TO BE ARGUED BEFORE THE COURT *EN BANC* MAY 19, 2014
No. 13-5281

IN THE
United States Court of Appeals
for the District of Columbia Circuit

AMERICAN MEAT INSTITUTE, *ET AL.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *ET AL.*,

Defendants-Appellees,

and

UNITED STATES CATTLEMEN'S ASSOCIATION, *ET AL.*,

Intervenor-Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
Case No. 1:13-cv-1033 (Hon. Ketanji Brown Jackson)

SUPPLEMENTAL BRIEF FOR APPELLANTS

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GLOSSARY

AMS: Agricultural Marketing Service

COOL: Country of origin labeling

USDA: United States Department of Agriculture

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QUESTION PRESENTED

"Whether, under the First Amendment, judicial review of mandatory disclosure of 'purely factual and uncontroversial' commercial information, compelled for reasons other than preventing deception, can properly proceed under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), or whether such compelled disclosure is subject to review under *Central Hudson Gas & Electric* v. *PSC of New York*, 447 U.S. [557] (1980)." Rehearing Order 1.

INTRODUCTION

Central Hudson applies to compelled commercial factual disclosures. *Zauderer* is an application of *Central Hudson* to a narrow set of particular facts: when the government has compelled the addition of a disclaimer to an advertisement in order to prevent consumers from being misled. That is how the Supreme Court articulated its holding 30 years ago; that is how this Court applies it today; and that is why the answer to the first part of the Question Presented is "no": Judicial review of factual disclosures compelled for reasons other than preventing deception cannot "properly proceed under *Zauderer*."

The Final Rule fails "under *Zauderer*" in any event. *Zauderer* itself demonstrates why. There, the state court had held that contingent-fee attorneys must disclose not only the potential for costs but also the fees they would charge if successful. 461 N.E.2d 883, 886 (Ohio 1984). The court said both requirements were needed "for purposes of clarity." *Id.* But the Supreme Court did not affirm the rate-disclosure requirement—or the "purposes of clarity" justification for it. 471 U.S. at 653. Though the majority brushed the issue aside, *id.* at 653 n.15, Justice Brennan's concurring opinion did not mince words: the "clarity" rationale was "an unacceptable substitute for the reasoned analysis that is required when regulating commercial speech," *id.* at 660. That is exactly the problem here.

Central Hudson applies, but even under *Zauderer*, the Final Rule fails.

BACKGROUND

From the beginning, Appellants' First Amendment claim has turned on one critical question: What governmental interest is served by requiring one subset of meat products (just muscle cuts, just at supermarkets) to identify the country or countries where the source animal was "born," "raised," and "slaughtered"?[1]

AMS's answer has changed with the season. In its Final Rule, the agency articulated no governmental interest at all. *See* JA510; Appellants' Br. 21. In the District Court, AMS argued the Rule corrected misleading speech (albeit speech previously compelled by the agency). *See id.* at 25. In this Court, AMS abandoned that approach and asserted a broader governmental interest in "ensuring that information provided to consumers is accurate and meaningful," maintaining all the while that *Zauderer*, and not *Central Hudson*, applied. AMS Br. 27.

The Panel affirmed this unprecedented labeling requirement based on *Zauderer* – but it presumed two government interests that the government itself had disavowed. First, the Panel found that the Rule "enables a consumer to apply patriotic or protectionist criteria in their choice of meat." Slip Op. 14. According

[1] This case is not about origin-labeling generally, or about consumers' "interest in knowing where their food is coming from," AMS Br. 14. Retail shoppers can tell where their *meat* comes from by looking for the USDA inspection stamp or the customs declaration on imported meat, both required under regulations not at issue here. This case is about whether labels must provide additional information about the animal's travel history – a requirement not imposed, to our knowledge, on any other category of consumer product.

to AMS, though, "[t]he availability of COOL information *does not imply* that there will necessarily be any change * * * in demand for products of one origin versus others." JA518.[2] So even if the new labeling "enables *a consumer*" to contribute to protectionism, there is nothing to show that the government desired that result or promulgated the Final Rule to achieve it.

