

2017

## Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of *National Association of Manufacturers v. SEC*

Emma Land

Follow this and additional works at: <http://digitalcommons.law.ou.edu/olr>

 Part of the [Business Organizations Law Commons](#), and the [First Amendment Commons](#)

---

### Recommended Citation

Emma Land, *Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of National Association of Manufacturers v. SEC*, 69 OKLA. L. REV. 519 (2017), <http://digitalcommons.law.ou.edu/olr/vol69/iss3/5>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [darinfox@ou.edu](mailto:darinfox@ou.edu).

## NOTE

### Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of *National Association of Manufacturers v. SEC*

Imagine you have purchased a brand new smartphone. And, as an especially savvy and politically cognizant consumer, you are interested in finding out where your new smartphone comes from. Given news coverage regarding unethically sourced products—from child labor in China to the rise of the fair trade coffee movement in South America—your concern is not novel.<sup>1</sup>

It would probably be valuable to know that the core components that go into constructing electronics like your new smartphone—tungsten, tin, gold, and tantalum—are often sourced from the war-torn region of the Democratic Republic of the Congo (the “DRC”).<sup>2</sup> You might also be interested to know that armed militias often monopolize the mines that produce these minerals so they can sell minerals to U.S. companies and finance their civil war, which has now been raging for more than two decades.<sup>3</sup> The war that they are financing just so happens to be one of the bloodiest conflicts in world history, characterized by extreme levels of gender-specific violence.<sup>4</sup> Unfortunately, browsing the website of your new smartphone’s manufacturer, you find no information on the sources of their electronics. In fact, a recent circuit court decision has affirmatively protected the rights of companies like your smartphone manufacturer to omit this information from their websites under the First Amendment.<sup>5</sup>

Would you still purchase the same smartphone if you knew that, just by purchasing its core components, you could be indirectly funding a humanitarian crisis? If this information would alter your purchasing

---

1. See, e.g., David Barboza, *Despite a Pledge by Samsung, Child Labor Proves Resilient*, N.Y. TIMES (Jul. 10, 2014), <http://www.nytimes.com/2014/07/11/business/international/children-found-working-at-samsung-supplier-in-china.html>; Alison Benjamin, *Fair Dunk'em*, GUARDIAN (Feb. 9, 2006), <http://www.theguardian.com/environment/2006/feb/09/food.fairtrade>.

2. See *What Are Conflict Minerals?*, SOURCE INTELLIGENCE, <http://www.sourceintelligence.com/what-are-conflict-minerals/> (last visited Apr. 15, 2017).

3. See *Eastern Congo*, ENOUGH PROJECT, [http://www.enoughproject.org/conflicts/eastern\\_congo](http://www.enoughproject.org/conflicts/eastern_congo) (last visited Apr. 15, 2017).

4. See *id.*

5. *Nat'l Ass'n of Mfrs. v. SEC (NAM III)*, 800 F.3d 518, 519–24 (D.C. Cir. 2015), *reh'g en banc denied*, No. 13-5252 (Nov. 9, 2015).

decisions, you might find the Court of Appeals for the D.C. Circuit's decision in *National Ass'n of Manufacturers v. Securities Exchange Commission* ("NAM III") unsettling.

In August 2015, a panel of three judges on the D.C. Circuit Court in *NAM III* decided that the Securities Exchange Commission (the "SEC")'s rule requiring companies to publish whether their minerals have been found to be "DRC conflict free" on their websites violated the First Amendment rights of corporations.<sup>6</sup> The SEC promulgated this rule following the express mandate of section 1502 of the Dodd-Frank Act.<sup>7</sup> Although compelled commercial disclosures have long been an accepted and even favored method of regulation, recent First Amendment challenges have cast doubt upon how heavily the government may rely on this method to encourage corporate transparency in publicly traded U.S. companies.<sup>8</sup> Depending on the type of compelled speech at issue, courts have applied varying levels of scrutiny to cases challenging the constitutionality of compelled disclosures. Speech compelled for purposes of avoiding consumer deception and disclosures of purely factual information enjoy a relatively low level of scrutiny, subject only to a rational basis inquiry. However, the D.C. Circuit Court found that conflict minerals disclosures fall outside this realm of lax scrutiny; the court instead applied a more exacting level of scrutiny to strike down these disclosures.<sup>9</sup>

To put it simply, the D.C. Circuit Court got it wrong. The court unnecessarily deviated from its own precedent—decided scarcely over a year before *NAM III*—in which it extended the application of rational basis scrutiny to a wider array of cases, under the justification that a company's constitutional interest in avoiding government-compelled disclosure of purely factual and uncontroversial information is minimal.<sup>10</sup> The court improperly narrowed the scope of that prior decision in holding that rational basis scrutiny applies only to advertising material, it misplaced reliance on finding proof that the SEC's regulation would in fact prove efficacious in alleviating the conflict in the DRC, and it found that the disclosures

---

6. *Id.*

7. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249, & 249b); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p)(1)(A) (2012).

8. *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 541–43 (2012).

9. *NAM III*, 800 F.3d at 521–24.

10. *See* *Am. Meat Inst. v. U.S. Dep't of Agric. (AMI)*, 760 F.3d 18, 22–23 (D.C. Cir. 2014).

required did not convey purely factual information. With its decision, the D.C. Circuit overlooked the negative consequences of its decision on consumers, U.S. policy, and the state of compelled commercial disclosures as a whole. Although the SEC recently decided not to pursue further appeal of the *NAM III* decision,<sup>11</sup> this case widens the circuit split regarding the level of scrutiny that applies to government-compelled disclosures, and its missteps ought to be considered when these issues appear before sister circuit courts.

Consumers deserve to be able to make informed decisions with regard to the products they purchase. In light of the extreme brutality in the DRC and the urgency with which ameliorating steps must be taken, it is imperative that the U.S. government be afforded the ability to use the SEC's disclosure regime to encourage corporate transparency.

This Note proceeds as follows: Part I provides the factual background behind the conflict minerals crisis in the DRC and the enactment of section 1502 and the SEC's Conflict Minerals Rule. Part II traces compelled commercial speech law prior to the D.C. Circuit Court's decision. Part III discusses the litigation surrounding the National Association of Manufacturers' constitutional challenge to section 1502 and the D.C. Circuit Court's ultimate decision that requiring companies to publish whether or not their conflict minerals have been found to be "DRC conflict free" on their websites violates the First Amendment rights of corporations. Finally, Part IV emphasizes the broad impact of the D.C. Circuit Court's decision and highlights the major flaws in the majority's unsound ruling striking down the Conflict Minerals Rule.

### *I. Introduction to the Conflict Minerals Crisis in the DRC and Section 1502 of the Dodd-Frank Act*

#### *A. The DRC Civil War and Conflict Minerals Crisis*

The DRC has never been a stranger to civil war and corruption. Armed groups fighting in the region are eager to capture the vast mineral wealth of the country.<sup>12</sup> However, the most recent conflict, spurred by the 1997 incursion of Rwandan militias aimed at eradicating extremist Hutu forces, has become the center of what some observers have called "Africa's world

---

11. Cory Hester, *SEC Accepts Ruling That Part of Conflicts Minerals Rule Violates Free Speech*, WESTLAW CAP. MKTS. DAILY BRIEFING (Apr. 13, 2016), 2016 WL 1442370.

