ORAL ARGUMENT SCHEDULED FOR MAY 19, 2014
No. 13–5281

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT (EN BANC)

AMERICAN MEAT INSTITUTE, *et al.*,
Plaintiff-Appellants
v.
U.S. DEPARTMENT OF AGRICULTURE, *et al.*,
Defendant-Appellees

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

Brief of *Amici Curiae* Tobacco Control Legal Consortium, Campaign for Tobacco-Free Kids, Advocates for Environmental Human Rights, American Cancer Society Cancer Action Network, American Lung Association, American Public Health Association, Americans for Nonsmokers' Rights, Center for Health, Environment & Justice, the Center for Science in the Public Interest, Essential Information, National Association of Consumer Advocates, National Association of County and City Health Officials, National Association of Local Boards of Health, Public Good Law Center, and Public Health Law Center In Support Of Defendant-Appellees On Supplemental Question

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. All parties, intervenors, and amici *appearing* before the district court and this Court, with the exception of the *amici* filing this brief, are set forth in the Brief of Federal Appellees filed April 16, 2014.

Rulings Under Review. The ruling under review is the opinion on September 11, 2013, by Judge Ketanji Brown Jackson, docket number 48, denying plaintiffs' motion for a preliminary injunction, and the accompanying order, docket number 49. The opinion is not yet published.

Related Cases. We are not aware of any related cases.

CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing. No members of any party to this filing have issued shares or debt securities to the public.

The general nature and purpose of each *amicus* is identified in the Appendix to this brief.

CERTIFICATE OF COUNSEL

As explained more fully in the accompanying motion, the 15 *amici curiae* submitting this brief are filing separately from other *amici*, because theirs is a distinct perspective with distinct concerns. *Amici* are organizations that advocate for public health, consumer protection, and the environment, and have a particular interest in the impact of this *en banc* Court's decision on disclosure regimes in those areas.

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GLOSSARY

Commodity Exchange Act	Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.*
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
OSHA	Occupational Safety and Health
Administration	

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations dedicated to advancing public health, consumer protection, and environmental justice.[1] The members and constituencies served by *amici* rely on mandatory disclosures to protect these important interests. *Amici* have been instrumental in advocating for and achieving more effective and useful disclosure regimes.

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

[1] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or any other person – other than *amici* – contributed any money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The deferential standard of First Amendment review announced in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), is appropriate for all mandatory commercial disclosures of factual information. It is premised on recognition that such disclosures not only prevent consumer deception, but generally enhance – rather than restrict – the stream of commercial information. By fostering *more* informed decisionmaking, the *Zauderer* disclosure standard represents the very opposite of the type of "highly paternalistic" speech prohibition, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), that has been disfavored since First Amendment protection was first extended to commercial speech.

It is undoubtedly true that many disclosure requirements originated in response to ongoing patterns of serious deception – and continue to provide essential protection against such deception. But it is also true that disclosure requirements serve many other vital interests besides averting deception, interests that include health and safety, individual autonomy exercised through informed decision-making,

transparent markets, environmental protection, and personal privacy, to name a few. Applying more stringent review to all disclosure requirements that principally serve those other interests could threaten a wide range of federal, state and local disclosure laws – ranging from warnings about the presence of mercury in light bulbs to calorie disclosures in fast food restaurants to notifications of medical patients' privacy rights.

Only compelling constitutional concerns could justify adopting a standard that would threaten the protections provided by such laws. But no such concerns have been demonstrated. To the contrary, a heightened standard would elevate the interest of the speaker in suppressing facts over that of the audience in being informed – an inversion of the First Amendment.

ARGUMENT

I. INCREASING THE LEVEL OF SCRUTINY FOR DISCLOSURES OF FACTUAL COMMERCIAL INFORMATION WOULD IMPERIL AN EXTENSIVE REGULATORY FRAMEWORK THAT PROVIDES ESSENTIAL PROTECTIONS.

Contemporary regulation of commerce depends on mandatory disclosures of information to protect public health and safety, to minimize environmental harms, and to maintain transparent markets in which consumers can enter transactions with sufficient information to allow their choices to match their preferences. *See* Cass Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613, 613 (1999) ("informational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law"). Subjecting mandatory disclosures to heightened scrutiny whenever they serve a purpose other than preventing deception would "would work a sea change" in "a vast regulatory apparatus" protecting the American public. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 155, 153.

