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Nos. 08-1119, 08-1225

In The
Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

UNITED STATES,

Petitioner,

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF PUBLIC GOOD, THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST, THE ENVIRONMENTAL LAW FOUNDATION, AND THE CENTER FOR ENVIRONMENTAL HEALTH AS AMICI CURIAE IN SUPPORT OF RESPONDENT UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES................................iii

INTEREST OF *AMICI*..1

INTRODUCTION AND SUMMARY OF ARGUMENT...4

ARGUMENT..6

I. A DEFERENTIAL STANDARD OF REVIEW APPLIES TO THE DISCLOSURE REGIME IMPOSED BY SECTION 528......................6

  A. The *Zauderer* Standard Reflects The Reasons Commercial Speech Is Protected By The First Amendment.......................7

  B. The *Central Hudson* Test Does Not Apply To Mandatory Factual Disclosures.........11

  C. Strict Scrutiny Does Not Apply to Mandatory Factual Disclosures.............15

  D. The Disclosures At Issue Here Are Governed By *Zauderer*..........................17

II. INCREASING THE LEVEL OF SCRUTINY FOR DISCLOSURES OF FACTUAL COMMERCIAL INFORMATION WOULD DISRUPT A BROAD AND EXTENSIVE REGULATORY FRAMEWORK.....................21

A. Mandatory Disclosure Laws Are Essential For Consumer Protection......................23

1. Health and safety...........................24

2. Consumer finance............................25

3. Other matters of consumer interest…26

B. Mandatory Disclosure Laws Promote Transparent And Efficient Markets........28

CONCLUSION..30

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)....8

Abramson v. Gonzalez, 949 F.2d 1567, 1577 (11th Cir. 1992)....10, 13

Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977)....12, 19

Borgner v. Brooks, 284 F.3d 1204, 1213-14 (11th Cir. 2002)....13, 15

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)....*passim*

Commodities Futures Trading Comm'n v. Vartuli, 228 F.3d 94 (2d Cir. 2000)....29

Connecticut Bar Ass'n v. United States, 394 B.R. 274 (D. Conn. 2008)....19

Douglas v. State, 921 S.W.2d 180 (Tenn. 1996)....19

Edenfield v. Fane, 507 U.S. 761 (1993)....8

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)....7

Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743 (5th Cir. 2008)....17

Ibanez v. Florida Dept. of Bus. & Prof'l Regulation, 512 U.S. 136 (1994)............................18, 19, 20

In re R.M.J., 455 U.S. 191 (1982).........12, 13, 17, 18

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)..16

National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001)..*passim*

New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009)........................6, 10, 14, 15, 19, 29

Parmley v. Missouri Dental Bd., 719 S.W.2d 745 (Mo. 1986)..10

Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990)..8, 20

Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294 (1st Cir. 2005)...............................13, 14, 19, 22, 29

Riley v. Nat'l Fed'n of Blind, 487 U.S. 781 (1988).............................13, 16, 17

Rubin v Coors, 514 U.S. 476 (1995)......................28

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)..8

Thompson v. Western States Med. Ctr., 535 U.S. 357 366 (2002)...8

United States v. Bell, 414 F.3d 474 (3d Cir. 2005)……………………………………………6, 13

United States v. Schiff, 379 F.3d 621 (9th Cir. 2004)……………………………………………6, 13

United States v. Sullivan, 332 U.S. 689 (1948)…….24

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976)…………………………………………4, 7, 8, 12

Walker v. Board of Prof'l Responsibility, 38 S.W.3d 540 (Tenn. 2001)……………………………………10, 15, 18

