

JUDGE KAVANAUGH AND COMMERCIAL SPEECH

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In recent years, corporations have increasingly used the First Amendment as a tool to challenge regulations of economic activity that traditionally would not have been viewed as raising free-speech issues or, at most, would have been subjected to a relatively permissive form of scrutiny for regulations that serve consumer-protection and other interests. Because of the significance of the issues raised by such cases—and their contribution to what Justice Kagan recently called “weaponizing the First Amendment”—this memorandum explains the doctrinal background and analyzes decisions indicating the views of Judge Brett Kavanaugh on the subject.

How We Got Here

The First Amendment provides broad protection for political, scientific, artistic, and religious speech. Restrictions on these types of expression are generally subject to “strict” First Amendment scrutiny, under which the government bears a heavy burden of justifying the regulation. Laws in this category rarely survive constitutional review.¹ Indeed, restrictions that target non-commercial expression due to its content or the viewpoint of its speaker are “presumptively invalid.”²

In contrast, until the 1970s, the courts did not recognize any First Amendment protection for commercial speech,³ such as advertising, proposals to engage in commercial transactions, and various other statements that a company makes about its products or services or with an economic motivation.⁴ In 1976, the Supreme Court held for the first time that commercial speech enjoys some First Amendment protection, under a theory that consumers had a right to receive important information.

Courts have generally granted more deference to laws restricting or compelling commercial speech than to laws affecting non-commercial speech. Regulations that directly restrict commercial speech are subject to “intermediate” scrutiny, also referred to as “*Central Hudson*” review.⁵ Unlike restrictions on political or artistic speech, commercial speech restrictions more often survive judicial review.

Moreover, laws that *compel* speech by commercial actors—such as regulations requiring food manufacturers to disclose nutritional and ingredient information—are subject to an even more relaxed form of First Amendment scrutiny, termed “rational-basis” scrutiny, also referred to as *Zauderer* review.⁶

The First Amendment poses no barrier of any kind to government regulations directed at commercial *conduct*, so long as those restrictions impose only incidental burdens on a company’s speech.⁷ This general principle explains why the government can, for example, prohibit companies from agreeing through speech to restrain trade, or pass anti-discrimination laws that bar companies from using discriminatory job postings.⁸

Rapidly Proliferating Corporate First Amendment Challenges

In the past decade, corporations have increasingly sought to undermine the established framework for analyzing laws that regulate or bear on commercial speech in two primary ways.

First, corporate challengers have sought both to recast as speech commercial activity that is not actually speech and to frame regulation of non-speech conduct as imposing significant burdens on companies' speech. These efforts, if successful, would subject to First Amendment scrutiny regulations that have long been assumed not to implicate free-speech interests at all.

As one example, in 2014, corporate plaintiffs challenged Seattle's living-wage ordinance on First Amendment grounds, arguing, among other things, that increased labor costs would reduce companies' ability to promote "their businesses and brands," thus impinging on their commercial-speech interests.⁹ The Ninth Circuit affirmed the denial of a preliminary injunction on First Amendment grounds,¹⁰ but the court of appeals treated the challenge—advanced by a former U.S. Solicitor General—seriously.

Second, corporate plaintiffs have also recently sought to ratchet up the level of First Amendment scrutiny applicable to regulations that concededly affect commercial speech. These cases generally fall into two categories: (1) those involving government-required disclosures in which plaintiffs argue that *Central Hudson* intermediate scrutiny, not *Zauderer's* rational-basis review, applies, and (2) those involving commercial disclosure laws or commercial speech restrictions in which companies argue that the content- or viewpoint-based nature of the regulations requires the application of strict scrutiny normally reserved for restrictions on political, artistic, religious, and other forms of "pure" speech.