In similar fashion, the Panel found that the Rule "enables one who believes that United States practices and regulation are better at assuring food safety than those of other countries, or indeed the reverse, to act on that premise." Slip Op. 14. But AMS repeatedly has maintained that the Rule has nothing to do with safety, *see* JA224 and Appellants' Rule 28(j) Letter; and other agencies of USDA run comprehensive safety programs for both domestic *and* imported livestock.

The Panel's extension of *Zauderer* to these circumstances should be rejected.

SUMMARY OF ARGUMENT

Central Hudson applies to compelled commercial disclosures of fact. *Zauderer* is a *Central Hudson* case; it comes into play when the compelled disclosures are intended to remedy commercial speech that otherwise would be

[2] AMS did not refute a 2012 study finding "no demand increase following the implementation of the mandatory COOL program" and "that consumers do not value meat products carrying Product of United States labels over those with Product of North America labels." JA518.

deceptive. And its reasoning is fully consistent with the *Central Hudson* standard as the Court understood it then and applies it now.

The interpretation of *Zauderer* offered by AMS and the Panel – which allows the government effectively to end-run First Amendment review – stretches *Zauderer* beyond its limits. It also upends four decades of Circuit precedent on compelled disclosures, including the standard this Court applies to FTC remedial orders. *See infra* at 13. The Panel's Opinion also created a split with the Second Circuit, *see Int'l Dairy Foods Ass'n* v. *Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (rejecting "consumer curiosity" as sufficient grounds for compelling speech), and with the Eleventh Circuit, *see Borgner* v. *Brooks*, 284 F.3d 1204 (11th Cir. 2002) (applying *Central Hudson* to mandated disclaimer); *see also Borgner* v. *Fla. Bd. of Dentistry*, 123 S. Ct. 688 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of review because the Eleventh Circuit was too lenient in applying *Central Hudson*). *Central Hudson* review applies to the issues here.

If the Circuit nevertheless decides *en banc* that it will chart a course with *Zauderer* as a distinct constitutional standard of review for compelled disclosures generally – rather than an application of *Central Hudson* to particular facts – Appellants respectfully submit that more work must be done to define what it means for judicial review to "properly proceed under *Zauderer*," Rehearing Order 1. Under any constitutionally permissible interpretation of *Zauderer*, AMS's rule

still fails. The government cannot defend a compelled disclosure on the ground that it has a governmental interest in compelling disclosures.

PRESERVATION OF STATUTORY CLAIMS

The Court ordered rehearing of this case *en banc* on the Panel's suggestion, before Appellants could file a petition detailing their objections to the Panel's rulings, including on their statutory claim. *See* Appellants' Br. 4-51; Reply 15-23. *Compare, e.g.*, Slip Op. 7 (the Rule "does not actually ban any element of the production process"); *with id.* at 2 (the Rule "eliminates the allowance for commingling"); JA985 (Rule "eliminates the practice of commingling"); JA1098 (The Court: "Was the ban on commingling necessary?" AMS Counsel: "Yes."). Appellants wish to preserve their right to seek rehearing of all of their claims.

ARGUMENT

I. THE *CENTRAL HUDSON* STANDARD APPLIES, AND AMS'S RULE FAILS UNDER THAT STANDARD.

A. The *Central Hudson* Standard Governs Regulation of Commercial Speech, Including Compelled Disclosures.

In 1977, this Circuit adopted a rule that a compelled disclosure could be upheld so long as it was "the least restrictive means of achieving a substantial and important government interest." *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 769 (D.C. Cir. 1977). That decision was grounded in the Supreme Court's then-new decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, which confirmed that commercial speech receives First Amendment

protection. 425 U.S. 748 (1976) ("*Virginia Pharmacy Board*"). This Circuit thus has applied the *Central Hudson* standard to compelled disclosures since before *Central Hudson* even issued.

In 1980, the Supreme Court decided *Central Hudson*. 447 U.S. 557. There, it adopted the now-familiar standard for judicial review of government regulation of non-misleading commercial speech:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.* at 566.

Applying that test, the Supreme Court struck down a New York regulation barring utilities from promotional advertising during the energy crisis, finding the regulation to be more extensive than necessary to achieve the State's substantial interest of promoting energy conservation and efficient rate structures. *Id.* at 568-569. The Supreme Court later clarified that *Central Hudson*'s fourth "prong" – whether a regulation is "not more extensive than is necessary," *id.* – did not entail a "least-restrictive-means test." *Bd. of Trustees of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 466-467 (1989).

