No. _____

In the
Supreme Court of the United States

NETCHOICE, LLC, and the COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
Cross-Petitioners,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,
Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida's Senate Bill 7072 imposes unprecedented restrictions on the rights of private Internet companies to exercise editorial judgment over the content on their services. Responding to an alleged conspiracy by "'big tech' oligarchs in Silicon Valley" to silence "conservative" content, S.B. 7072 singles out a select group of private companies and saddles them—and only them—with a slew of content-based and discriminatory requirements. The law openly abridges the targeted companies' First Amendment right to exercise editorial judgment over what content to disseminate on their websites via requirements that are speaker-based, content-based, and viewpoint-discriminatory. Those mandates are designed to work hand-in-glove with burdensome disclosure obligations that compel speech, interfere with editorial discretion, and facilitate enforcement of the substantive mandates by, for example, requiring companies to disclose their policies and explain their decisions. In a detailed opinion that explained the law's many flaws, the Eleventh Circuit unanimously concluded that most of S.B. 7072 cannot be reconciled with the First Amendment. But it then left a subset of the law's compelled disclosure provisions standing, based on a cursory analysis that side-stepped the law's pervasive viewpoint-discrimination, while overextending and misapplying *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

The question presented is:

Whether S.B. 7072 in its entirety, and its compelled disclosure provisions in particular, comply with the First Amendment.

PARTIES TO THE PROCEEDING

Cross-petitioners are NetChoice, LLC, and the Computer & Communications Industry Association.

Cross-respondents are Attorney General, State of Florida, in her official capacity; Joni Alexis Poitier, in her official capacity as Commissioner of the Florida Elections Commission; Jason Todd Allen, in his official capacity as Commissioner of the Florida Elections Commission; John Martin Hayes, in his official capacity as Commissioner of the Florida Elections Commission; Kymberlee Curry Smith, in her official capacity as Commissioner of the Florida Elections Commission; Deputy Secretary of Business Operations of the Florida Department of Management Services, in their official capacity.

CORPORATE DISCLOSURE STATEMENT

NetChoice has no parent corporation, and no publicly held corporation owns ten percent or more of its stock. The Computer & Communications Industry Association (CCIA) has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Northern District of Florida and the U.S. Court of Appeals for the Eleventh Circuit:

NetChoice, LLC v. Moody, No. 4:21-cv-00220 (N.D. Fla.) (June 30, 2021)

NetChoice, LLC v. Attorney General, No. 21-12355 (11th Cir.) (May 23, 2022)

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

The Internet has created unprecedented opportunities for free expression, and online services have enabled countless speakers to reach broader audiences. Given the sheer volume of that speech, websites must use editorial discretion to decide what speech to disseminate and how. These websites, no less than newspapers and other traditional media, sometimes face intense criticism for how they exercise their editorial discretion and how they articulate and explain their editorial decisions. Such criticism fully comports with First Amendment values, which encourage more speech as the remedy for controversial speech and editorial judgments. But last year, Florida took a different tack. It enacted Senate Bill 7072, a first-of-its-kind law that endeavors to punish select private companies for exercising editorial discretion in ways the state disfavors. That law abridges websites' editorial decisions and imposes crippling "disclosure" obligations, forcing websites to explain each of the countless decisions they must make every day. Such compelled obligations not only inflict enormous compliance burdens, but would provide a roadmap for those wishing to evade efforts to eliminate offensive content.

Florida openly and expressly designed the law to target certain providers because the state disagreed with their editorial decisions regarding "conservative" content. To that end, S.B. 7072 is carefully crafted to single out "Big Tech," but not the myriad other "social media platforms" (including smaller, right-leaning outlets) for special disfavored treatment and state

intrusion into their editorial discretion. The law targets only the largest "social media platforms"—services with at least 100 million monthly users or $100 million in gross annual revenue—such as Facebook.com, Twitter.com, and YouTube.com, while excluding smaller companies, like Parler.com, Rumble.com, and Gab.com. As initially enacted, the law carved out large companies that just happened to own a theme park in Florida. But Florida later repealed that carve-out when Disney executives criticized a different Florida law, thus layering a viewpoint-based repeal on top of a viewpoint-based exemption.

