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 OF INTERVENORS-APPELLEES ON PANEL REHEARING

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December 8, 2014

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 28(a)(1) and 26.1 and FRAP 26.1, counsel for intervenors-appellees certifies as follows:

(1) Parties and Amici. Parties and amici appearing below and in this Court are listed in the final Response Brief of Amnesty International of the USA, Inc. and Amnesty International Limited, filed October 30, 2013, except for Free Speech for People, which has entered an appearance as amicus curiae in support of the appellees following the order for panel rehearing in this case.

Intervenors-appellees Amnesty International USA and Amnesty International Limited are non-profit organizations. Neither organization has a parent corporation. No publicly held company has a 10% or greater ownership interest in either organization. The general purpose of the organizations is to do research and take action to end grave abuses of human rights around the world.

(2) Ruling Under Review. Reference to the ruling under review in this case appears in the final Appellants' Brief.

(3) Related Cases. Identification of related cases appears in the final Response Brief of Amnesty International of the USA, Inc. and Amnesty International Limited.

/s/ Scott L. Nelson
Scott L. Nelson

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GLOSSARY

DRC	Democratic Republic of the Congo
NAM	Plaintiffs-appellants National Association of Manufacturers, *et al*.
NAM Reh'g Resp.	Appellants' Joint Response to the Petitions for Rehearing En Banc (filed Sept. 12, 2014)
SEC	Securities and Exchange Commission

INTRODUCTION AND SUMMARY OF ARGUMENT

Intervenors-appellees Amnesty International USA and Amnesty International Limited submit this supplemental brief in response to the Court's request that the parties address: (1) the effect on this case of *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); (2) the meaning of the phrase "purely factual and uncontroversial information" as used in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and in *Meat Institute*; and (3) whether the determination that a disclosure conveys "uncontroversial information" is one of fact or law.

As to the first question, *Meat Institute* expressly overrules the stated basis for the panel's holding in this case. The panel held that the conflict minerals rule's requirement that certain companies disclose that products "have not been found to be 'DRC conflict free'" violates the First Amendment even when that statement accurately characterizes the results of investigation of the sourcing of minerals in the products. The panel reasoned that *Zauderer*'s "reasonable relationship" standard for assessing commercial disclosure requirements applies only when disclosure serves an interest in preventing consumer deception. The panel

therefore applied a more stringent standard of review than the "rational basis" review it acknowledged would apply under *Zauderer*. *See Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 370–72 (D.C. Cir. 2014).

Meat Institute expressly rejected the panel's holding in this case that *Zauderer* applies only to disclosures aimed at preventing consumer protection. *See* 760 F.3d at 22–23. Absent that holding, there is no basis for concluding that the interest in disclosing information about the source of minerals used in a company's products is insufficient to qualify under *Zauderer* or that the required disclosure is not reasonably related to that interest. Thus, unless *Zauderer* is inapplicable for some other reason, *Meat Institute* requires the panel to reverse its holding that the disclosure requirement violates the First Amendment.

In their response to the petitions for rehearing, appellants National Association of Manufacturers, *et al*. (NAM), argue that *Zauderer* is inapplicable because its standard can sustain only requirements for disclosure of "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. NAM asks the panel to transform the statement in its original opinion in this case that "it is far from clear that the description at issue … is factual and non-ideological," 748 F.3d at 371, into a new hold-

ing that *Zauderer* is inapplicable because the disclosure here is not "purely factual and uncontroversial."

NAM's position brings to the fore the Court's second and third questions concerning the meaning of *Zauderer*'s reference to "purely factual and uncontroversial information" and whether determining if information is "uncontroversial" presents a fact issue. The best reading of *Zauderer* is that "purely factual and uncontroversial information" is not a legal test. Rather, the phrase suggests an underlying principle that a commercial disclosure subject to the *Zauderer* standard should be factual in nature (as opposed to a statement of opinion) and that the disclosure should be *accurate* and hence not "controversial" in the sense that its *truth* is open to substantial dispute.

Whether a disclosure is accurate may, in some circumstances, involve issues of fact, but does not require resolution of a factual issue in this case. There is no genuine dispute that the required disclosure is accurate: The rule requires companies to disclose that products "have not been found to be 'DRC conflict free'" only when that is a truthful characterization of the results of due-diligence investigations into whether the products meet the specific criteria defining "DRC conflict free."

