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 et al.,

Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent,

and

AMNESTY INTERNATIONAL OF THE USA, INC. and AMNESTY INTERNATIONAL LIMITED,

Intervenors.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* GLOBAL WITNESS AND FREE SPEECH FOR PEOPLE RESPONSIVE TO THE COURT'S NOVEMBER 18, 2014 ORDER

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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): [1]

(A) Parties and *Amici*: Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the October 30, 2013 Brief for *Amici Curiae* Global Witness and Former Members of the United Nations Group of Experts on the Democratic Republic of the Congo:

Additional *amicus* for Appellees:

Free Speech for People, Inc.

(B) Rulings under Review: The appeal challenges the final order in case 1:13-cv-00635, entered by Judge Robert L. Wilkins on July 23, 2013 and reported at 956 F. Supp. 2d 43 (D.D.C. 2013). The panel granted a petition to rehear its April 14, 2014 opinion reported at 748 F.3d 359 (D.C. Cir. 2014).

(C) Related cases: *Amici* are unaware of any related cases.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than *amicus curiae*) contributed money that was intended to fund the preparation or submission of this brief.

(D) Authority to file *amici curiae* brief: Pursuant to D.C. Circuit Rule 29(b), all parties have consented to the filing of this amicus. *Amici* are filing this brief on the same date as Appellees' brief; this schedule was a condition of Appellants' consent.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Global Witness Limited ("Global Witness") and Free Speech For People, Inc. ("Free Speech For People"), respectively, state that:

1. Global Witness has no parent corporation and no publicly held corporation owns 10% or more of the stock of Global Witness.

2. Free Speech for People has no parent corporation and no publicly held corporation owns 10% or more of the stock of Free Speech For People.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

1. Global Witness Limited ("Global Witness") is a nongovernmental, not-for-profit organization founded in 1993 which investigates and campaigns to prevent natural resource-related conflict, corruption and associated environmental and human rights abuses. For over a decade, Global Witness has carried out extensive research on the minerals trade in the eastern Democratic Republic of the Congo; it has a team of experts who typically spend four months in the region each year. Global Witness regularly publishes the results of its research in reports on the role of tin, tantalum, tungsten and gold originating in the African Great Lakes region in worldwide supply chains.

Global Witness was a strong supporter of Congressional enactment of Section 1502 and was closely involved in the subsequent rulemaking process. It also participated in the drafting and now participates in the implementation of the Organization for Economic Cooperation and Development Due Diligence Guidance incorporated by the SEC rule. Section 1502 reports aid Global Witness in monitoring the quality of companies' due diligence efforts. Global Witness also owns stock in several issuers subject to Section 1502 reporting requirements.

2. Free Speech For People, Inc. ("Free Speech for People") is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy under the First Amendment. Free Speech

For People's thousands of supporters around the country engage in education and non-partisan advocacy to encourage and support effective government of, by, and for the American people. Free Speech For People has a particular history of arguing in defense of public laws against corporate First Amendment challenges, having filed amicus briefs to the United States Supreme Court in *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014) and *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012), and the Montana Supreme Court in *Western Tradition Partnership v. Attorney General*, 271 P.3d 1 (Mont. 2011), *rev. sub nom. Am. Tradition P'ship, supra*.

GLOSSARY

NLRB	National Labor Relations Board
OECD	Organization for Economic Co-operation and Development
SEC	Securities and Exchanges Commission

ARGUMENT

I. THE PANEL'S FIRST AMENDMENT HOLDING WAS OVERRULED.

The en banc Court overruled this panel's only First Amendment holding—that *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985), is limited to disclosure requirements reasonably related to preventing consumer deception. *See Am. Meat Inst.* ("*AMI*") *v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc).[1] The panel also "question[ed]" but it did "not decid[e] whether the information mandated [to be disclosed under Section 1502] was factual and uncontroversial." *AMI*, 760 F.3d at 27 (describing the panel's opinion). Because the briefing had not focused on the First Amendment question or the precise speech required by Section 1502, it was appropriate for the panel not to reach a definite conclusion. In fact, as *amici* explain, *see* Part III.3 *infra*, Section 1502 and its implementing rule do not require use of the very phrase—"not found to be conflict free"—that the panel suggested may be constitutionally objectionable.

II. "FACTUAL AND UNCONTROVERSIAL INFORMATION" INCLUDES ACCURATE STATEMENTS ABOUT FACTS, AS DISTINCT FROM STATEMENTS OF OPINION AND DUBIOUS FACTUAL STATEMENTS.

