),] to suggest that it is." *Id.* at 62.

Similarly, in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), the Supreme Court subjected a disclosure requirement to heightened scrutiny only because in the factual circumstance before the Court "a law compelling . . . disclosure would clearly and substantially burden the protected speech," *id.* at 798—in that case, by discouraging charitable solicitations that contain "informative and perhaps persuasive speech," *id.* at 796 (internal quotation marks omitted); *see also id.* at 796 n.9 (noting that if the burden of the disclosure requirement had fallen on "[p]urely commercial speech," it would, under *Zauderer*, be "more susceptible to compelled disclosure requirements").

This Court has recognized the significant First Amendment implications of ideological messages that "compel[] a speaker to endorse a position contrary to his beliefs, or to affirm a belief and an attitude of mind he opposes," *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108 (D.C. Cir. 2011) (internal quotation marks and brackets omitted), or mandated disclosures that "pose[] the danger that speech deserving of greater constitutional protection will be inadvertently suppressed," *SEC v. Wall Street Pub. Inst.*, 851 F.2d 365, 374 (D.C. Cir. 1988) (internal quotation marks and brackets omitted). But absent such concerns, disclosure requirements do not

intrude on any significant First Amendment interest, regardless of the nature of the government interest asserted. As this Court has observed in another context, "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) (quoting *Zauderer*, 471 U.S. at 650); *see also id.* at 374 (concluding that it would be "impermissibly 'paternalistic' for courts to challenge . . . disclosure requirements because 'zeal to protect the public from "too much information" could not withstand First Amendment scrutiny'" (quoting *Meese v. Keene*, 481 U.S. 465, 482 (1987)).

B. Plaintiffs have only a "minimal" interest in not conveying the information at issue here.

Plaintiffs make no allegation that the required country-of-origin labels interfere with any message they wish to communicate. Nor have they "articulated an objection to the content of the message conveyed by the mandated speech." Panel Op. 10; *see also id.* ("While [plaintiffs have] objected to the term 'slaughtered,' [they have] not expressed any problem with the euphemism that the 2013 rule allows retailers to substitute—'harvested.'"); Pls.' Reply Br. 8 n.2 (footnote in reply brief raising objection to the word "slaughtered," which was not raised in opening brief, and not

mentioning ability to substitute the word "harvested").[1] This case illustrates why the Supreme Court characterized the "constitutionally protected interest in *not* providing any particular factual information" as "minimal." *Zauderer*, 471 U.S. at 651 (emphasis in original).

Plaintiffs' primary interest in this case is not a First Amendment interest at all. Instead, plaintiffs urge that the regulation causes them to incur costs in the form of changing production processes or obtaining livestock from different sources. *See, e.g.*, Panel Op. 7 (noting asserted need to change production practices); *see also id.* at 6 (noting that plaintiffs are upstream producers who do not actually make the required disclosures to consumers). These costs would be no different if plaintiffs were merely required to keep track of the country of origin without passing on the information to consumers, a requirement that plainly would not violate the First Amendment.

The district court thus properly recognized that "Plaintiffs appear to conflate the burden that they claim the Final Rule places on their *finances* with the burden it places on their speech." PI Op. 18 [JA 1156] (emphasis in original). Plaintiffs' response is to note that commercial speech, regardless of the speaker's economic motivations, retains protection under the First Amendment. Pls.' Reply Br. 8–9. But the issue here is not plaintiffs' motivation, it is the nature of their asserted injury.

[1] Of course, a plaintiff cannot escape the *Zauderer* standard merely by objecting to or disagreeing with the content of the required message. This case does not present an occasion to determine when disclosures are properly described as "purely factual and uncontroversial," as that standard is plainly and concededly met here.

Plaintiffs cannot articulate any way in which the required disclosures chill protected *speech*, but instead complain of burdens on their production practices. Such burdens on nonexpressive conduct do not implicate the First Amendment.

