ARGUED JANUARY 7, 2014 **DECIDED APRIL 14, 2014**

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,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee,

AMNESTY INTERNATIONAL USA and AMNESTY INTERNATIONAL LTD.,

Intervenors for Appellee.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:13-cv-00635, Judge Robert L. Wilkins

JOINT RESPONSE TO THE PETITIONS FOR REHEARING EN BANC

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable respectfully submit this Corporate Disclosure Statement and state as follows:

1. The National Association of Manufacturers (NAM) states that it is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

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GLOSSARY

APA	Administrative Procedure Act
Amnesty	Intervenors-Appellees Amnesty International USA and Amnesty International Ltd.
Amnesty Br.	Intervenors-Appellees Amnesty International Petition for Panel Rehearing and Rehearing En Banc
Amnesty Supp. Br.	Intervenors-Appellees Amnesty International Supplemental Brief in Support of Petition for Panel Rehearing and Rehearing En Banc
DRC	Democratic Republic of the Congo
SEC	Securities and Exchange Commission
SEC Br.	Petition of the Securities and Exchange Commission for Rehearing or Rehearing En Banc Pending the Decision in *American Meat Institute v. U.S. Dep't of Agriculture*

INTRODUCTION

Rehearing en banc is not warranted in this case, which presents no conflict in this Court's decisions or with decisions of the Supreme Court or other Courts of Appeals. Indeed, the dispositive question—whether the compelled speech at issue is "purely factual and uncontroversial information"— is clearly resolved by application of a decades-old legal standard. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Because the standard for en banc review has not been satisfied, this Court should deny the requests for rehearing en banc.

Instead, the panel should amend its decision in light of this Court's holding in *American Meat Institute v. U.S. Department of Agriculture*, __ F.3d __, 2014 WL 3732697 (D.C. Cir. July 29, 2014) (en banc), to clarify that the compelled statement is not eligible for *Zauderer* review because it does not constitute "purely factual and uncontroversial information." In *American Meat*, the Court overruled prior circuit precedent limiting *Zauderer* to compelled disclosures aimed at preventing consumer deception, but also reaffirmed that *Zauderer* is limited to purely factual and uncontroversial disclosures. The Securities and Exchange Commission's (SEC) Conflict Minerals Rule is not a "purely factual and uncontroversial" disclosure requirement. Rather, as the panel majority stated, it forces companies to "confess blood on [their] hands." *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014). Issuers are forced to bear a scarlet letter that is laden with value judgments and opprobrious connotations with which they strongly disagree, because the rule compels

them to make a statement that "conveys moral responsibility for the Congo war," and "tell[s] consumers that [the issuers'] products are ethically tainted." *Id.*

Further, the compelled statement is not purely factual because, in many cases, issuers who are compelled to admit to potential complicity in the armed conflict have no connection to the conflict, but are simply unable to identify the source of their minerals. The minerals may have originated nowhere near the Congo, but because of the dearth of information about the supply chain, *see, e.g.,* U.S. Dep't of Commerce, *Department of Commerce Reporting Requirements Under Section 1502(d)(3)(C) of the Dodd-Frank Act World-Wide Conflict Mineral Processing Facilities* (Sept. 5, 2014) (*Dep't of Commerce Report*), http://www.ita.doc.gov/td/forestprod/DOC-ConflictMineralReport.pdf, and the rule's requirement that all uncertainty be resolved in favor of making the confession, many issuers will have to confess to having potentially supported armed groups. Such compelled speech and self-defamation violates the First Amendment.

