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American Meat Ruling May Whet Supreme Court Appetite

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The First Amendment guarantees both "the right to speak freely and the right to refrain from speaking at all."[1] Commercial speech has long been afforded lesser protection under the First Amendment,[2] though some recent Supreme Court decisions may signal that the commercial speech doctrine's days are numbered. In the meantime, federal courts are divided over how First Amendment protections should apply to forced commercial speech—mandatory warnings, informational disclosures, and other messaging imposed on private parties. The *en banc* D.C. Circuit will soon resolve key questions about what leeway the government has to force private parties to engage in speech, an issue that may ultimately end up before the Supreme Court. As governments around the country consider varied and novel disclosure and informational obligations, these legal principles will be critical.

In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court sustained a state requirement that attorneys advertising contingent-fee based services also make plain "that the client may have to bear certain expenses" if they lose, because without that information clients could be misled about their potential costs in bringing a suit. The Court applied nothing more than a form of rational basis review to such required disclosures. The Court declined to apply the more rigorous heightened scrutiny generally applicable to commercial speech from *Central Hudson Gas & Electric Corp. v. Public Service Commission* because it concluded that the disclosures would convey "purely factual and uncontroversial information" and were "reasonably related to the State's interest in preventing deception of consumers."[3]

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Since *Zauderer*, lower courts confronting more novel and burdensome mandates have disagreed about when to apply its rational basis standard. Some circuits have held that the *Zauderer* test applies *only* when the government's motivation for compelling speech is to prevent consumer deception. Others have concluded that the Supreme Court's reference to consumer deception was merely an example of a permissible governmental interest, and have applied *Zauderer* in cases where there is no asserted interest in the prevention of deception, but where the government believes the disclosure or message is useful to inform or educate the public.

Recently, this dispute over *Zauderer* has come to a head in D.C. federal court. Two panels of the D.C. Circuit have issued directly contradictory opinions, with one, *National Ass'n of Manufacturers v. SEC*, requiring an interest in preventing consumer deception, and another, *American Meat Institute v. Department of Agriculture*, explicitly rejecting such a requirement. The outcome of the pending *en banc* appeal of the latter case may set the stage for Supreme Court review.

Federal Circuits are Split on Whether Deception is a Prerequisite for *Zauderer*'s Rational Basis Standard

Federal Circuit Courts of Appeal have broadly split into two camps when applying the *Zauderer* standard. Some circuits have taken the *Zauderer* decision at its word and have applied *Zauderer* in the context of correcting consumer deception. For instance, in a case dealing with the mandated labeling of dairy products, the Sixth Circuit held that "*Zauderer* applies where a disclosure requirement targets speech [as] inherently misleading."[4] The Tenth Circuit has phrased its application of *Zauderer* in terms of *Central Hudson*, holding that the presence of deception eases the burden of meeting the *Central Hudson* test because the court "presumes that the government's interest in preventing consumer deception is substantial, and that where regulation requires disclosure only of factual and uncontroversial information and is not overly burdensome, it is narrowly tailored."[5]

The First Circuit, on the other hand, has taken a different view, holding that *Zauderer* is not limited to cases where the government aims to prevent deception.[6] In *Pharmaceutical Care Management Ass'n v. Rowe,* the First Circuit determined that a Maine statute requiring some pharmacy benefit managers to disclose conflicts of interest and certain financial arrangements with third parties was subject to rational basis review under *Zauderer*. The First Circuit stated that an interest in preventing deception was not a necessary prerequisite for the state to receive the benefit of *Zauderer*'s less-demanding analysis because the "routine disclosure of economically significant information designed to forward ordinary regulatory purposes . . . is [subject to] a test akin to the general rational basis test governing all government regulations under the Due Process Clause."[7]

The Second Circuit has adopted the First Circuit's view. In 2009, the Second Circuit rejected the argument that heightened scrutiny must apply to any disclosure requirements that are not aimed at preventing or correcting deception. The court thus sustained a city law requiring restaurants to post caloric information under *Zauderer*'s rational basis test without a showing that the required information was aimed to prevent consumer deception.[8] In *Connecticut Bar Ass'n v. United States*, a Second Circuit panel went on to suggest—*in dicta*—that *Zauderer*'s rational basis standard could apply any time the government compels disclosure without at

the same time suppressing speech.[9] Such an approach would dramatically expand the government's prerogative to compel private messaging so long as a regulated party could still promote its own message.

