RECENT CASES

FIRST AMENDMENT — COMPELLED COMMERCIAL DISCLOSURES — D.C. CIRCUIT LIMITS COMPELLED COMMERCIAL DISCLOSURES TO VOLUNTARY ADVERTISING. — *National Ass'n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), *reh'g en banc denied*, No. 13-5252 (D.C. Cir. Nov. 9, 2015).

Two primary cases govern instances of compelled commercial speech.[1] The first, *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[2] provides a general rule: to compel commercial speech, the government must satisfy intermediate scrutiny, which requires the government to prove a "substantial" interest exists and that the regulation "directly advances" the interest in a way "not more extensive than is necessary to serve that interest."[3] The second, *Zauderer v. Office of Disciplinary Counsel*,[4] provides an exception: required disclosures of commercial speech that contain "purely factual and uncontroversial information" are subject only to rational basis review.[5] Though *Zauderer* itself addressed only disclosures required to cure deceptive advertising, in 2014, the en banc D.C. Circuit in *American Meat Institute v. USDA*[6] (*AMI*) applied *Zauderer* broadly to cover disclosures mandated in furtherance of other government interests as well. Recently, in *National Ass'n of Manufacturers v. SEC*[7] (*NAM II*), a panel of the D.C. Circuit constrained *AMI*, holding that *Zauderer* covers only disclosures in voluntary commercial advertising.[8] The majority's reading of *Zauderer* is persuasive, but the court provided little guidance as to the meaning of *Zauderer*'s second requirement: that the compelled disclosures be "purely factual and uncontroversial."[9] If this requirement were confined to disclosures regarding the essential characteristics of a product, it would

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[1] The "core" of commercial speech is "speech which does no more than propose a commercial transaction." Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 523 n.12 (D.C. Cir. 2015) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983)). Whether speech combining commercial and noncommercial elements gets treated as commercial speech depends on "whether the communication is an advertisement, whether [it] makes reference to a specific product, and whether the speaker has an economic motivation." *Id.* (quoting Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 97 (2d Cir. 1998)); *see also* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 872–73 (2015) (describing the higher protection afforded "paradigmatic" First Amendment speech versus commercial speech, *id.* at 873).

[2] 447 U.S. 557 (1980).

[3] *Id.* at 566.

[4] 471 U.S. 626 (1985).

[5] *Id.* at 651.

[6] 760 F.3d 18 (D.C. Cir. 2014) (en banc).

[7] 800 F.3d 518 (D.C. Cir. 2015).

[8] *See id.* at 522–23.

[9] 471 U.S. at 651.

create an administrable boundary for rational basis review that would balance the interests of both consumers and commercial speakers.

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[10] seeks to ameliorate widespread violence in the Democratic Republic of the Congo (DRC) by reducing funding to armed groups from mining operations.[11] To this end, in 2012, the SEC implemented the Conflict Minerals Regulation, which requires companies whose products contain certain minerals to determine whether those minerals originated in the DRC or surrounding countries and to report on their websites their efforts to discover whether the minerals came from mines controlled by armed groups.[12] If a company cannot determine the mine from which its minerals originated, it must publish that its products "have not been found to be 'DRC conflict free.'"[13]

The National Association of Manufacturers (NAM) challenged the disclosure under the First Amendment insofar as it regarded products where the origin of minerals was uncertain, arguing that the disclosure was unconstitutionally compelled speech.[14] The U.S. District Court for the District of Columbia upheld the disclosure. Because the regulation affected commercial speech, not deceptive advertising, the court applied *Central Hudson*.[15] The court found the regulation satisfied intermediate scrutiny: the government had a substantial interest in "promoting peace and security in and around the DRC,"[16] the disclosure directly advanced the purpose by reducing funding to armed groups,[17] and the scheme was "proportionate to the interests."[18]

In its first panel decision, the D.C. Circuit affirmed the lower court's determinations on the administrative challenges but reversed on First Amendment grounds.[19] Writing for the panel, Judge Ran-

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[10] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[11] *See id.* § 1502 (codified at 15 U.S.C. § 78m(p) (2012)).

[12] Conflict Minerals, 17 C.F.R. §§ 240.13p-1, 249b.400 (2015).