Central Hudson and other cases in the same sequence together established the foundation for modern commercial-speech doctrine. *See also In re R.M.J.*, 455

U.S. 191 (1982); *Bates* v. *State Bar of Ariz.*, 433 U.S. 350 (1977); *Virginia Pharm. Bd.*, 425 U.S. 748; *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). Each of those cases generally accepts the basic *Central Hudson* premise: The Government may impose restrictions on commercial speech that directly advance substantial government interests, so long as there is a "reasonable fit" between the ends and the means. *Fox*, 492 U.S. at 480. These cases also discuss disclaimer requirements as a permissible way to address misleading speech, consistent with that standard. For example, in *Virginia Pharmacy Board*, the Court indicated that the government "may require commercial messages to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.' " 425 U.S. at 772 n.24 (quoting *Bates*, 433 U.S. at 384). *Central Hudson* quotes the same *Virginia Pharmacy Board/Bates* formulation. 447 U.S. at 565. And none of the cases in the *Central Hudson* sequence addresses disclosure requirements *outside* the context of combating deception. *See* Slip. Op. 11.

B. *Zauderer* Is An Application of *Central Hudson*.

Zauderer is a decision about disclosures compelled to avert consumer deception – that is, the type contemplated in *Bates*, *Virginia Pharmacy Board*, and *Central Hudson*. But *Zauderer* does not establish a separate inquiry; it simply applies the *Central Hudson* premise to a disclosure that has already been defined in

terms of the speech it corrects. Here is what *Zauderer* has to say about its place in the *Central Hudson* line:

> In virtually all of our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's protected interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required * * * in order to dissipate the possibility of consumer confusion or deception." *In re R.M.J.*, 455 U.S., at 201, 101 S. Ct., at 936. *Accord*, *Central Hudson Gas & Electric*, 447 U.S., at 565, 100 S. Ct., at 2351; *Bates v. State Bar of Arizona*, 433 U.S., at 384, 97 S. Ct., at 2709; *Virginia Pharmacy Bd.*, *supra*, 425 U.S., at 772, n. 24, 96 S. Ct., at 1831, n. 24.
>
> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. 471 U.S. at 651.

This discussion situates the disclaimer in *Zauderer* within the recognized scope of permissible "warnings" and "disclaimers" that *Central Hudson* and earlier cases recognized.

The *Zauderer* decision thus is an *application* of *Central Hudson*, where several of *Central Hudson*'s elements have already been established, in whole or in part. The government indisputably has a substantial interest in preventing deception of consumers, *Virginia Pharm. Bd.*, 425 U.S. at 771-772; *Zauderer*, therefore, did not address *Central Hudson*'s "substantial interest" factor.

Similarly, a government-compelled disclaimer to correct deceptive speech indisputably advances the government's interest in preventing deceptive speech; *Zauderer*, therefore, does not address *Central Hudson*'s "direct advancement" factor. Thus, all that remains for a court to do, when asked to review a corrective disclaimer, is ensure that it is not "unjustified" (i.e., the government's anti-deception interest is actually implicated) and that it is not "unduly burdensome" (i.e., it is no more extensive than necessary). 471 U.S. at 651. This is *Central Hudson.* The innovation of *Zauderer* – and the only one – is its recognition that the Court in *Bates*, *Virginia Pharmacy Board*, and *Central Hudson* had deemed disclaimers to be a less restrictive means of combating deception than an outright *ban* on speech. *Id.* This is a shortcut through *Central Hudson*, not a way around it.

To accept the proposition that *Zauderer* establishes a new standard of review would be to assign dramatic precedential significance to every case that applies *Central Hudson* to particular facts. For example, the Supreme Court applied *Central Hudson* to a federal restriction on beer labeling in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). The Court concluded the restriction failed that test. *Id.* at 491. But review of labeling restrictions does not proceed "under *Rubin*." Similarly, the Supreme Court applied *Central Hudson* to a Puerto Rico law restricting casino advertising in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). The Court upheld the restrictions. *Id.* at 344.