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)……………………………………16

Wooley v. Maynard, 430 U.S. 705 (1977)……………16

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)……………………………………*passim*

Constitutional Provisions

U.S. Const., amend. I……………………………*passim*

Statutes

11 U.S.C. § 528……………………………………*passim*

15 U.S.C. § 55……………………………………………27

15 U.S.C. §§ 68-68j………………………………………26

15 U.S.C. §§ 69-69j..27

15 U.S.C. §§ 70-70k...27

15 U.S.C. § 77e...28

15 U.S.C § 771..27

15 U.S.C. § 781..21

15 U.S.C. §§ 1601-1667f....................................25

15 U.S.C. § 1333..21

15 U.S.C. §§ 1451-61..26

15 U.S.C. § 1681..26

15 U.S.C. § 1692g..26

21 U.S.C. § 321..27

21 U.S.C. § 343..21

27 U.S.C. § 215..24

29 U.S.C. §§ 1021-1022....................................25

33 U.S.C. § 1318..21

42 U.S.C. §§ 1395i...25

42 U.S.C. §§ 1396r...25

42 U.S.C. § 11023..22

Cal. Civ. Code § 1916.5(a)(6)..............................26

Cal. Health & Safety Code § 25249.6..............22, 25

Cal. Health & Safety Code § 25250......................24

Cal. Health & Safety Code § 110423....................24

Del. Code Ann. tit. 6 § 7314...............................29

Fla. Stat. § 494.0038...26

Haw. Rev. Stat. § 431:10H-216...........................25

Idaho Code Ann. § 41-4605.................................25

Ky. Rev. Stat. Ann. § 286.9-102...........................26

Mass. Gen. Laws ch. 110A, § 202........................29

Mass. Gen. Laws ch. 183 § 63.............................26

Mich. Comp. Laws § 445.1862.............................26

Minn. Stat. § 62A.50...25

Minn. Stat. § 332.57...26

N.D. Admin. Code 13-05-01-04...........................26

N.H. Rev. Stat. Ann. § 421-B:17-a.......................29

N.M. Stat. § 59A-57-4...25

Nev. Rev. Stat. Ann. § 604A.435.........................26

N.Y. Envtl. Conserv. Law § 33-0707................22, 24

N.Y. Gen. Bus. 359-e..29

N.Y. Pub. Health Law § 206................................25

N.Y. Pub. Health Law § 2803-c............................25

N.Y. Pub. Health Law § 4408...............................25

Okla. Stat. tit. 36 § 2043......................................25

Vt. Stat. Ann. tit. 6, § 490...................................27

New York City Health Code § 81.50.....................24

Regulations

12 C.F.R., Part 226...25

16 C.F.R. pt. 436...28

21 C.F.R. § 1.21..24

21 C.F.R. § 202.1...22

29 C.F.R. § 1910.1200..22

Other Authorities

O. Dennis Hernandez, Jr., *Broker-Dealer Regulation Under the New Penny Stock Disclosure Rules: An Appraisal*, 1993 Colum. Bus. L. Rev. 27............28

Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977)..23

Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000).................9

Daniel D. Rubino, *et al.*, *Corporate and Securities Law Update*, 67 PLI/NY 11 (1999).....................28

David S. Rudner, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 Pace L. Rev. 39 (2005).......28

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INTEREST OF *AMICI*

Public Good, the Center for Science in the Public Interest, the Environmental Law Foundation, and the Center for Environmental Health submit this brief as *amici curiae* in support of the United States.[1] The brief is limited to the question of what standard should govern First Amendment review of mandated factual commercial disclosures like those at issue in this case.

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through amicus participation in cases of particular significance for consumer protection, freedom of speech, and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. As an organization with a particular interest in both safeguarding consumers and maintaining free speech, Public Good submits this brief to explain why well-established precedent – as well as the reliance of vast sectors of the United States economy on a constitutional regime permitting robust commercial disclosure requirements – counsel in favor of maintaining the current deferential standard of review.

The Center for Science in the Public Interest (CSPI) is a non-profit organization founded in 1971, with approximately 756,000 members in the United

[1] No counsel for a party authored this brief in whole or in part, and no person, other than *amici*, their members, and their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

States. CSPI has been a strong advocate for nutrition and health, food safety, alcohol policy, and sound science. Its award-winning newsletter, *Nutrition Action Healthletter,* with some 900,000 subscribers in the United States and Canada, is the largest-circulation health newsletter in North America. CSPI has carved out a niche as the organized voice of the American public on nutrition, food safety, health, and other issues. It has long sought to educate the public and to advocate government policies that are consistent with scientific evidence on health and environmental issues. It supports menu labeling information, ingredient and nutritional information on packaged foods, and other forms of mandatory disclosure of facts known only to the seller. These disclosures ensure that consumers are both informed about the content of the foods they buy and not deceived by half-truths in food advertising and labeling. Any further constriction of the role of government in requiring mandatory disclosures would result in less informed consumers, leading to marketplace inefficiency.

Environmental Law Foundation is a recognized nonprofit charitable corporation that provides legal advice and assistance to protect the environment, communities, and consumers against harmful toxics. ELF seeks to improve environmental quality for those most at risk by providing access to information, strategies and enforcement of environmental, toxics, and community right-to-know laws. In the course of that work ELF has for nearly twenty years enforced California laws requiring consumer, product and

safety disclosures to ensure a fully informed and fair marketplace. ELF recently ended years of litigation against school bus operators who operate buses with high levels of diesel engine exhaust in the school bus cabin where the children are. California law mandates that such exposures be accompanied by warnings to children and parents of the presence of that highly toxic substance. When it became clear warnings were going to be required by the court, the school bus operators chose instead to retrofit and replace the offending buses, resulting in cleaner air for not only the children, but the neighborhoods and schools affected by the buses. *See 2009 Clay Awards*, California Lawyer (March 2009), *available at* http://www.callawyer.com/story.cfm?eid =899950&evid= 1&newIssueDate=03-01-2009. This outcome illustrates that disclosure laws can both inform and act as a prod to improve substantive safety and consumer protection.