"Factual and uncontroversial information" refers to statements of fact (as distinct from opinion), the accuracy of which is uncontroversial.[2]

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[1] Section 1502's role in furthering Congress's compelling interests in preventing humanitarian catastrophe in the Congo and protecting and informing investors was discussed in Global Witness's Oct. 30, 2013 *amicus* brief.

[2] The phrase itself does not necessarily have talismanic significance: "[T]he language of an opinion is not always to be parsed as though we were dealing with

Factual: As other circuits have held, "whether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion." *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (controlling opinion of Stranch, J.); *Nat'l Elec. Mfrs. Ass'n ("NEMA") v. Sorrell*, 272 F.3d 104, 114 n.5 (2d Cir. 2001) (drawing same distinction); *accord Zauderer*, 471 U.S. at 651 (disclosure requirement did not "prescribe what shall be orthodox in . . . matters of opinion" (internal citation omitted)); Robert C. Post, *Compelled Commercial Speech*, Draft 2A at 38-40 (accessed Dec. 7, 2014) (discussing the panel's opinion), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504180.

This distinction between mandatory disclosures of fact and mandatory disclosures of opinion in commercial speech[3] makes sense: "[T]he extension of First Amendment protection to commercial speech is justified principally by the

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language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). The Supreme Court has upheld mandatory disclosures under *Zauderer* without using the words "factual and uncontroversial." *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

[3] In contrast to commercial speech, *see Zauderer*, 471 U.S. at 651, when highly protected speech is at stake, the government may not compel either statements of fact or of opinion. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573-74 (1995); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988). But these cases expressly distinguished commercial speech. *See Riley*, 487 U.S. at 796 & 796 n.9 (applying test for "fully protected expression" and noting that "commercial speech is more susceptible to compelled disclosure requirements"); *Hurley*, 515 U.S. at 573 (noting that its holding applies only "outside th[e] context" of commercial speech).

value to [listeners] of the information such speech provides." *Zauderer*, 471 U.S. at 651; *accord Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980). Requiring commercial speakers to make accurate factual statements "furthers the societal interest in the fullest possible dissemination of information." *Cent. Hudson*, 447 U.S. at 561-62; *accord NEMA*, 272 F.3d at 114. By contrast, the compulsion of statements of opinion—opinions the speaker may not even hold—does not sufficiently further the societal interest in the dissemination of information to be constitutional. *Cf. Disc. Tobacco*, 674 F.3d at 554-58.

Uncontroversial: The term "uncontroversial" excludes from *Zauderer*'s scope statements that address "factual" matters but which are false or, at best, highly questionable. *See AMI*, 760 F.3d at 27 (disclosure uncontroversial because speakers "d[id] not disagree with the truth of the facts required to be disclosed").[4] In other words, "uncontroversial" refers to a statement's status as accurate, not the statement's results or its subject matter.

[4] "Uncontroversiality" may also exclude those "factual disclosures that are so one-sided or incomplete," *AMI*, 760 F.3d at 27, that they mislead listeners, and because of their required format, do not permit sufficient additional corrective speech. *See, e.g.*, *CTIA—The Wireless Ass'n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054 (N.D. Cal. 2011) *aff'd in relevant part*, 494 F. App'x 752 (9th Cir. 2012) (holding unconstitutional five-by-eight-inch fact sheet and one-by-two-inch sticker for this reason). There is no limit to the corrective speech that speakers can include in their Section 1502 reports. *See Meese v. Keene*, 481 U.S. 465, 482 (1987) ("the reactions of the public to the [Congressional] label 'political propaganda'" could be adequately cured by additional explanation).

An accurate, factual statement may provide information relevant to a public controversy or even spark such a controversy, without the *statement itself* being "controversial." Many regulatory regimes require disclosure of facts that may provoke controversy or even condemnation, such as "the chairman of our board was convicted of securities fraud," *cf.* 17 C.F.R. § 229.401(f)(2); "the government has opened a criminal investigation into our company," *cf.* 17 C.F.R. § 229.103; "the ignition switches on 800,000 of our vehicles are faulty," *cf.* 49 U.S.C. § 30118(b)(2)(A) & (c), or "[t]he National Labor Relations Board has found that we violated Federal labor law." *Guardsmark, LLC*, 344 NLRB 809, 814 (2005), *enf'd*, 475 F.3d 369, 380 (D.C. Cir. 2007).

