Legal Backgrounder

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First Amendment in Flux: Supreme Court Clarification Needed on Compelled Commercial Speech

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The First Amendment protects not only the act of speaking, but also the affirmative act of *not* speaking. The right to be silent extends to business enterprises, even when the compelled speech relates to commercial activity. State and federal authorities are increasingly encroaching on the limits of businesses' right not to speak by imposing warning, labeling, and other disclosure mandates. While the US Supreme Court precedents provide a framework for judicial analysis of challenges to compelled commercial speech, lower federal courts have ruled inconsistently on compelled speech. A recent US Court of Appeals for the DC Circuit decision, *Nat'l Ass'n of Mfrs. v. SEC* (*NAM II*), offers an intelligible path forward on compelled speech, but the outcome of pending First Amendment challenges in other circuits may propel the Supreme Court to bring clarity to this critical area.

Zauderer v. Office of Disciplinary Counsel

When federal courts evaluate a government regulation that compels a business to communicate information it would not otherwise convey, the determinative issue is not whether government has the power to regulate business, but how closely the court should scrutinize the regulation under the First Amendment. The 1985 *Zauderer* decision was the Supreme Court's first consideration of compelled speech in the commercial context. 471 U.S. 626 (1985). The case dealt with Ohio attorney-advertising regulations that both restricted and compelled speech. Ohio bar regulators disciplined Zauderer in part for failing to disclose in an advertisement promoting his contingent-fee services that clients could be liable for litigation costs if they were to lose.

In general, the Court explained that "commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted *only* in the service of a substantial governmental interest, and *only* through means that directly advance that interest." *Id.* at 638 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)) (emphasis added). Ohio's substantial governmental interest was the prevention of consumer deception. Because the "purely factual and uncontroversial information" Ohio required be included in attorney advertisements was "reasonably related to the State's interest in preventing deception," the advertiser's rights were "adequately protected." *Id*. at 651. The Court's use of "reasonably related" reflects a reduced burden on the government to prove a fit between the disclosure policy and the state interest being advanced. A reduced burden of proof is appropriate for misleading commercial speech because speech that confuses consumers possesses little value under the First Amendment. *Zauderer* thus concluded a disclosure mandate that clarifies the information is more respectful of the advertiser's limited First Amendment rights than an outright ban on the advertisement.

The *Zauderer* Court noted that its approval of compelled speech in the case before it did not reflect the general principle that *compulsion* of speech merits less protection than *prohibition* of speech. In fact, the Court

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added that in some instances, "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* at 650 (citing *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)).

DC Circuit Issues Conflicting Interpretations of *Zauderer*

***American Meat Institute v. USDA* (*AMI*)**. The speech at issue in *AMI* was a congressional mandate to place country-of-origin labeling on food products, including meat, and the US Department of Agriculture's (USDA) rule implementing that mandate. A three-judge panel of the DC Circuit rejected a trade association's request for an injunction on First Amendment grounds, though it did recommend and the court voted to rehear AMI's claim *en banc*.

In three prior cases involving compelled commercial speech, DC Circuit panels held that the reduced level of scrutiny the Supreme Court utilized in *Zauderer* applies only in instances where the disclosure mandate or warning is aimed at preventing consumer deception. *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). Those opinions noted that in post-*Zauderer* decisions such as *United States v. United Foods*, 533 U.S. 405 (2001) and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Supreme Court reiterated that it would apply a level of scrutiny lower than that of *Central Hudson* only where the state interest in compelling speech was preventing deception.

The majority decision of the *en banc AMI* panel, 760 F.3d 18 (D.C. Cir. 2014), also acknowledged those Supreme Court precedents, as well as the DC Circuit's own past jurisprudence. It also referenced a timeless warning from an 1821 Supreme Court ruling that counseled "against extending general language of an opinion into different contexts." *Id*. at 22 (citing *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). The court then proceeded to overrule its past precedents and ignore *Cohens*' wise counsel.

The *AMI* opinion supported its sweeping conclusion with three arguments. First, it asserted that *Zauderer* rejected the *Central Hudson* test as "unnecessary" in light of the "material differences between disclosure requirements and outright prohibitions on speech." *Ibid* (quoting *Zauderer*, 471 U.S. at 650). Second, the court observed that "First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Ibid* (quoting *Zauderer*, 471 U.S. at 652, n.14). Third, the court stated that because the required disclosure in *Zauderer* took the form of "purely factual and uncontroversial information," the advertiser's interest was "minimal." *Ibid*. Based on these factors, the *AMI* court concluded, "[a]ll told, *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as 'minimal' seems inherently applicable beyond the problem of deception." *Ibid*.