S.B. 7072's flaws extend well beyond viewpoint discrimination. It discriminates among speakers and on the basis of content, and it compels all manner of speech, from onerous disclosures to third-party content the companies would prefer not to disseminate. All those provisions work together in service of the ultimate aim of abridging the editorial judgments of these private companies about what content to disseminate. In short, S.B. 7072 is a compendium of First Amendment problems that triggers strict scrutiny several times over.

It is thus no surprise that the Eleventh Circuit unanimously concluded that S.B. 7072's editorial mandates and one of its disclosure obligations cannot be reconciled with the First Amendment. That decision followed a district court decision broadly condemning S.B. 7072, including its disclosure obligations. Thus, all four federal judges to consider S.B. 7072 have found it unconstitutional in the main. Florida seeks review of the Eleventh Circuit's decision

to the extent it enjoins S.B. 7072. *See* No. 22-277. Given the importance of the issues at stake, the disagreement amongst the courts of appeals, and the proliferation of similar laws in other states, cross-petitioners acquiesce to this Court's review. Indeed, this Court already recognized that these weighty issues merit review when it vacated the Fifth Circuit's stay of a district court order preliminarily enjoining enforcement of a similar Texas law. *See NetChoice, LLC v. Paxton*, 142 S.Ct. 1715, 1715-16 (2022); *id.* at 1716 (Alito, J., dissenting).

But this Court should not review only part of the law. If the Court grants Florida's unopposed petition, it should also grant this conditional cross-petition so that it can consider the constitutionality of the entire law—including the compelled disclosure provisions that the court of appeals left standing. The constitutionality of those provisions is inextricably intertwined with the constitutionality of the enjoined provisions, including other disclosure provisions that are the subject of the state's petition. The compelled disclosure provisions reflect the same viewpoint-based and speaker-based distinctions and improper purposes that permeate the law. And they intrude deeply into editorial judgments and decisions about how to explain those judgment, both of which are constitutionally protected. Granting the cross-petition thus will ensure that the Court has before it *all* the relevant provisions that raise serious First Amendment difficulties.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 34 F.4th 1196 and reproduced at Pet.App.1a-67a.[1] The district court's order granting the preliminary injunction is reported at 546 F.Supp.3d 1082 and reproduced at Pet.App.68a-95a.

JURISDICTION

The Eleventh Circuit issued its opinion on May 23, 2022. Florida petitioned for certiorari on September 21, 2022. This conditional cross-petition is timely filed in accordance with Rule 12.5. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to Florida's petition. Pet.App.96a-108a.

STATEMENT OF THE CASE

A. Legal Background

1. The First Amendment "prohibits the government from telling people what they must say," *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013), as it protects "both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Just as the government may not compel private parties to disseminate its own preferred message, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), it may not compel one private speaker

[1] All Pet.App. cites are to the appendix to Florida's petition in No. 22-277.

to disseminate the message of another, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) ("*PG&E*"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Those core First Amendment principles prohibit the government from interfering with the right of private parties to exercise "editorial control over speech and speakers on their properties or platforms." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1932 (2019). In *Tornillo*, for example, the Court struck down a Florida law that required newspapers to give political candidates space in the paper to respond to negative coverage. Although the response would have been the candidate's speech in the first instance and clearly labeled as such, the Court concluded that forcing a newspaper to run it would violate the First Amendment. As the Court explained, the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment," which is itself protected speech. *Tornillo*, 418 U.S. at 258. The law's "intrusion into the function of editors" thus failed to "clear the barriers of the First Amendment." *Id.*

While *Tornillo* concerned newspapers, its core insight—that "the editorial function itself is an aspect of 'speech,'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality op.)—is not "restricted to the press." *Hurley*, 515 U.S. at 574. It applies equally to "business

corporations generally," as well as to "ordinary people engaged in unsophisticated expression." *Id.* And it applies to the "dissemination of information," which is "speech within the meaning of the First Amendment" as well. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Thus, just as the government cannot compel a newspaper to run content, it cannot compel a private utility to include third-party speech in its billing envelopes, *PG&E*, 475 U.S. at 20-21, or compel a private parade organizer to include a group whose values it does not share, *Hurley*, 515 U.S. at 574-76.