In response to a First Amendment challenge to a similarly "routine disclosure of economically significant information designed to forward ordinary regulatory purposes," the First Circuit noted, "There are literally thousands of similar regulations on the books.... The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Pharm. Care Mgmt. Ass'n* [*PCMA*] *v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *see also National Elec. Mfrs. Ass'n* [*NEMA*] *v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (recognizing "the potentially wide-ranging implications" of subjecting to heightened scrutiny the "[i]nnumerable federal and state regulatory programs [that] require the disclosure of product and other commercial information"). To "expose these long-established programs to searching scrutiny by unelected courts ... is neither wise nor constitutionally required." *Id.*

A. Mandatory Disclosure Laws Play A Crucial Role In Protecting Public Health And Safety And The Environment.

Numerous disclosure laws at the federal, state and local levels protect public safety and health and the environment, even where there is no danger of deception.

Many laws require warning labels on products that could pose health hazards. *E.g.,* 15 U.S.C. § 2605(a)(3) (authorizing EPA to

require warning labels on products containing toxic substances); 27 U.S.C. § 215 (requiring warning label on alcohol bottles); 21 C.F.R. § 201.57 (stating labeling requirements for prescription drugs and "biological products"); *United States v. Sullivan*, 332 U.S. 689, 693 (1948) (upholding required warning labels on "harmful foods, drugs and cosmetics"); *NEMA*, 272 F.3d at 113-16 (rejecting First Amendment challenge to statute requiring warning labels with disposal instructions for mercury-containing light bulbs).

Other laws require notification of hazards in other contexts. *E.g.*, 29 U.S.C.A. § 655(b)(7) (authorizing OSHA to require appropriate warnings to employees about workplace hazards); 42 U.S.C. §§ 11021-22 (requiring reporting of information about stored hazardous chemicals to government bodies and fire departments and to be made publicly available); Cal. Health & Safety Code § 25249.6 (mandating warnings of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (authorizing regulators to require disclosure of pesticide formulas).

Environmental protection depends on extensive notification requirements. *See, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. §§ 1319, 1342, 1369 (requiring monitoring and reporting of effluent

discharges, with reports to be made available to the public); 42 U.S.C. § 11023 (requiring reporting of toxic chemical emissions); 42 U.S.C. § 7542 (making available to the public records and reports obtained from vehicle manufacturers under Clean Air Act); 40 C.F.R. § 110.6 (requiring reporting of oil spills).

Individuals' ability to choose a healthful diet is enhanced by extensive federal regulations requiring food labels with specified format and content, *e.g.*, 21 C.F.R. § 101.9, as well by menu labeling laws for chain restaurants. *E.g.*, 21 U.S.C. § 343(q)(5)(H).

B. Mandatory Disclosures Allow Consumers To Make Informed Choices.

In addition to obtaining essential protection against deception, consumers are protected by disclosure laws that principally serve other purposes, such as allowing consumers to compare rival products meaningfully, evaluate the health consequences of their choices, or understand their legal rights. Moreover, free markets can respond to public demand only if all parties can readily obtain relevant information. *See* Sunstein, *supra*, at 619 (laws "designed to assist consumers in making informed choices … are meant to be market-enhancing").

Consumer protection disclosure protocols extend into virtually every industry. For decades the federal government has mandated

disclosures in such varied areas as "the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel." Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 664 (1977).

Pervasive disclosure regimes protect consumers in financial transactions. *See, e.g.*, 15 U.S.C. §§ 1601-1667f, and Reg. Z, 12 C.F.R. §§ 226.1-226.59 (creditors must make written disclosures of all finance charges, expressed as an annual percentage rate); 12 U.S.C. § 2601 *et seq.* & Reg. X, 12 C.F.R. § 1024 (mortgage brokers must make specific disclosures about loan fees and terms); 15 U.S.C. §§ 1679c, 1680g (credit repair organizations and credit reporting agencies must provide specified disclosures).

Health maintenance organizations and other health plan providers must disclose essential terms of their services in understandable language. *See, e.g.*, 29 U.S.C. §§ 1021-1022 (requiring summary description for employee benefit plans); N.Y. Pub. Health Law § 2803-c(3) (enumerated "rights and responsibilities" of patients must be posted "conspicuously"); N.M. Stat. § 59A-57-4(B)(1) (managed health care plans must disclose benefits, exclusions, responsibilities, and

rights). Nursing homes must meet similar disclosure requirements. 42 U.S.C. §§ 1395i-3(c)(1)(B), 1396r(d)(6).