While the Ninth Circuit has not yet squarely addressed the question, it has signaled that it endorses the view that an interest in preventing deception is required. In 2009, in a case involving mandated violent video game labeling, the Ninth Circuit stated that under *Zauderer* "[c]ompelled disclosures, justified by the need to dissipate the possibility of consumer confusion or deception, are permissible if the disclosure requirements are reasonably related to the State's interest in preventing deception."[10] In 2012, the Ninth Circuit applied the *Zauderer* rational basis standard to a city ordinance requiring vendors to provide cell phone safety information, but did not reach the question of whether prevention of deception was the sole permissible rationale under *Zauderer.* Instead, it found that the ordinance could not pass even *Zauderer* review because the speech being compelled was not "purely factual and uncontroversial."[11] Later that year, the Ninth Circuit rejected a lower court decision that had adopted the no-consumer-deception-required interpretation of *Zauderer* to sustain required opt-out messages on phone directories.[12] Perhaps cognizant of the doctrinal disputes over appropriate triggers for *Zauderer* review, the Ninth Circuit did not reach this question, instead applying strict scrutiny to phone directories at issue because they included commercial and non-commercial speech.

Two Recent D.C. Circuit Decisions Disagree on the *Zauderer* Deception Question

The D.C. Circuit is deeply conflicted on the scope of the *Zauderer* standard. The Circuit's earlier cases seem to clearly require an interest in preventing deception before the government gets the benefit of *Zauderer's* more relaxed standard of review. For example, in *R.J. Reynolds Tobacco v. FDA*, the court applied intermediate scrutiny—not *Zauderer*—to a First Amendment challenge to graphic images on cigarette labels because the government had not shown a danger that the tobacco companies' advertisements would mislead customers without the graphic images, and the graphic warnings were not purely factual and uncontroversial.[13] But in recent months separate panels have issued two divergent opinions both on the Circuit's past precedent and on the scope of *Zauderer*. A pending *en banc* review is likely to settle the issue in the D.C. Circuit, but may invite Supreme Court review.

National Ass'n of Manufacturers v. SEC

On April 14, 2014 the D.C. Circuit issued an opinion in *National Ass'n of Manufacturers v. SEC.*[14] The case involved the SEC's rules issued to meet the "Conflict Minerals" investigation and reporting requirements of the Dodd-Frank Act.[15] The Act required the SEC to issue regulations requiring firms using "conflict minerals" to investigate and disclose the origin of those minerals.[16] The SEC's final regulations require that an issuer describe its products as "not DRC conflict free" in the report it files with the Commission and post that statement on its website, if the issuer is unable to confirm that its products do not include conflict-free materials. The National Association of Manufactures challenged the regulations, asserting, among other things, that the requirement that the issuer describe its products as "not DRC conflict free" constitutes a compelled message in violation of speakers' First Amendment rights. The district court rejected this argument, finding that the SEC's regulation survived intermediate scrutiny under *Central Hudson.*[17]

The D.C. Circuit reversed, finding first that rational basis review under *Zauderer* did not apply because *Zauderer* is "limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers,'"[18] and "[n]o party ha[d] suggested that the conflict minerals rule is related to preventing consumer deception."[19] The court explained that "the general rule[] that the speaker has the right to tailor [] speech, applies equally to statements of fact the speaker would rather avoid."[20]

The court applied *Central Hudson*'s intermediate scrutiny, and, unlike the lower court, found that the conflict minerals disclosure rule could not survive because the government failed to prove that less restrictive means of enforcing the SEC's Congressional mandate would fail.[21] In his partial concurrence, Judge Sri Srinivasan objected to the court's decision to address whether the *Zauderer* rational basis standard requires a showing of deception. Instead, in his opinion, the court should have withheld its decision on the First Amendment until the *en banc* panel of the D.C. Circuit decided *American Meat Institute v. Department of Agriculture*.[22]

American Meat Institute v. Department of Agriculture

As Judge Srinivasian notes, the D.C. Circuit may definitively resolve whether an interest in preventing deception is a precondition to *Zauderer* review in a case currently being heard by the court *en banc*, *American Meat Institute v. Department of Agriculture* ("*AMI*").[23] In the disputed decision, issued March 28, 2014, a three-judge panel upheld country-of-origin labeling requirements for meat products under *Zauderer*'s rational basis standard, relying only on the government's claimed interest in arming consumers with additional information when purchasing food.[24] The court expressly rejected the *Zauderer* prevention-of-deception requirement, saying that "*Zauderer*'s characterization of the speaker's interest in opposing forced disclosure [of public health or other information] as 'minimal' seems inherently applicable beyond the problem of deception."[25] The court aligned itself with the First and Second Circuits' view of *Zauderer* as expressed in *Rowe* and *Sorrell.* The panel found that its view of *Zauderer* did not conflict with earlier panel decisions in *National Ass'n of Manufacturers v. NLRB* or *R.J. Reynolds Tobacco Co. v. FDA*, which included *Zauderer* deception inquiries, because according to the *AMI* panel, those cases turned on other grounds, including *Zauderer*'s first precondition, *i.e.*, that the relevant disclosures were not purely factual and uncontroversial.[26] On April 4, 2014, at the suggestion of the panel, the *en banc* court *sua sponte* ordered briefing and oral argument on the issue of what interest is required to trigger *Zauderer*'s more relaxed review.[27]

The stage is set for the full D.C. Circuit to determine for itself the circumstances in which the government gains the benefit of *Zauderer*'s rational basis review—the *en banc* court will hear argument in *American Meat Institute* on May 19, 2014. Other interpretive questions under *Zauderer* may remain, but the expansion of *Zauderer* in the D.C. Circuit beyond an asserted interest in preventing deception would be a major achievement for regulators seeking to impose novel messaging and disclosure obligations.

Conclusion

As the government increasingly requires businesses to make public disclosures or convey desired messaging, the robustness of businesses' First Amendment protections against compelled speech is an ever more important question. Circuits are split and the D.C. Circuit—which hears the lion's share of challenges to federal

regulatory action—continues to debate the meaning of *Zauderer*. Although the outcome of the D.C. Circuit's *en banc* decision on *American Meat Institute* could settle this important question in the circuit, a notable circuit split will remain. The Supreme Court will likely have to decide whether *Zauderer*'s rational basis review requires a showing that a mandate aims to correct deceptive speech, or whether *Zauderer*'s relaxed standard can be counted on to protect "disclosure" obligations determined by the government to promote various interests, ranging from public and environmental health to economic development, social issues, and foreign policy.

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[1] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[2] *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980).

[3] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Cent. Hudson*, 447 U.S. at 564-66 (requiring the government to show (1) a substantial government interest, (2) materially advanced by the restriction, and (3) that the restriction is narrowly tailored).

[4] *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640-41 (6th Cir. 2010).

[5] *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005). Other circuits similarly have not applied the test outside the narrow class of cases involving consumer deception. *See, e.g., Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002) (upholding required disclaimers on dental advertisements to correct consumer misconception); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006) (holding that video game labels were subject to strict scrutiny because they were not purely factual and uncontroversial); *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 228 (5th Cir. 2011) (holding that required attorney advertising disclosures were reasonably related to the state's interest in preventing deception); *Ficker v. Curran*, 119 F.3d 1150, 1152 (4th Cir. 1997) (striking down state ban on an attorney's targeted mailings because restriction failed intermediate scrutiny review); *United States v. Bell*, 414 F.3d 474, 484 (3d Cir. 2005) (upholding court order requiring fraudulent tax advice site to post injunction prominently on website to prevent consumer deception under *Zauderer*).

[6] *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (stating that the court found no cases limiting Zauderer to situations where potentially deceptive advertising is directed at consumers).

[7] *Id.* at 316 (Boudin, J. and Dyk, J., concurring).

[8] *See N.Y.S.R.A. v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (relying on public information and health interest asserted by the City); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (upholding state labeling requirements for some products containing mercury).

[9] *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 93 (2d Cir. 2010).

[10] *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (citation and quotations omitted) (finding that because sale and prohibition rules were invalid, the required label would not prevent deception); *but see Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003) (upholding requirement that municipal storm water systems distribute materials on impact of storm water discharge under rational basis review as part of a larger regulatory scheme; the court did not apply *Zauderer* or address correction-of-deception).

[11] *CTIA v. San Francisco*, 494 F. App'x 752 (9th Cir. 2012). This outcome highlights the power of the first prerequisite for *Zauderer* review—that the compelled disclosure be purely factual and uncontroversial.

[12] *See Dex Media W., Inc. v. Seattle*, 696 F.3d 952, 965 (9th Cir. 2012).

[13] *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012); *see also Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.18 (D.C. Cir. 2013); *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403 (D.C. Cir. 2012); *United States v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1144-45 (D.C. Cir. 2009).

[14] *Id.*

[15] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (relevant parts codified at 15 U.S.C. §§ 78m(p), 78m note ("Conflict Minerals")).

[16] *See* 15 U.S.C. § 78m(p)(1)(A).

[17] *Nat'l Ass'n of Mfrs. v. SEC*, 956 F. Supp. 2d 43 (D.D.C. 2013). The district court refrained from applying the *Zauderer* test because the Commission conceded at oral argument that the disclosures are not aimed at preventing misleading or deceptive speech. *See id.*

[18] *Nat'l Ass'n of Mfrs. v. SEC*, — F.3d —, 2014 WL 1408274, at *9 (D.C. Cir. Apr. 14, 2014) (quoting *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1213.

[19] *Id.*

[20] *Id.* (citation omitted).

[21] *Id.* at *10-11.

[22] *Id.* at *11. Judge Srinivasan also noted the court's suggestion that the conflict minerals disclosure requirement might fail to satisfy the "purely factual and uncontroversial" *Zauderer* precondition, but that the decision itself only hinges on the deception question. *Id.* at *12.

[23] *Am. Meat Inst. v. Dep't of Agric.*, — F.3d —, 2014 WL 1257959 (D.C. Cir. Mar. 28, 2014).

[24] *Id.* at *6.

[25] *Id.*

[26] *Id.* at *6-7.

[27] *See id.* at *7, n.1.