Plaintiffs underscore the error of their analysis by urging "that *Zauderer* review is appropriate only in the context of *voluntary* commercial advertisements." Pls.' Reply Br. 5 (emphasis in original). In the context of voluntary advertisements, the *Zauderer* standard accounts for the possibility that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. But here, plaintiffs emphasize that the restriction has no effect on their desire to engage in voluntary advertising, and thus illustrate why it does not chill protected speech. The absence of any link between protected speech and the disclosures at issue weakens, rather than strengthens, plaintiffs' First Amendment argument.

C. This Court's precedents do not require a different result.

The *en banc* Court is not bound by prior panel decisions of this Court. But in any event, the panel reconciled its decision with this Court's precedents. In *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), this Court considered a regulation requiring cigarette manufacturers to print on their cigarette packages and advertisements a set of textual warnings about the dangers of cigarette use, accompanied by graphic images selected by the Food and Drug Administration. The Court noted that "the government can certainly require that consumers be fully

informed about the dangers of hazardous products." *Id.* at 1212. And the Court observed that the tobacco companies "never argued that *no* disclosure requirements are warranted," and "concede[d] in their brief that they would be amenable to a number of new disclosure requirements, including putting the Act's new text on the side of packages, the bottom front of packages and advertisements, or using less shocking graphics." *Id.* at 1215 (emphasis in original). The panel's decision in this case echoes those acknowledgments by the Court in *Reynolds*.

Plaintiffs focus instead on the analysis in *Reynolds* relating to the graphic images proposed by FDA. But as to those images, the *Reynolds* decision "rejected any idea that the mandated disclosures were of 'purely factual and uncontroversial' information," in contrast to the disclosures at issue here. Panel Op. 12 (citing *Reynolds*, 696 F.3d at 1212). Instead, the panel majority in *Reynolds* characterized the images as an attempt by the government to force cigarette manufacturers "to go beyond making purely factual and accurate commercial disclosures." *Id.* at 1212. And the Court cited the Supreme Court's discussion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 15–16 n.12 (1986), which distinguished "appropriate information disclosure requirements" from requirements that corporations carry "messages of third parties" that are "biased against or . . . expressly contrary to the corporation's views." *See Reynolds*, 696 F.3d at 1213–14. "*Reynolds*'s amalgamation of distinctions—the problem to be cured and the character of the mandate—militates against viewing it as a holding that the first alone was fatal to *Zauderer* review." *Id.*

Reynolds's reliance on *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994), illustrates the limited nature of the holding in *Reynolds*. *See Reynolds*, 696 F.3d at 1214 (discussing *Ibanez*). In *Ibanez*, the Supreme Court considered a conditional disclosure requirement that purported to prevent "specialist" designations from being misleading. The regulation at issue "prohibit[ed] use of any 'specialist' designation unless accompanied by a disclaimer" stating that "'the recognizing agency is not affiliated with or sanctioned by the state or federal government'" and "set[ting] out the recognizing agency's 'requirements for recognition, including, but not limited to, education, experience, and testing.'" *Ibanez*, 512 U.S. at 146 (quoting regulation at issue; *Ibanez*'s brackets omitted). The Supreme Court observed that it was "plain" that "[t]he detail required in the disclaimer . . . effectively rules out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing," and that there was no evidence of "harm that is potentially real, not purely hypothetical." *Id.* at 146–47. Citing *Zauderer*, the Court concluded that the disclaimer requirement was "one imposing 'unduly burdensome disclosure requirements [that] offend the First Amendment.'" *Id.* at 146 (quoting *Zauderer*, 471 U.S. at 651) (alteration in original). The Court's analysis in *Ibanez* rested on its conclusion that the government had not established that the regulation advanced its asserted interest, and that the "plain" consequence of the regulation was to "effectively rule[] out" a type of protected speech. There is no basis for suggesting that the analysis in *Ibanez* would have been any different if the government interest

that the regulation purported to serve was something other than preventing deception. Moreover, in *Ibanez*, as in *Reynolds* (but unlike here), the compelled disclosure was explicitly held to interfere with the right to free expression.