[13] SEC, OMB NO. 3235-0697, FORM SD: SPECIALIZED DISCLOSURE REPORT 3–4 (2012), https://www.sec.gov/about/forms/formsd.pdf [https://perma.cc/TL4R-NABP]. "DRC conflict free" is defined as products that do not contain "minerals that directly or indirectly finance or benefit armed groups" in covered countries. 15 U.S.C. § 78m(p)(1)(D).

[14] Nat'l Ass'n of Mfrs. v. SEC (*NAM 1*), 748 F.3d 359, 370 (D.C. Cir. 2014), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). NAM also brought challenges under the Administrative Procedure Act and Exchange Act. *Id.* at 365.

[15] Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43, 77 (D.D.C. 2013). Until *AMI*, circuit precedent limited *Zauderer* to instances of deceptive advertising. *See id.*

[16] *Id.* at 79.

[17] *See id.* at 79–80. The court held the scheme to a less rigorous evidentiary standard because it was in the foreign relations context, which allows conclusions "based on informed judgment rather than concrete evidence." *Id.* at 79 (quoting Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010)).

[18] *Id.* at 81 (quoting Nat'l Cable & Telecomms. Ass'n v. FCC, 555 F.3d 996, 1002 (D.C. Cir. 2009)).

[19] *See NAM I*, 748 F.3d at 370, 373.

dolph,[20] like the lower court, found that *Zauderer* did not apply.[21] He wrote that the threshold for applying *Zauderer* is not simply whether information was factual and uncontroversial.[22] Rather, it is a special test limited to disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers."[23] The court found the regulation was not a "'reasonable' 'fit,'"[24] as the government "present[ed] no evidence that less restrictive means would fail."[25]

However, this opinion was vacated after *AMI*, which found mandatory country-of-origin labeling on meat packaging subject only to *Zauderer*'s rational basis scrutiny.[26] The *AMI* court determined that *Zauderer* applied to government interests beyond curing deceptive advertising because *Zauderer*'s stated basis for protecting commercial speech — providing information to consumers — easily expanded to other government interests, including health or quality concerns about meat.[27] Under this reading of *Zauderer*, any "purely factual and uncontroversial" compelled disclosure need pass only rational basis review, regardless of whether the initial advertisement was deceptive or whether there was an initial advertisement at all.[28]

In light of *AMI*'s wider application of *Zauderer*, the D.C. Circuit granted a rehearing for the Conflict Minerals Regulation.[29] Writing for the court, Judge Randolph reaffirmed the first panel decision.[30] He began by asking "whether *Zauderer* . . . reache[d] compelled disclosures that are unconnected to advertising or product labeling at the point of sale."[31] After pointing to numerous specific references to advertising in *Zauderer*, the court determined that *Zauderer*'s loose standard applied only to cases of "voluntary commercial advertising."[32]

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[20] Judge Randolph was joined by Judge Sentelle in full and by Judge Srinivasan in Parts I, II, and III, but not Part IV regarding the First Amendment claim.

[21] *NAM I*, 748 F.3d at 371.

[22] Here, though, "it is far from clear that the description . . . is factual and non-ideological." *Id.*

[23] *Id.* (quoting R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213 (D.C. Cir. 2012), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014) (en banc)).

[24] *Id.* at 372 (quoting Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

[25] *Id.* NAM offered alternatives: allowing companies to "use their own language to describe their products" or having the government "compile its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit to the Commission." *Id.*

[26] *AMI*, 760 F.3d at 27.

[27] *Id.* at 22. *AMI* overruled the initial panel decisions in *National Ass'n of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, and *NAM I*. *AMI*, 760 F.3d at 22–23.

[28] *AMI*, 760 F.3d at 26 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

[29] *See NAM II*, 800 F.3d at 520.

[30] *Id.* at 521.

[31] *Id.* at 522. The court here maintained its assumption that the disclosure qualifies as commercial speech but cabined *Zauderer* to point-of-sale disclosures. *See id.* at 524 n.14.

[32] *Id.* at 523; *see also id.* at 522.