But judicial review of advertising restrictions does not proceed "under *Posadas*." To the contrary, in an advertising-restriction case the Supreme Court "[r]eli[es] on the *Central Hudson* analysis *set forth in Posadas*." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 508 (1996) (emphasis added). That is just how *Zauderer* applies: a court reviewing the validity of a deception-preventing disclaimer may use "the *Central Hudson* analysis set forth in" *Zauderer*. *See also Zauderer*, 471 U.S. at 657 (concurring opinion of Brennan, J.) ("agree[ing] with the Court's somewhat amorphous 'reasonable relationship' inquiry only on the understanding that it comports with" *Central Hudson*).

The *Zauderer* decision did not generate a new standard of constitutional scrutiny; it illustrated how "the *Central Hudson* analysis" plays out in the context of disclaimers compelled to address deceptive advertising.

C. The Panel's Opinion Disregards Circuit Precedent and Supreme Court Guidance.

The Panel here reached a different conclusion, finding *Central Hudson* review "unnecessary" under *Zauderer* and distinguishing – albeit with difficulty – its prior decision in *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205 (D.C. Cir. 2012). Slip Op. 11. But its conclusion was grounded in a misreading of *Zauderer*. And its conclusion had the effect of abrogating many circuit cases.

First, the misreading of *Zauderer*: The Panel cited footnote 14 of the *Zauderer* majority opinion to support its conclusion that *Zauderer* announced a

different standard of constitutional scrutiny. Slip Op. 11. The footnote, to be sure, suggests that a "least restrictive means" test would be unnecessary in dealing with a disclosure, because disclosures had already been recognized as a less restrictive alternative to addressing deception than outright bans. 471 U.S. at 651 n.14 (citing *Central Hudson*, 447 U.S. at 565). But as the Supreme Court later explained, footnote 14 was "dicta" that had wrongly "*assume*[*d*]" the *Central Hudson* standard required a "least restrictive means approach." *Fox*, 492 U.S. at 476 (emphasis added; hyphenation omitted). There was no least restrictive means "test" to delete from *Central Hudson* in the first place, and the footnote was "dicta" in any event.

The effect of the Panel's decision also was to abrogate several prior decisions of this Court in one fell swoop. Take, for example, *United States* v. *Philip Morris*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam). *Philip Morris* is a lengthy opinion on tobacco advertising with one section – a very important section – addressing corrective disclosures. *Id.* at 1142-1145. There, the Court reviewed the district court's order requiring the defendant tobacco companies to publish corrective statements in various media. The district court had not yet determined the *text* of disclosures, so this Court evaluated the threshold question of whether *any* disclosure could be compelled. *Id.* at 1142. And at this step, the Court concluded, the *Central Hudson* standard applied. After surveying the precedents –

including *Zauderer* – the Court reached the only plausible conclusion: "[T]he Supreme Court's bottom line is clear: the government must affirmatively demonstrate its means are 'narrowly tailored' to achieve a substantial governmental goal.' " *Id.* at 1143 (quoting *Fox*, 492 U.S. at 480). The court assessed the alleged violations, concluded disclosures were warranted, and instructed the district court, on remand, to draft the text of the disclosures in a manner consistent with *Zauderer* and *Warner-Lambert*, ensuring they were tailored to the defendants' earlier deceptions. *Id.* at 1144-45.

The *Philip Morris* decision is not an outlier in this Circuit. It follows *Warner-Lambert*, as well as this Court's subsequent decision in *Novartis Corp.* v. *FTC*, 223 F.3d 783 (D.C. Cir. 2000), which also holds that the *Central Hudson* standard applies to FTC-compelled disclaimers to prevent "misleading and deceptive advertising." *Id.* at 789. And strikingly, in *Novartis*, it was *the FTC* that proposed *Central Hudson* review, even with *Zauderer* on the books. *See* Brief of Respondent, *Novartis*, No. 99-1315, 1999 WL 34833882, at *59-*60 (D.C. Cir. filed Dec. 23, 1999). More striking still, the FTC cited *Zauderer* and did *not* characterize it as abrogating *Central Hudson or* dramatically expanding the Commission's remedial powers. *See id.* at *63.

