COMMERCIAL SPEECH — COMPELLED DISCLOSURES — D.C. CIRCUIT APPLIES LESS STRINGENT TEST TO COMPELLED DISCLOSURES. — *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

In the four decades since the Supreme Court first held that the First Amendment provides some protection to commercial speech,[1] it has struggled to explain how far that protection extends.[2] While an intermediate scrutiny test introduced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[3] provides a general, if highly flexible, framework for evaluating *restrictions* on commercial speech,[4] it remains unclear how mandated *disclosures* should be assessed.[5] In *Zauderer v. Office of Disciplinary Counsel*,[6] the Court found it unnecessary to apply the full degree of *Central Hudson* scrutiny to a "purely factual and uncontroversial"[7] disclosure required in order to correct an otherwise misleading advertisement.[8] The D.C. Circuit declined to apply the "less exacting"[9] *Zauderer* standard to disclosures mandated for purposes other than preventing consumer deception in *R.J. Reynolds Tobacco Co. v. FDA*,[10] which struck down a rule requiring graphic warning labels on cigarette packages,[11] and in *National Ass'n of Manufacturers v. SEC*[12] *(NAM)*, which struck down a rule requiring firms using "conflict minerals" to report links to the Congo.[13]

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[1] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The core definition of commercial speech is "speech which does 'no more than propose a commercial transaction,'" *id.* at 762 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)), but speech that does more than this may still be classified as commercial under certain circumstances, *see* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

[2] *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990) ("Unless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner."); Robert Post, Lecture, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 3 (2000) (noting that commercial speech doctrine "has veered wildly between divergent and inconsistent approaches").

[3] 447 U.S. 557 (1980).

[4] *See id.* at 566.

[5] In the political speech context, by contrast, compelled speech is treated no differently than speech restrictions. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) (describing "[t]he right to speak and the right to refrain from speaking" as "complementary"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[6] 471 U.S. 626 (1985).

[7] *Id.* at 651.

[8] *See id.* at 650–51.

[9] Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010).

[10] 696 F.3d 1205, 1214–15 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. V. U.S. Dep't Agric., 760 F.3d 18 (D.C. Cir. 2014).

[11] *Id.* at 1222. The warning labels included images depicting a man smoking through a tracheotomy hole and a crying woman. *Id.* at 1216.

[12] 748 F.3d 359, 371 (D.C. Cir. 2014), *reh'g granted* No. 13–5252 (D.C. Cir. Nov. 18, 2014).

[13] *See id.* at 363, 370–71, 373.

Recently, in *American Meat Institute v. USDA*[14] *(AMI)*, the en banc D.C. Circuit diverged from the trajectory set by those two cases and held that *Zauderer* applies to "factual and uncontroversial" disclosures mandated by the government for *any* purpose.[15] *AMI* marks a welcome doctrinal departure from *R.J. Reynolds* and *NAM*. Factual and uncontroversial disclosure mandates are consistent with the principles underlying commercial speech jurisprudence, and the *AMI* majority was correct to hold that all such mandates should receive the more lenient review of *Zauderer*. However, *AMI* may not signal a significant departure from *R.J. Reynolds* and *NAM* in practice. The decision's impact will depend on how the D.C. Circuit approaches the difficult question of whether a disclosure is "purely factual and uncontroversial."

In May 2013, the Secretary of Agriculture promulgated a rule requiring that meat products carry labels identifying the country where each step of the production process took place.[16] The American Meat Institute (AMI), relying on *R.J. Reynolds*, challenged the rule as an unconstitutional compulsion of speech.[17] Judge Jackson of the U.S. District Court for the District of Columbia relied upon *Zauderer* in denying AMI's motion for a preliminary injunction.[18] She accepted that *Zauderer* applied only to disclosures intended to prevent deception,[19] but reasoned that *Zauderer* review was proper because the old, less precise country-of-origin labels could have created "consumer confusion" about where the meat had been produced.[20]

The D.C. Circuit affirmed.[21] Writing for a unanimous panel, Judge Williams[22] advanced a more expansive reading of *Zauderer*. He held that *Zauderer* applies to disclosure mandates generally, not just those intended to prevent deception.[23] To reach this conclusion, Judge Williams distinguished the controversial disclosure in *R.J. Reynolds* from the purely factual disclosure in the instant case.[24] However, recognizing that some judges might disagree with his interpretation of *Zauderer*, Judge Williams recommended en banc review.[25]

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[14] 760 F.3d 18 (D.C. Cir. 2014) (en banc).

[15] *Id.* at 22.