AMI had pointed to *Zauderer*'s statement that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal" to conclude that compelled disclosures did not merit intermediate scrutiny.[33] Conversely, Judge Randolph drew on *Zauderer*'s context to hold that the minimal interest extended only to voluntary advertising rather than to all government-compelled disclosures.[34] To support his conclusion, the judge pointed to two cases that distinguished *Zauderer* as being limited to regulation of commercial advertising.[35] Judge Randolph used those precedents to hold that the court's reliance on *Central Hudson* was correct and that its reasoning under intermediate scrutiny remained intact.[36]

The court gave two alternative bases for its decision. First, it argued that, even under *AMI*'s view of *Zauderer*, the regulation would still fail. Acknowledging that the government interest was substantial, the court argued that the government did not prove that the measure would be effective.[37] Second, the court found that the information was not "purely factual and uncontroversial."[38] Because the court held that "uncontroversial" could not mean the same thing as "purely factual," an accurate statement could fall outside of *Zauderer*.[39] The court found the required disclosure to be controversial because it required manufacturers to take moral responsibility for conflict in the DRC even if they disagreed with the charge of moral failing.[40] If this type of disclosure were allowed, the government could compel companies to label their products as not "environmentally sustainable" or not "fair trade" as long as the government provided a factual definition of these terms.[41]

Dissenting, Judge Srinivasan argued that the disclosure was clearly commercial speech[42] and that *Zauderer* was the appropriate standard of review.[43] Based on the benefit to consumers of the free flow of commercial information, Judge Srinivasan adopted *AMI*'s reading of

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[33] *AMI*, 760 F.3d at 22 (quoting *Zauderer*, 471 U.S. at 651).

[34] *See NAM II*, 800 F.3d at 522–23. Though not deciding whether the Conflict Minerals disclosure was commercial speech, the panel argued that *Zauderer* applied only at the heart of commercial speech: voluntary advertising. *See id.* at 523 & n.12.

[35] *See id.* at 523 (citing United States v. United Foods, Inc., 533 U.S. 405 (2001) (distinguishing *Zauderer* as applicable to voluntary advertising and striking down a requirement that a mushroom producer pay for advertising promoting unbranded mushrooms); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995) (finding that outside of commercial advertising, the general rule is that speakers get to tailor their speech)).

[36] *See id.* at 524.

[37] *See id.* at 524–27.

[38] *Id.* at 527; *see also id.* at 527–29.

[39] *Id.* at 528.

[40] *See id.* at 530.

[41] *See id.*

[42] *See id.* at 534 (Srinivasan, J., dissenting).

[43] *See id.* at 532.

Zauderer that the court should grant permissive review to disclosures that increase the flow of truthful information and that companies have a minimal interest in "resisting disclosure"[44] as long as the information is "purely factual and uncontroversial."[45] Additionally, because the phrase "purely factual and uncontroversial" comes from a judicial opinion rather than a statute, Judge Srinivasan argued the phrase could be understood in context to mean facts about whose truth "there could be no 'disagree[ment].'"[46] He argued the statutory definition of "not . . . 'DRC conflict free'" provided the necessary uniformity to eliminate debate over factual accuracy and allowed manufacturers to clarify the phrase with additional information.[47] Further, Judge Srinivasan articulated that the "uncontroversial" standard should not bar disclosures about topics that companies "would rather avoid" because that would draw into question things such as nutrition labels or disclosures of mercury content.[48] The dissent then concluded, like the trial court, that the regulation would pass the *Central Hudson* test.[49]

The majority correctly read *Zauderer*'s permissive review as applicable only to voluntary commercial speech. However, it did not provide significant guidance on *Zauderer*'s requirement that disclosures be "purely factual and uncontroversial." If this were confined to information about the essential characteristics of a product, it would provide an administrable boundary for rational basis review that would balance the interests of consumers and commercial speakers.

Cases leading up to and following *Zauderer* defy *AMI*'s charge that *Zauderer* "does not give a clear answer" on its scope.[50] The first case establishing protection for commercial speech emphasized that "[f]reedom of speech presupposes a willing speaker" and that the First Amendment protects not only the recipient of information but also the speaker.[51] In *Zauderer* itself, the Court determined the "well settled" approach to

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[44] *See id.* at 534.

[45] *See id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

[46] *Id.* at 538 (alteration in original) (quoting *AMI*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc)); *see also id.* at 537.