12. *DR Congo Country Profile*, BBC NEWS, <http://www.bbc.com/news/world-africa-13283212> (last updated Apr. 11, 2017).

war.”<sup>13</sup> This war has become the world’s deadliest conflict since World War II.<sup>14</sup> It has produced 5.4 million deaths, a death toll as catastrophic as the U.S. Civil War, the Vietnam War, and the Korean War, *combined*.<sup>15</sup> Beyond mere death toll, however, this conflict has spawned some of the most notorious human rights atrocities the world has ever seen.<sup>16</sup> The conflict in the DRC is characterized by extreme levels of violence, particularly sexual and gender-based violence, which has risen to the level of an extreme humanitarian crisis in the region.<sup>17</sup>

“Conflict minerals,” including tantalum, tin, gold, and tungsten,<sup>18</sup> are at the center of the DRC crisis. Militant groups have capitalized upon the natural resource-rich nature of the region, largely financing themselves by taking control of local mines and exploiting the mineral trade.<sup>19</sup> After these minerals are extracted from the mines, they can be sold through several intermediaries before ultimately being purchased by large, multinational companies.<sup>20</sup> U.S. companies typically purchase conflict minerals for use in manufacturing various products, including electronics, automobiles, and sports equipment.<sup>21</sup> Companies in the mineral extraction industry indirectly finance these armed groups by purchasing minerals from militant-controlled mines.<sup>22</sup>

#### *B. Passage of Section 1502 of the Dodd-Frank Act and the Conflict Minerals Rule*

The United States has consistently made alleviating the crisis in the DRC a high priority, and in doing so has recognized the necessity for U.S. companies conducting business operations in the DRC region to exercise proper due diligence in determining the supply and chain of custody of

---

13. *Id.*

14. Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, § 101(7), 120 Stat. 3384, 3385; *DR Congo Country Profile*, *supra* note 12.

15. *What Are Conflict Minerals?*, *supra* note 2.

16. *Id.*

17. MICHAEL V. SEITZINGER & KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R 43639, CONFLICT MINERALS AND RESOURCE EXTRACTION: DODD-FRANK, SEC REGULATIONS, AND LEGAL CHALLENGES 1 (2015).

18. 17 C.F.R. pts. 240, 249(b) (2015).

19. *Conflict Minerals*, RAISE HOPE FOR CONGO, <http://www.raisehopeforcongo.org/content/conflict-minerals> (last visited Apr. 15, 2017).

20. *See id.*

21. *What Are Conflict Minerals?*, *supra* note 2.

22. *Conflict Minerals*, *supra* note 19.

conflict minerals.<sup>23</sup> In 2006, Congress enacted the Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, pledging “to make all efforts to ensure that the Government of the Democratic Republic of the Congo . . . is committed to responsible and transparent management of natural resources across the country.”<sup>24</sup>

In order to further facilitate this goal of transparency in the mineral extraction industry, Congress added section 1502 to the Dodd-Frank Act.<sup>25</sup> Section 1502 mandates that the SEC promulgate rules requiring publicly traded companies to conduct due diligence in determining the origins of their minerals and to submit reports to the SEC regarding whether those minerals have been determined to be “DRC conflict free.”<sup>26</sup> After multiple rounds of soliciting commentary and developing proposed rules, the SEC adopted its final rule on August 22, 2012 (the “Conflict Minerals Rule,” or, the “Rule”).<sup>27</sup>

The Conflict Minerals Rule outlines a three-step process: First, the company must decide if it is covered by the Rule.<sup>28</sup> The Rule only applies to publicly traded companies for which conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that company.<sup>29</sup> If the company is covered by the Rule, the second step requires the company to conduct a reasonable country of origin inquiry regarding their minerals.<sup>30</sup> The third and final step depends on the results of the country or origin inquiry. If the results of this inquiry reveal that the company either knows or has reason to believe that its minerals originated in the DRC or an adjoining country, the company must exercise due diligence in determining the source and chain of custody of their conflict minerals.<sup>31</sup> If, after due diligence, the company determines that its minerals did not originate in the covered countries, it still must

---

23. See Press Release, U.S. Dep't of State, Statement Concerning Implementation of Section 1502 of the Dodd-Frank Legislation Concerning Conflict Minerals Due Diligence (July 15, 2011), <http://www.state.gov/documents/organization/168851.pdf>.

24. Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, § 102(8), 120 Stat. 3384, 3386.

25. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p) (2012).

26. *Id.*

27. See Conflict Minerals, 77 Fed. Reg. 56,277–79, 56,365 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249, & 249b).

28. See *id.* at 56,285, 56,287.

29. *Id.* at 56,287–98.

30. *Id.* at 56,310–16.

31. *Id.* at 56,316–17, 56,320–21.

prepare and submit a form to the SEC describing its due diligence efforts.<sup>32</sup> The company may then refer to those minerals as “DRC conflict free.”<sup>33</sup> If, on the other hand, the company reveals that its minerals did originate in the covered countries (or it cannot determine whether its minerals originated in the covered countries), the company must prepare and submit a Conflict Minerals Report to the SEC.<sup>34</sup> Those minerals must be referred to as having “not been found to be 'DRC conflict free.’”<sup>35</sup>

Once the three-step process is complete, the Conflict Minerals Rule requires that companies publish their reports on their public websites.<sup>36</sup> There is, however, no requirement that the information be placed on any physical labeling of the product itself.<sup>37</sup>

The National Association of Manufacturers and other organizations challenged section 1502 and the Conflicts Mineral Rule alleging, among other things, that the required publishing of SEC disclosures on company websites constitutes unconstitutionally compelled corporate speech.<sup>38</sup>

## II. Compelled Commercial Speech

In order to better understand the legal landscape in which section 1502 and the Conflict Minerals Rule operate, a brief overview of compelled commercial speech is necessary. Government-compelled speech is a pervasive component of U.S. consumer culture. One can find required disclosures on nearly any product, from cigarettes and medications to automobiles and electronics. Further, publicly traded companies are required to make an expansive host of disclosures to the SEC regarding various elements of their products.<sup>39</sup> However, while there has been a great deal of analysis broadly pronouncing the right of private individuals to be free from compelled speech, judicial guidance on the matter of compelled speech in the commercial realm is scant.<sup>40</sup>

In 1976, the Supreme Court first announced the right of commercial speech to enjoy First Amendment protection in its *Virginia State Board of*

---

32. *Id.* at 56,313.

33. *Id.*

34. *Id.*

35. *Id.* at 56,281.

36. *Id.* at 56,315–16.

37. *See id.* at 56,323.

38. Nat'l Ass'n of Mfrs. v. SEC (*NAM II*), 748 F.3d 359, 362–65 (D.C. Cir. 2014), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014).

39. *NAM III*, 800 F.3d 518, 531 (D.C. Cir. 2015) (Srinivasan, J., dissenting).