[16] *Id.* at 21. This 2013 rule modified a prior rule implementing a federal country-of-origin labeling statute, which was passed in 2002 and later amended in 2008. *Id.* at 20.

[17] Am. Meat Inst. v. USDA, 968 F. Supp. 2d 38, 49 (D.D.C. 2013).

[18] *Id.* at 50–52.

[19] *See id.* at 48.

[20] *Id.* at 51; *see id.* at 50–51. Judge Jackson also rejected AMI's argument that the rule exceeded the agency's authority under the authorizing statute. *See id.* at 59.

[21] Am. Meat Inst. v. USDA, 746 F.3d 1065, 1068 (D.C. Cir. 2014).

[22] Judge Williams was joined by Chief Judge Garland and Judge Srinivasan.

[23] *Am. Meat Inst.*, 746 F.3d at 1073.

[24] *Id.* at 1072–73. *NAM* had not yet been decided at the time of the panel decision, so Judge Williams did not distinguish the "conflict minerals" disclosure.

[25] *Id.* at 1073 n.1.

On rehearing en banc, a divided D.C. Circuit affirmed.[26] Writing for the majority, Judge Williams[27] first considered the applicability of the *Zauderer* standard to the instant case.[28] He acknowledged that all of the Supreme Court's applications of *Zauderer* have concerned disclosures intended to remedy misleading advertising,[29] but noted that the Court's justification for its approach in *Zauderer* — that a company's interest in withholding factual information from consumers is "minimal" — applies to all factual and uncontroversial disclosure mandates.[30] To the extent that *R.J. Reynolds* and *NAM* conflicted with this broad application of *Zauderer*, the majority declared that they were overruled.[31]

The majority then evaluated the constitutionality of the country-of-origin requirement under *Zauderer*. In assessing disclosure mandates under *Zauderer*, the court applied a version of the *Central Hudson* test, which requires, among other things, (i) that the government's asserted interest be substantial,[32] and (ii) that the regulation "directly advance" that interest,[33] such that there is "a 'reasonable proportion' between means and ends."[34]

First, the majority analyzed the adequacy of the government's interest. It disagreed with AMI's claim that country-of-origin information merely satisfies consumers' "idle curiosity."[35] Instead, it noted the long history of country-of-origin labels and the usefulness of such information to consumers concerned about production standards or contamination threats.[36] The majority judged that these interests met

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[26] *AMI*, 760 F.3d at 20.

[27] Judge Williams was joined by Chief Judge Garland and Judges Tatel, Griffith, Srinivasan, Pillard, and Wilkins.

[28] *See AMI*, 760 F.3d at 21–22. The en banc court did not revisit AMI's statutory argument. *Id.* at 21.

[29] *Id.* at 22 (citing Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010)). Nevertheless, two circuit courts have held that *Zauderer* applies to commercial disclosures generally, regardless of the government's purpose. *See* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (per curiam); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–15 (2d Cir. 2001).

[30] *AMI*, 760 F.3d at 22 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)) (internal quotation marks omitted).

[31] *Id.* at 22–23.

[32] It is not clear whether *Zauderer* requires a "substantial" government interest or whether a lesser one will suffice. *See id.* at 23 ("[T]he Supreme Court has not made clear whether *Zauderer* would permit government reliance on interests that do not qualify as substantial under *Central Hudson*'s standard, a standard that itself seems elusive.").

[33] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

[34] *AMI*, 760 F.3d at 26 (citation omitted) (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

[35] *Id.* at 23 (internal quotation marks omitted).

[36] *See id.* at 23–25. These interests were identified by members of Congress when the authorizing statute was passed, *id.* at 24, but were not raised by the agency in its brief or during rulemaking. The court determined, however, that since the agency's action was required by statute, the doctrine of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) — which would otherwise have prevent-

the "substantial" standard of *Central Hudson*, and thus it had no need to decide whether a lesser interest would have satisfied *Zauderer*.[37]

Second, the majority assessed the relationship between the government's regulatory goals and its chosen means. Because disclosure mandates self-evidently advance the government's end of providing consumers with information and generally impose a negligible burden on a speaker, they will almost always stand up to this part of the analysis.[38] For this reason, the majority suggested that *Zauderer* could be seen as "an *application* of *Central Hudson*, where several of *Central Hudson*'s elements have already been established."[39]

Having found the country-of-origin requirement to satisfy *Zauderer*, the majority then ensured that the disclosure satisfied "the criteria triggering the application of *Zauderer*"[40]: whether the disclosure is of "purely factual and uncontroversial information."[41] AMI did not dispute that country-of-origin information is factual, though it did argue that the word "slaughter" could be considered controversial.[42] The majority acknowledged the legitimacy of that concern, but noted that the rule allows retailers to use the more neutral word "harvested" instead.[43] Accordingly, the majority found that the disclosure requirement was constitutional under *Zauderer*.