Outside the commercial context, courts have recognized that a forced admission that one is a convicted sex offender—a scarlet letter of the highest order—may still involve matters of uncontroversial fact, even if it will cause controversy among neighbors. *Cf. United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) (holding sex-offender self-registration requirement constitutional because it compelled statement of fact, not "ideological belief"); *see also* 42 U.S.C. § 16918 (requiring "all information about each sex offender in the registry" to be "made available on the internet"). In fact, the Supreme Court has upheld disclosure requirements in political speech precisely *because* the disclosed information might cause controversy. *See Citizens United v. Fed. Election*

Comm'n, 558 U.S. 310, 370 (2010) (upholding disclosure requirements because they would allow "citizens [to] see whether elected officials are in the pocket of so-called moneyed interests" (internal citation omitted)). After all, the value of accurate facts to the marketplace of ideas is highest when they are germane to a public controversy.

III. WHETHER INFORMATION IS "UNCONTROVERSIAL" INVOLVES A QUESTION OF LEGISLATIVE FACT, BUT CAN BE DETERMINED HERE WITHOUT EVIDENCE.

1. "Controversiality" is generally a question of legislative fact.

"Controversiality" is a mixed question of fact and law that is best described as one of legislative fact. Legislative facts are those states of affairs "which have relevance to legal reasoning." Fed. R. Evid. 201, Advisory Committee Note. Judicial notice of such facts is common in constitutional litigation. *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (noting instances, including *Brown v. Bd. of Ed.*, 347 U.S. 483, 495 n.11 (1954)). In *Dunagin*, the Fifth Circuit held that facts relevant to a commercial speech analysis should be treated as legislative facts. *Dunagin*, 718 F.2d at 748 n.8.

Legislative facts noticed by courts are treated as matters of law for purposes of appellate review and preclusion doctrine.[5] *See Lockhart v. McCree*, 476 U.S. 162, 170 n.3 (1986) (noting problems with circuit splits and appellate review if

[5] If "controversiality" were treated as a purely factual question, collateral estoppel doctrine would allow successive challenges by non-parties, potentially resulting in inconsistent rulings as to the constitutionality of the same disclosure mandate.

legislative facts were treated otherwise); *Dunagin*, 718 F.2d at 748 n.8 (de novo review preserves the "special role" of appellate courts in "constitutional adjudication"). An appellate court may, however, "in appropriate situations," remand for further evidence on legislative facts to be introduced "through regular channels." Fed. R. Evid. 201 Advisory Committee Note.

2. As the Supreme Court did in *Milavetz* and *Zauderer*, the Court may determine uncontroversiality here without extraneous evidence.

Just as in *Zauderer* and in *Milavetz*, the Court may determine that the statements here are uncontroversial through an inspection of the law itself. The ethical rule in *Zauderer* required that lawyers "disclose that clients will have to pay costs even if their lawsuits are unsuccessful (*assuming that to be the case*)." *Zauderer*, 471 U.S. at 652 (emphasis added).[6] Likewise, here issuers must report that their products have not been "found to be DRC conflict free" *only if* an inquiry pursuant to "a nationally or internationally recognized due diligence framework," Form SD—Item 1.01(c), 77 Fed. Reg. at 56,363, does not find them to be conflict-free.

The panel was concerned that the public may understand the term "DRC conflict-free" as a controversial assessment of moral responsibility. *See* Slip Op. at

[6] In *Milavetz*, the mandated diclosures were uncontroversially accurate descriptions of the Bankruptcy Code. *See Milavetz*, 559 U.S. at 233. *Zauderer*, *Milavetz* and this case are all distinct from a statement such as "cell phone radiation causes cancer," where a court may need evidence—either in the record or subject to judicial notice—to evaluate controversiality.

20. But, first, the statement is simply a factual report on the results of the due-diligence inquiry conducted pursuant to the OECD framework.[7] The moral assessment—to the extent there is any—is embedded in the factual report on the results of the inquiry. In this way, it is no different than a statement that the NLRB has found an employer to have violated the law. *See, e.g.*, *Guardsmark*, *supra.* The issuer is of course free to add additional speech to clarify any ambiguity on this point.

Second, Section 1502 specifies that "DRC conflict-free" means "not contain[ing] minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country." 15 U.S.C. § 78m(p)(1)(A)(ii).[8] Whether a product contains such minerals is a matter of fact, not a controversial assessment of moral responsibility. It may lead some listeners to assess moral responsibility but, in that regard, it is no different from other factual disclosures that may cause controversy. *See supra*, at 4-5.[9]

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[7] In practice, the rule's "nationally or internationally recognized due diligence framework" means the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, (2d ed. 2012) ("OECD Guidance"). *See* 77 Fed. Reg. at 56,281.

[8] The OECD Guidance further specifies how to make this determination. *See* OECD Guidance, Annex II at 21 (defining "direct or indirect support").