BACKGROUND

The "conflict minerals" statute, 15 U.S.C. § 78m(p), and the SEC rule implementing it, 77 Fed. Reg. 56,274 (Sept. 12, 2012), require companies whose products contain certain minerals to conduct due diligence to attempt to determine whether those minerals may have originated in the Democratic Republic of the Congo ("DRC") or adjoining countries and, if so, whether proceeds from those minerals may have "directly or indirectly finance[d] or benefit[ted] armed groups" committing

human rights abuses. 15 U.S.C. § 78m(p)(1)(A)(ii); 77 Fed. Reg. at 56,364. Following the due diligence, unless a company can conclude that it has no "reason to believe" the minerals "*may* have originated" in the DRC region (emphasis added), or can affirmatively confirm that minerals that may have originated in the region did not "directly or indirectly finance or benefit armed groups," the statute and rule compel the company to state on its website and in public reports that the products have not been found to be "DRC conflict free." 15 U.S.C. § 78m(p)(1)(A)(ii); 77 Fed. Reg. at 56,363.

The National Association of Manufacturers, Chamber of Commerce, and Business Roundtable (Appellants) filed suit, contending that the rule was inconsistent with the statute and was arbitrary and capricious in violation of the Administrative Procedure Act (APA). Appellants also argued that the compelled speech violated the First Amendment.

The panel rejected Appellants' statutory and APA arguments, but agreed that the compelled statement was unconstitutional. The panel majority noted that *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012), had held that the standard of review set forth in *Zauderer* is "limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers,'" and that the SEC had conceded that the compelled statement at issue was not intended to prevent consumer deception. *Nat'l Ass'n of Mfrs*, 748 F.3d at 371. Further, the panel noted that *Zauderer* applies only to "certain disclosures of 'purely

factual and uncontroversial information,'" and "it is far from clear that the description at issue—whether a product is 'conflict free'—is factual and nonideological." *Id.* at 370-71. Rather, the compelled statement "requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups," a message with which issuers may strongly disagree. *Id.* at 371. "By compelling an issuer to confess blood on its hands," the panel held, "the statute interferes with that exercise of the freedom of speech under the First Amendment." *Id.*

Accordingly, the panel applied the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Nat'l Ass'n of Mfrs*, 748 F.3d at 372. The panel held that the compelled statement fails to meet this standard because it is not narrowly tailored. *Id.* Rather, "narrower restrictions on expression," such as allowing companies to "use their own language to describe their products," or having the SEC "compile its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit," could have been used to achieve the government's objectives. *Id.*

Following the decision, the SEC staff issued guidance, stating that it still "expects companies to file any reports required under [the rule] on or before the due date." Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule* (Apr. 29, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994. These reports must include all of the information required by the rule, including a "description of the due diligence that the

company undertook," and the results of the due diligence, including "the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin." *Id.* The one notable change from the rule provided in the guidance is that companies would no longer be forced to also "describe [their] products as 'DRC conflict free'" or having "not been found to be 'DRC conflict free.'" *Id.*

Both the SEC and Amnesty filed petitions for rehearing and rehearing en banc, requesting the court to hold the case in abeyance pending the en banc decision in *American Meat*. On July 29, 2014, *American Meat* held that *Zauderer* review is not limited "to cases in which the government points to an interest in correcting deception." 2014 WL 3732697, at *3. The case further concluded that *Zauderer* review "requires the disclosures to be of 'purely factual and uncontroversial information' about the good or service being offered." *Id.* at *8. Amnesty then filed a supplemental brief seeking rehearing or rehearing en banc in light of the decision in *American Meat*. The Court then called for this response to the petitions.

ARGUMENT

I. THE STANDARDS FOR REHEARING EN BANC ARE NOT MET.

Rehearing en banc is not warranted to consider the application of *Zauderer*'s long-established "purely factual and uncontroversial" requirement to the compelled statement at issue here. *See Zauderer*, 471 U.S. at 651; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("Although the State may at times

'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information,' outside that context it may not compel affirmance of a belief with which the speaker disagrees" (citations omitted)). None of the criteria for full court review has been satisfied.

