ARGUED JANUARY 7, 2014 DECIDED APRIL 14, 2014
DECIDED ON PANEL REHEARING AUGUST 18, 2015

No. 13–5252

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and
BUSINESS ROUNDTABLE,
Plaintiffs-Appellants

v.

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

and

AMNESTY INTERNATIONAL USA and AMNESTY INTERNATIONAL LTD,
Intervenors-Appellees.

On Appeal From The United States District
Court For The District Of Columbia

Brief of *Amici Curiae* Tobacco Control Legal Consortium, American Cancer Society Cancer Action Network, Campaign for Tobacco-Free Kids, National Association of County and City Health Officials, Public Health Law Center, and Truth Initiative In Support Of Appellees' Petitions For Rehearing En Banc

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *amici curiae* certifies as follows:

Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court, with the exception of *amici* joining this brief, are listed in the Supplemental Brief of Appellants, filed December 29, 2014. The amici joining this brief are the Tobacco Control Legal Consortium, the American Cancer Society Cancer Action Network, the Campaign for Tobacco-Free Kids, the National Association of County and City Health Officials, the Public Health Law Center, and the Truth Initiative.

Ruling Under Review

The Securities and Exchange Commission and Amnesty International have petitioned for rehearing en banc of this Court's decision on panel rehearing, decided on August 18, 2015, of an appeal challenging the final order in case 1:13-cv-00635, entered by Judge Robert L. Wilkins on July 23, 2013, denying Plaintiff-Appellants' motion for summary judgment and granting Defendant-Appellees' and Intervenor-Appellees' cross-motions for summary judgment.

Related Cases

This case was previously before this Court as Case No. 12-1422. After the Court held in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), that it lacked jurisdiction, it transferred this case to the district court pursuant to 28 U.S.C. §1631. Order, Case No. 12-1422 (D.C. Cir. filed May 2,

2013). Counsel is aware of no related cases currently pending in this or any other court.

CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

Amici are organizations dedicated to advancing public health. They rely heavily on mandatory disclosures to achieve their goals. The general nature and purpose of each *amicus* is explained further in the Appendix to this brief.

CERTIFICATE OF COUNSEL

Amici curiae have coordinated to file one brief. They are not aware of any other organization or individual that has been invited or seeks an invitation to file an *amicus* brief in support of Appellees' Petitions for Rehearing En Banc.

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GLOSSARY

AMI	American Meat Institute
NYSRA	New York State Restaurant Association
OSHA	Occupational Safety and Health Administration

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations dedicated to protecting public health.[1] *Amici* rely heavily on a wide variety of mandatory disclosures to enable individuals to protect their own health. They have a strong interest in this case because they regularly witness the critical importance of appropriate public health warnings.

The identity and interest of each *amicus curiae* are stated in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitions for rehearing en banc filed by the Securities and Exchange Commission and by Intervenors should be granted, because this case involves questions of "exceptional importance," Fed. R. App. P. 35(a)(2), not just to those concerned about conditions in the Democratic Republic of the Congo, but also to organizations (like *amici*) that rely on disclosures to foster public health, warn of environmental hazards, and protect the public in a variety of important contexts.

The panel decision includes three novel holdings that, if broadly adopted, would significantly interfere with existing law: (1) The deferential standard of First Amendment review for compelled factual commercial disclosures announced in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), applies only to disclosures connected with voluntary advertising or product labeling. Slip Op. at 7-11. (2) *Zauderer* does not apply to disclosures relating to any issue around which there is public controversy, even if there is no controversy about the truth of

[1] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

the required disclosures. Slip Op. at 19-24. (3) To establish under *Zauderer* that "disclosure requirements are reasonably related to the state's interest" the state must show – subject to a high burden of proof – that the requirements are effective in achieving the state's interest. Slip Op. at 13-18.

These holdings involve questions of exceptional importance because of their far-reaching implications. Taken together, the three holdings drastically narrow the scope of applicability of *Zauderer* review and equally drastically ratchet up its stringency. If generally followed, they would expose to unprecedented scrutiny not just the full array of required disclosures crucial to regulation of securities, but also the myriad disclosure regimes that allow the public to make informed decisions in the marketplace as in the workplace.