The *AMI* court misconstrued *Zauderer*. First, the court appears to have inferred that *Zauderer* broadly rejected the availability of *Central Hudson*'s intermediate scrutiny for all mandatory disclosures. The *Zauderer* Court, however, did not relegate all compelled speech to the lowest level of scrutiny; instead it indicated instances where compelled speech may violate the First Amendment to the same degree as prohibited speech. *Zauderer*, 471 U.S. at 650.

Second, *AMI* used the *Zauderer* Court's statement that disclosure interests are "substantially weaker" to support the conclusion that all compelled commercial speech is subject to lower scrutiny. The Court made the statement that speakers' First Amendment interests in mandated disclosure is substantially weaker not in the abstract, but in the context of explaining that compelling speech is a less-restrictive alternative to prohibiting speech *when consumer confusion may otherwise arise from the business's communication*.

Finally, the *AMI* court incorrectly concluded that targets of compelled-speech laws have a "minimal" First Amendment interest because the required disclosure in *Zauderer* took the form of "purely factual

and uncontroversial information." *AMI,* 760 F.3d at 22. *Zauderer* did not conclude that the factual nature of the disclosure alone rendered a speaker's interest "minimal."

The *Zauderer* Court also reasoned that the speaker's interest is minimal when a government policy required clarifying disclosures of a "purely factual" nature *in advertising*. *Zauderer,* 471 U.S. at 651. The Court made that clear in stating, "we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, '[warnings] or [disclaimers] might be appropriately required … *in order to dissipate the possibility of consumer confusion or deception*.'" *Ibid* (emphasis added).

***National Association of Manufacturers v. Securities and Exchange Commission* (*NAM II*)**. NAM's First Amendment challenge to SEC's so-called Conflict Minerals Rule resulted in two separate DC Circuit opinions. As noted above, the *AMI en banc* panel expressly overruled *NAM I* (748 F.3d 359 (D.C. Cir. 2014)). In *NAM I*, a three-judge panel reversed a district court decision that upheld the SEC rule as constitutional. To the surprise of many observers, the same three-judge panel reached the identical conclusion—the Conflict Minerals Rule violated NAM members' First Amendment rights—after the *en banc AMI* panel had altered the circuit's approach to compelled commercial speech.

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act instructed SEC to promulgate regulations requiring securities issuers to report annually whether certain "conflict minerals" (gold, tantalum, tin, and tungsten) used in their products originated in the Democratic Republic of the Congo or an adjoining country. NAM filed suit in the District Court for the District of Columbia. That court held that because the Conflict Minerals Rule directly advanced a substantial governmental interest, SEC had met its burden under the *Central Hudson* test for commercial speech limits. On appeal, the *NAM I* panel affirmed the application of *Central Hudson*'s "intermediate" scrutiny, but disagreed that the rule could survive that scrutiny.

The three-judge panel that decided *NAM I* (Senior Judges Sentelle and Randolph and Judge Srinivasan) ordered a rehearing in light of the *AMI* decision. Senior Judge Randolph authored the majority opinion, joined by Senior Judge Sentelle. The opinion examined the narrow question of "whether *Zauderer*, as now interpreted in *AMI*, reaches compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *NAM II*, 800 F.3d 518, 522 (D.C. Cir. 2015).

The court concluded that the lower level of scrutiny applied in *Zauderer* only comes into play when the challenged government speech mandate impacts advertising or product labeling. The *Zauderer* Court, Senior Judge Randolph explained, "was not holding that any time a government forces a commercial entity to state a message of the government's devising, that entity's First Amendment interest is minimal." *Ibid*. He further cited the Supreme Court's *United Foods* decision to support the limited scope of *Zauderer*. Although the compelled speech there was considered "commercial," the Court found that *Zauderer* did not apply because "[t]here is no suggestion in the case now before us [the compelled speech is] somehow necessary to make voluntary advertisements nonmisleading for consumers." *United Foods,* 533 U.S. at 416.