The Center for Environmental Health is a nonprofit public interest organization, with over 7,000 supporters. Based in Oakland, California, CEH advocates for public health, to prevent pollution, and to protect children, families, and communities from toxic chemicals. CEH challenges government regulations that are not properly protective of the public right to know and public health; litigates to protect consumers exposed to hazardous chemicals in products; and supports communities in their struggles for cleaner environments. CEH provides information to its supporters and the general public regarding legislative, regulatory, and policy issues that affect health and the environment, including commenting

on federal and state pesticide policies; effective corporate campaigns to protect public health; and ways families can protect themselves from the toxic chemicals in air, water, food, and consumer products. CEH coordinates CHANGE (Californians for a Healthy and Green Economy), a statewide chemicals policy reform coalition. CEH also serves as a lead partner in worldwide coalitions such as Health Care Without Harm.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty-five years ago, in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court set out the standard for constitutional review of mandatory commercial disclosures of factual information. That standard affords considerable deference to government efforts to compel disclosures in the commercial context. The Court recognized not only that such disclosures may prevent consumer deception, but also that they contribute to, rather than detracting from, the stream of beneficial commercial information. By fostering more speech rather than less, 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 this Court has disfavored since it first extended First Amendment protection to commercial speech. A disclosure regime allows consumers to take more responsibility for their financial future, not less. It provides them with information that they would not otherwise have. As long as there is a reasonable

relationship, therefore, between a particular set of disclosures and the interest that the government seeks to serve, and as long as those disclosures are not unduly burdensome or otherwise unjustified, *Zauderer*, 471 U.S. at 650-51, the disclosures comport with the requirements of the First Amendment.

Petitioners' attempts to replace the *Zauderer* standard with some form of heightened scrutiny make little sense in the context of this case or in the wider marketplace. Neither intermediate nor strict scrutiny has any place in the review of factual commercial disclosure requirements. Adopting either of these standards would severely threaten not only the disclosure regime at issue in this case but also the entire edifice 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 securities registration requirements.

Because these laws serve so many useful, even essential, functions, both for consumers and for the economy as a whole, only the most compelling concerns could justify adopting a new standard that would threaten their continued application. Nothing in the facts of this case, or in the arguments raised by petitioners, presents any such reason. Indeed, to adopt a heightened standard would be to elevate the interest of the speaker in suppressing facts over that of the audience in being informed. That is an inversion of what the First Amendment requires.

The Court should affirm that the *Zauderer* standard remains applicable both in this case and in any review of compelled disclosure of factual commercial information.

ARGUMENT

I. A DEFERENTIAL STANDARD OF REVIEW APPLIES TO THE DISCLOSURE REGIME IMPOSED BY SECTION 528.

The proper standard for judicial review of mandatory factual disclosures in commercial contexts has been settled for a quarter of a century. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court established a deferential rule of review that has guided courts, legislatures, regulatory agencies, and businesses ever since. A governmental requirement that factual commercial information be disclosed is valid "as long as [the] disclosure requirements are reasonably related to the state's interest" and are not "unjustified or unduly burdensome." *Id*. at 651.

Mandatory disclosures in commercial contexts are reviewed according to the *Zauderer* "reasonable relationship" standard. *See, e.g., New York State Rest. Ass'n v. New York City Bd. of Health* [hereinafter *NYSRA*], 556 F.3d 114, 132 (2d Cir. 2009) (under *Zauderer*, "rules mandating that commercial actors disclose commercial information" are subject to "more lenient review"); *United States v. Bell*, 414 F.3d 474, 485 (3d Cir. 2005) (per *Zauderer*, in commercial setting, the government "may impose reasonable regulations on content to prevent deception of customers"); *United States v.*

Schiff, 379 F.3d 621, 631 (9th Cir. 2004) (applying *Zauderer* standard) ("mandated disclosure of factual, commercial information does not offend the First Amendment").

The mandatory disclosure provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 11 U.S.C. § 528(a)(4) and (b)(2)(B), should be reviewed – and upheld – under this standard.

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

Applying a more lenient standard to commercial speech disclosures than to commercial speech restrictions accords with the reason that advertising receives constitutional protection in the first place: to "insure that the flow of truthful and legitimate commercial information is unimpaired." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). This principle formed the foundation upon which the commercial speech doctrine was developed. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected … because it furthers the societal interest in the free flow of commercial information"). And the centrality of the informational role of commercial speech has

remained a constant in the ensuing decades. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357 366 (2002) (First Amendment protection applies to commercial speech because "the free flow of commercial information is indispensable" to the public interest) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 765); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) ("societal interests in broad access to complete and accurate commercial information [are what] First Amendment coverage of commercial speech is designed to safeguard"); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (First Amendment protects "the free flow of commercial information").