The panel majority's opinion conflicts sharply with this Court's decision in *American Meat Institute v. United States Dept. of Agriculture* [*AMI*], 760 F.3d 18 (D.C. Cir. 2014) (en banc), as discussed by Petitioners, *e.g.* S.E.C. Pet. at 6-8. In addition, each of the panel's three holdings involves a further question of exceptional importance in that each "conflicts with the authoritative decisions of other United States Courts of Appeals." Fed. R. App. P. 35(b)(1)(B).

ARGUMENT

I. THE PANEL'S HOLDINGS IMPERIL AN EXCEPTIONALLY IMPORTANT ARRAY OF PROTECTIVE REGULATIONS.

The importance of the questions raised in this case is illustrated by the far-reaching nature of the decision's implications for countless government regulations that have until now been considered constitutionally unproblematic.

Mandatory commercial disclosures in many contexts besides advertising and product labels play a crucial role in protecting the public. Required notifications of hazards protect public safety. *E.g.*, 29 U.S.C.A. § 655(b)(7) (authorizing OSHA to require warnings to employees about workplace hazards); 42 U.S.C. §§ 11021-22 (requiring information about stored hazardous chemicals to be reported and made publicly available). Environmental protection depends on extensive notification requirements. *E.g.* 33 U.S.C. §§ 1319, 1342, 1369 (requiring reporting of effluent discharges, with reports to be made available to the public); 42 U.S.C. § 11023 (requiring reporting of toxic chemical emissions). Required disclosures protect consumers in financial transactions. *E.g.*, 12 U.S.C. § 2601 *et seq.* & Reg. X, 12 C.F.R. § 1024 (mortgage brokers must make specific disclosures about loan fees and terms); 15 U.S.C. § 1681g (credit reporting agencies must provide specified disclosures). Personal privacy is protected by requiring health plans and health care providers to inform patients of their privacy rights. 45 C.F.R. § 164.520. Requiring home lenders to make public information about the race, national origin, sex and income of loan applicants and actual borrowers, 12 U.S.C. §§ 2801-10, helps deter discriminatory lending practices.

None of the foregoing disclosures occur in advertisements or on product labels. Therefore, according to the rule of the panel, all would be reviewed under standards at least as stringent as those of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), a test under which no regulation has survived Supreme Court review for two decades. *See* Seth E. Mermin & Samantha K. Graff, *The First Amendment & Public Health, At Odds*, 39 Am. J.L.

& Med. 298, 299 n.12 (2013). A holding with such drastic implications for such an extensive body of jurisprudence surely involves an important question of law.

Many important protections are similarly threatened by the holding that any disclosures – however undisputed their factual accuracy – are subject to more stringent review if they concern an issue about which there is public controversy or where there is controversy over the significance of the facts to be disclosed. Under the panel majority's rule, the requirement that automobile manufacturers disclose mileage ratings and affix a label to the fuel compartment of vehicles capable of operating on alternative fuels, 49 U.S.C. § 32908, would apparently be subject to heightened scrutiny because of public controversies about climate change. Similarly, disputes about the ethics of animal research would trigger enhanced review of straightforward recordkeeping and reporting requirements for research facilities, 9 C.F.R. §§ 2.35-2.36, and disagreements about mandatory vaccinations would support heightened scrutiny of requirements that schools report immunization rates. *E.g.*, Va. Code § 22.1-271.2; N.C. G.S. 130A-155(c).