C. Mandatory Disclosures Provide Crucial Protections To Investors.

Disclosure regimes provide transparency throughout the American economy. Investors rely on mandatory disclosures no less than do consumers. *See, e.g.,* 15 U.S.C. §§ 77e, 77j (requiring registration and prospectus for public offers of securities); §§ 78l, 78m, 78o(d) (imposing ongoing registration and disclosure requirements for issuers of exchange-traded securities).

The entire securities industry is premised on "transparency" – *i.e.*, required disclosure of factual information – in order to secure efficient markets. *See, e.g.,* 15 U.S.C. § 78b ("national public interest ... makes it necessary ... to require appropriate reports to remove impediments to ... a national market system for securities"); 43 Fed. Reg. 59,614, 59,638 (Dec. 21, 1978) ("by establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings"). Legislative judgments that such disclosures serve important public interests are entitled to a high degree of deference. *See Commodities Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 108

(2d Cir. 2000) (upholding disclosure rules of Commodity Exchange Act because they were "reasonably related to the government's interest in preventing ... inefficiencies in the commodities markets that are contrary to the public interest").

D. Mandatory Disclosures Serve Varied Public Interests By Varied Means.

Disclosure requirements in commercial contexts serve many important purposes in addition to preventing deception. As illustrated above, many requirements simply facilitate the free flow of information, which can in turn support safety, health, and prudent financial decisionmaking. Additionally, privacy interests are protected by requirements that health plans and health care providers inform patients of their privacy rights, 45 C.F.R. § 164.520, and that financial institutions provide annual disclosures to customers concerning their privacy policies. 15 U.S.C. § 6803. Animal welfare is protected by requiring specified recordkeeping and reports from animal dealers, exhibitors, and research facilities, allowing public pressure to be brought to bear. 9 C.F.R. §§ 2.35-2.36, 2.7, 2.75-2.77, 2.80; *see also* 15 U.S.C. §§ 69-69j (invoices and advertising for fur products must specify English name of animal from which fur was taken). The public's ability to monitor – and address through the political process –

the extent to which broadcast stations serve the public is fostered by requirements that specified documents be kept on file for public inspection and, for noncommercial television stations, that available files include lists of programs serving the community. 47 C.F.R. §§ 73.3526, 73.3527.

Besides directly empowering individual informed choice, mandatory disclosures may achieve their ends less directly – by putting pressure on private companies to improve their behavior, or by allowing the public to respond to misbehavior through the political process. *Sunstein*, *supra*, at 614. For example, required reports on toxic emissions helped lead to passage of the 1990 Clean Air Act Amendments and spurred legislation in many states, while also inducing companies to reduce pollution even without legislation. Cass Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 Fla. St. U.L. Rev. 653, 662-63 (1993).

Similarly, by requiring home lenders to make public information about loan type, property location, and the race, national origin, sex and income of applicants and actual borrowers, and to post notice of that information's availability, the Home Mortgage Disclosure Act, 12

U.S.C. §§ 2801-10, allows the public to pressure lenders to reform discriminatory lending practices.

E. Heightened Scrutiny Could Imperil Crucial Protections Relied On By The Public.

The disclosure regimes surveyed above could withstand – as comparable others have withstood – an inquiry under *Zauderer* into whether they were "reasonably related" to the public interests served. *See, e.g.*, *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding NYC menu labeling ordinance); *PCMA*, 429 F.3d 294 (upholding mandated disclosures by pharmacy benefit managers to health benefit providers). Given the importance of such government interests as public health and safety, protection for citizens against unwitting financial catastrophe, and citizens' rights to privacy, most of these requirements could probably survive even heightened scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

However, important protections could be imperiled – and the implementation of others delayed – by ongoing uncertainty surrounding application of the *Central Hudson* standard, and by a consequently increased threat of costly litigation. Creditors would likely race to challenge statutes requiring them to advise defaulting debtors of their

legal rights. *See* Cal. Civ. Code, §§ 2924c(b), 2983.2. Manufacturers of junk foods would be equally eager to challenge required calorie counts on labels. *See supra* in sec. A.