After holding *Zauderer* inapplicable and stating that *Central Hudson* provided the appropriate level of First Amendment scrutiny, the *NAM II* court referenced its decision in *NAM I*, which concluded that the Conflict Minerals Rule did not directly advance a substantial governmental interest. Because of "the flux and uncertainty of the First Amendment doctrine of commercial speech and the conflict in the circuits regarding the reach of *Zauderer*," the court decided to also analyze the rule under the standard set out in *AMI*. *NAM II*, 800 F.3d at 524.

The court stated that "the first step under *AMI* (and *Central Hudson*) is to identify and assess the 'adequacy of the [governmental] interest motivating' the disclosure requirement." *Ibid* (quoting *AMI*, 760 F.3d at 23). The governmental interest in "ameliorat[ing] the humanitarian crisis in the DRC" was deemed to be adequate. The second step *AMI* utilized in applying *Zauderer* (and also applicable under *Central Hudson*, the *NAM II* court added)

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examined whether the compelled-speech mandate "would 'in fact alleviate' the harms it recited 'to a material degree.'" *Id*. at 527 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

Senior Judge Randolph concluded that the effectiveness of the Conflict Minerals Rule mandatory disclosure was "entirely unproven and rests on pure speculation." *Ibid*. The court rejected SEC's request that it defer to the judgment of Congress on "this matter of foreign affairs" that the rule would alleviate a humanitarian crisis. *Id*. at 525. It noted that Congress "held no hearings [prior to passage] on the likely impact of § 1502" and that at post-passage hearings "the testimony went both ways." *Id*. at 526. The court further cited evidence that the rule "may have backfired." *Ibid*.

Lastly, the court addressed whether the disclosure mandated "purely factual and uncontroversial information." In *AMI,* the court stated that *Zauderer* "requires the disclosures to be of 'purely factual and uncontroversial information' about the good or service being offered" and that these criteria "trigger[] the application of *Zauderer.*" *AMI,* 760 F.3d at 27. The *NAM II* court wrestled with making sense of the phrase "factual and uncontroversial." It concluded that the SEC-mandated label "'[not] conflict free' is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell customers that its products are ethically tainted, even if they only indirectly finance armed groups. … 'By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.'" *NAM II*, 800 F.3d at 530 (quoting *NAM I*, 748 F.3d at 371).

On March 4, 2016 in a letter to US House of Representatives Speaker Paul Ryan, Attorney General Loretta Lynch announced that the Department of Justice would not be seeking Supreme Court review of the DC Circuit's *NAM II* decision.

Conclusion

There is a pull and tug as courts subject restrictions on advertising and other forms of commercial speech to increasingly stiff constitutional review, *see, e.g.*, *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016), and government entities have increasingly enacted laws that force businesses to communicate unflattering messages about themselves or their products. One example is the City of San Francisco's attempt to both prohibit certain marketing for "sugar-sweetened beverages" and impose warnings on such advertisements. In response, advertisers filed First Amendment challenges to both ordinances. On December 1, 2015, the city Board of Supervisors repealed the ad ban, but kept the warning in place. The challenge to the compelled-speech mandate is pending in the Ninth Circuit, which is hearing the advertisers' appeal after a trial court judge refused to impose an injunction against the ordinance. *Am. Bev. Ass'n v. City & Cty. of S.F.*, 2016 WL 2865893 (N.D. Cal. May 17, 2016).

Meanwhile, on the other coast, a three-judge panel of the New York Supreme Court, Appellate Division, First Department, is considering a challenge to New York City's sodium-content disclosure ordinance. The ordinance mandates that affected restaurants post a "risk statement" at the point of purchase for certain high-sodium menu items.

Whether *Zauderer*'s level of scrutiny applies to those ordinances, neither of which seeks to alleviate consumer confusion, is at issue in both constitutional challenges. Both cases involve laws directed at advertising, as did *Zauderer*, and because *NAM II* did not involve advertising it may not offer the business association plaintiffs a persuasive precedent to evade *Zauderer*.

If either the Ninth Circuit or, ultimately, the New York Court of Appeals joins the DC Circuit in departing from US Supreme Court precedents on the appropriate level of scrutiny for mandated disclosure on consumer products, the High Court should wade back into compelled commercial speech. Given the opportunity, the Court is most likely to quash lower courts' departure from clear precedents like *United Foods* and confirm that except in narrow circumstances, the judiciary must examine government commercial-speech mandates with exacting scrutiny.

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