Attempts to cabin *Zauderer's* scope and subject consumer-disclosure laws to *Central Hudson* or even more exacting levels of scrutiny have involved, for example, requirements that tobacco companies use graphic cigarette labels,¹¹ that airlines prominently disclose total price, rather than the price without government fees and taxes, of airfare,¹² that restaurants disclose calorie counts for their food,¹³ and that career training programs disclose estimates of the cost to complete their programs.¹⁴ If corporate plaintiffs are successful in narrowing *Zauderer's* application, such narrowing would cast doubt on similar disclosure requirements, limit the range of objectives that could support required disclosures, and force the government to marshal more evidence supporting the need for and efficacy of such disclosures before it could impose new ones.

Attempts to apply strict scrutiny to commercial speech rules because they are content-based are similarly proliferating. In a number of recent cases, corporate plaintiffs argue that commercial speech restrictions, and sometimes disclosure requirements as well, should be subject to strict scrutiny because they target speech based on its content or the viewpoint of its speaker.

Examples of such cases have included challenges to a law limiting chiropractors' ability to solicit patients involved in car accidents,¹⁵ a law requiring cell phone retailers to provide notices to customers,¹⁶ a law requiring that food manufacturers disclose whether their products are produced with genetic engineering,¹⁷ and zoning or other laws affecting commercial billboards.¹⁸

The Supreme Court

In a number of recent opinions, the Supreme Court used the First Amendment to protect business interests, to the detriment of consumers. These decisions, although harmful in their own right, have also created uncertainty with respect to the commercial-speech doctrine and its scope, and are certain to encourage the types of challenges discussed above and spawn further litigation that reaches the Supreme Court.

For example, in 2011, in *Sorrell v. IMS Health Inc.*, the Supreme Court struck down on First Amendment grounds a consumer-protection law in Vermont challenged by data miners and a pharmaceutical association.¹⁹ The law at issue in *Sorrell* provided, with limited exceptions, that pharmacy records of doctors' prescribing practices could not be sold, disclosed by pharmacies for marketing, or used for marketing by drug manufacturers, who had otherwise been buying this data before the law's enactment.²⁰ The law attempted to counter the harmful effects of pharmaceutical "detailing," through which drug representatives encourage doctors to prescribe brand-name drugs that may be more costly and less safe than generic counterparts.²¹

In reaching its holding, the Supreme Court in *Sorrell* suggested that the dissemination of data identifying doctors and their prescribing patterns, which was collected by pharmacies pursuant to government mandate and sold for profit, was speech.²² The Court concluded that it did not need to definitively decide that issue, though, because even if such information did not constitute speech, the law violated the First Amendment by imposing a "speaker- and content-based burden on protected expression" that disfavored pharmaceutical manufacturers and marketing.²³ Accordingly, the Court determined that some form of "heightened" First Amendment scrutiny applied because of the law's significant burden on expression. The Court avoided deciding whether *Central Hudson's* intermediate scrutiny or strict scrutiny for content- and viewpoint-based restrictions applied because it determined that the law could not survive *Central Hudson*.²⁴

In dissent, three justices warned that the opinion would have broad ramifications for the government's ability to adopt regulatory programs. After all, such "programs necessarily draw distinctions on the basis of content," and in the context of those programs, it is not "unusual for particular rules to be 'speaker-based,'" affecting only certain categories of companies.²⁵ In the dissenters' view, the majority opinion threatened a return of the *Lochner* era, "when judges scrutinized legislation for its interference with economic liberty."²⁶

Then, just last term, a bare majority of the Supreme Court issued another opinion that companies are sure to marshal in support of their campaign to use the First Amendment as a weapon. Although the case technically presented the question of what level of scrutiny applies to "professional" speech, as opposed to "commercial" speech, the Supreme Court invoked commercial-speech doctrine in troubling ways and suggested that, at least in the context of regulating professionals, the government may have a heavier burden to justify content- or speaker-based restrictions long thought permissible.