Challengers could often argue, for example, that even highly effective regulations fail to meet the requirement that they "*directly* advance[] the governmental interest" at stake. *Cent. Hudson*, 447 U.S. at 566 (emphasis added). Many of the disclosure provisions surveyed above achieve salutary objectives through *indirect* means, by allowing an informed public to bring pressure to reform business or government behavior. Or challengers could argue – even for minimally burdensome disclosure requirements – that "the Government could achieve its interests in a manner that does not [regulate] speech, or that [regulates] less speech." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). It is not difficult for challengers to conjure alternatives – however expensive and infeasible—to mandated disclosures. For example, many mandated warnings could arguably be replaced by public education programs – provided that those programs have limitless funds so that they can reach all potentially affected parties.

There is no constitutional interest at stake that would warrant subjecting vital disclosure regimes to such an array of legal hurdles.

II. LIMITING *ZAUDERER* TO REGULATIONS COUNTERING DECEPTION IS UNSUPPORTED BY PRECEDENT OR THE CONSTITUTION.

The narrow tailoring necessary to avert undue restrictions on protected speech has no relevance to measures that enhance the free flow of information, and do so without infringing the "individual freedom of mind" safeguarded by heightened scrutiny of compelled speech. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

A. The *Zauderer* Standard Reflects The Reasons Commercial Speech Is Protected By The First Amendment.

Applying a more lenient standard to commercial speech disclosures in general than to commercial speech restrictions accords with the principal reason for conferring constitutional protection on commercial speech in the first place: "A commercial advertisement is constitutionally protected ... because it furthers the societal interest in the free flow of commercial information." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

Consequently, a deferential standard of review is appropriate when government seeks to require commercial speakers to disclose useful information. "Within commercial speech . . . the primary constitutional value concerns the circulation of accurate and useful

information. For the state to mandate disclosures designed more fully and completely to convey information is thus to advance, rather than to contradict, pertinent constitutional values." Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 28 (2000). For this reason, an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S. at 650 (emphasis in original).

Nothing in the reasoning of *Zauderer* supports limiting its holding to cases of deception. The "free flow of commercial information," 471 U.S. at 646, is enhanced whenever relevant factual information is made available, even when that flow has not been impeded by misleading speech.

The Court in *Zauderer* explicitly rejected the argument "that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement" can withstand *Central Hudson* review. *Zauderer*, 471 U.S. at 650. That argument, the Court observed, "overlooks material differences between disclosure requirements and outright prohibitions on speech." *Id.* Disclosure regimes are subject to less stringent review

"because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 652 n.14.

Mandatory factual disclosures are treated differently from suppression of speech in entirely non-commercial contexts as well. In campaign finance law, for example, it is well established that mandated disclosures are subject to less rigorous First Amendment scrutiny than are restrictions on spending for political speech or even restrictions on political contributions. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-67 (2010). Reduced scrutiny applies because disclosure requirements "do not prevent anyone from speaking," *id.*, and because of the public's "informational interest." *Id.* at 369. It does not depend on any showing that the disclosures are necessary to prevent deception.

B. Other Courts Interpret *Zauderer* Broadly.

The panel's observation, slip op. at 14, that the narrow reading of *Zauderer* suggested by the majority in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012), would create a split with the First and Second Circuits actually understates the extent to which such a narrow reading would be out of step with other Courts of

Appeal. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013) ("*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than … preventing consumer deception"); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) (applying *Zauderer* in upholding requirement that providers of storm sewers inform the public about impacts of stormwater discharge, without finding any danger of deception). *See also Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 89 (Cal. 2013) ("Laws requiring a commercial speaker to make purely factual disclosures related to its business affairs, whether to prevent deception *or simply to promote informational transparency*, … do not warrant intermediate scrutiny," but rather rational basis review) (emphasis added).

C. The *Reynolds* Majority Misread Supreme Court Precedent.

The principal precedent suggesting that *Zauderer* review applies only to disclosures countering deception is this court's divided panel opinion in *Reynolds*. 696 F.3d 1205. The panel majority reached that conclusion by misreading not only *Zauderer*, but also *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136,

146 (1994) and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

Ibanez did not hold that the applicability of *Zauderer* review depended on "a showing that the advertisement at issue would likely mislead consumers." *Reynolds*, 696 F.3d at 1214. Rather, the Court in *Ibanez* applied *Zauderer* review to the disclaimer at issue there, but found that it failed to satisfy review under that standard because it was "unduly burdensome" on protected speech. *See Ibanez*, 512 U.S. at 146-47 (length of required disclaimers prevented including legitimate statements of qualifications on business cards and letterheads); *see also Douglas v. State*, 921 S.W.2d 180, 188 (Tenn. 1996) ("we read *Ibanez* to mean that the disclaimer violated the First Amendment simply because it was 'unduly burdensome' under ... *Zauderer*").