Then there is *Spirit Airlines*, 687 F.3d 403, also omitted from the Panel's Opinion but just as central to Appellants' argument as *Reynolds*. *See* Reply Br. 4

("Even if [*Reynolds*] could be distinguished * * *, [*Spirit*] cannot be."). That decision confirms, in no uncertain terms, that *Zauderer* is a rule that applies to disclosures "target[ing] misleading speech." 687 F.3d at 413. It is true that *Spirit Airlines* treats *Zauderer* and *Central Hudson* as two distinct standards, and called the former "reasonableness review." *Id.* at 411. But, the Court conducted an analysis under *both* standards, and used virtually identical reasoning. *See id.* at 413-415. *Spirit Airlines* thus illustrates (even if it does not explicitly acknowledge) that *Zauderer* is just how *Central Hudson* applies when a disclaimer targets deception.

The Supreme Court has not been silent on these questions, either. And what it has said does not bode well for the government. For example, in *Milavetz, Gallop, & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), the Supreme Court applied *Zauderer* to uphold a disclosure requirement applicable to so-called debt-relief agencies. The disclosure requirement was intended to prevent consumer deception, and *Zauderer* clearly applied "[f]or that reason." *Id.* at 249. In fact, the Supreme Court highlighted the interest in preventing deception as an "essential feature[ ]" of *Zauderer*. *Id.* at 250; *see also United States* v. *United Foods Co.*, 533 U.S. 405, 416 (2001) (declining to review compelled marketing assessments under *Zauderer* because "[t]here [wa]s no suggestion" that the assessments "were

somehow necessary to make voluntary advertisements nonmisleading to consumers").

See as well the remarks of the two sitting justices who dissented from the denial of certiorari in *Borgner* v. *Brooks*, 284 F.3d 1204 (11th Cir. 2002). *Borgner* v. *Fla. Bd. of Dentistry*, 123 S. Ct. 688 (2002) (Thomas and Ginsburg, JJ.). In that appeal, the Eleventh Circuit applied *Central Hudson* (not *Zauderer*) to determine whether the State could compel a dentist to include disclaimers about certain specialty certifications. 284 F.3d at 1207. The court of appeals answered the question yes, believing the dentist's advertisements to be potentially misleading. *Id.* at 1216. Justice Thomas and Justice Ginsburg would have granted review in that case – not because they thought *Zauderer* should have applied, but because they thought the Eleventh Circuit had not applied *Central Hudson* strictly enough. 123 S. Ct. at 688. In their view, the court of appeals should have demanded more proof of potential deception, and even then it would be "unclear whether forcing upon dentists a government-scripted disclaimer [wa]s an appropriate response." *Id.* at 689. As for *Zauderer*, they were dismissive: when an advertisement is not "misleading as written," "*Zauderer* is not very helpful to the State." *Id.*

Milavetz, *Borgner*, *Spirit Airlines*, *Philip Morris*, *Novartis*, *Warner-Lambert*: each of these decisions confirms that *Zauderer* applies only when the government has shown its disclaimer is aimed at preventing consumer deception.

* * *

So, if the *Central Hudson* standard applies to compelled disclosures, and *Zauderer* is an application of that standard to disclaimers targeting deception, what standard applies to compelled disclosures, like the one at issue here, that are *not* targeting deception?

The answer: *Central Hudson*, of course. The compelled disclosure must be "tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993); *see also, e.g.*, *Zauderer*, 471 U.S. at 657 n.1 (Brennan, J., concurring) ("Disclosure requirements * * * must demonstrably and directly advance substantial state interests, and they may extend no further than 'reasonably necessary' to serve those interests.") (quoting *In re R.M.J.*, 455 U.S. at 203).

AMS all but abandoned its *Central Hudson* defense in its brief (burying it within one sentence, Br. 27), and for good reason. The Final Rule fails under *Central Hudson*. *See* Appellants' Br. 30-34.

II. EVEN IF THIS COURT EXTENDS *ZAUDERER*, IT SHOULD REJECT AMS'S "ANY INTEREST" STANDARD.

If this Court holds that *Zauderer* has application to disclosures other than those compelled to prevent deception, Appellants respectfully request that this Court endeavor to define the class of governmental interests that may be sufficient to justify a compelled disclosure, and to establish which party – the government or the challenger – has the burden of proving that the asserted governmental interest falls within that class.

