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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to D.C. Circuit Rule 28(a)(1):

(A) Parties and Amici

Appellants

National Association of Manufacturers
Chamber of Commerce of the United States of America
Business Roundtable

Amici for Appellants

Professor Marcia Narine; Ambassador Jendayi Frazer; Dr. J. Peter Pham
American Coatings Association, Inc.; American Chemistry Council; Can Manufacturers Institute; Consumer Specialty Products Association; National Retail Federation; Precision Machined Products Association; The Society of the Plastics Industry, Inc.; American Petroleum Institute; Foodservice Packaging Institute; North American Metal Packaging Alliance, Inc.; Retail Litigation Center, Inc.

Appellee

United States Securities and Exchange Commission

Intervenors for Appellee

Amnesty International USA
Amnesty International Ltd.

Amici for Appellee

Better Markets, Inc.
Senator Barbara Boxer, Senator Dick Durbin, Russ Feingold, Howard Berman, Congressman Wm. Lacy Clay, Congressman Keith Ellison, Congressman Raul Grijalva, Congressman John Lewis, Congressman Ed Markey, Congressman Jim McDermott, Congresswoman Gwen Moore, Congresswoman Maxine Waters; Eliot Engel
Global Witness Limited; Fred Robarts; Gregory Mthembu-Salter
Free Speech for People, Inc.

(B) Rulings Under Review

This appeal challenges the final order in case 1:13-cv-00635, reproduced in the appendix at JA919, entered by Judge Robert L. Wilkins on July 23, 2013, denying Appellants' motion for summary judgment and granting Appellee's and Intervenor-Appellees' cross-motions for summary judgment.

(C) Related Cases

This case was previously before this Court as Case No. 12-1422, on a petition for direct review of Final Rule 13p-1 and Form SD, *Conflict Minerals*, 77 F.R. 56,274 (Sept. 12, 2012). After the Court held in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), that it lacked jurisdiction over such petitions, at Appellants' request it transferred this case to the district court pursuant to 28 U.S.C. §1631. Order, Case No. 12-1422 (D.C. Cir. filed May 2, 2013). Counsel is aware of no related cases currently pending in any other court.

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.

2. The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

3. Business Roundtable (BRT) states that it is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than

16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders and generate more than $540 billion in sales for small and medium-sized businesses annually. BRT companies give more than $9 billion a year in combined charitable contributions. BRT has no parent corporation, and no publicly held company has 10% or greater ownership in BRT.

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Sudarsan Raghavan, *How a well-intentioned U.S. law left Congolese miners jobless*, Wash. Post, Nov. 30, 2014 17

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Amici Br.	Brief of Amici Curiae Global Witness and Free Speech for People in Response to the Court's November 18, 2014 Order
Amnesty	Intervenors-Appellees Amnesty International USA and Amnesty International Ltd.
Amnesty Br.	Supplemental Brief of Intervenors-Appellees on Panel Rehearing
DRC	Democratic Republic of the Congo
SEC or Commission	Securities and Exchange Commission
SEC Br.	Supplemental Brief of the Securities and Exchange Commission

INTRODUCTION

In *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc), the Court reaffirmed that *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), does not apply unless the government-mandated statements are "of 'purely factual and uncontroversial information' about the good or service being offered." The Court overruled prior circuit precedent limiting *Zauderer* "to cases in which the government points to an interest in correcting deception," 760 F.3d at 22, but left this basic, well-established principle intact. The panel should amend its opinion in this case to clarify that the Securities and Exchange Commission's (SEC's) Conflict Minerals Rule is not a "purely factual and uncontroversial" disclosure requirement within the meaning of *Zauderer*. This is a question of law for the Court to decide de novo.

The Rule's compelled statement of whether products are "DRC conflict free" is not purely factual and uncontroversial for at least three reasons. First, the compelled statement is not factual in nature, but rather constitutes an ideological judgment that companies who cannot confirm where the minerals in their products originated bear some "moral responsibility for the Congo war." *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014). As the panel explained, the government is forcing companies to "confess blood on [their] hands" and "tell consumers that [their] products are ethically tainted." *Id.*

Second, the compelled statement is both non-factual and controversial because it is highly misleading, susceptible to interpretations that are not factually accurate. In many cases, issuers forced to make the compelled statement will have no connection to the region at all, but will be simply unable to identify the source of their minerals due to the length and complexity of their supply chains, making their compelled association with the armed conflict misleading and inaccurate.