Those principles equally apply to a private social media company's editorial judgment about what content to disseminate (or not to disseminate) via its website, applications, and online services. As then-Judge Kavanaugh put it, the government may not "tell Twitter or YouTube what videos to post" or "tell Facebook or Google what content to favor" any more than it may "tell *The Washington Post* or the *Drudge Report* what columns to carry." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

2. NetChoice and the Computer & Communications Industry Association (CCIA) are Internet trade associations. Their members operate a variety of popular websites, apps, and online services, including Facebook.com, Twitter.com, YouTube.com, and Etsy.com.[2] Users can share content on those services and interact with it and each other. That content is generated by billions of users located throughout the

[2] While most members operate websites, apps, and other online services, this cross-petition collectively refers to all of the services that cross-petitioners' members offer as "websites."

world, it is uploaded in different formats and languages, and it spans the entire range of human thought—from the creative, humorous, and political to the offensive, dangerous, and illegal.

Given the sheer volume and breadth of material available through their websites, NetChoice's and CCIA's members have invested extensive resources into developing rules and standards to edit, curate, and display content in ways that reflect their unique values and the distinctive communities they hope to foster. Facebook, for example, "wants people to be able to talk openly about the issues that matter to them." *Facebook*, https://bit.ly/3tdKbtn (last visited Oct. 21, 2022). But it also recognizes that "the internet creates new and increased opportunities for abuse." *Id.* It therefore restricts several categories of content that it finds objectionable, such as hate speech, bullying, and harassment. *Id.* YouTube likewise prohibits "harmful, offensive, and/or unlawful material" like "pornography, terrorist incitement, [and] false propaganda spread by hostile foreign governments." CA.Supp.App.25-1 ¶¶3, 9. Twitter, for its part, allows a wider range of violent and adult content. *Twitter*, https://bit.ly/3wuaxsb (last visited Oct. 21, 2022). Other members target a more limited audience and exercise editorial discretion accordingly. For example, Etsy, in its effort to "keep human connection at the heart of commerce," has adopted policies requiring any item "listed as handmade" be "made and/or designed by … the seller." *Etsy*, https://etsy.me/3wsbNMe (last visited Oct. 21, 2022). Moreover, virtually all member companies have advertising clients who are critical to their business models and do not wish to pay to have

their advertisements disseminated alongside offensive material.

Collectively, cross-petitioners' members make billions of editorial decisions each day. Those decisions include choices to block or remove content or users, display content with additional context, and a wide range of other nuanced judgments about how to arrange, rank, or prioritize the material published on their websites. Given the expressive nature of those decisions, it is inevitable that some will disagree with and criticize them. Others will agree with and praise them. Some will say too much speech is disseminated, and others will say too little. That is all to be expected in a nation that values the First Amendment and its commitment to more speech as the remedy for speech with which people disagree. But in May 2021, Florida lawmakers took their criticism of cross-petitioners' members' editorial judgments in a different and more dangerous direction: They enacted S.B. 7072, which aims to punish select companies for exercising their editorial discretion in ways the state disfavors.

Florida made no secret of the law's motivation and its aim. Upon signing the bill, the governor announced in his official public statement: "If Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable." CA.App.38. That same official statement quotes the lieutenant governor touting the law as "tak[ing] back the virtual public square" from "the leftist media and big corporations," whom she perceived to "censor … views that run contrary to their radical leftist narrative." CA.App.1352. Another lawmaker added: "[O]ur freedom of speech as

conservatives is under attack by the 'big tech' oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated." CA.App.24.

