EN BANC ARGUMENT SCHEDULED 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.

On Appeal from an Order of the
U.S. District Court for the District of Columbia Denying a Preliminary Injunction
(Honorable Ketanji Brown Jackson)

SUPPLEMENTAL BRIEF OF AMICI CURIAE FOOD & WATER WATCH, INC.; THE RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA; THE SOUTH DAKOTA STOCKGROWERS ASSOCIATION; AND THE WESTERN ORGANIZATION OF RESOURCE COUNCILS IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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April 21, 2014

CORPORATE DISCLOSURE STATEMENT

Food & Water Watch, Inc., is a national, nonprofit, public interest consumer advocacy organization. It has no parent company, and no publicly-owned corporation owns 10% or more of its stock.

The Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America, is a national, nonprofit trade association that exclusively represents the interests of independent cattle producers within the multi-segmented U.S. beef supply chain. It has no parent company, and no publicly-owned corporation owns 10% or more of its stock.

The South Dakota Stockgrowers Association is a grassroots organization of independent livestock producers dedicated to promoting and protecting the South Dakota livestock industry. It has no parent company, and no publicly-owned corporation owns 10% or more of its stock.

The Western Organization of Resource Councils is a regional organization of grassroots community membership-based organizations with the mission to advance a democratic, sustainable, and just society through community action. It has no parent company, and no publicly-owned corporation owns 10% or more of its stock.

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GLOSSARY

AMI	American Meat Institute
COOL	Country-of-origin labeling
USDA	U.S. Department of Agriculture

INTEREST OF AMICI CURIAE[1]

Amici Food & Water Watch, *et al.*, are a group of nonprofit consumer and rural advocacy organizations, as well as trade associations representing the cattle industry. They were intimately involved in, and spent considerable resources on, advocating for both the passage of the country-of-origin labeling (COOL) statute and the development of the COOL rule at issue in this case. Amici are defendants-intervenors in this case in the district court, as their intervention motion was granted after the American Meat Institute (AMI) filed its notice of appeal to this Court. Due to the timing of the district court's ruling on intervention, amici participated as amici curiae before this Court in the panel proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Food & Water Watch, *et al.*, submit this supplemental brief to address the question identified in this Court's April 4, 2014, order: 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 (1985), or whether such compelled disclosure is subject to review under *Central Hudson Gas & Electric v. Public Service*

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

Commission, 447 U.S. 557 (1980). As explained below, *Zauderer*'s rational-basis standard applies to compelled commercial disclosures that serve permissible government purposes of any kind, not just those aimed at preventing deception. *Zauderer*'s reference to the prevention of deception identified a sufficient, but not exclusive, government interest for the application of rational-basis review. Were this Court to hold otherwise, it would place itself at odds with decisions of the First, Second, and Sixth Circuits. For these reasons, the denial of the motion for a preliminary injunction should be affirmed.

The en banc Court should also affirm denial of the preliminary injunction motion even if it determines that *Zauderer*'s standard of review applies only to disclosure requirements aimed at preventing consumer deception. Although amici do not revisit the issue later in this brief, the plaintiffs cannot demonstrate a likelihood of success on the merits because the U.S. Department of Agriculture's (USDA) COOL rule serves a government interest in preventing deceptive or misleading speech, and thus qualifies for rational-basis review even under plaintiffs' narrow reading of *Zauderer*. *See* Food & Water Watch Amicus Br. 9-16.[2] Moreover, the COOL rule satisfies intermediate First Amendment scrutiny under *Central Hudson*. *Id.* at 16-21.[3]

[2] As amici have explained, a key goal of the COOL statute was to prevent consumers from believing that meat from animals imported from other countries (continued)

ARGUMENT

Zauderer subjects commercial-speech disclosure requirements to a level of constitutional scrutiny "akin to the general rational basis test governing all government regulations." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., for the majority). It thus treats disclosure requirements differently from prohibitions on commercial speech, which are subject to intermediate First Amendment scrutiny. *Zauderer*, 471 U.S. at 650.