In *National Institute of Family and Life Advocates v. Becerra (NIFLA)*, a 5-4 majority held, in an appeal from a denial of a preliminary injunction, that crisis pregnancy centers were likely to prevail on a First Amendment challenge to a law requiring commonsense disclosures to pregnant

women.²⁷ The California law requires licensed medical facilities that provide women with assistance involving pregnancy or family planning to tell those women how they can find financial and other help in accessing comprehensive family planning services, including abortion.²⁸ It also mandates that unlicensed facilities, including some that offer ultrasounds, pregnancy tests, and pregnancy counseling, disclose that they are not licensed to offer medical services.²⁹ Advocates of the law view it as critical to ensuring that pregnant women receive timely, accurate information about their options, and they point to evidence that some centers covered by the law have deceived pregnant women about the centers' services.³⁰

The Court in *NIFLA* held that the unlicensed-facility disclosure requirement could not survive *Zauderer*'s rational-basis review because California's justification for the requirement was hypothetical,³¹ and the disclosure was too burdensome for facilities.³² The Court refused to apply *Zauderer* review to the disclosure requirement applicable to *licensed* facilities because the Court counterintuitively thought a disclosure about how women could access comprehensive family planning services "in no way" related to the licensed clinics' services.³³ The Court held that this disclosure requirement was instead subject to heightened scrutiny—it did not decide whether intermediate or strict scrutiny applied—and that the requirement likely could not survive.³⁴ It emphasized that the disclosure requirement was content-based, and stated that the "dangers associated with content-based regulations of speech are also present in the context of professional speech."³⁵

The dissent contended that the majority's "broad content-based test" would "invite[] courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle."³⁶ The dissent stated that "the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly" the exceptions to the Court's content-based test "are interpreted."³⁷ It warned that the majority's test could subject to heightened scrutiny a host of commonsense disclosure requirements, including ones requiring "hospitals to tell parents about child seat belts" or a vaccine for pertussis, mandating "signs by elevators showing stair locations," and "requiring property owners to inform tenants about garbage disposal procedures."³⁸

Judge Kavanaugh's Views

In his time on the D.C. Circuit, Judge Brett Kavanaugh has applied the First Amendment in ways that call into question economic and regulatory policy critical to consumers. His judicial opinions broadly embrace expansion of the First Amendment to protect commercial activity.

Perhaps the best indicator of Judge Kavanaugh's views is a concurrence he authored in *American Meat Institute v. U.S. Department of Agriculture*, a case in which the D.C. Circuit, sitting en banc, considered the scope of *Zauderer* review and whether it applied to a Department of Agriculture regulation that mandated disclosure of country-of-origin information on meat products.³⁹

In that case, trade associations representing livestock producers, feedlot operators, and meat packers argued that the rule violated companies' First Amendment rights by requiring them to

disclose country-of-origin information to retailers, who in turn provided the information to consumers through packaging.⁴⁰ They contended that heightened First Amendment scrutiny, not *Zauderer* review, applied because, among other reasons, the disclosure requirement was not intended to prevent consumer deception, a limitation the challengers urged the D.C. Circuit to read into *Zauderer*'s scope.

A majority of the en banc court held that *Zauderer* review is not limited to government disclosure requirements that serve an interest in preventing consumer deception. It concluded that the government's interests in country-of-origin labeling to "enable consumers to choose American-made products" and to provide information relevant to "individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak" were sufficient.⁴¹ The majority included some unusual dicta suggesting that one might "think of *Zauderer* largely as an application of *Central Hudson*," but it had no need to so hold to decide the case.⁴² Because the interests in the meat-labeling requirement were "substantial," as would be required if *Central Hudson* review applied, the majority declined to consider "whether a lesser interest could suffice under *Zauderer*."⁴³

Judge Kavanaugh concurred only in the court's judgment, writing his own opinion to justify the disclosure requirement under the First Amendment. His concurrence makes clear that he would subject consumer-disclosure requirements at least to intermediate First Amendment scrutiny, just like commercial-speech *restrictions*, and effectively overturn *Zauderer*. His concurrence also indicates that he takes an exceedingly narrow view of the consumer-protection interests that might justify a commercial disclosure requirement and could be skeptical of new disclosure requirements that have not long been on the books. Indeed, he stated that the government's interest in supporting American industry supported the regulation, but not its interest in providing information to consumers.⁴⁴