NAM argues that the disclosure is not factual and uncontroversial because it conveys a "value judgment" and forces a company to "denounce its own products as immoral." NAM Reh'g Resp. 9. NAM's argument is contrary to the Supreme Court's decision in *Meese v. Keene*, 481 U.S. 465 (1987). *Meese* held that a label reflecting neutral, objective criteria defined by law—there, the label "propaganda" as applied to a film—is not "pejorative" merely because someone unfamiliar with the legal definition might misunderstand it. *See id*. at 484. Here, as in *Meese*, when the term "DRC conflict free" "is construed consistently with the neutral definition contained in the text of the [regulation] itself, the constitutional concerns voiced by [appellants] completely disappear." *Id.* at 485.

ARGUMENT

I. *Meat Institute* overrules the basis of the panel's decision.

The Court's original decision in this case rested on the conclusion that *Zauderer*'s "reasonably related" standard is inapplicable to the challenged disclosure requirement because the disclosure is not aimed at preventing consumer deception. *See* 748 F.3d at 370–72. That determination led the Court to apply a more stringent standard, under which it found the requirement was not "narrowly tailored" because the government had not shown that "less restrictive means would fail." *Id*. at 372.

The Court's subsequent en banc decision in *Meat Institute* held that the *Zauderer* standard is not limited to disclosures aimed at consumer deception, because the reasoning underlying the standard "sweeps far more broadly than the interest in remedying deception." 760 F.3d at 22. *Zauderer* rests on the "minimal" protection due a commercial speaker's desire not to disclose factual information relating to its products, a consideration "inherently applicable beyond the problem of deception." *Id*. at 22. Thus, *Meat Institute* explicitly overruled the panel's decision in this case insofar as it "limit[ed] *Zauderer* to cases in which the government points to an interest in correcting deception." *Id*. at 22–23.

The panel's holding in this case limiting *Zauderer* to disclosures targeting deception was the basis for its selection of a standard of review under which it held that the requirement at issue failed to meet a criterion—narrow tailoring—that is not a part of the *Zauderer* standard for commercial disclosure requirements. *See Zauderer*, 471 U.S. at 650–51 & n.14. As *Meat Institute* explained, when the government asserts an interest in disclosure of information that is reasonably related to the disclosure requirement imposed, *Zauderer* holds that the disclosure satisfies any requirement of "fit" between ends and means because of the "self-

evident tendency of a disclosure mandate to assure that the recipients get the mandated information." 760 F.3d at 26. Thus, by overruling the basis on which the panel imposed a test more stringent than *Zauderer*'s, *Meat Institute* also necessarily invalidates the conclusion that the disclosure requirement here fails for lack of narrow tailoring.

NAM does not appear to contest this point. Its response to the rehearing petitions does not suggest that the panel's decision could be sustained under the *Zauderer* standard. NAM likewise does not argue that the government's interest in promoting disclosure concerning the sourcing of materials used in companies' products and the possible relationship of that sourcing to the financing of armed groups in the Democratic Republic of Congo is insufficient to invoke *Zauderer*. *Cf. Meat Inst.*, 760 F.3d at 23 (discussing nature of interests sufficient to support disclosure). Indeed, by not challenging requirements that companies disclose other information concerning the sourcing of conflict minerals used in their products, NAM implicitly concedes that the government's interest suffices to justify disclosure requirements on this subject.

NAM also does not contest that the disclosure at issue here "relate[s] to the good[s] or service[s] offered by the regulated party," *id*. at

26, which *Meat Institute* indicates is a logical implication of *Zauderer*. *Id*. Nor does NAM suggest that the challenged disclosure requirement is "so burdensome that it essentially operates as a restriction on constitutionally protected speech," *id*. at 27; *see also Zauderer*, 471 U.S. at 651; indeed, it could not burden or chill protected speech because it applies irrespective of whether a company has engaged in such speech.

Thus, NAM acknowledges that the Court would have to articulate a new basis for holding *Zauderer* inapplicable to arrive at the result it reached before. NAM urges the panel to "amend its decision … to clarify that the compelled statement is not eligible for *Zauderer* review because it does not constitute 'purely factual and uncontroversial information,'" NAM Reh'g Resp. 1, a holding it calls "implicit in the panel's opinion." *Id*. at 8. NAM concedes, however, that the panel said only that it was "far from clear" whether the disclosure "is factual and nonideological," *id*. at 4 (quoting 748 F.3d at 370–71), a statement *Meat Institute* properly characterized as "questioning but not deciding whether the information mandated was factual and uncontroversial." 760 F.3d at 27.