I. *Zauderer* did not limit the application of rational-basis review to disclosure requirements aimed at preventing deception. In *Zauderer*, the Supreme Court upheld the constitutionality of a state bar disciplinary rule requiring attorneys who advertised contingent-fee representation to disclose that clients would have to bear certain costs. *See id.* at 633. The Court held that the disclosure

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but slaughtered in the United States was from the United States. *See, e.g.*, 148 Cong. Rec. S4024 (May 8, 2002) (statement of Sen. Tim Johnson) (stating that "opponents of country-of-origin labeling . . . like to import cheap meat . . . and camouflage those products as 'Made in the USA'"); 145 Cong. Rec. S2038 (Feb. 25, 1999) (statement of Sen. Feingold) (stating that, without country-of-origin labeling, consumers' only guidance was "misleading" because many people "would assume that a steak that carries a USDA inspection and grade label is U.S. produced").

[3] Indeed, as the panel concluded, one of the government's interests in the COOL rule is to enable consumers who believe that the United States is "better at assuring food safety" than other countries, "or indeed the reverse, to act on that premise." Slip Op. at 14. Protecting consumer safety is a substantial interest that satisfies *Central Hudson*. *See Pearson v. Shalala*, 164 F.3d 650, 655-56 (D.C. Cir. 1999) (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995)).

requirement was justified because the average consumer might not understand the difference between fees and costs. *Id.* at 652. Under these circumstances, the Supreme Court held that the disclosure requirement was "reasonably related to the [s]tate's interest in preventing deception of consumers," and thus "passe[d] muster" under the First Amendment. *Id.* at 651-52.

Although *Zauderer* concluded that a state interest in protecting consumers from deception is sufficient to uphold a disclosure requirement, it did not state or even suggest that such an interest is the only one permissible. Rather, it unsurprisingly focused on the government's interest in preventing deception because of the facts of the case before it; the potentially deceptive nature of the advertisement in the case was "self-evident." *Id.* at 652. The Court had no need to rely on any other government interest to uphold the disclosure requirement.

That the Supreme Court never said that only an interest in preventing consumer deception could justify disclosure requirements under *Zauderer*'s permissive standard was no mere oversight. Rather, the Supreme Court's analysis in *Zauderer* confirms that rational-basis review applies to commercial disclosure requirements that further government interests other than preventing deception.

First, *Zauderer* explained that First Amendment protection for "commercial speech is justified principally by the value to consumers of the information such speech provides." *Id.* at 651. Given that the provision of information to consumers

is the main reason for holding such speech protected in the first place, a commercial entity's "constitutionally protected interest in *not* providing any particular factual information" is "minimal." *Id.*; *see also id.* at 651 n.14 (stating that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed"). The Supreme Court and other courts have repeatedly relied on this justification for differential treatment of compelled commercial disclosures and outright prohibitions on commercial speech. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010) (citing *Zauderer* for this proposition); *see also, e.g.*, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001) (stating that, unlike prohibitions on commercial speech, factual disclosure requirements have no potential to "offend the core First Amendment values of promoting efficient exchange of information" and that such disclosure in fact "furthers, rather than hinders, the First Amendment goal of the discovery of truth").

Reading *Zauderer*'s rationale as limited to commercial disclosure requirements targeted only at preventing deception would make no sense. Disclosures are valuable wherever they are used to increase consumer awareness and knowledge about a particular issue important to consumers. For example, numerous laws require companies to include health and safety warnings that are

necessary for consumers to understand the risks they will undertake if they heed the companies' commercial message. *See*, *e.g.*, 21 C.F.R. § 201.57 (requirement mandating warnings on drug labels, including prominent "black box" warnings that emphasize particular hazards); *cf. Pearson*, 164 F.3d at 659 (recognizing that "the government's interest in preventing the use of labels [on dietary supplements] that are true but do not mention adverse effects" could typically be satisfied "by inclusion of a prominent disclaimer"). Other laws and regulations require disclosures that provide more general health information of interest to consumers. *See*, *e.g.*, 21 U.S.C. § 343(i)(2) (requiring that most food product labels bear an ingredient list); 21 C.F.R. § 101.9 (requiring nutrition labels on food packaging and identifying the information those labels must address, such as calories, dietary fiber, and certain vitamins and minerals). Required commercial disclosures are not limited to the health and safety context. For example, the Federal Trade Commission mandates disclosures by automobile dealers of warranty information in "Buyers' Guides" to be displayed on the windows of used cars offered for sale, 16 C.F.R. § 455.2, and disclosures of relationships between an endorser and a seller of a product, *id.* § 255.5. And the Securities and Exchange Commission compels issuers of securities to disclose information useful to investors as they make investment decisions, such as information about whether the issuer has adopted a code of ethics for certain executive officers, 17 C.F.R. § 229.406, and

the existence of most material pending legal proceedings to which the issuer is a party, *id.* § 229.103. "There 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); *accord Sorrell*, 272 F.3d at 116.