The dissenting opinion in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), also relied on by *Reynolds* (*see* 696 F.3d at 1213 & n.7), similarly involved a regulation that impinged on free expression. *Glickman* concerned a requirement that California fruit growers pay assessments that served in part to fund "generic advertising of California nectarines, plums, and peaches." *Glickman*, 521 U.S. at 460. The Court concluded that the assessments, which served the regulatory regime more generally and were not solely designed to fund advertisements, raised no First Amendment concern. The dissenting opinion upon which the *Reynolds* Court relied observed that the growers "den[ied] that the general [advertising] message [was] as valuable and worthy of their support as more particular claims about the merits of their own brands." *Id.* at 489 (Souter, J., dissenting). The dissenting Justices thus concluded that the regulation impermissibly intruded on the growers' "expressive preference." *Id.* A version of that view was adopted by a majority of the Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), where the Court invalidated a mandatory assessment designed almost exclusively to fund generic advertisements for mushrooms. The Court's analysis of assessments that funded promotional materials, to which the Court noted that the plaintiffs had raised an

objection, *see id.* at 416, does not dictate the standard for purely factual and uncontroversial disclosures.

In *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), this Court considered a requirement that employers post a notification of employee rights under the National Labor Relations Act. This Court was not interpreting the First Amendment, but was interpreting a statute, 29 U.S.C. § 158(c). *See* Panel Op. 13. In that context, the Court observed that the plaintiffs viewed the required notification "as one-sided, as favoring unionization." *Nat'l Ass'n of Mfrs.,* 717 F.3d at 958. And the Court quoted the Supreme Court's observation that in prior cases, "a 'compelled-speech violation' occurred when 'the complaining speaker's own message was affected by the speech it was forced to accommodate.'" *Id.* (quoting *Forum for Academic & Institutional Rights*, 547 U.S. at 63). The only portion of the decision that addressed *Zauderer* was "a footnote response to a party's footnote on a constitutional issue," which "altogether lacks the earmarks of a constitutional holding." Panel Op. 13.

In *National Association of Manufacturers v. SEC*, No. 13-5252 (D.C. Cir. Apr. 14, 2014), a different panel of this Court relied on *Reynolds* for the proposition 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 *Reynolds*, 696 F.3d at 1213, in turn quoting *Zauderer*, 471 U.S. at 651). The *en banc* Court is not bound by the reasoning of the

panel in that case, which also (unlike the present case) involved a dispute as to whether the disclosures at issue were factual and uncontroversial, *see id.*

D. Applying *Zauderer* appropriately balances the government's interest against plaintiffs' minimal First Amendment interest.

Applying the *Zauderer* standard, the panel appropriately balanced the benefit of allowing consumers to know the country of origin of their food against "the 'minimal' intrusion on [plaintiffs'] First Amendment interests." Panel Op. 14. The contention that *Central Hudson* review should apply to compelled disclosures of factual and uncontroversial information in the commercial speech context would ignore the minimal nature of plaintiffs' First Amendment interest.

Although it is unnecessary to address whether the government's interests include a likelihood of deception, the district court also properly recognized that "the 'likelihood of deception is hardly . . . speculative'" in this case. PI Op. 15 [JA 1153] (quoting *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 413 (D.C. Cir. 2012)) (omission in original). The rule at issue here eliminated allowances in the prior agency rule that had "all but ensured that certain . . . commodities would carry misleading labels" because meat could be labeled based on the country of origin of animals other than the one from which the meat was derived. *Id.* The likelihood of consumer confusion was enhanced by the fact that "retailers had no obligation to provide any of the details regarding which steps of the production process happened where," and by retailers' ability "to list the countries in any order." *Id.* at 16 [JA 1154]. The First

Amendment does not preclude the agency from requiring accurate information about where a consumer's food comes from.

CONCLUSION

For the foregoing reasons, and those given in our principal brief, the district court's order should be affirmed.

Respectfully submitted,

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APRIL 2014

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set out in this Court's order of April 4, 2014. This brief contains 4,858 words.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Pursuant to the Court's order of April 4, 2014, I will also cause thirty paper copies of this brief to be hand-delivered to the Court by 4:00 today. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny