



FIRST AMENDMENT LIMITS GOVERNMENT'S POWER TO COMPEL COMMERCIAL SPEECH

by Jonathan F. Cohn and Paul J. Ray

Attempting to aggrandize governmental power at the expense of the Constitution, a number of federal agencies and state actors have pushed to expand a narrow exception to the First Amendment. As originally conceived, this exception to free speech applied only to *deceptive* commercial speech. In recent years, however, government attorneys have argued that the exception also applies in a variety of circumstances in which the government mandates businesses to deliver the government's chosen message. One decision by the US Court of Appeals for the DC Circuit lent credence to this position. However, courts have generally rejected the efforts of federal and state governments to dictate the speech of private actors.

Government-mandated speech inherently raises First Amendment concerns. Generally, federal and state regulations that compel commercial speech receive the same First Amendment scrutiny as other types of commercial speech regulation under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹—a standard that has properly grown increasingly protective in recent years.² In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, however, the US Supreme Court carved out a narrow exception; a disclosure requirement that is “reasonably related to the State’s interest in preventing deception of consumers”³ need not pass the tests that ordinarily apply to commercial speech regulations, including that the regulation be no “more extensive than is necessary to serve [a substantial government] interest.”⁴

From the beginning, the Supreme Court limited this narrow exception to disclosure requirements needed to prevent consumer deception. This limitation is critical because it prevents the exception from swallowing the rule and allowing the government to compel America’s businesses to make ideological or other statements with which they disagree. At the same time, the limitation does not interfere with laws legitimately designed to prohibit deceptive practices that harm consumers, undermine competition, and serve no societal benefit. Among the anti-deception regulations that have been upheld under *Zauderer* are a state law requiring pharmacy benefit managers to disclose conflicts of interest and financial arrangements that could give rise to them;⁵ a federal statute requiring disclosure of certain facts about the bankruptcy process by debt relief agencies;⁶ and a Department of Transportation rule requiring airlines to post prominently the final price for tickets.⁷

By contrast, for decades, courts have struck down regulations not related to preventing deception. For instance, the Second Circuit struck down a Vermont statute requiring milk manufacturers to disclose the use of certain hormones in their cows. The court explained that the statute was designed to satisfy consumer curiosity, not to prevent consumer deception.⁸ In a recent case, *American Meat Institute v. US Department of Agriculture*, the DC Circuit dealt a blow to this important limitation, applying *Zauderer* to a federal regulation that was not drawn to prevent consumer deception. The regulation required labels on certain meat products disclosing the country of origin. The court held that *Zauderer* applied and upheld the regulation, notwithstanding the absence

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of a consumer-deception rationale. In quite an understatement, the court acknowledged that the Supreme Court had “suggested possible confinement” of *Zauderer* “to correcting deception,” but declined to apply this limitation because, in the circuit court’s view, the Supreme Court’s rationale extended more broadly than its express language.⁹ By departing from a longstanding and critical limitation on *Zauderer* review, the DC Circuit has raised the specter of a wave of regulations that compel private businesses to parrot the government’s preferred message on an undefined host of topics.

Fortunately, however, the *Zauderer* exception remains subject to several additional limitations that protect commercial-speech rights. Three limitations in particular are worth noting. First, in *National Association of Manufacturers v. Securities and Exchange Commission*, the DC Circuit held that *Zauderer* applies only to disclosures connected with advertising or product labeling at the point of sale; commercial regulations compelling speech in other forums is subject to ordinary *Central Hudson* review. The court accordingly held that a statute and an SEC regulation compelling companies to make disclosures online and in their SEC filings, rather than at the point of sale, was not entitled to *Zauderer* review.¹⁰

Second, *Zauderer* applies only when the compelled disclosure is “factual and uncontroversial.”¹¹ This limitation prevents the government from requiring that American businesses pick sides—or, rather, pick the government’s side—in controversial policy issues. For instance, in *NAM v. SEC*, the court held that a compelled disclosure by manufacturers that their products were not “conflict free” with respect to war in the Democratic Republic of the Congo “conveys moral responsibility for the Congo war”—a controversial statement with which the manufacturers naturally disagreed.¹² The regulation accordingly violated the First Amendment.

Finally, *Zauderer* applies only if the compelled disclosure is commercial speech. If the speech is not commercial speech, strict scrutiny—the most demanding form of review available under the law—applies. Commercial speech is speech proposing a commercial transaction. A recent decision illustrates the importance of this principle. In *PSEG Long Island LLC v. Town of North Hempstead*, the town required a business to post signs on its poles regarding the dangers of chemicals with which the poles were treated—dangers the business strongly disputed.¹³ The court ruled that the compelled speech was subject to strict scrutiny, rather than *Central Hudson* or *Zauderer*, because the signs did not propose a commercial transaction.¹⁴

This array of limitations on *Zauderer* is crucial for preserving First Amendment rights. The Constitution does not give regulators *carte blanche* to co-opt American businesses. If the government wishes to speak, it may do so itself, but it may not commandeer private actors to serve as the government’s mouthpiece.

(Endnotes)

¹ 447 U.S. 557 (1980); see also *Nat’l Ass’n of Manufacturers v. SEC*, 800 F.3d 518, 519 (D.C. Cir. 2015).

² See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2652 (2011). See also Thomas R. Julin, *Better Think Twice Before Restricting Commercial Speech*, WLF LEGAL OPINION LETTER, Feb. 10, 2017, available at <https://goo.gl/EuNZPG>.

³ 471 U.S. 626, 651 (1985) (emphasis added).

⁴ *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

⁵ *Pharma. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294 (1st Cir. 2005).

⁶ *Conn. Bar Ass’n v. United States*, 620 F.3d 81 (2d Cir. 2010).

⁷ *Spirit Airlines, Inc. v. U.S. Dep’t of Transportation*, 687 F.3d 403 (D.C. Cir. 2012).

⁸ *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

⁹ 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc).

¹⁰ 800 F.3d at 522.

¹¹ *Am. Meat Inst.*, 760 F.3d at 21.

¹² 800 F.3d at 530.

¹³ 158 F. Supp. 3d 149 (E.D.N.Y. 2016). See also Gregory S. Chernack, *Ruling on Utility Poles Mandatory Warning Protects Against Forced Speech*, WLF LEGAL OPINION LETTER, Apr. 15, 2016, available at <https://goo.gl/2oUs9g>.

¹⁴ 158 F. Supp. 3d at 164.