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" interest of the commercial speaker in not providing such information—exactly the situation in *Zauderer*. *See* 471 U.S. at 651. In this case, even if this Court were to determine that the COOL rule does not further a government interest in preventing consumers from being misled, *but see supra* note 2 and Food & Water Watch Amicus Br. at 9-16, the rule unquestionably provides useful information to consumers about the country of origin of their meat products. Although consumers may have a wide variety of motivations for focusing on a product's origin, it cannot seriously be questioned that, "[t]o some consumers . . . places of origin matter." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 889-90 (Cal. 2011) (noting that consumers' origin preferences may stem from "[a] range of motivations . . . , from the desire to support domestic jobs, to beliefs about quality, to concerns about overseas environmental or labor conditions, to simple patriotism"); *cf. Va. State Bd. of*

Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976) (recognizing that when a "domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs," the advertisement is of "general public interest").

In addition, as in *Zauderer*, the speakers' interest in keeping consumers in the dark—here, about where animals used in meat products were born, raised, and slaughtered—is minimal. The COOL rule 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 v. Maynard*, 430 U.S. 705, 714 (1977). The rule 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. v. Barnette*, 319 U.S. 624, 642 (1943). Rather, under the COOL rule, companies must simply disclose factual and uncontroversial information about the nature of their products.[4] In this

[4] This Court's April 4 order asked for supplemental briefing on the question whether *Zauderer* applies to "'purely factual and uncontroversial' commercial information, compelled for reasons other than preventing deception." The order thus assumes—and amici agree—that the en banc Court need not decide whether *Zauderer* applies to information that is not purely factual or that might be controversial. As the panel concluded, *see* Slip Op. at 10, the disclosure requirement under the COOL rule compels factual information that is not controversial. In any event, *Zauderer*'s reference to "purely factual and uncontroversial information," 471 U.S. at 651, described the nature of the disclosure at issue in that case. It did not set forth a minimum standard affecting (continued)

commercial context, companies 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.

Second, footnote 14 in *Zauderer* confirms that the Supreme Court contemplated that rational-basis review could apply to disclosure requirements that serve government interests beyond preventing deception. In that footnote, the Court rejected the contention that disclosure requirements should be subject "to a strict 'least restrictive means' analysis" under which requirements cannot survive First Amendment scrutiny "if there are other means by which the State's *purposes* may be served." *Zauderer*, 471 U.S. at 651 n.14 (emphasis added). The Court concluded that it would not be "appropriate to strike down [disclosure] requirements merely because other possible means by which the State might achieve its *purposes* can be hypothesized." *Id.* (emphasis added). By referring, twice, to the possibility that states might rely on multiple purposes to justify disclosure requirements, *Zauderer* recognized that preventing deception is not the only purpose sufficient to warrant rational-basis review.

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the application of rational-basis review. *See Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (Stranch, J., for the majority) (holding that "whether 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").

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, the application of intermediate scrutiny only to prohibitions on commercial speech as opposed to disclosure requirements affecting such speech. This differential treatment is on solid ground in light of the justification for commercial speech protection. *See supra* pages 4-5. Moreover, it is in accord with the well-established principle in the commercial speech context that disclosure is "constitutionally preferable to outright suppression." *Pearson*, 164 F.3d at 657.

II. Interpreting *Zauderer* to limit rational-basis review to disclosures aimed at preventing deception would put this Court at odds with decisions of the First, Second, and Sixth Circuits, all three of which have concluded that *Zauderer* review may apply to commercial disclosure requirements that serve government interests other than preventing consumer deception. These circuits have adopted an interpretation of *Zauderer* that flows straightforwardly from that case's language and rationale. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001); *N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132-34 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, J., for the majority); *Discount Tobacco City & Lottery, Inc. v.*

United States, 674 F.3d 509, 556, 566 (6th Cir. 2012) (Stranch, J., for the majority). This Court should follow the lead of these circuits.