Third, the compelled use of the government's "DRC conflict free" slogan is controversial because it forces companies to inject themselves into a contentious debate over the causes of a foreign conflict, to adopt the government's loaded terminology classifying products as not "conflict free" depending on the minerals they contain, and to appear thereby to endorse the government's view that the mineral trade is responsible for the conflict. This is a highly controversial position, with which many policy experts disagree.

The supplemental briefs of the Commission, intervenors, and amici fail to confront these issues. They focus on the required factual descriptions of the scope and results of due diligence investigations—which our constitutional claim never challenged—rather than on the mandate that companies then add the non-factual and highly controversial statement that those facts *mean* a product is not "conflict free." It is that mandate that is unconstitutional. The First Amendment bars laws that require private speakers to parrot the government's chosen vocabulary and contested characterization of a policy issue. It does so not only because such laws violate the

speakers' right to address such issues on terms of their own choosing (or elect to stay silent), but also because the government cannot be permitted to create a false appearance of consensus, and thereby skew public debate and opinion, by compelling the establishment of private echo chambers for the government's views.

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. Unless a company can conclude that it has no "reason to believe" the minerals "may have originated" in the DRC region, or can confirm that the minerals did not "directly or indirectly finance or benefit armed groups," the company must state on its website and in public reports filed with the SEC that the products have not been found to be "DRC conflict free."[1] 15 U.S.C. § 78m(p)(1)(A)(ii); 77 Fed. Reg. at 56,363.

[1] Amici assert that the rule does not compel this statement, but rather leaves issuers free to describe their findings in their own words. Amici Br. 9-10. The SEC, however, notably fails to endorse this position. SEC Br. 18 ("[T]he challenged statement is required once a year in the body of a conflict minerals report"); JA767

The panel held that this compelled statement violates the First Amendment. It noted that *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012), concluded that *Zauderer* is "limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception,'" and the compelled statement was not intended to prevent deception. *Nat'l Ass'n of Mfrs*, 748 F.3d at 371. Further, the panel noted that *Zauderer* applies only to "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.*

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. It noted that "we do not decide whether to use strict scrutiny or the *Central Hudson* test for commercial speech," because "the final rule does not survive even *Central Hudson*'s intermediate standard." *Id.* It held that the compelled statement fails to meet this

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("[E]very such issuer will have to describe products in its Conflict Minerals Report as having 'not been found to be DRC conflict free'").

standard because it is not narrowly tailored. *Id.* "[N]arrower 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 panel decision, the SEC staff issued guidance, stating it "expects companies to file any reports required." 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#.VJhGUs8BAA. These reports must include all of the factual information required by the rule, including a "description of the due diligence that the company undertook," and "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 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.*

On November 18, 2014, the panel issued an order granting rehearing, and directing the parties to file supplemental briefs addressing (1) the "effect, if any," of "this court's ruling in *American Meat Institute*," on this case; (2) "the meaning of 'purely factual and uncontroversial information'"; and (3) whether "determination of what is 'uncontroversial information'" is "a question of fact." This brief addresses the second and third questions in part I, and the first question in part II.

ARGUMENT

I. A DISCLOSURE IS NOT PURELY FACTUAL AND UNCONTROVERSIAL IF IT COMPELS A COMPANY TO CONVEY A GOVERNMENTAL MESSAGE THAT IS IDEOLOGICAL, MISLEADING, OR OTHERWISE CONTENTIOUS; THIS INQUIRY IS A QUESTION OF LAW.

Zauderer's requirement that compelled statements must be of "purely factual and uncontroversial information" protects First Amendment interests of the highest order. "Some of [the] Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). This principle prevents the state from "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] 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)). As this Court recently explained in *American Meat Institute*, "*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,'" under the guise of regulating commercial speech. 760 F.3d at 27 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15-16 n.12 (1986) (plurality op.)).