A deferential standard for government disclosure regimes springs directly from this principle. When government "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion). "[T]he preferred remedy [for potentially misleading speech] is more disclosure rather than less." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990) (plurality opinion). Accordingly, it is "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24. "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).

The *Zauderer* standard represents the application of these basic principles underlying this Court's commercial speech jurisprudence. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," 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 added).

Lower courts have readily applied this reasoning, emphasizing the distinct consequences of commercial disclosure requirements and restrictions on commercial speech:

> [M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and

> free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.

National Elec. Mfrs. Ass'n v. Sorrell [hereinafter *NEMA*], 272 F.3d 104, 113-14 (2d Cir. 2001) (*accord NYSRA*, 556 F.3d at 132; *see also Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992) ("To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information").

State courts, too, have adopted and relied on the reasoning of *Zauderer*. *See, e.g., Walker v. Board of Prof'l Responsibility*, 38 S.W.3d 540, 546 (Tenn. 2001) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal") (quoting *Zauderer*); *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 752 (Mo. 1986) ("The interests of the State, by requiring 'factual and uncontroversial information' about the services involved, are advanced at no significant cost to the

disclaimant's first amendment rights. More important is the value to consumers of the greater information conveyed").

B. The *Central Hudson* Test Does Not Apply To Mandatory Factual Disclosures.

Petitioners argue, unavailingly, that the disclosures mandated by section 528 of Title 11 should be assessed according to this Court's standard for reviewing *restrictions* on commercial speech, set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Precisely this argument – in the specific context of attorney advertising – already was made and explicitly rejected by this Court in *Zauderer*.

The attorney petitioner in *Zauderer* argued "that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contend[ed] that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so." 471 U.S. at 650.

The Court in *Zauderer* explicitly rejected this argument. The attorney petitioner, the Court observed, "overlook[ed] material differences between disclosure requirements and outright prohibitions on speech." *Id*. at 650. 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.

> [I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'

Id. at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982); *citing Central Hudson Gas & Electric,* 447 U.S. at 565; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Virginia State Bd. of Pharmacy,* 425 U.S. at 772, n. 24).

For this reason the Court explicitly held that the *Central Hudson* standard should not apply in the case of commercial disclosures of factual information. Instead, a "reasonable relationship" test should apply in cases where the government has not prohibited or restricted the flow of commercial information but rather has simply required advertisers "to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650.

Lower courts have been no less explicit. *See NEMA*, 272 F.3d at 115 ("*Zauderer*, not *Central Hudson*, describes the relationship between means and ends demanded by the First Amendment in

compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that restrict commercial speech"; *id.* at 113 (to apply *Central Hudson* to a disclosure requirement is to "misperceiv[e] the proper standard."). *See also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (applying *Zauderer* standard to compelled commercial disclosures); *Bell*, 414 F.3d at 485 (same); *Schiff*, 379 F.3d at 631 (same).[2]

Petitioners seek to circumvent the conclusion that *Central Hudson* is inapplicable to compelled disclosures by proposing a novel two-tier standard, according to which the *Zauderer* standard applies only where the compelled disclosures are necessary to prevent deception or substantial likelihood of consumers being misled, and *Central Hudson* applies otherwise. Pet. Br. at 78-79. But Petitioners' alleged precedents for applying *Central Hudson* in cases not threatening deception concern either restrictions on commercial speech, *In re R.M.J.*, 455 U.S. 191,[3] or fully protected, non-commercial speech, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), and hence

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[2] The Eleventh Circuit, while applying the full *Central Hudson* test to mandatory disclosure regimes contrary to the explicit holding of *Zauderer,* has nevertheless upheld the challenged regimes by emphasizing the greater leniency accorded disclosures as opposed to restrictions on speech. *See Borgner v. Brooks*, 284 F.3d 1204, 1213-14 (11th Cir. 2002); *Abramson*, 949 F.2d at 1577.

[3] In fact, in striking down the restrictions at issue, the Court in *In re R.M.J.* suggested that instead "a warning or disclaimer might be appropriately required." 455 U.S. at 201.

are inapplicable. Petitioners' argument finds no support in the language or reasoning of *Zauderer*.

Indeed, *Zauderer* explicitly rejected the argument that the State needed to "establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception [and] that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so." 471 U.S. at 650. The Court's recognition that commercial disclosure requirements serve First Amendment interests in the free flow of information is not confined to cases of potential deception.