Finally, even those disclosures still deemed to fall within the province of *Zauderer* after the panel's decision would be subject to a new level of review of their effectiveness. Decisions of this Court make clear that establishing effectiveness is no small hurdle. *See, e.g., R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1219-22 (D.C. Cir. 2012) (finding that reduced smoking in countries with graphic warning labels on cigarettes and extensive survey evidence were insufficient to establish that graphic warning labels would be effective in reducing smoking), *overruled on other grounds by AMI*, 760 F.3d

18. The imposition of a proof-of-effectiveness standard would delay or prevent such basic warning label regimes as those governing the presence of allergens in food, 21 U.S.C. § 343(w), the safety of children's toys, 15 U.S.C. § 1278, and the serious side effects of prescription drugs, 21 C.F.R. § 201.57(e). Indeed, it is difficult to see how even the most commonsense regulation requiring, for example, signs stating the maximum occupancy for public meeting spaces, D.C. Building Code § 117.1, or that employees should wash their hands after using the restroom, 14 D.C. Mun. Regs. § 1117.4, or just "EXIT," 29 C.F.R. § 1910.37(b)(2), could readily survive a similar *ex ante* demand for proof of effectiveness.

In sum, the panel's holding would invite legal challenges to, and demand judicial reconsideration of, a wide array of disclosure regimes that benefit the public in numerous ways and that have never been considered constitutionally problematic. Whether such an overhaul of regulatory jurisprudence is called for is surely a question of exceptional importance.

II. EACH OF THE PANEL'S HOLDINGS ENGENDERS A SPLIT OF AUTHORITY WITH OTHER CIRCUITS.

Both the panel majority's narrowing of the scope of applicability of *Zauderer* review and its ratcheting up of the stringency of that review conflict with the conclusions of other Courts of Appeals.

Other Circuits have not limited application of *Zauderer* review to advertisements and product labels. *See, e.g.*, *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 453 (5th Cir. 2015) (applying *Zauderer* to required posting of remedial statement on third party website);

Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 721 F.3d 264, 284-87 (4th Cir. 2013) (en banc) (holding that *Zauderer* would apply to required sign postings – unconnected to any advertising – at place of business, provided the regulated speech was commercial); *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 95-96 (2d Cir. 2010) (applying *Zauderer* to notices debt relief agencies must provide to their clients); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005) (applying *Zauderer* to compelled disclosures concerning investment advice in newsletter and on radio); *Env. Def. Ctr. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) (citing *Zauderer* in rejecting First Amendment challenge to required distribution of educational materials about the impacts of stormwater discharge); *see also Beeman v. Anthem Prescription Mgmt., LLC*, 58 Cal. 4th 329 (2013) (applying *Zauderer* to uphold requirement that pharmacy benefit managers send data to insurance companies).

Other Courts of Appeals have found factual statements to be "uncontroversial" within the meaning of *Zauderer* when there is no reasonable controversy about their truth, regardless of disputes over policy. For example, the Second Circuit applied *Zauderer* to a requirement that restaurants post calorie information on menu boards, rejecting restaurants' argument that more rigorous scrutiny should apply because "the *significance* of the facts" to be disclosed was disputed. *New York State Restaurant Ass'n v. New York City Board of Health [NYSRA]*, 556 F.3d 114, 133-34 (2d Cir. 2009) (emphasis added). Here, by contrast, the panel majority rejected *Zauderer* review precisely on the basis of controversy about the significance of the facts to be disclosed, Slip Op. at 23-24, even though there is no

more dispute about the accuracy of factual reporting about the geographic origins of the regulated minerals (or about the lack of confirmation of their origins) than there was in *NYSRA* about the accuracy of the posted calorie counts. *See also Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 560 (6th Cir. 2012) (asking only whether required warnings were "accurate" as well as factual to determine whether *Zauderer* review applied); *id.* at 569 ("Facts can … spark controversy" but that does not take them out of the ambit of *Zauderer*).

Subjecting commercial disclosure requirements to critical appraisal to determine whether there is sufficient evidence of their effectiveness is likewise at odds with the rulings of other Courts of Appeals. *See NYSRA*, 556 F.3d at 134 n.23 (in context of *Zauderer* review, State "has no obligation to produce evidence, or empirical data to sustain … rationality"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (the First Amendment is satisfied "by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose," contrasting the more exacting scrutiny applicable to commercial speech *restrictions*). *See also Greater Baltimore Ctr*, 721 F.3d at 283 (commercial disclosure requirements "need only survive rational basis scrutiny"); *Disc. Tobacco*, 674 F.3d at 555 ("courts apply a rational-basis rule" to "factual, commercial-speech disclosure requirements"); *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) ("disclosure requirements for commercial speech trigger a rational basis test"); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., concurring) ("The idea that

these thousands of routine regulations require an extensive First Amendment analysis is mistaken").