There are at least three components to the "purely factual and uncontroversial" requirement. First, the compelled statement must be purely factual in nature: it cannot explicitly or implicitly convey an opinion, a political or ideological position, or

a moral judgment. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (*Zauderer* does not apply to "opinion-based" or "subjective" statements); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003) (*Zauderer* does not apply to "compel[led] endorsement of political or ideological views"); *R.J. Reynolds*, 696 F.3d at 1212 (*Zauderer* does not apply when the government "seeks to compel a product's manufacturer to convey the state's subjective" or "ideological . . . view").

Second, the compelled statement must be "indisputably accurate and not subject to misinterpretation." *R.J. Reynolds*, 696 F.3d at 1216; *CTIA—The Wireless Asso'n v. City of S.F.*, 494 F. App'x 752, 753 (9th Cir. 2012) (*Zauderer* does not apply where compelled statements are "misleading" or "could prove to be [mis]interpreted"). *Zauderer* upheld compelled speech "to dissipate the possibility of consumer confusion or deception," 471 U.S. at 651; it would turn *Zauderer*'s rationale on its head to hold that the government is equally free to compel speech that is itself confusing or deceptive. If a compelled statement is inaccurate or susceptible to misinterpretation, then it is both non-factual and controversial: a statement that is untrue or misleading does not convey "facts," and a statement is not "uncontroversial" if the speaker can reasonably "disagree with the truth of the facts required to be disclosed" or if the "required factual disclosures" are "one-sided or incomplete." *Am. Meat Inst.*, 760 F.3d at 27.

Third, a compelled statement may be "controversial in the sense that it communicates a message that is controversial," even if factually accurate. *Id.* For

instance, a compelled statement may be "controversial" if it forces companies "to mention controversial" topics on which they would prefer to remain silent. *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 245 n.6 (2d Cir. 2014). Although the mere potential that a factual statement could give rise to controversy does not make that statement "controversial," the government also does not have free rein to force companies to speak on contentious public issues, particularly where the "compelled recitation of a message" risks interfering with the company's own message or skewing the public debate. *Env'tl Def. Ctr., Inc.*, 344 F.3d at 850.

Whether a compelled statement constitutes "uncontroversial information" is a question of law. This Court and other courts have routinely decided the issue de novo, with no suggestion that deference to a fact-finder is appropriate. *See, e.g.*, *Am. Meat Inst.*, 760 F.3d at 27; *Blagojevich*, 469 F.3d at 652; *Evergreen Ass'n*, 740 F.3d at 245 n.6. It is part of the test determining the applicable constitutional standard, which is an antecedent legal issue for the court. And similar First Amendment questions regarding the nature and meaning of speech are regularly treated as questions of law. For instance, whether commercial speech is inherently misleading, so as to lack First Amendment protection, is a question of law. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990) (plurality op.). Whether speech is "on a matter of public concern" is likewise a "question[] of law." *Tao v. Freeh*, 27 F.3d 635, 638-39 (D.C. Cir. 1994). Whether a statement "can[] reasonably be interpreted as stating actual facts," whether the statement is "provable as false," and whether it is

"reasonably capable of defamatory meaning" are also all "questions of law for the court to decide." *Farah v. Esquire Magazine*, 736 F.3d 528, 534-35 (D.C. Cir. 2013).

The Supreme Court has emphasized the importance of independent appellate review of First Amendment issues, "to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). This "rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact," *id.* at 501, even if "in other contexts application of such a legal standard would likely be considered a mixed question of law and fact," *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999). Indeed, while the appellees variously describe the "uncontroversial information" requirement as a "mixed question of law and fact," SEC Br. 4, or a "question of law" "in most instances," Amnesty Br. 13, all parties agree that the Court should resolve the issue here de novo.

II. THE COMPELLED SPEECH IN THIS CASE VIOLATES THE FIRST AMENDMENT.

A. The Compelled Statement In This Case Is Not "Purely Factual And Uncontroversial Information."

The compelled speech in this case is not purely factual and uncontroversial for at least three reasons: it conveys an ideological and moral judgment rather than pure factual information; it is highly misleading and susceptible to misinterpretation; and it forces companies to convey a governmental position on a controversial topic.