Specifically, unlike the majority, Judge Kavanaugh would have directly held that "*Zauderer* is best read simply as an application of *Central Hudson*, not a different test."⁴⁵ Accordingly, he would have required that the government meet the more stringent *Central Hudson* standard in showing that the disclosure requirement served its interests.⁴⁶ Judge Kavanaugh wrote that the country-of-origin labeling requirement could not be justified based on a health or safety interest because the requirement "obviously" did "not serve those interests."⁴⁷ He stated that the "critical" consideration for First Amendment purposes was instead the "historical pedigree" of country-of-labeling requirements to encourage consumers to buy American products.⁴⁸

Judge Kavanaugh also noted in his concurrence that he "agree[d] with the results and most of the reasoning" of the court's earlier opinion in *R.J. Reynolds Tobacco Co. v. FDA*,⁴⁹ which the majority of the en banc court overruled in *American Meat Institute* to the extent it suggested that *Zauderer* was limited to disclosures to prevent consumer deception. In *Reynolds*, a divided panel invalidated a portion of a Food and Drug Administration rule that required cigarette companies to include on their packaging and in advertisements graphic warnings about the health effects of smoking. The opinion held that *Zauderer* review did not apply to the warnings because they did not impart uncontroversial, factual information to consumers.⁵⁰ The majority held the warnings could not survive *Central Hudson* review because they were insufficiently effective at reducing smoking rates.⁵¹ In a dissent, Judge Rogers emphasized that the majority's "understanding of the

precedent governing the appropriate level of scrutiny” in the case was “inconsistent with the Supreme Court’s principal justification for extending First Amendment protection to commercial speech—the value to consumers of the information such speech provides.”⁵² She also faulted the majority for refusing to consider another key government interest in the disclosures: “the clearly stated interest in effectively communicating information about the negative health consequences of smoking to consumers.”⁵³

Judge Kavanaugh in his *American Meat Institute* concurrence also noted his agreement with the first of two opinions in *National Ass’n of Manufacturers v. SEC*.⁵⁴ (The second opinion in *National Ass’n of Manufacturers* was issued after Judge Kavanaugh’s concurrence in *American Meat Institute*.⁵⁵) In *National Ass’n of Manufacturers*, another divided panel of the D.C. Circuit invalidated a portion of a Securities and Exchange Commission (SEC) regulation that required companies filing reports with the SEC to investigate and disclose publicly whether their products contained “conflict minerals” from the Democratic Republic of Congo or its neighbors and whether the use of such minerals in the companies’ products helped finance armed groups that contribute to conflict and humanitarian crisis there.⁵⁶ In the panel’s initial opinion (later overruled in part by *American Meat Institute*), it held that companies could not be required to state in public securities filings or on their websites that their products had “not been found to be ‘DRC conflict free,’”⁵⁷ even though that term had an objective definition under the rule. Judge Srinivasan refused to join that portion of the majority’s opinion, questioning why the majority would reach the issue instead of staying a decision until the en banc court had decided *American Meat Institute*, which was then pending.⁵⁸

The one aspect of *R.J. Reynolds* and *National Ass’n of Manufacturers* that Judge Kavanaugh specifically criticized in his *American Meat Institute* concurrence was that each had referred to *Zauderer* “as mere rational basis review.”⁵⁹ In other words, he thought these two decisions, which were controversial within the Circuit and struck down important consumer-disclosure requirements, portrayed existing First Amendment jurisprudence as *too* deferential to the consumer-protection interests served by disclosure.

Judge Kavanaugh’s dissent from denial of rehearing en banc in *United States Telecom Ass’n v. FCC* provides another indicator of his views.⁶⁰ Although this case was not analyzed or decided using the commercial-speech doctrine, Judge Kavanaugh’s dissent suggests that he may use the First Amendment to invalidate regulations of commercial conduct not traditionally thought to implicate free-speech interests in any way.