Lower courts have likewise rejected the strained interpretation of *Zauderer* proposed by Petitioners. "*Zauderer's* holding was broad enough to encompass … disclosure requirements" not concerned with preventing consumers from being misled. *NYSRA*, 556 F.3d at 133. *See also NEMA*, 272 F.3d at 115 (noting that *Zauderer* applied even though the "compelled disclosure at issue . . . was not intended to prevent 'consumer confusion or deception' per se, but rather to better inform consumers"). Indeed, the First Circuit in 2005 "found *no* cases limiting *Zauderer*" to "potentially deceptive advertising." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 310 n.8 (emphasis added).

The principle that, in the context of commercial speech, mandatory factual disclosures are scrutinized more leniently than are restrictions

on speech is widely recognized. *See Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002 (following *Zauderer*) ("Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech"); *NYSRA*, 556 F.3d at 132 (applying *Zauderer*) ("rules mandating that commercial actors disclose commercial information" are subject to "more lenient review than regulations that restrict accurate commercial speech"); *Walker*, 38 S.W.3d at 546 (citing *Zauderer*) ("The fact that the regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment").

C. Strict Scrutiny Does Not Apply to Mandatory Factual Disclosures.

If the heightened scrutiny of *Central Hudson* has no place in the analysis of section 528, then strict scrutiny is even less appropriate. Yet in support of heightened scrutiny for the disclosure requirements of section 528, petitioners attempt to analogize this case to a variety of cases in which this Court applied the most stringent level of scrutiny. Pet. Br. at 76-84. These arguments were all made, and rejected, in *Zauderer*.

Like Philip Q. Zauderer in 1985, petitioners liken their situation to that of speakers refusing to violate their own consciences by mouthing a political

message prescribed by the government. Pet. Br. at 76-77. And like Mr. Zauderer's, petitioners' sallies are readily met. "[T]he interests at stake in [commercial disclosures] are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*." *Zauderer*, 471 U.S. at 651. In contrast to the rights of freedom of conscience violated by compelled statements of personal belief, "[t]he right of a commercial speaker not to divulge accurate information about his services is not . . . a fundamental right." *Id.*; *see also NEMA*, 272 F.3d at 114 ("[T]he individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state, are not ordinarily implicated by compelled commercial disclosure") (citations omitted). To the contrary, "required disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." *NEMA*, 272 F.3d at 114.

Petitioners' reliance on *Riley*, 487 U.S. 781, is of no greater avail. Strict scrutiny was applied in *Riley* only because the compelled disclosures were analyzed as noncommercial speech. *See id.* at 796 (finding that the charitable solicitors there engaged in "fully protected expression" rather than "[p]urely commercial speech"). In fact the Court in *Riley* explicitly noted that commercial speech is "more susceptible to compelled disclosure requirements." *Id.* at 796 n.9 (citing *Zauderer*); *see also Bell*, 414

F.3d at 479-80 (noting distinction in *Riley*). Petitioners have not argued that the advertising disclosures at issue in the present case are anything other than commercial speech.[4]

In urging heightened scrutiny for mundane mandatory commercial disclosures, Petitioners here advance a radical new notion: that the interest of a commercial speaker in suppressing facts outweighs the interest of an audience in receiving accurate commercial information. That is a notion that does not comport with the First Amendment.

D. The Disclosures At Issue Here Are Governed By *Zauderer*.

The advertising disclosures mandated by section 528 fall comfortably within the category of disclosures covered by the *Zauderer* standard. This Court has repeatedly endorsed the use of similar disclosures in the context of professional advertising. *See Zauderer*, 471 U.S. at 650-51 (upholding requirement that attorney state in advertisements that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful); *In re R.M.J.*, 455 U.S. at 201 ("a warning or disclaimer might be appropriately required . . . in order to dissipate the possibility of consumer confusion or

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[4] The Fifth Circuit in *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008) appears to have applied the strict scrutiny of *Riley* to the disclosure requirements of BAPCPA, even while finding that the requirements withstood that scrutiny. For the reasons stated explicitly in *Riley*, however, there is no reason to apply strict scrutiny to the commercial disclosures at issue here.

deception. '[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture[;] the preferred remedy is more disclosure, rather than less'") (quoting *Bates*, 433 U.S. at 375 (1977)) (footnotes omitted).

In this case the required disclosures are straightforward: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." As in this Court's earlier cases, the disclosures required by sections 528(a)(4) and (b)(2) are targeted at "dissipat[ing] the possibility of consumer confusion or deception." *In re R.M.J.*, 455 U.S. at 201. Whether they succeed in this endeavor is a matter of deference to Congress, subject only to *Zauderer*'s requirement that the requirements be "reasonably related to the State's interest in preventing deception of consumers"[5] and not "unjustified or unduly burdensome."