40. Keighly, *supra* note 8, at 541.

*Pharmacy v. Virginia Citizens Consumer Council, Inc.* decision.<sup>41</sup> In doing so, the Court recognized that the “consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>42</sup> However, even though the Court granted First Amendment protection to commercial speech, the Court was careful to note that regulations of commercial speech may be afforded a “different degree of protection,” based on the need to “insure that the flow of truthful and legitimate commercial information is unimpaired.”<sup>43</sup>

The first case to firmly illustrate the degree of protection afforded to commercial speech was *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>44</sup> In *Central Hudson*, the Supreme Court provided a four-part test for analyzing government regulations of commercial speech: (1) the speech must concern lawful activity and must not be misleading, (2) the asserted governmental interest must be substantial, (3) the regulation must directly advance the governmental interest asserted, and (4) the regulation must not be more extensive than is necessary to serve the interest.<sup>45</sup> Courts generally accept that this test represents a type of intermediate scrutiny applied in the context of commercial speech regulations.<sup>46</sup>

Following *Central Hudson*, the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* relaxed the requirements for regulations on *compelled* commercial speech.<sup>47</sup> In *Zauderer*, the Court applied a rational basis standard for compelled commercial speech, noting that while the commercial speech is still afforded First Amendment protections, that protection is lesser than what is required for what the Court deems “noncommercial speech.”<sup>48</sup> The *Zauderer* Court stated that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>49</sup> The Court further emphasized that an advertiser’s “constitutionally protected interest in not providing any

---

41. 425 U.S. 748, 761-62 (1976).

42. *Id.* at 763.

43. *Id.* at 771 n.24.

44. 447 U.S. 557 (1980).

45. *Id.* at 566.

46. *NAM II*, 748 F.3d 359, 372 (D.C. Circuit 2014), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014).

47. 471 U.S. 626, 651 (1985).

48. *Id.* at 637.

49. *Id.* at 651.

particular factual information in his advertising is minimal.”<sup>50</sup> However, though *Zauderer* provided a relaxed approach to regulations of government-compelled commercial speech, the language of the case is less than clear as to the scope of this rational basis approach, including what “types” of compelled commercial speech trigger the *Zauderer* rational basis analysis.<sup>51</sup> This remains an open question, and circuit courts across the country use very different methods of attempting to answer it.<sup>52</sup>

### III. *The National Association of Manufacturers Decisions*

Against the backdrop of this uncertain legal landscape surrounding government-compelled speech, the D.C. Circuit Court was tasked with considering a constitutional challenge to the Conflict Minerals Rule’s requirement that disclosures be posted on a company’s public website.

#### A. *Procedural History and the American Meat Institute Decision*

While this Note primarily concerns the D.C. Circuit Court’s August 2015 ruling in *NAM III*, that decision is the culmination of a long and twisting history of constitutional challenges to the SEC’s Conflict Minerals Rule,<sup>53</sup> which highlights the uncertainty that plagues the realm of compelled disclosure regulation.

Shortly after the SEC’s Conflict Minerals Rule took effect, the National Association of Manufacturers, alongside the Business Roundtable, and the United States Chamber of Commerce (collectively, “the Manufacturers”), filed suit in a D.C. District Court to challenge the constitutionality of the Conflict Minerals Rule’s directives.<sup>54</sup> The Manufacturers alleged, among other things, that the statute and Rule violated the Constitution’s First Amendment guarantee of freedom of speech by requiring a company to publish on its own website that its products are “not DRC conflict free,” even when the company is simply unable to trace its supply chains to

---

50. *Id.*

51. *See* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (applying strict scrutiny when *Zauderer* is found inapplicable); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny when video labeling requirements were found to be outside of the *Zauderer* exception).

52. *Disc. Tobacco City*, 674 F.3d at 559-60 n.8; *Entm’t Software Ass’n*, 469 F.3d at 652.

53. *See* *Nat’l Ass’n of Mfrs. v. SEC (NAM I)*, 956 F. Supp. 2d 43 (D.D.C. 2013), *rev’d in part*, 748 F.3d 359 (D.C. Cir. 2014); *NAM II*, 748 F.3d 359 (D.C. Cir. 2014), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014); *AMI*, 760 F.3d 18 (D.C. Cir. 2014); *NAM III*, 800 F.3d 518 (D.C. Cir. 2015).

54. *See NAM I*, 956 F. Supp. 2d at 46.

determine the minerals' origins.<sup>55</sup> The Manufacturers complained that this requirement forces a company to falsely associate itself with groups involved in human rights violations.<sup>56</sup>

Importantly, although the Manufacturers challenged many aspects of the Conflict Minerals Rule, during the course of trial the Manufacturers confirmed that the only portion of the Rule they challenged under the First Amendment was the requirement that companies publish the conflict minerals sourcing information on their own websites.<sup>57</sup> Thus, the companies essentially conceded that the Rule's requirement that they conduct due diligence procedures in order to produce a disclosure report to the SEC was fully within the government's authority to compel.<sup>58</sup>

In response to the Manufacturer's allegations, the district court held that the statute and the Conflict Minerals Rule withstood all of the constitutional challenges and did not violate First Amendment rights of companies.<sup>59</sup> Notably, this court refused to apply the relaxed *Zauderer* standard, interpreting it to only apply in cases of consumer deception.<sup>60</sup> Instead, the district court applied the stricter *Central Hudson* intermediate scrutiny test, and *still* found that the Rule passed constitutional muster.<sup>61</sup>

On appeal, the D.C. Circuit Court of Appeals reversed, holding that the Conflict Minerals Rule did, in fact, violate the First Amendment rights of companies dealing in conflict minerals.<sup>62</sup> The court of appeals agreed with the district court that the *Zauderer* test was not the appropriate standard of review.<sup>63</sup> This time, however, the court invalidated the Rule under the third prong of the *Central Hudson* test, finding that the Rule was not narrowly tailored.<sup>64</sup> The Rule failed this prong because, in the court's eyes, the SEC did not prove that less restrictive means would fail in advancing the government interest of promoting peace and security in the DRC.<sup>65</sup> The court proposed some means of accomplishing the interest of corporate transparency that it found less restrictive, including allowing the SEC to

---

55. *Id.* at 53.

56. *See id.* at 73.

57. *Id.*

58. *Id.*

59. *Id.* at 81–82.

60. *Id.* at 76–77.

61. *Id.* at 78–80.

62. *NAM II*, 748 F.3d 359, 370–73 (D.C. Cir. 2014), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014).

63. *Id.* at 372.

64. *Id.*

65. *Id.* at 372–73.

analyze the companies' disclosure reports and compile its own, centralized list of which products have been found to be "DRC conflict free."<sup>66</sup> Because the SEC had failed to provide sufficient evidence that such means would fail, the court struck down the Rule's requirement that companies denote whether their conflict minerals are "DRC conflict free" on their own company websites as a First Amendment violation.<sup>67</sup>

This was not the end of the road for the Conflict Minerals Rule, however. In his concurring opinion, Judge Srinivasan noted that a similarly situated case was pending before the D.C. Circuit Court, and suggested the *NAM II* court hold off in deciding whether the *Zauderer* standard could be extended to cover the SEC disclosures until that decision came out.<sup>68</sup> That intervening decision was *American Meat Institute v. U.S. Department of Agriculture* ("AMI").<sup>69</sup>

*AMI* involved a First Amendment challenge to country-of-origin labeling requirements on meat products.<sup>70</sup> The American Meat Institute challenged disclosures required on the packaging of meat products relating to where the animals used in the products were born and slaughtered.<sup>71</sup> The purpose of these disclosures was to aid consumers in making informed decisions when purchasing meat products and was not related to curing alleged consumer deception.<sup>72</sup> The *AMI* court recognized the extent of the confusion among the courts regarding the breadth of the *Zauderer* standard, and took the task of answering the question of "whether the principles articulated in *Zauderer* apply more broadly to factual and uncontroversial disclosures required to serve other government interests [than preventing consumer deception]."<sup>73</sup>

The D.C. Circuit Court in *AMI* ultimately decided that "[t]he language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception."<sup>74</sup> The court was persuaded by the *Zauderer* reasoning that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [and thus, a

---

66. *Id.*

67. *Id.* at 373.