In *United States Telecom Ass’n*, a panel of the D.C. Circuit held that the FCC acted reasonably in adopting—after receipt of four million public comments—what was commonly known as the “net neutrality” order.⁶¹ That order, which has since been superseded by the FCC under the Trump Administration, was intended to prevent broadband companies like Comcast and AT&T from holding themselves out to the public as neutral, high-speed internet providers while blocking or slowing down a consumer’s access to disfavored material in order to promote the broadband companies’ own content or content offered by fee-paying affiliates.⁶²

The D.C. Circuit rejected an argument raised by industry challengers that the net neutrality order forced them “to transmit speech with which they might disagree.”⁶³ It emphasized that the order only applied to companies that—like telephone companies or postal services—hold

themselves out “as neutral, indiscriminate platforms for transmission of speech of any and all users,”⁶⁴ not ones that display an intent to use their editorial judgment in identifying available content. It concluded that where a broadband company takes on the role of a common carrier open to all comers, it is not unconstitutional to expect the company to provide access to content in the non-discriminatory way that it has held out to consumers.⁶⁵

The court ultimately denied petitions for rehearing en banc of the panel’s decision. In his dissent from those denials, Judge Kavanaugh indicated that he would have held that the order violated the First Amendment because it could not survive intermediate scrutiny.⁶⁶ In his view, a broadband company’s decision to be open to all comers—in essence, a common carrier—is itself “an exercise of editorial discretion” protected by the First Amendment.⁶⁷

Two of Judge Kavanaugh’s colleagues on the original panel pointed out the dangers of his view. Under it, they wrote, a broadband company holding itself out as providing “neutral, indiscriminate access to all websites” could slow users’ ability to watch Netflix or block their access to the websites of the Wall Street Journal or New York Times.⁶⁸ A telephone company could “restrict access to certain numbers based on political affiliation or other criteria.”⁶⁹ “[N]o Supreme Court decision,” these judges wrote, “supports the counterintuitive notion that the First Amendment entitles an” internet service provider “to hold itself out to potential customers as offering them an unfiltered pathway to any web content of *their* own choosing, but then, once they have subscribed, to turn around and limit their access to certain web content based on the [*provider*’s] own commercial preferences.”⁷⁰

Conclusion

The last 40 years have seen the Supreme Court embrace a new theory of corporate, commercial speech rights. Originally designed to enable consumers to gain access to information from sellers, the Court has recently transformed it into an affirmative right for corporations. With the Supreme Court employing increasingly expansive definitions of what constitutes “speech,” and increasingly aggressive scrutiny of governmental action, corporations are successfully deploying the First Amendment as an anti-regulatory weapon. Judge Kavanaugh’s record on the D.C. Circuit raises concerns about these matters that should be considered before any Senator votes on his nomination to the Supreme Court.

¹ See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

³ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

⁴ See, e.g., *Bolger*, 463 U.S. at 64; *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013); *Spirit Airlines, Inc. v. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

⁵ *Cent. Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557 (1980).

⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

⁷ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

⁸ See *id.* at 2664-65 (citations and internal quotation marks omitted).

⁹ *Int’l Franchise Ass’n, Inc. v. City of Seattle*, No. 14-848, Compl. (W.D. Wash. 2015 filed June 11, 2014).

¹⁰ *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015).