II. *Zauderer* applies to accurate factual disclosures.

NAM's argument confirms that in light of *Meat Institute*, the panel must overturn its conclusion that the conflict minerals disclosure requirement is unconstitutional unless it finds *Zauderer* inapplicable for the reasons NAM now advances—namely, that *Zauderer* requires a disclosure subject to its relaxed scrutiny to be "purely factual and uncontroversial" and that the disclosure here does not meet that requirement because it requires NAM to subscribe to a "value judgment" by making a moral or ideological statement. NAM Reh'g Resp. 9. NAM's position misreads both *Zauderer* and the disclosure requirement at issue.

Meat Institute sheds little light on whether *Zauderer*'s reference to "purely factual and uncontroversial information" states a legal standard and, if so, what that standard means. *Meat Institute* noted that the parties before it agreed "that *Zauderer* applies to government mandates requiring disclosure of 'purely factual and uncontroversial information,'" 760 F.3d at 21, so the Court was not presented with any issue about whether "purely factual and uncontroversial" is a legal test that all disclosures subject to review under the *Zauderer* standard must satisfy. Moreover, *Meat Institute*'s brief discussion of whether the disclosures at

issue in that case were factual and uncontroversial made no attempt to define those terms precisely, because it was evident that the required disclosures concerning country-of-origin labels on meat were factual and uncontroversial under any possible definition. *See id*. at 27.

Zauderer itself used the phrase "purely factual and uncontroversial" to characterize the particular information subject to disclosure in that case, not to articulate a legal test. *See* 471 U.S. at 651. "This language appears in *Zauderer* once and the context does not suggest that the Court is describing the characteristics that a disclosure must possess for a court to apply *Zauderer*'s rational-basis rule. That language instead merely describes the disclosure the Court faced in that specific instance." *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (Stranch, J., for majority).

We do not mean to suggest that the phrase "purely factual and uncontroversial" is without significance. *Zauderer* used it to contrast the disclosures at issue there with unconstitutional speech-compulsion requirements 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." 471 U.S. at 651 (quoting *W. Va. State*

Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). The contrast posits a distinction between, on the one hand, requirements that commercial speakers disclose accurate factual information and, on the other, requirements that they subscribe to disputed matters of political, religious or other forms of opinion. As the Sixth Circuit pointed out in *Discount Tobacco*, this interpretation draws support from other language in the same part of *Zauderer* referring to the disclosure requirement at issue as applying to "factual information" and "accurate information," 471 U.S. at 651 & n.14, as well as from the Supreme Court's later opinion in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), where the Court's affirmance of a commercial disclosure requirement rested on its "factual" and "accurate" nature, *id*. at 250–52. *See Discount Tobacco*, 674 F.3d at 559 n.8.

In asserting that the law is well-settled, NAM acknowledges that *Discount Tobacco*'s reading of *Zauderer*—*i.e.*, that it applies to accurate, factual disclosures, but not to matters of opinion—is consistent with precedents of this Court (including *Meat Institute*) and other circuits. *See* NAM Reh'g Resp. 8. The Second Circuit, whose analysis NAM also endorses (*see id*. at 7) similarly interprets *Zauderer* to distinguish between

permissible disclosure requirements involving "accurate, factual commercial information," *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001), and those requiring speakers to adopt the government's "preferred message" on matters of ideology or opinion. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

Zauderer's use of the term "uncontroversial," though ill-suited to establishing an element of a legal standard, is evocative of two aspects of this dichotomy: *Zauderer* does not extend to compulsion to endorse messages about matters of belief or opinion, and the facts subject to disclosure must be accurate rather than controverted. *See*, *e.g.*, *Meat Inst.*, 760 F.3d at 27 (referring to the possibility that a statement may be controversial in the sense that there is disagreement about "the truth of the facts" and "in the sense that it communicates a message that is controversial"). An accurate factual statement is not "controversial" in either sense merely because it provokes an emotional reaction or provides information pertinent to topics on which opinions are debated. As the Sixth Circuit put it in *Discount Tobacco*—in a passage endorsed by NAM, *see* NAM Reh'g Resp. 8—"Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that

does not magically turn such facts into opinions. … [W[]ether 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." 674 F.3d at 569.