Judge Rogers concurred in part, but objected to the majority's suggestion that *Zauderer* is simply an application of *Central Hudson*.[44] Instead, argued Judge Rogers, *Central Hudson* and *Zauderer* involve distinct standards — the latter is akin to rational basis review, while the former is more demanding.[45]

Judge Kavanaugh concurred in the judgment. Though he found the government's interest to be substantial given the long history of supporting American industry through country-of-origin labeling,[46] he

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ed the court from considering rationales not explicitly articulated by the agency — did not apply. *AMI*, 760 F.3d at 25.

[37] *AMI*, 760 F.3d at 23.

[38] *See id.* at 26.

[39] *Id.* at 27 (quoting Supplemental Brief for Appellants at 9, *AMI*, 760 F.3d 18 (No: 1:13-cv-1033), 2014 WL 1600434) (internal quotation marks omitted).

[40] *Id.*

[41] *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)) (internal quotation marks omitted).

[42] *Id.*

[43] *See id.* The majority also remarked that some factual disclosures could be "so one-sided or incomplete" that they could not qualify as uncontroversial, and that no mandate could require a corporation to carry third-party messages with which it disagrees, but concluded that the country-of-origin disclosure did not raise such concerns. *Id.*

[44] *Id.* at 28 (Rogers, J., concurring in part).

[45] *See id.* at 29–30. ("[B]lurring the lines between the two standards may sow confusion where . . . the focus is not on the adequacy of the government interest, as here, but instead on the evidentiary support for, or the 'fit' of, the disclosure requirement." *Id.* at 30.).

[46] *See id.* at 32. (Kavanaugh, J., concurring in the judgment).

emphasized that merely wishing to "giv[e] consumers information" is not a sufficient interest.[47] Judge Kavanaugh also endorsed the majority's suggestion that *Zauderer* is an application of *Central Hudson*.[48]

Judge Brown[49] wrote a lengthy dissent defending the narrower approach to *Zauderer* that she had advanced in *R.J. Reynolds*. For Judge Brown, *Zauderer* simply made clear that the First Amendment does not protect deceptive commercial speech; it did not establish that commercial disclosures are categorically less deserving of constitutional scrutiny than restrictions.[50] Judge Brown characterized the majority's reformulated *Zauderer* standard as extremely lax: "rational basis review minus any legitimate justification."[51] She assailed the majority for looking beyond the interests identified by the government during the litigation and coming up with its own justifications for the statute.[52] By finding that the government's "amorphous" interest in country-of-origin information was substantial, the majority "effectively absolve[d] the government of any burden."[53] Now, as long as a disclosure can be characterized as "factual and noncontroversial," a seller's packaging is "the government's billboard."[54]

The majority's consumer-oriented justification for the First Amendment's protection of commercial speech is more faithful to the Court's precedents than the speaker-oriented approach that underwrote *R.J. Reynolds* and *NAM*.[55] The cursory *Zauderer* review conducted in *AMI* is appropriate for factual and uncontroversial disclosure mandates, which actually further the aims of the commercial speech doctrine. But disclosures like those in *R.J. Reynolds* and *NAM*

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[47] *Id.* at 31.

[48] *Id.* at 33. Judge Kavanaugh rejected Judge Rogers' contention that *Zauderer* should be thought of as rational basis review. *Id.* Instead, as an application of *Central Hudson*, he saw it as considerably more demanding. *See id.* at 33–34. The D.C. Circuit previously conceived of *Zauderer* as a rational basis test, as have most other circuits that have addressed the question. *See, e.g.*, Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 264 (2d Cir. 2014); Centro Tepeyac v. Montgomery Cnty., 722 F.3d 184, 189 (4th Cir. 2013); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't Agric., 760 F.3d 18 (D.C. Cir. 2014); Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 227 (5th Cir. 2011); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005).

[49] Judge Brown was joined by Judge Henderson, who also wrote a separate dissent criticizing the *AMI* panel for contradicting *R.J. Reynolds*. *AMI*, 760 F.3d at 35 (Henderson, J., dissenting).

[50] *See id.* at 37–38 (Brown, J., dissenting).

[51] *Id.* at 38.

[52] *Id.* at 46–48.

[53] *Id.* at 46.

[54] *Id.* at 40.