1. The Compelled Statement Is Not Purely Factual Because It Conveys An Ideological And Moral Judgment.

The compelled statement that products have not been found "DRC conflict free," 77 Fed. Reg. at 56,363, is not purely factual because it conveys an ideological and moral judgment. As the panel cogently explained, "the label 'conflict free'" 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.* "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." *Id.* Two of the SEC's five Commissioners agree and "oppose the position taken in the SEC's brief." Bloomberg BNA, *SEC Argues Its Conflict Minerals Rule Survives First Amendment Scrutiny* (Dec. 12, 2014), http://www.bna.com/sec-argues-conflict-n17179918838/ (quoting joint statement by Commissioners Gallagher and Piwowar that "[r]equiring persons to presume their guilt by association with the current tragedy in the Congo region unless proven otherwise is neither factual nor uncontroversial").

Indeed, the compelled use of the governmental slogan "DRC conflict free" adds no *factual* information to the conflict minerals reports. As the SEC notes, the Conflict Minerals Rule separately requires companies to disclose in these reports "the

steps an issuer has taken to exercise due diligence on the source and chain of custody of minerals used in its products, as well as the results of that due diligence." SEC Br. 11; *see* JA808-09. Appellants did not challenge any of these required factual disclosures under the First Amendment, and the SEC left those portions of the rule in force following the panel opinion. The compelled statement of whether the products are "DRC conflict free" does not add factual information, but rather adds the government's moral judgment that, based on the facts disclosed, the products are "ethically tainted." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371.

The SEC contends that because the term "DRC conflict free" is "defined in the rule and statute," the statement of "whether an issuer has found its products to meet [this] defined standard" is a "literal fact." SEC Br. 12. Similarly, it argues that the definition of "DRC conflict free"—that the minerals "directly or indirectly finance or benefit armed groups" responsible for serious human rights abuses—is purely factual and uncontroversial because the armed groups are "specifically identified in an annual State Department report." *Id.* 13-14.

This argument misinterprets *Zauderer*, and would dramatically weaken the First Amendment's protection. An "objective" statutory definition of a loaded ideological phrase does not render that phrase "purely factual." In *Blagojevich*, for instance, the government argued that compelling video game manufacturers to place labels stating "18" on "sexually explicit" video games was "purely factual and uncontroversial" because the statute provided a precise, objective definition of "sexually explicit." 469

F.3d at 652. The Seventh Circuit rejected this argument, holding that "[e]ven if one assumes that the State's definition of 'sexually explicit' is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term." *Id.* Accordingly, *Zauderer* review did not apply because "[t]he sticker ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit." *Id.* Here, similarly, the statutory definition of "DRC conflict free" is "the [government's] definition," and the companies forced to use the term "may have an entirely different" understanding of what type of remote connections to a war-torn region render a product not "free" of the "DRC conflict."

If the law were otherwise, there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language. For instance, companies could be compelled to state that their products are not "environmentally sustainable" or "fair trade" if the government provided "factual" definitions for those slogans—even if the companies vehemently disagreed that their practices were "unsustainable" or "unfair." *Zauderer* review is inappropriate for such laws "requir[ing] corporations to carry . . . messages [that are] biased against or are expressly contrary to the corporation's views," *Am. Meat Inst.*, 760 F.3d at 27, and that impermissibly attempt to influence public debate by requiring private speakers to use slanted code words.

Appellees rely on *Meese v. Keene*, 481 U.S. 465 (1987), for the proposition that the government may compel companies to use "loaded term[s]," if those terms are

given a "neutral definition[]" in a statute. Amnesty Br. 18; SEC Br. 16. *Meese*, however, is not a compelled speech case. In *Meese*, a statute defined certain films as "political propaganda," and required distributors of films so defined to make certain disclosures. Significantly, the statute did not require the distributors to state that their films were "political propaganda." *Keene v. Meese*, 619 F. Supp. 1111, 1115 (E.D. Cal. 1985); *see also Block v. Meese,* 793 F.2d 1303, 1313-15 (D.C. Cir. 1986) (distinguishing government speech from compelled private speech). The required disclosure statement itself was "wholly innocuous," and the plaintiff did not challenge it. *Keene*, 619 F. Supp. at 1115. Instead, the plaintiff argued that the *government's* characterization of the films as "political propaganda" violated the First Amendment. The Supreme Court, reserving the question of "the permissible scope of Congress' 'right to speak,'" held that the government's speech was constitutional because "political propaganda" was "statutorily defined in a neutral and evenhanded manner." *Meese*, 481 U.S. at 484.