First, review is not "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35. This Court has consistently limited *Zauderer* to "purely factual and uncontroversial" disclosures, and reaffirmed this limitation in *American Meat*. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1145 (D.C. Cir. 2009) (per curiam) ("[T]he court must confine the [compelled] statements to 'purely factual and uncontroversial information.'"). Contrary to Amnesty's assertion that *American Meat* did not consider the issue,[1] Amnesty Supp. Br. 4-5, the Court unambiguously stated that "the [*Zauderer*] decision requires the disclosures to be of 'purely factual and uncontroversial information' about the good or service being offered." 2014 WL 3732697, at *8; *see also id.* at *14 ("the majority opinion and I agree

[1] The SEC's petition for rehearing or rehearing en banc simply contends that "there is a significant possibility that the *en banc* Court's decision in *American Meat Institute* will warrant panel rehearing regarding the First Amendment issue in this case," and "[t]here is also a significant possibility that the *en banc* decision in *American Meat Institute* will clarify the question of whether consideration of the panel's First Amendment analysis by the full court is warranted." SEC Br. 5. Indeed, the Argument section of the SEC's petition does not even mention the "purely factual and uncontroversial information" requirement, much less dispute that it is an essential element of *Zauderer*. For the reasons explained *infra*, the decision in *American Meat* does not warrant rehearing or rehearing en banc.

on the following: To justify a compelled commercial disclosure, . . . the Government must show that the disclosure is purely factual [and] noncontroversial." (Kavanaugh, J., concurring in the judgment)). Indeed, the Court discussed this requirement at length. It concluded that the country-of-origin labels at issue were "factual," and were not "controversial," either in the sense that the companies "disagree with the truth of the facts required to be disclosed," or "in the sense that [the label] communicates a message that is controversial." *Id.* at *8.[2]

Other circuits have reached similar conclusions. *See, e.g., CTIA—The Wireless Ass'n v. City of S.F.*, 494 F. App'x 752, 753 (9th Cir. 2012) ("Under the standard established in *Zauderer* any governmentally compelled disclosures to consumers must be 'purely factual and uncontroversial'" (citation omitted)); *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 245 n.6 (2d Cir. 2014) ("we do not believe that the law regulates 'purely factual and uncontroversial information,' such that rational basis review would apply," because the law "requires pregnancy services centers to state the

[2] Amnesty also briefly suggests that en banc consideration is warranted as to the question whether the standard set forth in *SEC v. Wall Street Publishing Institute*, 851 F.2d 365, 372 (D.C. Cir. 1988), applies here. Amnesty Br. 8-9. The SEC did not contend that the *Wall Street Publishing* standard should apply in this case, and does not request rehearing on this basis. *See Nat'l Ass'n Mfrs*, 748 F.3d at 372 n.12. In any event, rehearing en banc on this question is not warranted. The panel correctly held that *Wall Street Publishing* does not apply because "the 'conflict free' label is not employed to sell securities," and to interpret the decision as broadly as Amnesty urged "would allow Congress to easily regulate otherwise protected speech using the guise of securities laws." *Id.* at 372. Amnesty points to no intra-circuit or inter-circuit conflict on this question that would warrant en banc consideration.

City's preferred message"); *see also Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8, 569 (6th Cir. 2012) (*Zauderer* does not require compelled speech to be "uncontroversial" in the sense that it does not "provoke an emotional response," but the standard is limited to "factual" and "accurate" information), *cert. denied*, 133 S. Ct. 1996 (2013).

Second, the panel's decision does not "involve[] a question of exceptional importance." Fed. R. App. P. 35. Appellants believe that the panel should amend its decision in light of *American Meat* to clarify that the compelled statement is not eligible for *Zauderer* review because it does not constitute "purely factual and uncontroversial information." That holding, which is already implicit in the panel's opinion, will present merely a straightforward application of a decades-old legal standard—and, as shown *infra* Part II, would be clearly correct. By contrast, a decision upholding the requirement here would break new and dangerous ground. Appellants are aware of no case permitting the government to require a company to adopt an ideological slogan written by the government that attacks the company and its products, and neither the SEC nor Amnesty has cited any such case. If such requirements were deemed permissible, the temptation for Congress and state legislatures to require similar self-shaming measures across a range of controversial issues could be irresistible.