[55] For more on the distinction between audience-oriented and speaker-oriented approaches to the First Amendment, see Robert Post, Lecture, *Transparent and Efficient Markets: Compelled Speech and Coerced Commercial Association in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 559 (2006).

are not obviously factual and uncontroversial, and the court left ample room for plaintiffs to challenge mandated disclosures on that basis.

The consumer-welfare approach of *AMI* is more consistent with commercial speech doctrine than the libertarian approach of *R.J. Reynolds* and *NAM*.[56] When the Supreme Court first extended First Amendment protection to commercial speech, it focused on the "consumer's interest in the free flow of commercial information."[57] The Court made this more explicit in *Central Hudson*, declaring that "[t]he First Amendment's concern for commercial speech is based on the *informational* function of advertising."[58] In *AMI*, the majority rightly emphasized that *Zauderer* recognizes a broad consumer interest in product information.[59] By contrast, *R.J. Reynolds* and *NAM* depicted *Zauderer* as a narrow exception to otherwise robust protection against compelled speech of any sort, citing cases involving compelled *political* speech to support their skepticism toward commercial disclosures.[60] In *R.J. Reynolds*, Judge Brown even invoked the "*individual freedom of mind* protected by the First Amendment" to support her narrow construal of *Zauderer*.[61] This focus on the expressive rights of commercial actors, as opposed to the informational interests of consumers, is at odds with the Supreme Court's commercial speech jurisprudence.[62]

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[56] For more on the libertarianism of *R.J. Reynolds*, *NAM*, and other recent D.C. Circuit decisions, particularly those authored by Judge Brown, see generally Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, U. CHI. L. REV. (forthcoming 2015), http://ssrn.com/abstract=2460822 [http://perma.cc/442X-FHDE].

[57] Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976). More recently, the Court's commercial speech decisions have been inflected with speaker-oriented rhetoric, *see* sources cited *infra* note 62, but these decisions are consistent with the consumer-welfare approach, which remains paramount, *see infra* note 62.

[58] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (emphasis added).

[59] *See AMI*, 760 F.3d at 22–23.

[60] *See NAM*, 748 F.3d 359, 371 & n.11 (D.C. Cir. 2014) (citing Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573–74 (1995); Wooley v. Maynard, 430 U.S. 705, 714 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't Agric., 760 F.3d 18 (D.C. Cir. 2014) (same).

[61] *R.J. Reynolds*, 696 F.3d at 1211 (emphasis added) (quoting *Wooley*, 430 U.S. at 714) (internal quotation mark omitted).

[62] Judge Brown correctly noted in dissent that "[t]he clear trajectory of the Supreme Court's jurisprudence is toward greater protection for commercial speech, not less." *AMI*, 760 F.3d at 43 (Brown J., dissenting). However, when the Court has struck down commercial speech regulations in the past two decades, it has struck down *restrictions*, not disclosures. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). A strict approach to commercial speech restrictions is fully consistent with a lenient approach to factual disclosures — both promote the fundamental purpose of commercial speech protection by increasing the amount of commercially relevant information available to consumers.

Under this consumer-oriented approach, the majority was correct to subject factual disclosure mandates to a less searching standard of review. By promoting "the robust and free flow of accurate information," factual disclosure mandates further the interests protected by commercial speech doctrine.[63] In this context, courts need not scrutinize the government's purpose for imposing disclosure mandates especially intensely. The generous analysis of the majority suggests that any factual disclosure that could reasonably be construed to benefit American consumers or producers will withstand the first prong of *Zauderer*.[64] And by declaring that most disclosure mandates "self-evidently" advance the government's interest and exhibit a "reasonable fit" between means and ends,[65] the court made it less likely that future disclosure requirements will be invalidated under *Zauderer*'s second prong.

Though *AMI* expanded the scope of *Zauderer*, a compelled disclosure must be found "purely factual and uncontroversial" before it receives *Zauderer*'s permissive review. This is a highly indeterminate criterion. As Judge Brown noted in dissent, "what is claimed as fact may owe more to faith than science,"[66] and even if a disclosure is indisputably factual it may implicate a matter of public controversy and thus be scrutinized under a more exacting standard.[67] Thus, *AMI* may not represent a significant practical departure from *R.J. Reynolds* and *NAM* because the disclosures in those cases were arguably not "purely factual and uncontroversial," and would likely still receive heightened scrutiny.[68] The panel in *R.J. Reynolds* remarked that the graphic

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[63] *AMI*, 760 F.3d at 29 (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114 (2d Cir. 2001)).

[64] That the majority and Judge Kavanaugh justified the disclosure by reference to completely distinct government purposes, neither of which had been advanced by the government in litigation (and one of which had even been explicitly rejected by the government, *see AMI*, 760 F.3d at 50–51 (Brown, J., dissenting)), suggests that the court would be loath to find that there is not an adequate purpose for requiring a disclosure. The Supreme Court's past applications of *Central Hudson*, which explicitly requires a "substantial" government interest (as *Zauderer* may or may not), also indicate that the bar is set quite low for the government. *See, e.g.*, Bd. of Trs. v. Fox, 492 U.S. 469, 475 (1989) (finding that a ban on "Tupperware parties" in the dormitories of a state college was based, inter alia, on a substantial interest in promoting an educational atmosphere).

[65] *AMI*, 760 F.3d at 26.

[66] *Id.* at 54 (Brown, J., dissenting).

[67] *See, e.g.*, Evergreen Ass'n v. City of N.Y., 740 F.3d 233, 245 n.6 (2d Cir. 2014) (determining that a disclosure required of New York City pregnancy services centers — whether they provide referrals for abortion, emergency contraception, and prenatal care — was not "uncontroversial" because it required centers "to mention controversial services that some . . . centers . . . oppose"); *see also* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (holding that an "18" sticker that the state required to be placed on certain video games was "subjective and highly controversial" in that it represented the state's judgment that the game was "sexually explicit").

[68] It is not clear what level of scrutiny a disclosure that is not purely factual and uncontroversial should receive. The Second Circuit, which conceives of *Zauderer* as a rational basis test, recently left open the question of whether such a disclosure (even one of a "political nature") should receive intermediate or strict scrutiny. *See Evergreen Ass'n*, 740 F.3d at 249–50.

warning labels the government wanted to affix to cigarette packages were "inflammatory" and could not "rationally be viewed as pure attempts to convey information to consumers."[69] The panel in *NAM* questioned whether the "conflict free" designation was truly "non-ideological," since it "requires [a company] to tell consumers that its products are ethically tainted."[70] The *AMI* majority gave no indication that it disagreed with these analyses. In fact, the majority took seriously a more subtle "factual and uncontroversial" argument: that requiring companies to use the word "slaughter" — which "might convey a certain innuendo" — crosses the line into the controversial.[71] The D.C. Circuit has shown sensitivity to the slightest hints of controversy, and thus future challenges to disclosure mandates will likely focus on the "factual and uncontroversial" question.[72]

Although the "factual and uncontroversial" criterion is malleable, it is of genuine First Amendment importance. If the government conscripts a private party to espouse a factually contested view or to disclose certain facts in the service of a controversial agenda, this raises concerns that the government is impermissibly interfering in "public discourse."[73] When the government compels the public display of an ideological message, the more forgiving review of commercial speech regulation is no longer appropriate, and the libertarian concerns of *R.J. Reynolds* gain traction.[74] But as the *AMI* majority's treatment of the word "slaughter" indicates, even the most innocuous disclosures may contain some element of controversy.[75] The D.C. Circuit must now decide just how much controversy it is willing to tolerate.[76]

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[69] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't Agric., 760 F.3d 18 (D.C. Cir. 2014).

[70] *NAM*, 748 F.3d 359, 371 (D.C. Cir. 2014), *reh'g granted* No. 13–5252 (D.C. Cir. Nov. 18, 2014).

[71] *AMI*, 760 F.3d at 27.

[72] Indeed, the plaintiff in *NAM* made the "purely factual and controversial" issue the crux of its argument against the conflict minerals disclosure in the supplemental brief it submitted for the rehearing of *NAM*. *See* Supplemental Brief of Appellants, *NAM*, 748 F.3d 359 (D.C. Cir. Dec. 29, 2014) (No. 13-5252).

[73] For an extended treatment of the difference between commercial speech and public discourse, see generally Post, *supra* note 2.

[74] *See* Wooley v. Maynard, 430 U.S. 705, 713 (1977) (holding that the government may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property . . . for the express purpose that it be observed and read by the public"); *see also* Evergreen Ass'n, Inc. v. City of N.Y., 740 F.3d 233, 249–50 (2d Cir. 2014) (taking the "political nature" of a disclosure into account in finding it unconstitutional).

[75] Perhaps for this very reason, the Sixth Circuit has said that disclosures need not be *purely* factual and uncontroversial to satisfy *Zauderer*. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (opinion of Stranch, J.).

[76] The *NAM* panel will have an opportunity to make this decision upon rehearing, when it interprets the meaning of "purely factual and uncontroversial." *See* Order Granting Petitions for Panel Rehearing, *NAM*, 748 F.3d 359 (D.C. Cir. Nov. 18, 2014) (No. 13-5252).