AMS offered a particularly lenient interpretation of *Zauderer*'s analysis, and the Panel appears to have accepted it. AMS suggested that a compelled disclosure is justified so long as it is reasonably related to "an[y] identified governmental interest." AMS Br. 21. *See also Nat'l Ass'n of Mfrs.* v. *SEC*, --- F.3d ----, No. 13-5252, slip op. 24 (D.C. Cir. Apr. 14, 2014) (opinion of Srinivasan, J, concurring in part) (characterizing Panel's Opinion as holding that "*Zauderer*'s standard * * * requires that disclosure mandates be 'reasonably related' to the government's interests"). And the Panel's Opinion actually went further: it found the compelled-disclosure requirements here to be satisfied merely by *consumers*' interest in protectionist meat purchases and/or irrational safety concerns, both of which interests the government expressly had *disclaimed*. An "*any* interest" standard, no matter who "identifie[s]" the interest, is unheard of in constitutional law. Even rational-basis review requires the government to point to an interest that

is both "*legitimate*" and "*governmental*," *Fox*, 492 U.S. at 480, meaning that there exists a *governmental* interest in addressing some sort of *actual* problem or harm, not merely an irrational pursuit. *See, e.g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). There is no support in *Zauderer*, *Milavetz*, this Circuit's precedent, or any other binding authority for an "any-interest-will-do" standard.

And, to be clear, even the slightly toothier rational-basis "legitimate governmental interest" standard is not appropriate here either. To the best of Appellants' understanding, rational-basis review applies only when a fundamental right is *not* implicated. *See, e.g.*, *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009). Compelled disclosures implicate First Amendment rights. *Zauderer*, 471 U.S. at 651. A test requiring merely a "legitimate governmental interest" is therefore inappropriate.

If *Zauderer* is to be extended as a rule of general applicability outside its stated limits of preventing deception, then the Court should require the government to point to a legitimate "consumer *protection*" interest, relating to the prevention of an actual *harm* to consumers and not merely the provision of gratuitous information. Appellants note that the government has previously interpreted *Zauderer* in this more moderated way. *See* Brief *Amicus Curiae* of U.S. FDA, *et*

al., *N.Y. State Restaurant Ass'n* v. *N.Y.C. Bd. of Health*, No. 08-1892-cv, at 13, 2008 WL 653101 (2d. Cir. filed May 29, 2008) (compelled disclosures "need only be reasonably related to the governmental interest in protecting consumers"). That formulation would also have the benefit of avoiding a split with the First and Second Circuits, whose decisions in this area upheld disclosures based on clearly defined consumer-protection interests. *See Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 309 (1st Cir. 2005) (Maine's "interest in ensuring its citizens receive the best and most effective health care possible"); *N.Y. State Restaurant Ass'n* v. *N.Y.C. Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009) (New York City's "goal of reducing obesity"); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d 104, 115 (2d Cir. 2000) ("Vermont's interest in protecting human health and the environment from mercury poisoning").[3]

To date, AMS, and the Panel, have pointed only to a *consumer* interest in information about where source animals are "born" and "raised." There is no claim of a *governmental* interest, addressed to the remedying of a harm. The Panel attempted to bridge the gap between "any interest" and "governmental interest" by characterizing the government's interest as one of "enabl[ing]" consumers to act on

[3] *See also Discount Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 561-62 (6th Cir. 2012) (opinion of Stranch, J.) (upholding federal tobacco-warning requirement under rational-basis review because "the warnings' purpose is to prevent consumers from being misled about the health risks of using tobacco").

jingoistic or irrational impulses. Slip Op. 14. But such speculations about the "criteria" a consumer might use, or about the "assur[ances]" a consumer might need before purchasing a product from a USDA-inspected facility, processing USDA-inspected animals, *id.*, are "an unacceptable substitute for the reasoned analysis required when regulating commercial speech." *Zauderer*, 471 U.S. at 660 (Brennan, J., concurring). *See also Amestoy*, 92 F.3d at 71 n.1 (when government "takes no position" on a subject, "mere consumer concern is not, in itself, a substantial interest") (emphasis omitted). If this Court holds that the government has an interest in compelling disclosures – full stop – there is "no end" to what might follow, *id.* at 74.[4]

Appellants submit that the Rule cannot be justified merely in terms of a consumer interest in being "arm[ed] * * * with additional information when purchasing food," *Nat'l Ass'n of Mfrs.*, slip op. 24 (Srinivasan, J., concurring in part), without an account of why that is a *governmental* interest here. Such an account has been conspicuously absent at every stage of this proceeding.