The *Milavetz* Court declined to address how broadly the *Zauderer* standard applies. The *Reynolds* majority took *Milavetz* to limit *Zauderer* review to disclosure requirements needed to avert consumer deception. *Reynolds*, 696 F.3d at 1214 (quoting *Milavetz*, 559 U.S. at 250). But the *Milavetz* Court's formulation simply reflected the way the government respondent framed the issue. *See* 559 U.S. at 249. This does not show that the Court understood a state interest in

preventing misleading advertising to be a precondition for *Zauderer* review, any more than *Central Hudson* review applies only when the state interest served is energy conservation, the interest recognized in that case. *See Central Hudson*, 447 U.S. at 569.

That *Milavetz* left open the possibility of applying *Zauderer* review more generally is indicated by its endorsement of the principle that the "constitutionally protected interest in *not* providing … factual information is 'minimal,'" *Milavetz*, 559 U.S. at 249-50 (quoting *Zauderer,* 471 U.S. at 651), and its consideration of whether the challenged requirements were "reasonably related to *any* governmental interest." *Id.* at 252 (emphasis added).

Other courts have continued post-*Milavetz* to apply *Zauderer* broadly. *See Disc. Tobacco*, 674 F.3d at 556; *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 93 (2d Cir. 2010) ("because the regulations compel disclosure without suppressing speech, *Zauderer,* not *Central Hudson,* provides the standard of review"); *Beeman*, 315 P.3d at 89.

D. *Zauderer* Applies Broadly To Uncontroversially True Factual Disclosures, Regardless Of Their Impact.

Although *Amici* support the conclusion reached by the panel, the panel's discussion of *Reynolds*, 696 F.3d 1205, requires elaboration.

The *en banc* Court should make clear that *Zauderer* review is not limited to cases in which the speaker has only a "minimal" interest in not providing information. Slip op. at 13. The holding of *Zauderer* was that for commercial speakers the "*constitutionally protected* interest[2] in *not* providing ... particular factual information" is *always* minimal, regardless of what other interests a speaker may have in hiding certain facts. 471 U.S. at 650 (first emphasis added); *see also id.* at 651 (disclosure requirements are "unduly burdensome" if they "might offend the First Amendment by chilling protected ... speech").[3] The *Reynolds* majority ruled that *Zauderer* review was inapposite not because the manufacturers' interest was more than "minimal," but because it found that the specific graphics at issue were not "factual and uncontroversial," *Reynolds*, 696 F.3d at 1212, a conclusion from which Judge Rogers dissented. *Id.* at 1229-32.

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[2] In context this refers to First Amendment interests; other constitutionally protected interests, *e.g.*, privacy, may apply to some non-commercial disclosures.

[3] Whether burdens on commercial speech are *undue* may depend both on the strength of the interests served by disclosure and on the speaker's past history of deception. *See, e.g., United States v. Philip Morris*, 449 F.Supp.2d 1, 926 (D.D.C. 2006), *aff'd in relevant part*, 556 F.3d 1095 (D.C. Cir. 2009) ("the First Amendment does not preclude corrective statements where necessary to prevent consumers from being confused or misled").

In actuality, a disclosure can be "factual and uncontroversial" even if its impact may be "provocative[]," *Reynolds*, 696 F.3d at 1216 (cited in slip op., at 12), so long as it is sufficiently well established that there is no reasonable controversy about its truth. *See id.* at 1229-1230 (Rogers, J., dissenting).

Finally, a fact cannot be "one-sided." Slip op. at 12. Either it is true or it is not. Government cannot possibly compel disclosure of *all* known facts, and there is no constitutional infirmity when government opts for disclosure of certain facts in the expectation that they may influence people's choices. *See Reynolds*, 696 F.3d at 1230 (Rogers, J., dissenting) ("factually accurate … and persuasive are not mutually exclusive descriptions").

CONCLUSION

The *en banc* Court should affirm that requiring disclosures of "factual and uncontroversial" information does not offend the First Amendment so long as the disclosures are "reasonably related" to a legitimate government interest and are not "unduly burdensome." *Zauderer*, 471 U.S. at 651.