68. *Id.* at 373–75 (Srinivasan, J., concurring in part).

69. 760 F.3d 18 (D.C. Cir. 2014).

70. *Id.* at 21.

71. *AMI*, 760 F.3d at 20–21; see 7 U.S.C. § 1638a (2012).

72. See *AMI*, 760 F.3d at 21.

73. *Id.*

74. *Id.* at 22.

company's] constitutionally protected interest in *not* providing any particular factual information in [its] advertising is minimal.”<sup>75</sup> The D.C. Circuit Court in *AMI* followed its analysis by expressly overruling any cases within its circuit that could be interpreted to hold that *Zauderer* is limited to cases in which the justifying government interest is consumer deception.<sup>76</sup>

In short, under *AMI*'s reformulated and clarified version of the *Zauderer* standard, any government-compelled commercial disclosure of “purely factual and uncontroversial information” renders the speaker's interest in withholding such information “minimal.”<sup>77</sup>

### *B. Petition for Rehearing Granted*

*AMI*'s restated rule cast doubt upon whether *Zauderer*'s rational basis standard should apply to the Conflict Minerals Rule,<sup>78</sup> just as Judge Srinivasan predicted in his dissent to the court of appeals' prior ruling.<sup>79</sup> After *AMI* decided that *Zauderer* could, in fact, be extended beyond the consumer deception context, the D.C. Circuit Court granted the SEC's petition for rehearing in order to determine whether *AMI*'s formulation of the *Zauderer* standard had any effect on its ruling in *NAM II*.<sup>80</sup> Specifically, the *NAM III* court sought to decide whether *AMI*'s broad holding “reaches compelled disclosures that are unconnected to advertising or product labeling at the point of sale.”<sup>81</sup>

Even though the *AMI* court ruled—in direct contrast to what the court of appeals decided in *NAM II*—that the considerably more lenient *Zauderer* standard could apply outside the context of preventing consumer deception, that small window of hope was again quashed by the court of appeals on rehearing.<sup>82</sup> The court held that requiring manufacturers dealing in conflict minerals to publish on their websites whether their conflict minerals are “DRC conflict free” violated the First Amendment.<sup>83</sup>

---

75. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1984) (citation omitted).

76. *AMI*, 760 F.3d at 22.

77. *Id.* at 22–23 (quoting *Zauderer*, 471 U.S. at 651).

78. *NAM III*, 800 F.3d 518, 519–20 (D.C. Cir. 2015), *reh'g en banc denied*, No. 13-5252 (Nov. 9, 2015).

79. *NAM II*, 748 F.3d 359, 373 (D.C. Cir. 2014) (Srinivasan, J., concurring in part), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014).

80. *NAM III*, 800 F.3d at 520-21.

81. *Id.* at 522.

82. *See id.* at 520–21.

83. *Id.* at 521–24.

*C. After AMI: The Court Again Finds that the Conflict Minerals Rule Violates the First Amendment*

After a second round of considering the Manufacturers' challenge to the SEC's Conflict Minerals Rule, the D.C. Court of Appeals upheld its prior ruling, albeit for slightly different reasons. The court again refused to apply the *Zauderer* standard to the Conflicts Mineral Rule.<sup>84</sup> Although *AMI* allows applying rational basis review outside the context of consumer deception, the *NAM III* court found that the *Zauderer* standard is confined to *advertising*, "emphatically and, one may infer, intentionally."<sup>85</sup> The court emphasized *Zauderer*'s language that *AMI* relied upon, holding that "[the advertiser's] constitutionally protected interest in *not* providing any particular factual information *in his advertising* is minimal."<sup>86</sup> In justifying its position, the court cited several Supreme Court decisions in which the Court likewise refused to apply *Zauderer* outside the context of voluntary advertising.<sup>87</sup> In application to the Conflict Minerals Rule, the court found that the required publishing of SEC disclosure material is not within the purview of even the broadened *Zauderer* standard. The court relied upon the SEC's language in its Final Conflict Minerals Rule, which stated that the disclosure regime "[was] 'directed at achieving overall social benefits,' that the law was not 'intended to generate measurable, direct economic benefits to investors or issuers,' and that the regulatory requirements were 'quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve.'"<sup>88</sup> The court of appeals interpreted this language as a concession from the SEC that the case is unrelated to advertising or point of sale disclosures.<sup>89</sup>

Because the court of appeals decided that *Zauderer* did not apply to this case, *Central Hudson* would be the proper standard to follow. However, instead of renewing its analysis into whether the Conflict Minerals Rule withstands *Central Hudson*, the court quickly and simply repeated the reasoning it articulated prior to rehearing, that "the SEC's 'final rule does

---

84. *Id.* at 523–24.

85. *Id.* at 522.

86. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1984) (second emphasis added).

87. *NAM III*, 800 F.3d at 522–23.

88. *Id.* at 522 (quoting Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249, & 249b)).

89. *Id.* at 522.

not survive even *Central Hudson's* intermediate standard.”<sup>90</sup> The Rule was thus found to be an unconstitutional violation of companies’ First Amendment rights.<sup>91</sup>

However, because the court of appeals was sensitive to the “flux and uncertainty of the First Amendment doctrine of commercial speech,” the court decided to buttress its holding with an alternate ground for finding that the Conflict Minerals Rule violates the First Amendment.<sup>92</sup> The court stated that “[e]ven if the compelled disclosures here are commercial speech and even if *AMI's* view of *Zauderer* governed the analysis, we still believe that the statute and the regulations violate the First Amendment.”<sup>93</sup> The court enunciated that the first step in evaluating the constitutional validity of compelled commercial disclosures is to evaluate the adequacy of the governmental interest motivating the rule.<sup>94</sup> The court summarily accepted the SEC’s stated objective of “ameliorat[ing] the humanitarian crisis in the DRC,” and moved on to the second step of *AMI's* test: evaluating the effectiveness of the government’s measure in achieving the interest.<sup>95</sup> In reviewing efficacy of congressional initiatives, particularly in the arena of foreign relations, courts recognize that the political branches possess a greater degree of expertise and understanding on such matters, requiring courts to allow a degree of deference to the judgment of Congress.<sup>96</sup> Based on this reality, in the area of foreign relations, courts’ “conclusions must often be based on informed judgment rather than concrete evidence.”<sup>97</sup> Although the court in this case accepted that mere evidence of the government’s reasoning and judgment could demonstrate this efficacy, it found that the SEC’s efficacy argument did not even rise above the level of “speculation or conjecture.”<sup>98</sup> The court found the SEC’s argument purely speculative despite the fact that the SEC produced statements by multiple members of Congress and the executive branch, evidence of congressional

---

90. *Id.* at 524 (quoting *NAM II*, 748 F.3d 359, 372 (D.C. Cir. 2014), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014)).