[4] Suppose, for example, a state in the Southwestern United States passes a law requiring that fruits, vegetables, and nuts be labeled with factual information concerning whether they were "harvested" by a person who is a United States citizen. In defense of the law, the State asserts an "interest" in enabling consumers to exercise "patriotic or protectionist" preferences or to "act on the premise" that produce picked by U.S. citizens is safer than that picked by non-citizens ("or indeed the reverse"), Slip Op. 14. Under AMS's test and the Panel's Opinion, such a disclosure requirement is perfectly legal. Yet many would believe there is something deeply problematic with such a requirement.

Therefore no matter what type of *government* interest this Court requires, as long as it is more than just "any interest," the Final Rule must be invalidated.

III. THE FINAL RULE FAILS "UNDER *ZAUDERER*."

There is no separate *Zauderer* standard of review for all the reasons we have explained; *Zauderer* is a specific brand of *Central Hudson* review. And in any event, whether review is characterized as "under *Zauderer*" or "through *Central Hudson* by way of *Zauderer*," it was error for the Panel to apply *Zauderer* as if it were no more than a rational-basis test, requiring only some minimal degree of rationality. And in fact, the Panel did not even demand rationality from AMS. The Panel simply identified hypothetical government interests, without analyzing whether the new labels were "reasonably related" to those interests.

Zauderer requires more. As we discussed above, *see supra* at 10, the decision requires a court to assure itself that the compelled disclosure is not "unjustified" or "unduly burdensome." That is the analysis the *Zauderer* Court conducted. It analyzed whether the petitioner's advertisements were actually misleading – such that a compelled disclosure would be "justified" – and in a footnote it rejected for lack of "a factual basis" the petitioner's argument that the disclosure requirements were unduly burdensome. 471 U.S. at 651-653 & n.15. The Court did not hold that such arguments would thereinafter be precluded as a matter of law, and so the same analysis must be conducted here.

The Final Rule is unjustified, and it is unduly burdensome. Appellants have amply detailed the reasons why the Final Rule is unjustified in their prior briefing. They further refer the Court to Appellant AMI's comment letter, JA30, and Appellants' many declarations in the preliminary-injunction record, JA533-577, JA1008-1033, for a more detailed accounting of the burdens this Rule imposes. *Cf. Fox*, 492 U.S. at 480 ("fit" requires "the cost to be carefully calculated").

* * *

Here is the bottom line: AMS has never explained – not once – why "born," "raised," and "slaughtered" (or "harvested") designations are so important that they must be *compelled* rather than simply permitted and provided voluntarily (as they were before) by companies that want to capture the value of consumers' "patriotic and protectionist" preferences and their "beliefs" about food safety. *Cf. Virginia Pharm. Bd.*, 425 U.S. at 770 ("nothing prevents [one business] from marketing [its] own assertedly superior product, and contrasting it with that of" a competitor). AMS has never answered this question. In fact, AMS agrees there is no compelling market-failure argument that could justify this regime. JA519. It is difficult to conceive, as a matter of First Amendment law, administrative law, or the combination of the two, how such a mandate could be upheld.

With respect to this Court's broader purpose in convening *en banc*, Appellants offer the following observation: There are considerable difficulties in

converting the *Zauderer* analysis into a rule of general applicability, on the one hand, without running afoul of the Supreme Court's unassailable conclusion that compelled disclosures implicate First Amendment rights, on the other. This irreconcilable tension is just one further indicator that *Zauderer* was never intended to, and simply cannot as a matter of law or logic, have the meaning AMS would have this Court attribute to it.

Central Hudson applies; AMS's Rule fails *Central Hudson*. There is nothing more to it than that.

CONCLUSION

For the foregoing reasons, and those stated in Appellants' Opening Brief, Reply Brief, and Letter Submitted Pursuant to Rule 28(j), the District Court's decision should be reversed.

Dated: April 21, 2014

Respectfully submitted,

/s/ Catherine E. Stetson

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that this Supplemental Brief for Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 5,125 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that 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) because the Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify on this 21st day of April 2014, I filed the foregoing Supplemental Brief for Appellants through this Court's CM/ECF system, which will send an electronic notice of filing to all parties and *amicus curiae* participants in this case.

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