In sum, the panel decision conflicts with the law of numerous other Circuits on three distinct points, all with wide-ranging implications. It therefore presents questions of exceptional importance.

CONCLUSION

Because the panel decision raises questions of exceptional importance, and conflicts in several important respects with the holdings of other Courts of Appeals, the petitions for rehearing en banc should be granted.

DATED: October 14, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In the absence of a specific Rule prescribing a maximum length for *amicus* briefs in support of petitions for rehearing, *amici* have limited their brief to half of the fifteen pages allowed by Fed. R. App. P. 35(b)(2) to petitions for rehearing. This brief contains no more than seven and one half pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced 14-point typeface including serifs. The typeface is Times New Roman.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: October 14, 2015

/s/ Thomas Bennigson
Thomas Bennigson

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2015, I caused to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel, a true and correct copy of this Brief of *Amici Curiae* Tobacco Control Legal Consortium, *et al*.

DATED: October 14, 2015

/s/ *Vanessa Buffington*
Vanessa Buffington

APPENDIX
Identity and Interest of *Amici Curiae*

Tobacco Control Legal Consortium
The Tobacco Control Legal Consortium is a national network of non-profit legal centers providing technical assistance to public officials, health professionals and advocates concerning legal issues related to tobacco and public health.[1] The Consortium supports public policies that will reduce the harm caused by tobacco use. The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Many of the Consortium's briefs – in the United States Supreme Court, United States Courts of Appeals, and state courts around the nation – have addressed First Amendment claims brought by the tobacco industry.

American Cancer Society Cancer Action Network
The American Cancer Society Cancer Action Network (ACS CAN) is the nation's leading cancer advocacy organization that is working every day to make cancer issues a national priority. Many of the most important decisions about cancer are made outside of the doctor's office. Instead, they are made by government officials at the federal, state, and local levels, including in courts across the nation that rule on legal cases about tobacco control. ACS CAN works with over one million volunteer advocates on effective tobacco control across the nation.

Campaign for Tobacco-Free Kids
The Campaign for Tobacco-Free Kids is a non-profit organization that works to reduce tobacco use and its deadly toll in the United States and around the world.

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[1] The Tobacco Control Legal Consortium's activities are coordinated by the Public Health Law Center, at William Mitchell College of Law in St. Paul, Minnesota. The Consortium's affiliated legal centers include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at University of Maryland School of Law, Baltimore, Maryland; Public Health Advocacy Institute and Center for Public Health and Tobacco Policy, at Northeastern University School of Law, Boston, Massachusetts; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan; and Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey.

Tobacco-Free Kids advocates public policies that prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke.

National Association of County and City Health Officials
The National Association of County and City Health Officials (NACCHO) is the voice of the 2,800 local health departments across the country. Local health departments develop policies and create environments that make it easier for people to be healthy and safe, including informing the public of the hazards of tobacco use, reducing youth access to tobacco, and limiting exposure to secondhand smoke.

Public Health Law Center
The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law. The Center helps local, state, and national leaders promote public health by strengthening public policies. The Center also serves as the National Coordinating Center of the Network for Public Health Law, which offers specialized legal technical assistance to health departments nationwide on a wide range of issues relating to public health law, authority and practice. The Public Health Law Center and its programs have filed *amicus* briefs in numerous state and federal cases involving significant public health issues.

Truth Initiative
The Truth Initiative, formerly the American Legacy Foundation, envisions a future where tobacco is a thing of the past and where all youth and young adults reject tobacco use. The Truth Initiative's proven-effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences and approaches to reducing tobacco use. The Truth Initiative also develops programs to address the health effects of tobacco use – with a focus on priority populations disproportionately affected by the toll of tobacco – through alliances, youth activism, training and technical assistance. Located in Washington, D.C., the Truth Initiative was created as a result of the November 1998 Master Settlement Agreement between attorneys general from 46 states, five U.S. territories and the tobacco industry.