To say that compelled factual disclosures are analyzed according to the *Zauderer* standard is not to say that they are immune from meaningful First Amendment review. *See Walker*, 38 S.W.3d at 546 ("Of course, the state must always meet its burden of justifying the need for regulation in the first place"; disclosure requirements will not be upheld if "unduly burdensome"). In *Ibanez v. Florida Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994), for example, this Court found unconstitutional a Florida provision that, among other things, prohibited accountants

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[5] As noted, the applicability of the *Zauderer* standard is not confined to only those disclosure regimes whose purpose is to prevent deception. *See, e.g., NEMA*, 272 F.3d at 115.

from advertising themselves as certified specialists without certain detailed disclaimers. *Id*. at 146-49. Quoting *Zauderer*, the Court noted that "in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing 'unduly burdensome disclosure requirements [that] offend the First Amendment.'" *Id*. at 146. In the particular circumstances of that case, however, the Court found that the level of detail required in the disclaimer was unduly burdensome, because it "effectively rule[d] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id*. at 146-47. In addition, the Court found the regulation "unjustified," given regulators' "failure … to point to any harm that is potentially real, not purely hypothetical." *Id*. at 146. *See Douglas v. State*, 921 S.W.2d 180, 188 (Tenn. 1996) ("[W]e read *Ibanez* to mean that the disclaimer violated the First Amendment simply because it was 'unduly burdensome' under the *Zauderer* analysis").

It is true that in general, there are relatively few cases in which "unjustified or unduly burdensome disclosure requirements" offend the First Amendment by "chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. Certainly, the great majority of disclosure regimes that have been reviewed under the *Zauderer* standard have passed constitutional muster. *See, e.g.*, *NYSRA*, 556 F.3d 114; *NEMA*, 272 F.3d 104; *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294; *Connecticut Bar Ass'n v. United States*, 394 B.R. 274 (D. Conn. 2008). The reason for the relative paucity of successful

challenges may lie in the fact that a regime favoring disclosures rather than limitations on speech comports fully with the principles underlying the First Amendment.

In the present case, the disclosures mandated by section 528 especially with the limiting construction proposed by the government, do not exhibit the shortcomings found objectionable in *Ibanez*. In contrast to the agency record found "bare" of justification in *Ibanez*, 512 U.S. at 148, the legislative record here includes ample evidence of attorneys engaging in precisely the sort of advertising that the disclosures were designed to remedy. *See* U.S. Br. at 21. Nor are the disclaimer requirements "unduly burdensome," given their simplicity and the flexibility offered by permitting debt relief agencies to make a "substantially similar statement" to the one mandated. 11 U.S.C. § 528(a)(4) and (b)(2)(B). Lawyers as to whom the disclosures as written would not be wholly accurate are free to craft a "similar" statement or to supplement the required statement – to employ, that is, "more disclosure rather than less." *Peel*, 496 U.S. at 110. It is difficult to see how the First Amendment is violated by this regime.

In any event, regardless of whether this Court finds that the disclosure requirements pass muster, it is clear that *Zauderer* provides the standard under which they are to be reviewed.

II. INCREASING THE LEVEL OF SCRUTINY FOR DISCLOSURES OF FACTUAL COMMERCIAL INFORMATION WOULD DISRUPT A BROAD AND EXTENSIVE REGULATORY FRAMEWORK.

It is not only precedent in the juridical sense that dictates the application of the *Zauderer* standard here. Upon the foundation of *Zauderer* and the principles it embodies, the federal government and the states have erected "a vast regulatory apparatus" designed to prevent deceptive commercial speech and to compel additional useful disclosures. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 153. To alter that foundation "would work a sea change in this area of regulation," *id*. at 155, disrupting the well-established and pervasive disclosure regimes that govern American markets and protect the nation's consumers.

The Second Circuit has noted "the potentially wide-ranging implications" of a First Amendment complaint similar to that in this case:

> Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. See, e.g., … 15 U.S.C. § 781 (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of

> pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.

NEMA, 272 F.3d at 116.

Statutes, regulations and ordinances compelling commercial disclosures are ubiquitous. "There are literally thousands of similar regulations on the books – such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the

taxpayer…." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 316 (Boudin, C.J., concurring).

These regulations serve a wide variety of purposes in addition to the prevention and remedying of deceptive advertising. Even a brief sampling of those purposes, and the laws that implement them, illustrates why "[t]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Id*.

A. Mandatory Disclosure Laws Are Essential For Consumer Protection.

Government disclosure regimes intended to protect consumers are pervasive at both the federal and state levels. The Federal Trade Commission imposes mandatory disclosure rules in such 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).