[9] In any case, it is doubtful that the public will understand the statement to involve an assessment of moral responsibility: 86% of survey respondents thought that a disclosure that products "had not been found to be 'DRC-conflict free'" expressed a fact, not an opinion. *See* Daniel Herz-Roiphe, *Stubborn Things: An Empirical Approach to Facts, Opinions, and the First Amendment*, 113 MICH. L. REV. FIRST

A court cannot hold a statute unconstitutional because it "assume[s] that the public will attach an unsavory connotation [to one of its defined terms]." *Meese v. Keene*, 481 U.S. 465, 478 (1987). *Meese* held that "it is constitutionally permissible to require foreign agents to inform American viewers that movies made by foreign governments are 'political propaganda' [within the meaning of the Foreign Agents Registration Act]." *Time Warner Entm't Co., L.P. v. F.C.C.*, 93 F.3d 957, 982 (D.C. Cir. 1996). The Act defined "political propaganda" as materials "intended to influence the foreign policies of the United States, or [that] may reasonably be adapted to be so used." *Meese*, 481 U.S. at 470. Because Congress had defined "political propaganda" in this "neutral evenhanded manner," *id.* at 484, "the reactions of the public to the label," *id.* at 482, could not make the statute unconstitutional. After all, the statute did "not prohibit [a distributor] from advising his audience" of the neutral and factual nature of the statutory definition and explaining "that the films had not been officially censured." *Id.* at 480-81.

Here, just as in *Meese*, an issuer is free to correct any public misperception that "DRC conflict free" is a controversial moral censure and not a factual report about whether a due diligence inquiry found that armed groups in the Congo benefitted from certain minerals.

IMPRESSIONS (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530768 (accessed Dec. 7, 2014).

3. Neither Section 1502 nor its implementing rule requires speakers to use the phrase "not found to be DRC conflict free."

Nothing in the statute or the rule requires any speaker to use any variant of the term "DRC conflict free." The SEC regulation, 17 C.F.R. § 240.13p-1, requires issuers to follow the instructions on SEC Form SD. *See* Form SD, 77 Fed. Reg. 56,362-65 (Sept. 12, 2012). The instructions on the form constitute the only source of legal requirements directly binding on issuers required to file reports. They provide in relevant part:

> *Product Description:* Any registrant that manufactures products or contracts for products to be manufactured that have not been found to be ''DRC conflict free,'' as defined in paragraph (d)(4) of this item, *must provide a description of those products*, the facilities used to process the necessary conflict minerals in those products, the country of origin of the necessary conflict minerals in those products, and the efforts to determine the mine or location of origin with the greatest possible specificity.

Form SD Item 1.01(c)(2), 77 Fed. Reg. at 56364 (emphasis added). A statement as simple as "the following products are required to be disclosed pursuant to 15 U.S.C. § 78m(p)(1)(A)(ii) and its implementing rule" followed by a description of the products—such as "Model XYZ handheld cameras manufactured between Dates A and B"—and the other enumerated information would satisfy this mandate.[10] The statute, which directs the SEC to issue regulations, is consistent

[10] The form contains instructions using the term "conflict free," but it also specifies that "[a]ll instructions should . . . be omitted" when the form is filed. Form SD, General Instructions D, 77 Fed. Reg. at. 56,362.

with these instructions. *See* 15 U.S.C. 78m(p)(1)(A)(ii) (an issuer's report must include "a description of the products . . . that are not DRC conflict free" and other enumerated information). In sum, the term "DRC conflict free" is merely a convenient—but optional—label to summarize the results of the due diligence process.

The panel only held Section 1502 and, by extension the rule, constitutionally problematic "to the extent" they required "use of the particular descriptor 'not found to be 'DRC conflict free.'" Slip Op. at 23 at n.13. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Cmty. for Creative Non-Violence v. Watt*, 670 F.2d 1213, 1216 (D.C. Cir. 1982) (applying this canon to regulations). Not only is it "fairly possible" that the statute and rule do not require use of that particular descriptor, that is their most natural reading.

In sum, Section 1502 and its implementing rule require publicly-traded corporations to provide truthful, factual information, based on their own research, about their own products and their own supply chains; they may even choose their own wording. In any event, nothing in the disclosures is controversial or unconstitutional—whether or not the particular descriptor "not found to be DRC conflict free" is required.

Dated: December 8, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I electronically filed the foregoing *Brief of Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's appellate Case Management/Electronic Case Files (CM/ECF) system. Participants in this case who are registered CM/ECF will receive service of this filing by the Court's CM/ECF system.

Pursuant to the Court's November 18, 2014 order, 8 paper copies of this brief will be delivered to the Court via Federal Express.

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