Meese did not suggest, much less hold, that it would be constitutionally permissible for Congress to force filmmakers to label their own films as "political propaganda"—or not "propaganda free"—however the term was defined. Indeed, any such holding would be flatly contrary to the fundamental principle that the government cannot force people to convey the government's messages—even where the context makes clear that the words are the government's, not the speaker's. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that forcing individuals to carry a license plate with the State's slogan "Live Free or Die" violates the First Amendment).

Here, appellants have never argued, and the panel did not hold, that the First Amendment prohibits the *government* from stating that products are not "DRC conflict free." *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). Indeed, the panel noted that the government is free to do precisely that: "compile its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit to the Commission." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372. But it is repugnant to the First Amendment for the government to force companies to denounce their own products, whether through explicit statements or implicit ideological connotations. *See Pac. Gas*, 475 U.S. at 9; *Stuart v. Camnitz*, __ F.3d __, 2014 WL 7237744, at *4, *12 (4th Cir. Dec. 22, 2014) (holding that requiring abortion providers to describe the fetus violates the First Amendment because "[w]hile it is true that the words the state puts into the doctor's mouth are factual, that does not divorce the speech from its moral or ideological implications," and the compelled statement would "render[] the physician the mouthpiece of the state's message").

2. The Compelled Speech Is Not Factual Or Uncontroversial Because It Is Highly Misleading.

Second, the compelled statement is not "purely factual and uncontroversial" because it is highly misleading, obscuring deep uncertainty regarding the origin of minerals. There are often "ten, twelve, or even more layers of intermediaries between the mines" and the final manufacturer who must make the statement. JA432. As a result, the companies subject to the rule 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). The rule requires companies who are unable to determine the origin of the minerals to 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).

Because of the breadth of this requirement, many companies forced to make the statement would have, at most, an exceedingly remote connection to the DRC, and likely no connection at all. For instance, the SEC has asserted that a company would be compelled to state that its product had not been found "DRC conflict free" if there were just a five percent chance that the minerals could have originated in the region. JA840. Further, the SEC has taken the position that a company would be compelled to make this statement if a single part contained a trace amount of a mineral remaining from the use of a catalyst by a sub-supplier during production, even if the company had no advance knowledge the mineral would be used and no way to verify its origin. *See* 77 Fed. Red. at 56,297. The compelled statement that such products have not been found "DRC conflict free" is designed to convey the inaccurate and stigmatizing impression that there is likely to be some material connection between the products and the DRC conflict.

The SEC nonetheless argues that the statement is purely factual and uncontroversial because it is literally true that the products "have not been found to be 'DRC conflict free'"—"an issuer has either 'found' that its products 'do not contain' such minerals or it has not." SEC Br. 14. A number of cases, however, have rejected the contention that the government may force companies to make highly misleading statements as long as those statements are not literally false. *R.J. Reynolds*, for instance, recognized that the graphic cigarette warning labels were not "patently false," yet held that they were not purely factual and uncontroversial because they were "subject to misinterpretation." 696 F.3d at 1216-17. Similarly, in *CTIA* the district court recognized that all of the compelled statements about cell phone radiation "seem to be literally true, as far as they go," but held that *Zauderer* did not apply because "the overall message . . . is misleading." *CTIA—The Wireless Ass'n v. City of S.F.*, 827 F. Supp. 2d 1054, 1060-1062 (N.D. Cal. 2011). The Ninth Circuit agreed that *Zauderer* did not apply because "the ordinance compels statements that are . . . misleading," inaccurately implying "that using cell phones is dangerous." 494 F. App'x at 753-54.

Appellees argue that the compelled statements here are not misleading because the companies can add further statements in their own words to explain the context. But, as the panel recognized, "the right to explain compelled speech is present in almost every such case and is inadequate to cure a First Amendment violation." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 373; *see Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 958

(D.C. Cir. 2013). To force a speaker to convey a misleading governmental message—which the speaker must then attempt to correct through further speech—impermissibly interferes with the speaker's right to shape its own message, including "through silence." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371.

3. The Compelled Statement Is Controversial Because It Forces Companies To Convey A Governmental Position On A Controversial Topic.

