ARGUED JANUARY 7, 2014 DECIDED APRIL 14, 2014

NO. 13-5252

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,
Plaintiffs-Appellants,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee,

and

AMNESTY INTERNATIONAL OF THE USA, INC. and
AMNESTY INTERNATIONAL LIMITED,
Intervenors-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Robert L. Wilkins)

SUPPLEMENTAL BRIEF BY INTERVENORS-APPELLEES IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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** Authorities on which we chiefly rely are marked with asterisks.*

GLOSSARY

Amnesty International	Amnesty International USA and Amnesty International Limited, collectively
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376
DRC	Democratic Republic of the Congo
SEC	U.S. Securities and Exchange Commission

INTRODUCTION AND SUMMARY OF ARGUMENT

Intervenors-appellees Amnesty International USA and Amnesty International Limited filed a petition for panel rehearing and rehearing en banc in this case on May 29, 2014. The petition sought rehearing of the panel's First Amendment condemnation of a commercial disclosure requirement mandating that certain companies describe their products as having "not been found to be DRC [Democratic Republic of the Congo] conflict free." The petition pointed out that the Court's pending en banc consideration of a related First Amendment issue in *American Meat Institute v. U.S. Department of Agriculture*, No. 13-5281, could be dispositive in this case. On July 29, this Court issued its decision in *American Meat*. __ F.3d __, 2014 WL 3732697 (D.C. Cir. July 29, 2014) (en banc).

American Meat's rationale and its express overruling of a portion of the panel opinion in this case make clear that the panel erred in failing to apply the standard for First Amendment review set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Accordingly, panel or en banc reconsideration of the panel opinion is necessary, and under *Zauderer*, the commercial disclosure requirement at issue should be upheld.

BACKGROUND

The panel declined to apply *Zauderer* in this case because "[n]o party ha[d] suggested that the [Securities and Exchange Commission's (SEC)] conflict

minerals rule [was] related to preventing consumer deception," which the panel held is the only government interest to which *Zauderer* applies. Slip Op. at 19. After holding *Zauderer* inapplicable, the panel held that the SEC regulation requiring companies to state that their products had "not been found to be DRC conflict free" could not survive what it acknowledged to be the more stringent standard of First Amendment scrutiny set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Slip Op. at 21-22. In the panel's view, requiring affirmative disclosure was not narrowly tailored to serve the statutory purpose. *Id.*

In *American Meat*, the en banc Court held that *Zauderer*'s test for assessing the constitutionality of commercial disclosure requirements is not limited to requirements aimed at correcting misleading or confusing commercial speech. 2014 WL 3732697, at *3. The Court expressly overruled the panel's holding in this case that *Zauderer* is limited to disclosures based on "an interest in correcting deception." *Id.*

American Meat then applied *Zauderer* to uphold a country-of-origin labeling rule for meat products based on the government's longstanding interest in providing consumers with information to facilitate their choice of American-made products, consumers' interest in the country of origin of food products, and the potential health concerns or market impacts that could arise after a food-borne

illness outbreak. *Id.* at *4. Because these interests in disclosure were "substantial"—and would therefore qualify even under *Central Hudson*'s intermediate First Amendment scrutiny—the Court had no occasion to decide "whether a lesser interest could suffice under *Zauderer*." *Id.*

The Court also clarified that, when the government has a legitimate interest in disclosure, *Zauderer* holds that any requirement of a fit between ends and means is "self-evidently satisfied" by "a reasonably crafted mandate to disclose purely factual and uncontroversial information about attributes of [a] product or service being offered," unless the "disclosure is unduly burdensome in a way that chills protected commercial speech." *Id.* at *7 (internal quotation marks and alterations omitted).

ARGUMENT

I. Rehearing Is Warranted Because *American Meat* Overruled The Panel's Holding That *Zauderer* Applies Only to Disclosures to Prevent Deception.

American Meat requires rehearing in this case because it overrules the panel's First Amendment holding with respect to *Zauderer*. As *American Meat* held, an interest in preventing consumer deception is not required for *Zauderer* to apply. The government has a legitimate—indeed, substantial—interest in providing investors and consumers with information that is critical to their investing and purchasing decisions, including information about risks to companies' supply

chains and about the possible relationship between companies' products and armed groups in the DRC. *See* Amnesty International Response Br. at 3-4, 7, 35. Accordingly, this Court should hold that the interest at stake is sufficient to bring the conflict-mineral disclosure requirement within *Zauderer*'s scope. Because, as in *American Meat*, the interest is substantial, the Court need not decide whether a lesser interest could suffice.

II. The Disclosure Requirement Is Constitutional Under *Zauderer*'s First Amendment Standard, as Articulated in *American Meat*.

American Meat makes clear that "a reasonably crafted mandate to disclose purely factual and uncontroversial information about attributes of [a] product or service being offered" survives First Amendment scrutiny under *Zauderer*, unless the "disclosure is unduly burdensome in a way that chills protected commercial speech." 2014 WL 3732697, at *7 (internal quotation marks and alterations omitted). Under this standard, the requirement that certain companies state that their products have "not been found to be DRC conflict free" is constitutional.

A. Although Not Required for *Zauderer* to Apply, the Disclosure Is Purely Factual and Uncontroversial.

This Court need not determine that the conflict-mineral disclosure is purely factual and uncontroversial to uphold the disclosure requirement. Although *American Meat* assumed that *Zauderer* applies only where a disclosure is purely factual and uncontroversial, *see Am. Meat*, 2014 WL 3732697, at *7, it did not so

hold. That assumption was instead a "starting point common to both parties," and thus unnecessary to the Court's resolution of the case. *Id.* at *2; *see also id.* at *8 (stating that the plaintiff did "not contest that country-of-origin labeling qualifies as factual," nor "suggest anything controversial about the message that its members [were] required to express").