DATED: April 21, 2014

Respectfully submitted,

/s/ Mark Greenwold

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CERTIFICATE OF COMPLIANCE

In the absence of a specific Rule or court order prescribing a maximum length for *amicus* briefs on a supplemental question, *amici* have limited their brief to half the word count allowed to party briefs on the supplemental question. This brief contains 3733 words, according to Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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

DATED: April 21, 2014

/s/ Mark Greenwold
Mark Greenwold

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2014, I caused a true and accurate copy of this Brief of *Amici Curiae* Tobacco Control Legal Consortium, et al. to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel registered to receive electronic notices.

DATED: April 21, 2014

/s/ Mark Greenwold
Mark Greenwold

APPENDIX

Identity and Interest of Amici Curiae

Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of non-profit legal centers providing technical assistance to public officials, health professionals and advocates concerning legal issues related to tobacco and public health.[4] The Consortium supports public policies that will reduce the harm caused by tobacco use and has participated in the development of mandatory disclosure requirements for tobacco products at the federal, state and local level. The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Many of the Consortium's briefs – in the United States Supreme Court, United States Courts of Appeals, and state courts around the nation – have addressed First Amendment claims brought by the tobacco industry to challenge government regulation. The Consortium has a strong interest in this case because of the critical importance of appropriate mandatory warning labels on tobacco products, particularly in deterring young people from initiating tobacco use and becoming addicted. A heightened standard of First Amendment review of these requirements could threaten many of the protections the Consortium has worked to establish.

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

Campaign for Tobacco-Free Kids
The Campaign for Tobacco-Free Kids (CTFK) is a non-profit organization that has advocated for nearly twenty years – in coordination with grassroots tobacco control organizations throughout the country – for effective tobacco control measures at the state, local and federal levels. CTFK filed extensive comments with the FDA on the requirements for effective warning labels on cigarette packs and participated as *amicus curiae* in judicial proceedings in this Court and in the United States Court of Appeals for the Sixth Circuit in litigation over the validity of the statutory requirements for cigarette warning labels under the Family Smoking Prevention and Tobacco Control Act of 2009, and in litigation regarding the validity of state and local disclosure requirements for tobacco products.

Advocates for Environmental Human Rights
Advocates for Environmental Human Rights (AEHR) is a public interest law firm in New Orleans, dedicated to upholding the human right to live in a healthy environment. AEHR's clients are community organizations in the Gulf Region of the United States whose members and constituents are predominantly people of color, suffering chronic exposure to toxic pollution from industrial manufacturers and waste facilities located near their homes, schools, places of worship, and playgrounds. To ameliorate this situation, AEHR's work includes advocating for expanded and strengthened disclosure mandates, e.g., under the Emergency Planning and Community Right-to-Know Act (EPCRA), and for enforcement of existing legal mandates, e.g., in response to routine failures of polluters to provide complete and accurate reports under the Clean Air Act and implementing regulations.

American Cancer Society Cancer Action Network
The American Cancer Society Cancer Action Network (ACS CAN) is the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society. With nearly one million volunteer advocates, ACS CAN seeks to educate government officials on how to prevent cancer, save lives, and reduce suffering from the disease.

American Lung Association
The American Lung Association is the nation's oldest voluntary health organization, with over 300,000 volunteers in all 50 states and the District of Columbia. Because cigarette smoking is the major cause of

lung cancer and chronic obstructive pulmonary disease (COPD), the American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use, as well as efforts to regulate the marketing, manufacture and sale of tobacco products, including the development of effective warnings about the health risks associated with their use.

American Public Health Association
The American Public Health Association (APHA) champions the health of all people and all communities. APHA strengthens the profession of public health, shares the latest research and information, promotes best practices and advocates for public health issues and policies grounded in research. APHA is the only organization that combines a 140-plus year perspective, a broad-based member community and the ability to influence federal policy to improve the public's health.

Americans for Nonsmokers' Rights
Americans for Nonsmokers' Rights (ANR) is a national advocacy organization with more than 8000 organization and individual members. ANR promotes the protection of everyone's right to breathe smoke-free air, educates the public and policy-makers regarding the dangers of secondhand smoke, works to prevent youth tobacco addiction, and tracks and reports on the tobacco industry's efforts to oppose public health initiatives. Since the early 1980s, ANR has supported clean indoor air initiatives in more than 3000 communities in the United States. ANR supports mandatory disclosure of factual commercial information that protects public health, safety, and the environment by giving consumers the information they need to make informed decisions.