[47] *See id.* at 540 (quoting Conflict Minerals, 77 Fed. Reg. 56,274, 56,322 n.562 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p-1, 249b.400 (2015))).

[48] *See id.*

[49] *See id.* at 541–44. While the trial court described the government interest as promoting peace and security in the DRC, *see* Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43, 78 (D.D.C. 2013), Judge Srinivasan articulated a more particular interest in reducing the financing of armed groups in the DRC region through trade in conflict minerals, *NAM II*, 800 F.3d at 541 (Srinivasan, J., dissenting).

[50] *AMI*, 760 F.3d at 21. The *NAM II* court used point-of-sale advertising as a quintessential example of voluntary commercial speech. *See NAM II*, 800 F.3d at 521–22. Although the court declined to define the extent of commercial speech, its discussion did not foreclose the possibility that other forms of speech beyond point-of-sale advertising could fit into the category of voluntary commercial speech. *See id.* at 523 n.12.

[51] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

commercial speech was that the government may "prevent . . . commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction."[52] This approach assumes the government is addressing preexisting speech. The Supreme Court ratified this view when it struck down a mandatory assessment on all mushroom distributors, stating it was unclear how forcing companies to fund advertising was consistent with regulating "voluntary advertisements."[53] Of course the government can still compel speech out of silence. The disclosures simply must satisfy *Central Hudson*.[54]

The court in *AMI* departed from this precedent when it permitted the government to compel speech based solely on the benefit of commercial speech to consumers. Certainly, consumer benefit was key to the Supreme Court first striking down restrictions on advertising.[55] However, simply because consumer benefit was a reason to forbid government restriction of speech does not justify the converse: government power to compel speech to achieve that benefit. Rather, another variable comes into play — protection afforded to the speaker.[56] *AMI* misread *Zauderer* on this point: it characterized the advertiser's "minimal" interest in not disclosing information, predicated on rectifying misleading advertising, to mean that the minimal interest applies to every instance of accurate compelled speech.[57] *Zauderer* found the interest "minimal" in this one instance because the alternative was to ban the advertisement altogether.[58] Thus, a less restrictive way to fix the advertisement was to allow the voluntary portion to remain while compelling the speaker to rectify misleading aspects.[59] This limits instances of "minimal" interest to cases in which the company already elected to speak. Again, the government may still compel speech from silence as long as it satisfies *Central Hudson* intermediate scrutiny.

Although the court correctly read this portion of *Zauderer*, it could have done more to clarify the types of required disclosures that receive *Zauderer* review. After *AMI*, the standard for lenient review is whether the disclosure is "purely factual and uncontroversial."[60] The court

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[52] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (citation omitted).

[53] United States v. United Foods, Inc., 533 U.S. 405, 416 (2001).

[54] *See Zauderer*, 471 U.S. at 650–51, 651 n.14.

[55] *See Va. State Bd. of Pharmacy*, 425 U.S. at 763; Recent Case, 128 HARV. L. REV. 1526, 1531 (2015).

[56] *United Foods*, 533 U.S. at 410 (holding that "[t]he fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection").

[57] *See AMI*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc).

[58] *Zauderer*, 471 U.S. at 651.

[59] *See id.* at 652 & n.14 ("[A]ll our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech." *Id.* at 652 n.14.).

[60] *See* Timothy J. Straub, Note, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 FORDHAM URB. L.J. 1201, 1231 (2013).

could have concretely defined this phrase. It might have defined "factual" broadly[61] but then defined "uncontroversial" so as to limit rational basis review to disclosures regarding an essential feature of the product. This definition would prevent disclosures that force companies to wade into valuative debates while also enabling a disclosure that protects consumers.[62] By failing to formalize a definition, the court's discussion of disclosures danced around a standard but failed to articulate one,[63] which opened it to criticism by the dissent.[64]