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 524–26 (alteration in original) (quoting Brief for Appellee at 26, *NAM III*, 800 F.3d 518 (D.C. Cir. 2015) (No. 13-5252)).

96. *Id.* at 525; *see also* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–36 (2010).

97. *NAM III*, 800 F.3d at 525 (quoting *Holder*, 561 U.S. at 34–35).

98. *Id.* at 525–26.

hearings on the subject, and a United Nations Resolution.<sup>99</sup> The court summarily found this evidence insufficient, and bolstered its finding with evidence collected *after* the Conflict Minerals Rule was enacted, suggesting that the implementation of section 1502 may cause unintended aggravating effects on the humanitarian crisis in the DRC.<sup>100</sup> Ultimately, the court decided that even though the SEC's stated government interest passed intermediate scrutiny, the SEC failed to prove the efficacy of the measure to the degree required under the First Amendment to compel speech.<sup>101</sup>

Although the court decided that the SEC's failure to demonstrate that the Conflict Minerals Rule would in fact alleviate the DRC crisis alone would doom the rule to unconstitutionality, the court chose to further find that, if it were to continue its analysis under *AMI*'s test, the Conflict Minerals Rule would again fail because the compelled disclosures do not represent "purely factual and uncontroversial" information.<sup>102</sup> The court recognized that the *AMI* court "made no attempt to define those terms precisely."<sup>103</sup> Despite its uncertainty as to what "uncontroversial" could mean as it relates to commercial disclosures, the court simply quoted its own language from its prior ruling in deciding that "the description at issue—whether a product is 'conflict free' or 'not conflict free'—was hardly 'factual and non-ideological.'"<sup>104</sup> The court went on to say: "We put it this way: 'Products and minerals do not fight conflicts. The label "[not] conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups.'"<sup>105</sup>

The D.C. Circuit Court essentially rested its decision that the Conflict Minerals Rule's requirement that companies publish on their websites whether or not their conflict minerals have been found to be "DRC conflict free" violates the First Amendment on two findings: (1) section 1502 and the Conflicts Mineral Rule were not supported by sufficient empirical

---

99. *Id.*; see also *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (explaining that, in justifying a restriction on commercial speech, the government cannot rest on "mere speculation or conjecture").

100. *NAM III*, 800 F.3d at 526.

101. *Id.* at 527.

102. *Id.* at 527–30 (quoting *AMI*, 760 F.3d 18, 26 (D.C. Cir. 2014)).

103. *Id.* at 528 (quoting Supplemental Brief for Intervenors at 9, *NAM III*, 800 F.3d 518 (D.C. Cir. 2015) (No. 13-5252)).

104. *Id.* at 530 (quoting *NAM II*, 748 F.3d 359, 371 (D.C. Cir. 2014)).

105. *Id.* (quoting *NAM II*, 748 F.3d at 371).

evidence of efficacy in achieving its goal, and (2) the required disclosure does not constitute factual, uncontroversial information.<sup>106</sup>

The dissent also engaged in a full analysis of the *NAM III* case, but came to differing conclusions at several key junctures. First, the dissent would have found that the relaxed *Zauderer* standard applied to section 1502 and the Conflict Minerals Rule.<sup>107</sup> Upon finding no indication in *Zauderer* or the Supreme Court decisions following *Zauderer* that the relaxed standard was meant to only apply in advertising and product labels,<sup>108</sup> the dissent concluded that *Zauderer* rightfully applies to compelled government disclosure of purely factual and uncontroversial information.<sup>109</sup> The dissent then took up the task of interpreting the proper meaning of “purely factual and uncontroversial” from the *AMI* decision, and was careful to note that the phrase “comes from a judicial opinion, not a statute. And the ‘language of an opinion is not always to be parsed as though we were dealing with language of a statute.’”<sup>110</sup> The dissent ultimately found that the labels “DRC conflict free” or “not been found to be ‘DRC conflict free’” are merely terms of art defined by statute that do nothing more than convey factual information about a particular product’s source.<sup>111</sup> The additional fact that the Rule allows companies the flexibility to explain the context and meaning of the term on their websites makes it unlikely that consumers would be misled into believing that the company had essentially “confess[ed] blood on its hands,”<sup>112</sup> as the majority argued. Thus, in the dissent’s view, section 1502 and the Conflict Minerals Rule would properly fall under the purview of the lax *Zauderer* standard and pass constitutional scrutiny.<sup>113</sup>

However, perhaps following the majority’s lead, the dissent refused to stop its analysis here; the dissent went on to argue that even if the more demanding *Central Hudson* test were to apply in this case, section 1502 and the Conflict Minerals Rule would still pass constitutional muster.<sup>114</sup> Because the parties were in general agreement that promoting peace and security in the DRC region qualifies as a substantial interest,<sup>115</sup> the dissent

---

106. *Id.* at 526, 530.

107. *Id.* at 534–36 (Srinivasan, J., dissenting).

108. *Id.* at 536.

109. *Id.* at 537.

110. *Id.* (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

111. *Id.* at 538–39.

112. *Id.* at 540.

113. *Id.* at 541.

114. *Id.*

115. *Id.* at 542.

went on to find that there was ample evidence to support the conclusion that section 1502 and the Conflict Minerals Rule reasonably further the SEC's aims.<sup>116</sup> The dissent reemphasized that because "[p]redictive judgments about matters such as the overseas trade in conflict minerals lie uniquely within the expertise of Congress and the Executive," the Supreme Court "stressed the need to respect such judgments."<sup>117</sup> It was inappropriate for the majority to rely on post hoc evidence tending to disprove the efficacy of the Rule, because the proper frame of reference for deciding a statute's constitutionality ought to relate to the time when the statute was passed. The dissent states:

Whatever may be the actual effect of the statute and Rule—including the possibility that they may have had unanticipated consequences—their constitutionality would not turn on a post hoc referendum on their effectiveness at a particular point in time. Otherwise, a law's constitutionality might wax and wane depending on the precise time when its validity is assessed.<sup>118</sup>

*NAM III* was wrongly decided. The dissent aptly notes all of the weaknesses in the majority's decision, and each of these weaknesses prove fatal to the holding that the Conflict Minerals Rule violates the First Amendment. The decision creates a chilling effect on corporate transparency and contributes further to the already widespread uncertainty surrounding compelled commercial speech.

#### *IV. Why the National Association of Manufacturers Case Was Wrongly Decided*

##### *A. Importance of the National Association of Manufacturers Decision*

The *NAM III* decision will have a major effect on consumers, manufacturers, and regulatory disclosure schemes as a whole. Consumers are increasingly demanding corporate transparency,<sup>119</sup> and this decision

---

116. *Id.* at 543–44.

117. *Id.* at 544.

118. *Id.* at 545.