In addition, the compelled statement here is controversial because it forces companies to convey a governmental position on a controversial topic—a foreign armed conflict involving human rights atrocities. The compelled statements regarding whether minerals are "DRC conflict free" conveys the government's viewpoint that the mineral trade bears responsibility for the DRC conflict and the human rights atrocities that are occurring. That is not an uncontroversial assertion, but rather a policy conclusion with which many experts disagree.

Indeed, a number of "activists and researchers say that minerals aren't the core cause of Congo's war—that there are other, more powerful factors, such as political and ethnic struggles and conflicts over land." Sudarsan Raghavan, *How a well-intentioned U.S. law left Congolese miners jobless*, Wash. Post Nov. 30, 2014; *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").

B. The Compelled Statement Is Unconstitutional.

The compelled statement violates the First Amendment. As explained above, the *Zauderer* standard is inapplicable because the compelled statement is not purely factual and uncontroversial. And contrary to the SEC's argument, SEC Br. 19-20, *American Meat Institute* casts no doubt upon the panel's holding that the compelled statement fails *Central Hudson* review. The SEC contends that *American Meat Institute* held "that under *Central Hudson* the government is not required to show that its regulation is the least restrictive means to accomplish its purpose." SEC Br. 19. The panel opinion, however, explicitly recognizes this principle, which has long been firmly established. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372. It correctly held that there is not a "reasonable fit between means and ends," because the government presented no evidence that alternative means (such as "a centralized list compiled by the Commission") would be less effective. *Id.* at 372-73.

In any event, the compelled statements are not commercial speech. *See id.* at 372 (reserving this question). Commercial speech "do[es] no more than propose a commercial transaction." *Spirit Airlines, Inc. v. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012). Here, the compelled statement is not made in advertisements or in connection with any sale or transaction, but rather is required to be posted on companies' websites, which typically contain non-commercial speech, and required to

be included in an SEC filing. The statement is also not commercial in nature, but rather relates to conflict in a foreign country. Corporate speakers have full First Amendment protection to speak or remain silent regarding such contentious political subjects. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-77 (1978). Strict scrutiny therefore applies.

Finally, even if *Zauderer* review did apply, the compelled statement would still be unconstitutional because of the insufficient "relationship between the government's identified means and its chosen ends." *Am. Meat Inst.*, 760 F.3d at 25. Although appellants "do not contest that the government's interest in promoting peace and security in the DRC is substantial, even compelling," SEC Br. 17, the rule's highly indirect and attenuated means do not reasonably further that end. Rather, mounting evidence shows that it is counterproductive, impoverishing miners while exacerbating violence in the DRC. *See* 17-18, *supra*; Opening Br. 54-55.

The SEC argues that the fit between means and ends is sufficient because it is "using a disclosure mandate to achieve the goal of informing consumers about a product." SEC Br. 17-18. "Informing consumers," however, is not the purpose of the statute; as the SEC itself found during the rulemaking, the statute's purpose is "to decrease the conflict and violence in the DRC" and "promot[e] peace and security." JA795. Informing consumers (in the hopes that they will boycott products not found to be DRC conflict free) "describes only the *means* by which" the government hopes to accomplish this purpose. *R.J. Reynolds*, 696 F.3d at 1221.

Even if the SEC could assert a new governmental interest of "informing consumers" at this late stage of the litigation, the rule would not satisfy *Zauderer* review because that interest is not substantial. No court has held that a desire to inform consumers is sufficient to compel speech; indeed, if this interest were "alone sufficient, there is no end to the information that states could require manufacturers to disclose." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). There is no historical practice of compelling speech about foreign conflicts, *cf. Am. Meat Inst.*, 760 F.3d at 23, nor does such speech serve consumer health and safety by revealing intrinsic characteristics of a product being purchased, *see Amestoy*, 92 F.3d at 73. Rather, the compelled speech here conveys the government's moral disapproval of a lawful product. This is not a substantial interest, and the compelled statement violates the First Amendment. *See R.J. Reynolds*, 696 F.3d at 1218 n.13 ("we are skeptical that the government can assert a substantial interest in discouraging consumers from purchasing a lawful product").

CONCLUSION

For the foregoing reasons, the panel should reaffirm its holding that the Conflict Minerals Rule and statute violate the First Amendment to the extent they require companies to report to the Commission and to state on their websites that any of their products have "not been found to be 'DRC conflict free.' "

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Respectfully submitted,

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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 20 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
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 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
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