Existing case law supports this definition of "uncontroversial." In *United States v. United Foods, Inc.*,[65] the Supreme Court held that companies should not be required to "subsidize speech with which they disagree" even when it was factual advertising about the benefits of mushrooms.[66] This speech was purely factual, but because United Foods thought their mushrooms were superior, they could not be forced to speak about mushrooms in general. This speech would be extrinsic to United Foods's specific product. Likewise, in *R.J. Reynolds Tobacco Co. v. FDA*,[67] cigarette warnings with "inflammatory"[68] graphics that conveyed factual information did not satisfy the uncontroversial standard because they attempted to "evoke emotion . . . and browbeat consumers into quitting."[69] The cigarette company did not deny that they must include warnings but argued that these particular warnings brought in external factors such as the shaming of smokers.[70] The court in *AMI* similarly discussed "uncontroversial." In dicta, the court stated that the term "slaughtered" might have been controversial had the rule not been changed to allow companies to use "harvested" instead.[71] "Slaughtered" would have accurately described what the companies did; yet it would have been controversial by importing the debate surrounding the moral aspect of the question. This indicates that "uncontroversial" involves more than factual accuracy.

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[61] *See id.* at 1253 (suggesting three categories of factual information: product origin, legally accepted classifications pertinent to the product, and consequences (including its use or cost)).

[62] *See NAM II*, 800 F.3d at 540 (Srinivasan, J., dissenting) (citing examples such as calorie counts or nutritional information about unhealthy foods).

[63] *See id.* at 528–30 (majority opinion).

[64] *See id.* at 535 (Srinivasan, J., dissenting) (arguing the majority's position leads to an odd rule permitting the requirement of information on packaging but not on a website).

[65] 533 U.S. 405 (2001).

[66] *Id.* at 411.

[67] 696 F.3d 1205 (D.C. Cir. 2012).

[68] *Id.* at 1216.

[69] *Id.* at 1217. *AMI* overruled *R.J. Reynolds*'s primary reasoning that *Zauderer* did not apply because the disclosures did not regard deceptive advertising; the portion of *R.J. Reynolds* discussing the "purely factual and uncontroversial" standard was an alternative basis for the decision that *AMI* did not overturn.

[70] *Id.* at 1211.

[71] *AMI*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc).

This definition is more desirable than the dissent's on both a doctrinal and an administrative level. Doctrinally, defining "uncontroversial" as relating to a product's essential characteristics recognizes the full picture of interests — the speaker's and the consumer's — rather than only the interest of the consumer. This result is more faithful to the Supreme Court's trajectory in extending protection to commercial speech.[72] Consumers certainly have an interest in a product and their use of it, but their interest in extraneous information is more attenuated, such that the speaker's interest outweighs their interest. Meat packaging companies should not be forced to wade into the controversy over slaughtering animals, and manufacturing companies should not be forced to announce moral responsibility for violence in the DRC.[73]

This definition is also easier to apply. The dissent advocated defining the entire phrase to mean accurate information that cannot convey a matter of opinion.[74] However, distinguishing fact from opinion can be extremely difficult.[75] For example, the dissent argued that the government could not compel a company to label its product as "environmentally unsustainable" even if it defined the term.[76] But under the dissent's rationale, the government could likely require a company to disclose the amount of carbon dioxide released per unit of time during its manufacture under the label of "carbon dioxide emission rate." This disclosure has an embedded moral aspect that is extrinsic to the product itself. Moreover, the dissent reasoned that the "environmentally unsustainable" disclosure would not trigger *Zauderer* review even with a statutory definition because it "come[s] across as a matter of opinion."[77] Drawing the line of how statements "come across" would be a highly subjective task for a judge, whereas asking whether speech regards an essential feature of a product is less so.

A robust reading of the First Amendment should be informed by all of its concerns, including the rights of the speaker. Limiting the term "uncontroversial" to disclosures that pertain to an essential feature of a product is an administrable standard that maps well onto the balance of speaker and consumer interests. When consumers have only a tenuous interest in a disclosure, the government must show that the disclosure is reasonably related to an important governmental interest before companies can be forced to publish it.

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[72] *See id.* at 43 (Brown, J., dissenting) ("The clear trajectory of the Supreme Court's jurisprudence is toward greater protection for commercial speech, not less.").

[73] The majority viewed the disclosure this way, stating: "The label '[not] conflict free' is a metaphor that conveys moral responsibility for the Congo war." *NAM II*, 800 F.3d at 530.

[74] *See id.* at 537–38 (Srinivasan, J., dissenting).

[75] *See id.* at 528–29 (majority opinion).

[76] *Id.* at 541 (Srinivasan, J., dissenting).

[77] *Id.*