119. See NIELSEN, DOING WELL BY DOING GOOD: INCREASINGLY, CONSUMERS CARE ABOUT CORPORATE SOCIAL RESPONSIBILITY, BUT DOES CONCERN CONVERT TO CONSUMPTION? 5 (June 2014), <http://www.nielsen.com/content/dam/niensglobal/jp/docs/report/2014/Nielsen%20Global%20Corporate%20Social%20Responsibility%20Report%20-%20June%202014.pdf>; see also *American Consumers Take Sustainability to the Next Level*, TORC (Sept. 23, 2015), <https://www.torkusa.com/about/press-releases/news-detail?id=10863>

presents a major obstacle for consumers' ability to gather information about their products. Consumer perception of a company's transparency has been linked to willingness to purchase that company's product and to spread positive opinions about the company.<sup>120</sup> A recent study shows that fifty-five percent of consumers are willing to pay more money for sustainable products.<sup>121</sup> Perhaps unsurprisingly, sixty percent of those consumers are under thirty-four years old,<sup>122</sup> demonstrating that this trend is only likely to continue growing. Increased access to information allows consumers and investors to put pressure on companies to make ethical sourcing decisions. The Conflict Minerals Rule allows consumers to decide for themselves whether they want to participate in financing the atrocities in the DRC.

Beyond the consumer interest in access to product information, the United States is committed to holding its companies to a high standard of corporate transparency, and the *NAM III* ruling stands in plain contradiction to U.S. policy on the topic of business and human rights. In 2013, the U.S. Department of State published a document titled U.S. Government Approach to Business and Human Rights.<sup>123</sup> The document expressly endorses the UN Guiding Principles on Business and Human Rights,<sup>124</sup> which encourage companies to engage in extensive due diligence activities and to report the outcomes of those activities on their public websites.<sup>125</sup> In this 2013 guidance, the government clarified that the UN Guiding Principles are meant to be understood as the base level of responsibility and transparency that U.S. companies are expected to practice, and encouraged U.S. companies to strive beyond the recommendations of the UN Guiding

---

(stating that seventy-eight percent of consumers said they purchase sustainable products, compared to seventy-five percent in 2014).

120. Jiyun Kang & Gwendolyn Hustvedt, *Building Trust Between Consumers and Corporations: The Role of Consumer Perceptions of Transparency and Social Responsibility*, 125 J. BUS. ETHICS 253, 262 (2013).

121. NIELSEN, *supra* note 119, at 5.

122. *Id.* at 8.

123. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS (2013), <https://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf> [hereinafter U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS].

124. *Id.* at 3–5.

125. John Ruggie (Special Representative of the U.N. Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. DocA/HRC/17/31, at 17-18, 20 (Mar. 21, 2011).

Principles.<sup>126</sup> In further commitment to this goal of corporate responsibility, the U.S. government is currently in the process of developing a National Action Plan on Responsible Business Conduct.<sup>127</sup> The National Action Plan is centered upon the effort “to promote and incentivize responsible business conduct . . . with respect to transparency.”<sup>128</sup> U.S. government policy is clearly trending toward increased corporate transparency and disclosure. The *NAM III* ruling protecting companies’ ability to withhold the results of the due diligence efforts already required by the government presents a major obstruction in the operation of U.S. policy on business and human rights.

On a practical level, the D.C. Circuit Court’s ruling means that the commercial disclosures required of manufacturers in some states may be reviewed under different standards than those used for manufacturers in others.<sup>129</sup> Circuit courts continue to grapple with when to apply the *Zauderer* standard, and what standard to apply if the court finds the *Zauderer* standard inapplicable, creating a circuit split on how to review compelled commercial speech.<sup>130</sup> While the Second Circuit is willing to apply the relaxed *Zauderer* standard even when the prevention of consumer deception is not at issue,<sup>131</sup> the Sixth and Seventh Circuits have held that, when the case does not fit into the *Zauderer* exception, the court is to apply strict scrutiny.<sup>132</sup> *NAM III* has added even greater uncertainty to the already vague arena of compelled disclosures, producing a nearly impenetrable minefield of law under which manufacturers must operate.

---

126. U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS, *supra* note 123, at 4.

127. Press Release, White House Office of the Press Sec’y, Fact Sheet: The U.S. Global Anticorruption Agenda (Sept. 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

128. *Id.*

129. *See* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

130. Joshua A. Feinzeig, *Promoting World Peace Through the Use of the “Good Book”*: *Implementing Foreign Policy Through the Tax Code*, 40 *BROOK. J. INT’L L.* 953, 972–73 (2015).

131. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

132. *Disc. Tobacco City*, 674 F.3d at 554 (“If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard. If it does not, then we treat the disclosure as compelled speech under *Wooley v. Maynard* and its ilk and apply strict scrutiny.” (citations omitted)); *Entm’t Software Ass’n*, 469 F.3d at 651–52 (applying strict scrutiny when video labeling requirements were found outside to be outside of the *Zauderer* exception).

Further, this decision casts doubt on a number of other long-accepted disclosure regimes across industries.<sup>133</sup> Employers must notify employees of potential workplace hazards.<sup>134</sup> Automobile manufacturers must provide labels for their cars containing information on fuel consumption and greenhouse gas emissions.<sup>135</sup> Health care providers must inform patients of their privacy rights.<sup>136</sup> Mortgage brokers must make disclosures regarding loan terms and fees to borrowers.<sup>137</sup> Home lenders must make public information regarding the race, national origin, sex, and incomes of applicants and actual borrowers.<sup>138</sup> Credit companies are required to disclose information about card rates, fees, and balances to cardholders.<sup>139</sup> Because none of these disclosures involve advertising or point of sale disclosures, the *NAM III* court would review their constitutional legitimacy under the *Central Hudson* standard.<sup>140</sup> The *Central Hudson* test, though labeled as intermediate scrutiny, has been applied with such vigor that no government restriction of commercial speech has survived its review in over two decades.<sup>141</sup>

The implications of the *NAM III* decision are severe, both on consumer interests and U.S. policy, as well as on the current regulatory disclosure regime.

#### *B. The D.C. Circuit Court's Flawed Analysis*

The *NAM III* majority rested its decision on three findings—each of which are inadequate. First, the court found that *Zauderer* is limited to voluntary advertising or point of purchase sales, despite scant evidence that the *Zauderer* Court intended such a narrow interpretation of its rule. Second, the court decided that the government's inability to prove that the Rule would *actually* alleviate the DRC crisis doomed section 1502 and the Conflict Minerals Rule to unconstitutionality. Finally, the court did not find

---

133. Brief of Amici Curiae Tobacco Control Legal Consortium et al. in Support of Appellees' Petitions for Rehearing En Banc at 2–3, *NAM III*, 800 F.3d 518 (D.C. Cir. 2015) (No. 13-5252), 2015 WL 5996680.

134. See 29 U.S.C. § 655(b)(7) (2012).

135. See 40 C.F.R. pts. 85, 86, 600 (2015).

136. See 45 *id.* § 164.520.

137. See 12 U.S.C. §§ 2601-2606 (2012).

138. See 12 U.S.C. §§ 2801-2810 (2012).

139. See 15 U.S.C. § 1637a (2012).

140. See *NAM III*, 800 F.3d 518, 521–24 (D.C. Cir. 2015), *reh'g en banc denied*, No. 13-5252 (Nov. 9, 2015).

141. Seth E. Mermin & Samantha K. Graff, *The First Amendment and Public Health, at Odds*, 39 AM. J.L. & MED. 298, 299 n.12 (2013).

the labels “DRC conflict free” and “not been found to be DRC conflict free” to convey purely factual and uncontroversial information.