Indeed, statutory consumer protection regimes relying on mandatory disclosures encompass a wide variety of subject matter areas. A sampling of these laws reveals their variety and the degree to which consumers rely on mandated disclosures every day.

1. Health and safety.

Numerous health and safety-related disclosure laws are in place at the federal, state and local levels.

These include required warnings on potentially dangerous products. *See, e.g.,* 27 U.S.C. § 215 (requiring warning label on alcohol bottles); Cal. Health & Safety Code § 110423 (prohibiting the sale or distribution of certain products containing ephedrine group alkaloids unless the product label clearly and conspicuously contains certain statements and warnings); New York Envtl. Conserv. Law § 33-0707 (authorizing regulators to require disclosure of pesticide formulas); *United States v. Sullivan*, 332 U.S. 689, 693 (1948) (upholding federal law requiring warning labels on "harmful foods, drugs and cosmetics"); *NEMA*, 272 F.3d at 113-16 (rejecting First Amendment challenge to Vermont statute requiring that mercury-containing light bulbs be packaged with labels advising consumers that the bulbs contained mercury and should be disposed of as hazardous waste); 21 C.F.R. § 1.21 (1996) (authorizing Food and Drug Administration to require disclosure of material facts to avoid misleading labeling of food, drugs, or devices).

They also include menu labeling laws, *e.g.*, New York City Health Code § 81.50, laws requiring identification of and notification of proper disposal of hazardous waste, *e.g.*, Cal. Health & Safety Code § 25250.25, and laws mandating warnings of potential

exposure to certain hazardous substances). *E.g.*, Cal. Health & Safety Code § 25249.6.

Health maintenance organizations and other health plan providers must disclose the terms of the services they offer. *See, e.g.,* 29 U.S.C. §§ 1021-1022 (federal summary plan description requirement); N.Y. Pub. Health Law § 4408 (state HMO coverage disclosures); N.Y. Pub. Health Law § 2803-c(3) (enumerating "rights and responsibilities" to which patients are entitled); N.M. Stat. § 59A-57-4 (same). *See also* N.Y. Pub. Health Law § 206(1)(r) (mandating that all hospitalized patients receive a booklet upon admission explaining their rights). Nursing homes must meet similar requirements regarding residents' rights. 42 U.S.C. §§ 1395i-3(c)(1)(B), 1396r(d)(6).

Providers of long-term care insurance are in many states required to provide certain disclosures as a condition of marketing their products. *See, e.g.*, Okla. Stat. tit. 36 § 2043; Minn. Stat. § 62A.50; Idaho Code Ann. § 41-4605. They may even be required to disclose the tax consequences of purchasing such insurance. *See, e.g.*, Haw. Rev. Stat. § 431:10H-216.

2. Consumer finance.

Mandatory factual disclosure regimes pervade the law of consumer finance. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1667f, and Regulation Z, 12 C.F.R., Part 226 (requiring creditors to make written disclosures of all finance charges and related aspects of consumer credit transactions, including disclosing finance charges

expressed as an annual percentage rate); Ky. Rev. Stat. Ann. § 286.9-102 (requiring compliance with federal TILA disclosures); Mich. Comp. Laws § 445.1862 (same); Nev. Rev. Stat. Ann. § 604A.435 (same); Cal. Civ. Code § 1916.5(a)(6) (requiring a statement in "at least 10-point boldface type, consisting of the following language: Notice to borrower: This document contains provisions for a variable interest rate"). Mortgage brokers are required by state law to make specific additional disclosures relating to loan fees and terms. *See, e.g.,* Fla. Stat. § 494.0038; Mass. Gen. Laws ch. 183 § 63; N.D. Admin. Code 13-05-01-04. Debt collectors must disclose to consumers that they are contacting them to collect a debt. *See* 15 U.S.C. § 1692g. Credit repair organizations must provide both federal, *see* 15 U.S.C. § 1681, and state, *see, e.g.*, Minn. Stat. § 332.57, disclosure statements.

3. Other matters of consumer interest.

Disclosure regimes directed to consumer protection extend into virtually every industry. The federal Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (2000), for example, directs the FTC to issue regulations requiring that all consumer commodities other than food, drugs, therapeutic devices, and cosmetics be labeled to disclose net contents, identity of commodity, and name and place of business of the product's manufacturer, packer, or distributor. The Wool Products Labeling Act, 15 U.S.C. §§ 68-68j, requires that wool product labels indicate the country in which the product was processed or manufactured and that mail order promotional materials clearly and conspicuously

state whether a wool product was processed or manufactured in the United States or was imported. The Fur Products Labeling Act, 15 U.S.C. §§ 69-69j, requires that articles of apparel made of fur be labeled and that invoices and advertising for furs and fur products specify, among other things, the true English name of the animal from which the fur was taken and whether the fur is dyed or used. The Textile Products Identification Act, 15 U.S.C. §§ 70-70k, requires that any textile fiber product processed or manufactured in the United States be so identified and that mail order promotional materials clearly and conspicuously indicate whether a textile fiber product was processed or manufactured in the United States or was imported. And a provision of Vermont law requires particular labeling disclosures for all maple syrup sold in the state. Vt. Stat. Ann. tit. 6, § 490.