For example, requiring disclosure that a serving of peanut butter contains 2.5 grams of saturated fat is surely permissible under *Zauderer* even if people hold strong, conflicting opinions about how much saturated fat a healthy diet should contain, whether other considerations outweigh fat content in determining whether peanut butter is good for them, whether it is morally repugnant to market products containing saturated fat, or, for that matter, whether they like peanut butter. Likewise, in *Meat Institute*, the Court found it apparent that factually accurate country-of-origin labels on meat are uncontroversial, even though whether consumers should make decisions about purchasing meat based on its country of origin is a matter of sharp debate, reflected in the significant opposition of foreign governments to country-of-origin labeling. *See* World Trade Org., *Disputes*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm (describing complaint by 14 countries and the European Union against the country-of-origin meat-labeling rule).

Indeed, much of the value of factual information in a commercial setting is that it enables market participants to act on their own opinions about whether, how, and to what extent that information is relevant to marketplace decisions. Commercial speakers may have legitimate objections to being required to espouse opinions they do not share, *see Meat Inst.*, 760 F.3d at 27, but not to providing the *factual* information on which others who may disagree with their opinions may legitimately act. *See Zauderer*, 471 U.S. at 651; *Meat Inst.*, 760 F.3d at 24.

As to whether the factual and "uncontroversial" nature of a disclosure is an issue of law or fact, in most instances it will be the former, particularly when the issue is whether the disclosure is factual in nature as opposed to being a statement of opinion or belief. In the analogous context of libel, determining whether a statement is sufficiently factual in nature to be actionable is in the first instance a question of law. *See*, *e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990); *Farah v. Esquire Magazine*, 736 F.3d 528, 534–35 (D.C. Cir. 2013). Likewise, *Zauderer* and other decisions have consistently determined that disclosures are factual in nature as a matter of law, with no suggestion that factfinding is necessary. *See* 471 U.S. at 651; *see also Meat Inst.*, 760 F.3d at 27.

Whether a factual disclosure is accurate or "controversial" in the sense that it is untrue may in some cases involve resolution of questions of fact. Similarly, in libel law, whether a statement that has been determined as a matter of law to be actionable because it *can* be proved false is *actually* false is a fact question. *See*, *e.g.*, *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 628 (D.C. Cir. 2001). Thus, if a peanut-butter manufacturer were required to disclose that a serving contained 10 grams of saturated fat, and challenged the requirement on the ground that its peanut butter only contained one gram of saturated fat per serving, the challenge would present an issue of fact. Even so, most such cases will likely be resolved at summary judgment based on the legal issue of whether there is a material dispute of fact rather than on the basis of actual factual findings. And in many cases (as in this one), if a disclosure is determined as a legal matter to be legitimately factual in nature, there will be no real factual dispute as to whether it is accurate.

III. *Zauderer* applies to the conflict minerals disclosure rule.

The requirement that companies disclose that products have "not been found to be 'DRC conflict free'" is subject to *Zauderer*'s "reasonably related" standard because it requires only an accurate factual disclosure.

It is triggered when a company's investigation has not shown that a product meets the specific, factual criteria that determine whether, under the statute and regulation, the product is "DRC conflict free": namely, that any of the four conflict minerals present in the products did not originate in the DRC region or came from sources that did not provide financial support to or benefit armed groups identified by the Secretary of State as perpetrators of human rights abuses. Both the result of the investigation and its subject—whether products satisfy the definition of "DRC conflict free"—are matters of fact, and the disclosure cannot be inaccurate because it is required only when the company's investigation has in fact not found that a product is "DRC conflict free."

NAM nonetheless insists that the disclosure is not factual and uncontroversial because it forces companies to "bear a scarlet letter that is laden with value judgments and opprobrious connotations with which they strongly disagree, because the rule compels them to make a statement that 'conveys moral responsibility for the Congo war' and 'tell[s] consumers that [the issuers'] products are ethically tainted.'" NAM Reh'g Resp. 1–2 (quoting 748 F.3d at 371). NAM further asserts that the disclosure requires companies to "admit to potential complicity in the

armed conflict," *id*. at 10, "confess blood on [their] hands," *id*. at 1 (quoting 748 F.3d at 371), and subscribe to the "viewpoint that the mineral trade bears responsibility for causing the DRC conflict." *Id*. at 10.