*1. Zauderer Is Not Limited to Voluntary Advertising*

The *NAM III* court rested its holding upon a clear limitation of the *Zauderer* standard to instances of voluntary advertising or point of sale disclosures.<sup>142</sup> This limitation, however, conflicts both with the *Zauderer* Court’s core rationale as well as with the interpretations of other circuit courts.<sup>143</sup>

*Zauderer* expressly presents itself as a decision on *commercial speech*.<sup>144</sup> The *Zauderer* Court placed a lax standard of constitutional review on commercial speech because a company has a minimal interest in withholding factual information about its products when weighed against the value such disclosure provides consumers.<sup>145</sup> This stated reasoning for slackening the level of review is hardly unique to the advertising context; a company’s interest in withholding valuable information from its consumers should be found minimal irrespective of how the disclosure presents itself. The majority relied heavily on quotations from *Zauderer* using the word “advertising,”<sup>146</sup> but the majority fails to acknowledge that the use of the word is attributable more to the specific factual scenario of *Zauderer* (upholding a state requirement that attorneys’ advertising services must provide certain disclosures about fees to potential clients) than to any intentional limitation on the *Zauderer* Court’s part to the context of voluntary advertising.<sup>147</sup>

This reading of *Zauderer*’s holding is shared by at least one other circuit court, and has never been refuted by the Supreme Court.<sup>148</sup> In *United States v. Wenger*, the Court of Appeals for the Tenth Circuit upheld a requirement compelling radio program hosts to disclose information about payments made to encourage certain opinions, in the interest of providing listeners with knowledge of whether the hosts’ statements are truly disinterested.<sup>149</sup> This kind of disclosure is hardly related to advertising and certainly has

---

142. *See NAM III*, 800 F.3d at 521–22.

143. *Id.* at 535 (Srinivasan, J., dissenting).

144. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).

145. *Id.* at 650–53.

146. *NAM III*, 800 F.3d at 522.

147. *See id.* at 536 (Srinivasan, J., dissenting).

148. *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005); *see NAM III*, 800 F.3d at 535 (Srinivasan, J., dissenting).

149. 427 F.3d at 850–51.

nothing to do with point of sale disclosures. The Supreme Court has also never intimated that such a limitation would be warranted in its post-*Zauderer* decisions on commercial speech.<sup>150</sup>

Moreover, the majority's limitation of relaxed scrutiny to commercial advertising yields incongruous results. As Judge Srinivasan appropriately notes in his dissent, if the Conflict Minerals Rule had required manufacturers to place prominent labels regarding country of origin directly onto their products, the majority would review such point of sale disclosures under rational basis.<sup>151</sup> Yet when that same disclosure is required to be placed once yearly on the company's website, explained by any contextualizing information the company may choose to include, a more demanding standard of review would be necessary.<sup>152</sup> Why should a periodic internet post be more harshly scrutinized than a prominent product label? This result is especially illogical considering that, when presented with the choice, most manufacturers would almost certainly favor an internet posting over product label disclosures. The majority opinion does little to assuage its holding's discordant consequences, further suggesting that the majority framework should not stand.

*2. The Government Is Not Required to Prove Actual Effectiveness of the Conflict Minerals Rule*

The *NAM III* court's alternate holding, that, even under rational basis scrutiny, the SEC failed to demonstrate the actual effectiveness of the Conflict Minerals Rule, is equally as flawed as its first holding. The court demanded much stronger proof of efficacy than is actually required, failed to adequately defer to the executive branch's judgment in foreign relations, inappropriately relied on post-hoc evidence, and created an efficacy standard that would topple some of the most widely accepted disclosure regimes.

---

150. The majority cites a number of cases to prove that the Supreme Court would approve of an advertising limit. *See NAM III*, 800 F.3d at 523. However, these cases were merely restating the holding of *Zauderer*, not expressing an intent to limit the scope of *Zauderer's* holding. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Zauderer's* observation that the government may at times "prescribe what shall be orthodox in commercial advertising" in a case not involving commercial speech (citation omitted)); *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (reciting the holding of *Zauderer* upon its facts, but giving no indication that *Zauderer* was meant to be confined to the advertising context).

151. *See NAM III*, 800 F.3d at 535 (Srinivasan, J., dissenting).

152. *See id.*

The court overstated the level of proof required under the second prong of *Zauderer* constitutional scrutiny. The majority claimed to be following *AMI*'s formulation of the *Zauderer* standard, under which the court evaluates the effectiveness of the measure in achieving its goal. However, the *AMI* court actually evaluated effectiveness very loosely; the court stated that actual evidence of a regulation's effectiveness is not required, reasoning that "such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest."<sup>153</sup> *AMI* went so far as to say that a reasonably crafted government mandate to disclose certain facts about attributes of a company's product "will almost always demonstrate a reasonable means-ends relationship."<sup>154</sup> The *NAM III* majority, however, made no attempt to differentiate between a country of origin label for meat products that will always satisfy rational basis scrutiny, and a country of origin website posting for electronic products that the court deemed to fail rational basis scrutiny on this count.<sup>155</sup>

Beyond the *AMI* context, cases in the field of foreign relations call for an even lower standard for demonstrating effectiveness, as the court is to defer to the executive branch's judgment regarding the effectiveness of a particular rule.<sup>156</sup> Given the courts' lack of expertise in foreign affairs, and the difficulty with which the effectiveness of foreign affairs measures can be evaluated, courts' "conclusions must often be based on informed judgment rather than concrete evidence."<sup>157</sup> While the *NAM III* majority gave lip service to the Supreme Court precedent mandating deference to the executive branch's factual conclusions, the court quickly dismissed the SEC's proffered conclusions as "rest[ing] on pure speculation," and creating "evidentiary gaps."<sup>158</sup>

---

153. *AMI*, 760 F.3d 18, 26 (D.C. Cir. 2014) (citing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985)).

154. *Id.*

155. *NAM III*, 800 F.3d at 524–27.

156. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–36 (2010).

157. *Id.* at 34–35; *see Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973); *United States v. Harriss*, 347 U.S. 612, 626 (1954) (making no inquiry into whether the legislative record supported the determination that the regulation would be effective); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15–16 (D.C. Cir. 2009) (allowing a "value judgment based on the common sense of the people's representatives" to support required disclosure of contributions to lobbying activities).

158. *NAM III*, 800 F.3d at 525.

The importance of reducing funding to the armed conflict in the DRC has long been a source of concern, both in the U.S. and internationally.<sup>159</sup> The SEC provided citations to multiple sources bolstering its conclusion that reducing funding to armed groups would promote peace and security in the DRC.<sup>160</sup> Under scrutiny that has demanded no actual evidence of effectiveness,<sup>161</sup> and given the deference accorded in the realm of foreign relations,<sup>162</sup> the government's evidence of its rational, factual conclusion that section 1502 would serve its purpose should have more than satisfied the extremely low burden for demonstrating efficacy.