In addition, various federal agencies are authorized to treat material omissions from advertisements as actionably misleading. *See* 15 U.S.C. § 55 (authorizing FTC to determine falsity based on "the extent to which the advertisement fails to reveal facts material in light of representations" made).; 21 U.S.C. § 321(n) (authorizing Food and Drug Administration "to determine misbranding based on the extent to which the labeling fails to reveal facts material in the light of . . . representations"); 15 U.S.C § 771 (providing for liability when a securities prospectus knowingly or negligently "omits to state a material fact necessary in order to make the statements [made], in the light of the circumstances under which they were made, not misleading").

B. Mandatory Disclosure Laws Promote Transparent And Efficient Markets.

Disclosure regimes that rely on the deference of the *Zauderer* standard pervade not just consumer transactions but the entirety of the American economy. Disclosures are no less crucial to investors than to consumers. *See, e.g.,* David S. Rudner, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 Pace L. Rev. 39, 64 (2005) (discussing benefits to market efficiency of SEC's required disclosure rules). Indeed, the whole of the securities industry is premised on "transparency" – that is, required disclosure of factual information. *See, e.g.,* Promulgation of Trade Regulation Rule, 43 Fed. Reg. 59,614, 59,638 (Dec. 21, 1978) (codified at 16 C.F.R. pt. 436) ("By establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings"); Daniel D. Rubino, *et al.*, *Corporate and Securities Law Update*, 67 PLI/NY 11, 51 (1999) ("One of the principal goals underlying SEC regulation ... is the fostering of market transparency"); O. Dennis Hernandez, Jr., *Broker-Dealer Regulation Under the New Penny Stock Disclosure Rules: An Appraisal*, 1993 Colum. Bus. L. Rev. 27, 29 (appraising adequacy of federal regulation "in providing meaningful disclosure and market transparency" in over-the-counter stock market"). *See also Rubin v Coors*, 514 U.S. 476, 492 n.1 (1995) (Stevens, J., concurring in judgment) (noting 15 U.S.C. § 77e (requiring registration statement before selling securities) as example of

beneficial disclosure requirement). Disclosure requirements are an essential component of state blue sky laws as well. *See, e.g.*, Del. Code Ann. tit. 6 § 7314; Mass. Gen. Laws ch. 110A, § 202; N.H. Rev. Stat. Ann. § 421-B:17-a; N.Y. Gen. Bus. 359-e.

Courts have recognized that the entire edifice of securities regulation rests on a deferential regime favoring mandatory disclosures. *See, e.g., Commodities Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 108 (2d Cir. 2000) (upholding disclosure rules of the Commodity Exchange Act because "[t]he disclosure requirement at issue here was reasonably related to the government's interest in preventing ... hypothetical statistical presentations that, as Congress observed, could lead to inefficiencies in the commodities markets that are contrary to the public interest").

The disclosure regimes just surveyed could likely withstand – as various others have withstood – an inquiry into whether they were "unjustified" or "unduly burdensome" under *Zauderer*. *See, e.g.*, *NYSRA*, 556 F.3d 114 (upholding NYC menu labeling ordinance); *Pharm. Care Mgmt. Ass'n*, 429 F.3d 294 (upholding mandated disclosures by pharmacy benefit managers to health benefit providers). There is considerably greater doubt that they could survive heightened scrutiny, or even the threat of an increase in costly litigation posed by raising the level of scrutiny. But there is no doubt at all that our nation is well served by the continued protection which these laws afford to both its economy and its consumers. The First Amendment

interest in the free flow of information is served as well.

CONCLUSION

Even a brief sampling of the myriad disclosure regimes upon which much of the nation's economic activity relies illustrates the critical importance of maintaining a deferential level of First Amendment review for laws requiring factual commercial disclosures. The *Zauderer* standard has for a quarter century allowed disclosure regimes to protect the public by enhancing the flow of commercial information. Neither doctrinal developments in the past twenty-five years nor the particular facts of this case offer any sound reason to abandon that standard. To the contrary, they provide every reason to reaffirm it.

Respectfully submitted,

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October 28, 2009