The Second Circuit has applied *Zauderer* to commercial disclosure requirements that serve the purpose of informing consumers about environmental and health risks. In *Sorrell*, the court of appeals upheld under *Zauderer* a Vermont statute requiring manufacturers of light bulbs containing mercury to use labeling that disclosed the presence of mercury and told consumers how to dispose of mercury-containing products. *See* 272 F.3d at 107, 114-15. The law met *Zauderer*'s reasonableness requirement because it served "to better inform consumers about the products they purchase" by increasing their "awareness of the presence of mercury in a variety of products," which in turn served the state's interest in "the reduction of mercury pollution." *Id.* at 115.

Similarly, in *New York State Restaurant Ass'n*, the Second Circuit reiterated that a reasonable relationship to a state interest in informing consumers of factual information was sufficient to preserve a disclosure requirement against First Amendment challenge under *Zauderer*. *See* 556 F.3d at 132-33. There, New York City had required chain restaurants to disclose calorie contents of menu items. Reaffirming that "rules 'mandating that commercial actors disclose commercial information' are subject to the rational basis test," *id*. at 132 (quoting *Sorrell*, 272 F.3d at 114-15), the court held that the city's interest in combating obesity by

informing consumers about fast-food calories justified the challenged regulation, *id.* at 134.

In *Pharmaceutical Care Management Ass'n*, the First Circuit likewise interpreted *Zauderer* to apply beyond an interest in preventing deception. That case involved a commercial disclosure requirement that forced pharmacy benefit managers to disclose to health benefit providers certain "financial arrangements with third parties." 429 F.3d at 298-99 (lead opinion of Torruella, J.). The disclosure requirement, adopted in conjunction with other requirements ensuring that benefit managers acted as fiduciaries for their clients, was intended to place "health benefit providers in a better position to determine whether [pharmacy benefit managers] [were] acting against their interests, and correspondingly, to help control prescription drug costs and increase access to prescription drugs." *Id.* (lead opinion of Torruella, J.) The court of appeals held that the disclosure requirement was undoubtedly constitutional under *Zauderer* and emphasized that, were the court of appeals to hold otherwise, it would call into question a slew of longstanding laws requiring routine economic disclosures. *Id.* at 316 (Boudin, C.J., for the majority).

The Sixth Circuit has likewise endorsed a broad view of *Zauderer*. In *Discount Tobacco*, the Sixth Circuit cited with approval the Second Circuit's decision in *Sorrell* for the proposition "that *Zauderer*'s framework can apply even

if [a] 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); *see also id.* at 551-52 (identifying how Judge Stranch's opinion relates to the lead opinion). The court of appeals upheld against a First Amendment challenge a cigarette warning label requirement of the Family Smoking Prevention and Tobacco Control Act, holding that the requirements were "reasonably related to the purpose of preventing consumer deception." *Id.* at 562 (Stranch, J., for the majority). In so doing, however, the Court described *Zauderer*'s standard in broad terms, stating that the test is whether "the warnings (the means) be reasonably related to the purpose (*here*, preventing consumer deception)." *Id.* at 566 (Stranch, J., for the majority) (emphasis added).

Taken together, the First, Second, and Sixth Circuit decisions make clear that *Zauderer*'s rational-basis standard has broad application to commercial disclosure requirements, like those at issue in this case, regardless of whether those requirements serve an interest in preventing deception or instead address another important government interest. *Zauderer*'s reasonableness standard grants governments the authority to require companies to disclose factual information that reasonable consumers would find important to their decisions about purchasing and using a product—including information about the country of origin of the meat that they purchase.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court denying AMI's motion for a preliminary injunction.

Dated: April 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29 and 32 and this Court's April 4, 2014, order as follows: The type face is fourteen-point Times New Roman font, and the word count is 3,109. To the extent Federal Rule of Appellate Procedure 29(d) applies by way of analogy, this brief is no more than one-half the maximum length authorized by this Court for the parties' supplemental briefs.

/s/ Zachary Corrigan
Zachary Corrigan

CERTIFICATE OF SERVICE

I certify that on April 21, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Zachary Corrigan
Zachary Corrigan