Further, the majority's attempt to bolster its determination that the Conflict Minerals Rule is ineffective with evidence that its enactment has had unintended consequences is entirely misplaced. With regard to whether Congress adequately determined that its rule would be effective at promoting its goal, evidence of unintended effects of the rule after its passing is wholly irrelevant. As Judge Srinivasan noted, "[o]therwise, a law's constitutionality might wax and wane depending on the precise time when its validity is assessed."<sup>163</sup> The majority's evidence also fails to tell the whole story; in addition to the reports of section 1502's unintended consequences, other reports exist proclaiming that the rule has actually had a hugely successful impact on the ground.<sup>164</sup> While evidence of later-in-time ineffectiveness may be successful in tarnishing the reputation of section 1502, it provides no insight into the constitutionality of the rule *at the time it was passed*.

---

159. See 155 CONG. REC. S4697-98 (daily ed. Apr. 23, 2009) (statement of Sen. Feingold); S.C. Res. 1376, ¶ 8 (Nov. 9, 2001) (stressing that "the natural resources of the Democratic Republic of the Congo should not be exploited to finance the conflict in that country"); Karen E. Woody, *Securities Laws as Foreign Policy*, 15 NEV. L.J. 297, 315-17 (2014).

160. See 156 CONG. REC. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold) (accepting the UN's determination that militant groups are able to finance themselves by controlling mines and trade routes and referring to section 1502 as "a significant, practical step toward" addressing the underlying cause of the conflict); 156 CONG. REC. S3817 (daily ed. May 17, 2010) (statement of Sen. Durbin); 155 CONG. REC. S4697-98 (daily ed. Apr. 23, 2009) (statement of Sen. Feingold); Press Statement, Secretary of State Hillary Clinton, Conflict Minerals in the Democratic Republic of Congo 2010/994 (July 22, 2010), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/07/145039.htm>.

161. *AMI*, 760 F.3d 18, 26 (D.C. Cir. 2014).

162. *Holder*, 561 U.S. at 33-35.

163. *NAM III*, 800 F.3d at 545 (Srinivasan, J., dissenting).

164. Nicholas Webb et al., *Conflict Minerals and the Law*, BENCH & B. MINN., Jan. 2015, at 26, 28-29 (providing evidence that Dodd-Frank Section 1502 has had a hugely successful impact upon ameliorating the situation in the DRC).

Finally, the level of effectiveness required by the majority raises the standard for proof-of-effectiveness above what even the most commonplace disclosures can provide. The amicus brief filed by the Tobacco Control Legal Consortium and numerous other organizations argues that mandated warnings regarding allergens in food, safety of children's toys, and side effects of prescription drugs would almost certainly fail to "survive a similar *ex ante* demand for proof of effectiveness."<sup>165</sup> In the face of precedent suggesting that little to no evidence should be required,<sup>166</sup> the majority essentially required proof of *actual* effectiveness of the SEC's rule, creating an untenable standard under which even the most basic disclosure requirements would fall.

*3. The Conflict Minerals Rule's Labels Constitute Purely Factual and Uncontroversial Information*

The *NAM III* majority's final blow to the Conflict Minerals Rule—that the disclosures required do not represent purely factual or uncontroversial information—can also be negated. Even though the majority engaged in some discussion as to the actual requirements of *Zauderer's* "purely factual and uncontroversial" holding, the court ultimately leaned on its prior decision that the disclosures are "hardly 'factual and non-ideological,'" in that they "compel[] an issuer to confess blood on its hands."<sup>167</sup>

The Conflict Minerals Rule's label "DRC conflict free" does not require companies to confess blood on their hands, as the phrase is merely a statutorily defined term of art. Section 1502 defines "DRC conflict free" to mean that the reporting company's necessary minerals do not directly or indirectly finance or benefit armed groups in the DRC or an adjoining country.<sup>168</sup> It is difficult to see how this factual information regarding conflict sourcing could be materially different from those sourcing disclosures required in *AMI*; as the dissent notes, "[i]f geographic information about the sourcing of meat products qualifies as 'purely factual and uncontroversial,' as we held in *AMI*, so, too, does geographic information about the sourcing of a product's component minerals."<sup>169</sup> It is highly unlikely that these disclosures would mislead consumers, especially

---

165. Brief of Amici Curiae Tobacco Control Legal Consortium et al. In Support of Appellees' Petition for Rehearing En Banc, *supra* note 133, at 5.

166. See *AMI*, 760 F.3d at 26; *Holder*, 561 U.S. at 34-35.

167. See *NAM III*, 800 F.3d at 530.

168. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p)(1)(A)(ii), (D) (2012).

169. *NAM III*, 800 F.3d at 539 (citation omitted) (quoting *AMI*, 760 F.3d at 27).

considering the fact that companies are allowed to surround their disclosure with any contextualizing information they deem fit.<sup>170</sup>

A recent study shows that the vast majority of consumers find section 1502's conflict minerals labels to convey purely factual information. This survey found that eighty-six percent of consumers polled thought that the conflict minerals disclosures to convey purely factual information.<sup>171</sup> This margin is strikingly close to the ninety-seven percent of consumers who believed that country of origin product labeling—of the type that passed *AMI* scrutiny with ease—to be purely factual.<sup>172</sup> If the major concern is that the label “not been found to be ‘DRC conflict free’” will mislead consumers into believing a company has moral culpability for the DRC crisis,<sup>173</sup> this information demonstrates that such fears are largely unwarranted.

Because the Conflict Minerals Rule's labels are statutorily defined terms of art, presented within the context of the company's explanation of their meaning, and because consumers actually believe the disclosures to convey factual information, the majority's conclusory statement that these disclosures “compel[] an issuer to confess blood on its hands”<sup>174</sup> cannot stand.

### V. Conclusion

As the purchaser of a brand new smartphone, are you satisfied with the conclusion of the *NAM III* court? Does it make sense to you that the product labeling of the meat you purchase will be scrutinized less harshly than the websites you view in your search for reliable information? The D.C. Circuit Court has presented a major step backward in the ever-growing trend of corporate transparency. The court improperly limited the scope of rational basis review of commercial speech, it overstated the level of effectiveness the government is required to prove in matters of foreign affairs, and it deemed the Conflict Minerals Rule's disclosures “hardly” factual and uncontroversial with a brief conclusory statement. Each of these mistakes led the court to exacerbate an already unsound legal scheme that puts the

---

170. *Id.*

171. Daniel E. Herz-Roiphe, *Stubborn Things: An Empirical Approach to Facts, Opinions, and the First Amendment*, 113 MICH. L. REV. FIRST IMPRESSIONS 47, 56 (2015), [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1149&context=mlr\\_fi](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1149&context=mlr_fi).

172. *Id.*

173. *See NAM III*, 800 F.3d at 530.

174. *Id.* (quoting *NAM II*, 748 F.3d 359, 371 (D.C. Cir. 2014), overruled by *AMI*, 760 F.3d 18 (D.C. Cir. 2014)).

review of disclosure regimes across industries in question. These missteps doom the decision to unconstitutionality.

The confounding narrative over levels of scrutiny, compelled commercial speech, and the Conflict Minerals Rule only distracts from the true purpose of these disclosures: to help alleviate the humanitarian crisis in the DRC by encouraging U.S. companies to abstain from indirectly funding militant groups. Outside of the legal battle, thousands of miles away, the crisis still rages on in the DRC, and U.S. consumers deserve to know whether or not they are contributing to its perpetuation.

*Emma Land*