II. THE COMPELLED SPEECH IN THIS CASE IS NOT "PURELY FACTUAL AND UNCONTROVERSIAL INFORMATION."

The panel's strong indication that the compelled speech is not purely factual and uncontroversial is clearly correct. The rule requires companies to state whether any of its products has been found to be "DRC conflict free." 77 Fed. Reg. at 56,363. As the opinion cogently explains, this is not a statement of literal fact, because "[p]roducts and minerals do not fight conflicts." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371. Instead, it is a value judgment: "a metaphor that conveys moral responsibility for the Congo war." *Id.* It "requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups," *id.*, or even if the issuer is merely unable to determine their origin. Rather than conveying factual information to consumers, the disclosure is, as one dissenting Commissioner explained, intended to serve as a "scarlet letter," forcing a company to denounce its own products as immoral. JA710.

"An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371. Many companies forced to make the disclosure would have, at most, an exceedingly remote connection to the DRC region, and likely no connection at all. For instance, a company would be forced to state that its product had not been found to be "DRC conflict free" if one of several thousand parts contained a trace amount of tin remaining from the use of a catalyst by a sub-

supplier during production, even if the company had no advance knowledge the tin would be used and no way to verify its origin. *See id.* at 365-66 (discussing the rule's lack of a *de minimis* exception for issuers that use extremely small amounts of the minerals); 77 Fed. Red. at 56,297 (disclosure is required if the mineral "is contained in any amount, including trace amounts, in the product").

Furthermore, the compelled statement reflects a governmental viewpoint that the mineral trade bears responsibility for causing the DRC conflict. That is not a "purely factual and uncontroversial" matter, *Zauderer*, 471 U.S. at 651, but rather a policy conclusion, with which many experts disagree. *See The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 113 Cong. 8 (2013) (statement of Mvemba Dizolele) ("Proponents of [the conflict minerals provision] built their case on an erroneous premise that claimed that minerals were either the source or at the center of the conflict"); *id.* at 6-7 (statement of David Aronson) ("Advocates for the law disregarded the consensus opinion of Congolese experts," who have concluded that the law "is harming ordinary people, helping entrench militia and war lords, and in no way significantly reducing conflict").

Thus, the compelled statement here could not be further from *American Meat*, where the plaintiff did not challenge the factual nature of the compelled disclosure and "d[id] not suggest anything controversial about the message that its members are required to express." *Am. Meat*, 2014 WL 3732697, at *8. Indeed, a majority of this

Court in *American Meat* explicitly distinguished this case on the ground that the compelled disclosure here could be found to "communicat[e] a message that is controversial." *Id.* (majority opinion); *id.* at *14-15 & n.2 (Kavanaugh, J., concurring in the judgment). Unlike the country-of-origin labeling at issue in *American Meat*, the mandate here "run[s] afoul of the [Supreme] Court's warning that *Zauderer* does not leave the state 'free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.'" *Id.* at *8 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15-16 n.12 (1986) (plurality op.)).

The compelled statement is not "purely factual and uncontroversial" for the additional reason that it is highly misleading, because it obscures the deep uncertainty regarding the origin of the minerals. There are often "ten, twelve, or even more layers of intermediaries between the mines" and the final manufacturer subject to the disclosure requirement. JA432. As a result, the manufacturers subject to the requirement typically do not know the origin of the minerals in their products, and, even following extensive due diligence, are often unable to obtain that information. *See* OECD, *Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas* 39-41 (Jan. 2013). Yet the rule requires (after a two-year phase-in period) that companies who are unable to determine the origin of the minerals must report that their products have "not been found to be 'DRC conflict free'" if they have *any* "reason to believe" the minerals

"*may* have originated" in the region. 77 Fed. Reg. at 56,363-64 (emphasis added). During this litigation, the SEC explained that companies would be compelled to make this statement if there were even a *five percent chance* that the minerals could have originated in the DRC region. JA840.