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- ¹¹ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
- ¹² *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 412-13 (D.C. Cir. 2012).
- ¹³ *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009).
- ¹⁴ *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 199 (D.D.C. 2015), *aff'd on other grounds*, 640 F. App'x 5 (D.C. Cir. 2016).
- ¹⁵ *Chiropractors United for Research & Educ., LLC v. Conway*, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *2 (W.D. Ky. Oct. 1, 2015), *aff'd* (6th Cir. July 1, 2016).
- ¹⁶ *CTIA-The Wireless Ass'n v. City of Berkeley, California*, No. C-15-2529 EMC, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015), *aff'd on other grounds*, 854 F.3d 1105 (9th Cir. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2708 (2018).
- ¹⁷ See Chamber of Commerce Amicus Br., *Grocery Manufacturers Ass'n v. Sorrell*, No. 15-1504 (2d Cir.).
- ¹⁸ See, e.g., *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-CV-00093-SI, 2015 WL 4571564, at *3 (N.D. Cal. July 28, 2015), *aff'd*, 704 F. App'x 665, 667 n.1 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2574 (2018).
- ¹⁹ 131 S. Ct. 2653 (2011).
- ²⁰ *Id.* at 2659.
- ²¹ *Id.* at 2670.
- ²² *Id.* at 2667.
- ²³ *Id.* at 2663, 2667.
- ²⁴ *Id.* at 2667-72.
- ²⁵ *Id.* at 2677-78 (Breyer, J., dissenting).
- ²⁶ *Id.* at 2679 (Breyer, J., dissenting).
- ²⁷ 138 S. Ct. 2361 (2018).
- ²⁸ *Id.* at 2368.
- ²⁹ *Id.*
- ³⁰ See, e.g., NARAL Pro-Choice California Foundation, *Unmasking Fake Clinics, An Investigation into California's Crisis Pregnancy Centers* (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2018/03/NARAL-Pro-Choice-CA-Unmasking-Fake-Clinics-2015.pdf>.
- ³¹ *NIFLA*, 138 S. Ct. at 2377 (internal quotation marks omitted).
- ³² *Id.* at 2377-78.
- ³³ *Id.* at 2372.
- ³⁴ *Id.* at 2375-76.
- ³⁵ *Id.* at 2374.
- ³⁶ *Id.* at 2381 (Breyer, J., dissenting) (internal quotation marks omitted).
- ³⁷ *Id.* at 2380 (Breyer, J., dissenting).
- ³⁸ *Id.* at 2380-81 (Breyer, J., dissenting).
- ³⁹ 760 F.3d 18 (D.C. Cir. 2014) (en banc).
- ⁴⁰ *Id.* at 21.
- ⁴¹ *Id.* at 23.
- ⁴² *Id.* at 26-27.
- ⁴³ *Id.* at 23.
- ⁴⁴ *Id.* at 32 (Kavanaugh, J., concurring in the judgment).
- ⁴⁵ *Id.* at 33 (Kavanaugh, J., concurring in the judgment).
- ⁴⁶ *Id.* at 34 (Kavanaugh, J., concurring in the judgment).
- ⁴⁷ *Id.* at 31 (Kavanaugh, J., concurring in the judgment).
- ⁴⁸ *Id.* at 32 (Kavanaugh, J., concurring in the judgment).
- ⁴⁹ 696 F.3d 1205, 1212 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
- ⁵⁰ *Id.* at 1216.
- ⁵¹ *Id.* at 1217.
- ⁵² *Id.* at 1237 (Rogers, J., dissenting) (internal quotation marks and alterations omitted).
- ⁵³ *Id.* at 1235 (Rogers, J., dissenting).
- ⁵⁴ See *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 370-71 (D.C. Cir. 2014).
- ⁵⁵ *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).
- ⁵⁶ 748 F.3d at 370.
- ⁵⁷ *Id.* at 370-73.

⁵⁸ *Id.* at 370-75 (Srinivasan, J. concurring in part).

⁵⁹ *Am. Meat Institute*, 760 F.3d at 34 n.2 (Kavanaugh, J., concurring in judgment).

⁶⁰ 825 F.3d 674 (D.C. Cir. 2016).

⁶¹ *Id.* at 689, 695.

⁶² *Id.* at 690.

⁶³ *Id.* at 740.

⁶⁴ *Id.* at 743.

⁶⁵ *Id.* at 741-42.

⁶⁶ *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 431 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

⁶⁷ *Id.* at 429.

⁶⁸ *Id.* at 388 (Srinivasan, J., concurring in denial of reh'g en banc).

⁶⁹ *Id.* at 393 (Srinivasan, J., concurring in denial of reh'g en banc).

⁷⁰ *Id.* at 382 (Srinivasan, J., concurring in denial of reh'g en banc).