Center for Health, Environment & Justice
The Center for Health, Environment & Justice (CHEJ) is a national organization that provides organizing and technical assistance to grassroots community groups working to build healthy communities by protecting against environmental hazards. Founded in 1981 by mother-turned activist Lois Gibbs after she discovered in 1978 that her son's elementary school in the Love Canal neighborhood of Niagara Falls, NY was built on a toxic waste dump, CHEJ has worked with over 12,000 communities across the United States to enable people to have a voice in environmental policies that affect their health and well-being.

CHEJ's work includes assisting communities to identify hazards in their community. CHEJ's recent work with victims of a chemical spill in West Virginia that left 600,000 people without safe drinking water is just one example of the need for proper labeling of chemical products, to inform not only community members but also emergency response personnel in the event of an accident. CHEJ has also worked to discover information about toxics in such products as children's Sippy cups and baby bottles – information that should be readily available to all parents.

Center for Science in the Public Interest

The Center for Science in the Public Interest (CSPI) is a consumer advocacy organization whose twin missions are to conduct innovative research and advocacy programs in health and nutrition, and to provide consumers with current, useful information about their health and well-being. For more than four decades, CSPI has repeatedly advocated for transparency on food labels, to insure that consumers can make purchasing decisions based on all pertinent facts, including the country of origin of their foods. In 2007 CSPI urged the FDA to ban imports of wheat gluten, rice protein, and other grain products from China until it can be certified that the products are free of chemical or microbial contamination. The issues before the Court raise similar concerns. Consumers have the right to know where their food originated so they can insure the safety of the food they feed their families.

Essential Information

Founded in 1982 by Ralph Nader, Essential Information is dedicated to promoting democratic participation in government and advancing corporate accountability. Essential Information has published a bi-monthly magazine, books, reports, and daily news summaries, as well as sponsoring conferences and investigations and operating clearinghouses that disseminate information to grassroots organizations worldwide. Essential Information works to expand disclosure requirements for businesses. For example, it has worked to make home lending data available at the census tract level, so that organizations engaged in community reinvestment and affordable housing initiatives can effectively evaluate the performance of lenders and mortgage repurchasing companies. Essential Information has also worked to improve transparency in the pharmaceutical industry.

National Association of Consumer Advocates
The National Association of Consumer Advocates (NACA) is a leading national association of private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice involves representing and protecting consumers. Since its inception, NACA has focused primarily on the prevention and redress of abusive business practices, including predatory lending and issues related to mortgage foreclosures. NACA and it members litigate under statutes that require the disclosure of essential financial information, including the Truth in Lending Act, the Fair Credit Reporting Act, the Credit Repair Organizations Act and the Fair Debt Collection Practices Act.

National Association of County and City Health Officials
The National Association of County and City Health Officials (NACCHO) is a national organization representing the nation's 2800 local public health departments. Many local health departments are actively engaged in tobacco prevention and control programs to reduce the toll of tobacco use in their communities. NACCHO supports efforts that protect and improve the health of all people and all communities by promoting national policy, developing resources and programs, seeking health equity, and supporting effective local public health practices and systems. Mandatory disclosures – which protect public health, safety, and the environment by giving public health professionals and consumers the information they need to make informed decisions – are important to advancing NACCHO's work.

National Association of Local Boards of Health
The National Association of Local Boards of Health (NALBOH) is the national voice for local boards of health. Uniquely positioned to deliver technical expertise in governance, leadership and board development, NALBOH is committed to strengthening good governance where public health begins – at the local level. For over 20 years, NALBOH has been informing local boards of health on matters of national public health policy, and enabling their concerns to be heard.

Public Good Law Center
The Public Good Law Center (Public Good) is a public interest law firm dedicated to promoting rules of law that vindicate the proposition

that all are equal before the law. Through *amicus* participation in cases of particular significance for consumer protection, public health, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Public Good specializes in constitutional issues arising in regulation of business. Public Good has submitted *amicus* briefs in the United States Supreme Court, in Courts of Appeals around the nation, and in the Supreme Court of California in cases concerning freedom of speech and mandated disclosures, including the only brief filed in the Supreme Court in *Milavetz v. United States* that focused on that issue. It has also filed *amicus* briefs in cases involving fair debt collection practices, credit reporting abuses, and other contexts in which effective disclosure regimes play a crucial role in protecting the most vulnerable members of our society.

Public Health Law Center

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