The requirement that a company disclose that a product has "not been found to be 'DRC conflict free'" provides no basis for NAM's arguments. The disclosure requires no statement of moral responsibility, confession of ethical taint or complicity in armed conflict, or agreement with any viewpoint about the cause of conflict in the DRC. It is a statement about whether investigation has shown that the sourcing of minerals used in the company's products does not finance or support specifically identified armed groups. The company is not required to endorse any view as to whether the use of minerals that may contribute to the financing of such groups reflects moral culpability or whether it is a causal factor in promoting armed conflict.

NAM's position rests on the notion that the phrase "DRC conflict free" by itself expresses value judgments regardless of the statutory and regulatory criteria that give it content. But the phrase is not one to which readers will likely attach an understanding unfettered by its definition. Indeed, the phrase is probably new to most consumers and inves-

tors, and there is no reason to believe that they will take it as a "metaphor that conveys moral responsibility for the Congo war," 748 F.3d at 371, rather than giving it its defined meaning.

NAM argues that because the phrase *could* be seen as having "opprobrious connotations," NAM Reh'g Resp. 1, the Court must disregard its definition and view it as an "ideological slogan." *Id*. at 8. NAM says it is "aware of no case permitting the government to require a company to adopt" such an "ideological slogan." *Id*. However, the case most closely on point—*Meese v. Keene*, 481 U.S. 465—directly supports compelled disclosures based on neutrally defined terms even when those terms, divorced from legal definitions, might be viewed as pejorative.

In *Meese*, disclosure requirements for exhibitors of foreign films were triggered by a determination that the films met the statutory definition of "political propaganda," applicable to political material intended to influence U.S. foreign policy. *See id*. at 470–72. A person who wished to exhibit films meeting that definition challenged the statute on the ground that the identification of the films as "propaganda" subject to the law's disclosure requirements violated his First Amendment rights by attaching a term with a "pejorative connotation" to the films. *Id*. at 484.

Although the term "propaganda," unlike "DRC conflict free," has meanings independent of its legal definition, some of which are indeed pejorative, *see id*. at 477, the Supreme Court rejected the argument. Despite the statute's use of a much more loaded term than the ones at issue in this case (and its application to pure speech rather than commercial speech), the Court held that the statutory requirements were not unconstitutional just because listeners might ascribe to the term a meaning different from the "neutral definitions" the statute employed. *Id*.; *see also id*. at 484–85. Rather, the Court emphasized that the duty of a court was to give the term the meaning it was given by the law, under which the term had "no pejorative connotation." *Id*. at 484.

The Court emphasized that to the extent they might be concerned about possible misunderstandings of the term, "[d]isseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials." *Id*. at 481. The Court held that providing more information to "combat" any "bias" engendered by the term "propaganda" was superior, from the First Amendment standpoint, to suppressing the information that the films were "propaganda." *Id*. at 481–82.

The same considerations hold here. Regardless of whether "DRC conflict free" in the abstract might imply moral judgments, the legal definition of the term, which focuses on facts concerning the sourcing and origin of minerals and the benefits that specifically identified armed groups derive from them, determines the character of the disclosure for First Amendment purposes. Moreover, to the extent companies may wish to explain the meaning of the phrase, and why circumstances do not permit a determination that their products are conflict free, they may do so. That they may choose to provide such additional explanations does not condemn the disclosure requirement.

Nor is the disclosure requirement inaccurate, as NAM suggests, because companies required to make the disclosure may "simply [be] unable to identify the source of their materials." NAM Reh'g Resp. 2. Contrary to NAM's suggestion, the rule does not "require[] that all uncertainty be resolved in favor of making the confession." *Id*. Rather, the rule is carefully crafted to require only that companies state that uncertainty exists—*i.e.*, that they have *not found* that their products are "DRC conflict free" (when there is reason to believe the products contain minerals from the DRC region), not that they *have found* that they are *not* "DRC

conflict free." The disclosure is perfectly accurate in cases of uncertainty, and if companies want to emphasize and explain their uncertainty, and their own views as to the likelihood that materials are really derived from sources that do not financially support the identified armed groups, they are free to do so. Nothing in either the disclosure, or in the possible motivation it may give for companies to provide more factual information, violates the First Amendment.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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December 8, 2014

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 Century Schoolbook BT. There is no applicable type-volume limitation for this supplemental brief, which complies with the 20-page limit set forth in the Court's panel rehearing order requesting supplemental briefing, with the exception of the front material, glossary, signature block, and certificates.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on December 8, 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/ Scott L. Nelson
Scott L. Nelson