Properly understood, *Zauderer*'s reference to "purely factual and uncontroversial information" was descriptive with respect to the disclosure at issue and did not purport to set a threshold requirement for *Zauderer*'s application in all cases. *Zauderer* used the phrase to describe the requirement that attorney advertising disclose that clients might be liable for litigation costs even if their cases were unsuccessful. 471 U.S. at 651. The Court noted that the provision of this "purely factual and uncontroversial information" related to "the terms under which [the attorney's] services w[ould] be available," so that "the interests at stake in [the] case [we]re not of the same order" as ones implicated by government mandates that "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* (internal quotation marks omitted). Thus, *Zauderer* indicates that the government cannot require companies to express opinions on matters of politics, nationalism, religion, and the like under the guise of a commercial disclosure requirement. *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"). *Zauderer* does not establish more stringent threshold requirements that a commercial disclosure be both "purely" factual (unless "purely" factual connotes no more than a statement that is not on its face an opinion) and "uncontroversial" to come within *Zauderer*'s scope.

In any event, the descriptor at issue here is purely factual and uncontroversial, as *Zauderer* used those terms. First, the descriptor is based on an objective definition set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376. The statute defines "DRC conflict free" to mean that a product does "not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country." Dodd-Frank Act, § 1502(b), *codified at* § 78m(p)(1)(A)(ii). The statute further specifies that "armed group" means a group that perpetrates serious human rights abuses, as identified by the U.S. State Department in certain reports required by federal law. *Id.* § 1502(e)(3); *see also id.* § 1502(e)(4) (defining covered minerals); *id.* § 1502(e)(1) (defining "adjoining country"). Accordingly, when using the

descriptor, companies disclose only information that is factual as measured against an objective standard.

The disclosure is also uncontroversial, as even the plaintiffs do not "disagree with the truth of the facts required to be disclosed." *Am. Meat*, 2014 WL 3732697, at *8. The plaintiffs do not contest that there is conflict in the DRC or that armed groups responsible for perpetuating that conflict receive funding from minerals covered by the disclosure requirement. Nor do they contest that the sale of covered minerals directly and indirectly finances those armed groups. Although the plaintiffs have objected to imposing the disclosure requirement on companies that cannot confirm the sourcing of their minerals, they cannot explain why the language "not been found to be" does not adequately address this concern.

To be sure, companies may disagree that they bear some moral responsibility based on their business practices for the situation in the DRC, or that the disclosure requirement is an effective approach to addressing conflict and the humanitarian crisis in the DRC. But this kind of general controversy is irrelevant to determining whether the disclosure—which requires divulging only factual information—is itself controversial. Just as companies cannot "immunize false or misleading product information from government regulation simply by including references to public issues," *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983), they cannot avoid government disclosure requirements by

demonstrating that non-controversial, factual disclosures have some relationship to a matter of controversy.

B. The Disclosure Is Directly Related to Companies' Products.

American Meat stated that "to match *Zauderer* logically, [a] disclosure mandated must relate to the good or service offered by the regulated party." 2014 WL 3732697, at *7. Such a relationship exists here. Under the SEC rule, companies must use the "not been found to be DRC conflict free" descriptor only with respect to particular products. *See* Dodd-Frank Act, § 1502(b), *codified at* 15 U.S.C. § 78m(p)(1)(A)(ii); SEC, Conflict Minerals Rule, Final Rule, 77 Fed. Reg. 56,274, 56,281 (2012). The descriptor applies only to minerals that "are necessary to the functionality or production of [the] product[s]." Dodd-Frank Act, § 1502(b), *codified at* 15 U.S.C. § 78m(p)(2)(B). Accordingly, whatever *Zauderer* requires regarding "the precise scope or character of th[e] relationship" between a product or service and a commercial disclosure requirement, *Am. Meat*, 2014 WL 3732697, at *7, the descriptor at issue easily passes muster.

C. The Disclosure Is Not Unduly Burdensome.

The disclosure requirement is not "unduly burdensome in a way that chills protected commercial speech." *Id.* The challenged disclosure does not limit companies' "ability to convey their message." *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 643 (6th Cir. 2010); *see, e.g.*, *Ibanez v. Fla. Dep't of Bus. & Prof'l*

Regulation, 512 U.S. 136, 146-47 (1994) (holding disclosure requirement impermissible where detail required "effectively rule[d] out" the private party's speech). Although companies must make certain required disclosures on their websites, they are not required to place them in any particular place or to intermingle them with their other speech. Companies are also free to explain that the disclosures are required by law, to describe how "DRC conflict free" is defined by statute, and to criticize the disclosure requirement and its efficacy. Moreover, although companies must investigate and audit their sourcing practices to determine whether they must disclose that their products have not been found to be DRC conflict free, these activities involve regulation of non-expressive conduct unchallenged by plaintiffs on First Amendment grounds. The effort necessary to make the specific disclosure targeted by plaintiffs is not burdensome, and certainly not unduly so.

CONCLUSION

For the reasons described above and those reasons set forth in intervenors-appellees' petition, the petition for rehearing and rehearing en banc should be granted.

August 15, 2014

Respectfully submitted,

/s/ Julie A. Murray

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-face limitation set forth in Federal Rule of Appellate Procedure 32(a) because the type face is fourteen-point Times New Roman font. Although the Federal Rules of Appellate Procedure do not specify a type-volume limitation for a supplemental brief in support of a petition for rehearing or rehearing en banc, the foregoing brief is ten pages long and 1,954 words, well within the length permissible under Federal Rules of Appellate Procedure 35 and 40 for analogous petitions for rehearing and rehearing en banc.

CERTIFICATE OF SERVICE

I certify that on August 15, 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/ Julie A. Murray
Julie A. Murray