Furthermore, even when minerals can be traced to the DRC region, given the complexity and fluidity of the DRC conflict, it is often extremely difficult to determine whether their sale may have funded armed groups "directly or indirectly." Indeed, the State Department and the Commerce Department, after conducting investigations required by the statute, have reported that they are unable to determine which mines, and which mineral processing facilities, may be funding armed groups. *State Dep't Map*, JA680 ("Lack of verifiable data makes it difficult . . . to comprehensively verify the armed groups or other entities that are either present at mines or have access to revenue streams emanating from them."); *Dep't of Commerce Report* at 1 (noting that its list of mineral processing facilities "does not indicate whether a specific facility processes minerals that are used to finance conflict in the Democratic Republic of the Congo or an adjoining country" because "[w]e do not have the ability to distinguish such facilities"). When such fundamental uncertainties and remote possibilities are involved, the compelled statement can hardly be characterized as "purely factual and uncontroversial."

Amnesty contends that "the language 'not been found to be' . . . adequately address[es] this concern." Amnesty Supp. Br. 7. However, stating that a product has

"not been found to be 'DRC conflict free'" leaves consumers with the misleading and harmful impression that there is likely to be some substantial connection between the product and the DRC conflict. In fact, there may be a 95% chance that the product has no relation to the DRC whatsoever, and all the minerals it contains were mined in Nevada. JA840. Furthermore, the "not been found to be" language does nothing to change the ideological nature of the "conflict free" characterization, which "compel[s] an issuer to confess blood on its hands." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371. The unmistakable connotation of the compelled statement is that the issuer is immoral because it has not found its products to be free of the DRC conflict and has not done enough to avoid responsibility for the conflict.

Amnesty further contends that the compelled statement is purely factual and uncontroversial because it is "based on an objective definition set forth" in the statute. Amnesty Supp. Br. 6. But the statute defines "DRC conflict free" as "products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country," and further defines "armed group" as a group "that is identified as perpetrators of serious human rights abuses" in an annual Department of State report. 15 U.S.C. § 78m(p)(1)(A)(ii); § 1502(e)(3), Pub. L. No. 111-203, 124 Stat. 1376, 2217 (2010). This definition cannot make the "not DRC conflict free" label purely factual and uncontroversial because the definition itself is not purely factual and uncontroversial. Instead, it is pregnant with political and ideological conclusions and connotations,

such as which groups are responsible for "serious human rights abuses," and what it means to "indirectly finance or benefit" a group.

Furthermore, even if the definition were objective, the government cannot force a company to apply a loaded ideological label merely by giving that label an "objective" definition. If the standard were otherwise, companies could be forced, for instance, to state whether their products (or family-planning clinics) have not been found to be "socially conscious," or to support "family values," as long as those phrases were defined by a statute in seemingly "factual" terms. Such compelled disclosures, even if claimed to be "factual," would operate as a shaming mechanism, forcing companies to denounce—through unmistakable connotation—their own products or organizations as ethically tainted.

It is also no answer to the First Amendment challenge to say that a private party is simply being compelled to convey the government's position; indeed, that is the heart of the First Amendment harm. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Pac. Gas*, 475 U.S. at 15 n.12 (plurality op.). Although *Zauderer* found heightened scrutiny unnecessary because the State had "attempted only to prescribe what shall be orthodox in commercial advertising," without a strict application of *Zauderer*'s "purely factual and uncontroversial" requirement, compelled commercial speech may instead become a mechanism for the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force

citizens to confess by word or act their faith therein." *Zauderer*, 471 U.S. at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Nothing in the First Amendment, of course, prevents the government from taking positions on social and moral issues and disseminating those views to the public. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). Indeed, the panel here noted that the government is free to do precisely that, by compiling and disseminating its own list of products that it believes bear responsibility for the DRC conflict. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372-73. But it is repugnant to the First Amendment for the government to force private companies to bear a scarlet letter denouncing their own products. *Pac. Gas*, 475 U.S. at 9.

CONCLUSION

For the foregoing reasons, the petitions for rehearing en banc should be denied.

Dated: September 12, 2014

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Garamond Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and does not exceed 15 pages, exclusive of the certificate as to parties, rulings, and related cases, Rule 26.1 disclosure statement, table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Peter D. Keisler
Peter D. Keisler

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