The text of S.B. 7072 confirms that Florida passed the law to target certain entities "because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The formal legislative findings declare that "[s]ocial media platforms" have "unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms," and that the state has a "substantial interest in protecting its residents from inconsistent and unfair actions" by those "social media platforms." S.B. 7072 §§1(9)-(10). The state's beef did not extend to all "social media platforms"—only the largest ones with a perceived "leftist" bent. Thus, the law defines "social media platform" as services with at least 100 million monthly users or $100 million in gross annual revenue and singles out those websites for disfavored treatment. Fla. Stat. §501.2041(1)(g)(4). That definition captures services like Facebook.com and Twitter.com but excludes services like Parler.com and Gab.com—*i.e.*, websites that are perceived to have an ideology that the state prefers.

Late in the drafting process, the state realized that its definition of "social media platform" captured companies with a large Florida presence, namely Disney and Universal Studios. To protect those then-favored companies, legislators gerrymandered a carve-out for any entity that "owns and operates a theme park or entertainment complex." Fla. Stat. §501.2041(1)(g) (2021). The state later discovered,

however, that the viewpoints it wished to punish are not limited to Silicon Valley but reach Hollywood too. After Disney executives criticized another Florida law, Florida repealed the theme-park carve-out and eliminated similarly targeted tax benefits. *See* S.B. 6-C (2022). Before signing that bill, the governor stated: "You're a corporation based in Burbank, California, and you're going to marshal your economic might to attack the parents of my state? We view that as a provocation and we're going to fight back." *Florida Gov. DeSantis Signs Bill Stripping Disney of Special Tax Status*, Wall St. J. (Apr. 22, 2022), https://on.wsj.com/3k811Wp.

S.B. 7072 imposes a series of interrelated restrictions and requirements both prohibiting and compelling speech. Section 2 of the Act addresses "[s]ocial media deplatforming of political candidates." Fla. Stat. §106.072. The section prohibits a "social media platform" from "willfully deplatform[ing] a candidate for office." Fla. Stat. §106.072(2). The law defines "deplatform" to mean "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id.* §501.2041(1)(c). Section 2 combines that prohibition with a requirement that a covered "platform" must notify a candidate if it "willfully provide[s] free advertising for a candidate." *Id.* §106.072(4). S.B. 7072 does not define "free advertising," but it specifies that "[p]osts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' posts, content, material, and comments are not considered free advertising." *Id.*

Section 4 addresses "[u]nlawful acts and practices by social media platforms" and includes a series of interlocking substantive mandates and disclosure requirements. Fla. Stat. §106.072. In particular, Section 4 imposes many requirements that countermand how covered companies exercise editorial discretion over what content to disseminate on their websites and imposes several burdensome compelled-disclosure requirements to facilitate enforcement of those restrictions.

- ***Consistency.*** Section 4 requires a "social media platform" to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." *Id.* §501.2041(2)(b). The term "censor" is defined broadly to include not only actions taken to "delete," "edit," or "inhibit the publication of" content. It also bans websites from including their own affirmative speech by restricting any effort to "post an addendum to any content or material." *Id.* §501.2041(1)(b). "Shadow banning" refers to any action to "limit or eliminate the exposure of a user or content or material posted by a user to other users of [a] … platform." *Id.* §501.2041(1)(f). The law does not define the phrase "consistent manner."
- ***Standards.*** To help facilitate that requirement, a "social media platform" must "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." *Id.* §501.2041(2)(a).

- ***Rule changes***. Likewise, a "social media platform" must inform its users "about any changes to" its "rules, terms, and agreements before implementing the changes." *Id.* §501.2041(2)(c).
- ***30-day restriction***. A "social media platform" may not change "user rules, terms, and agreements … more than once every 30 days." *Id.* §501.2041(2)(c).
- ***Explanations***. Before a "social media platform" "deplatforms," "censors," or "shadow bans" any user, it must provide the user with a detailed notice. *Id.* §501.2041(2)(d). The notice must be in writing, be delivered within seven days, and include both a "thorough rationale explaining the reason" for the "censor[ship]" and a "precise and thorough explanation of how the social media platform became aware" of the content that triggered its decision. *Id.* §501.2041(3).
- ***View counts***. A "social media platform" must provide a user with the number of others who viewed that user's content or posts on request. *Id.* §501.2041(2)(e).
- ***User opt-out***. A "social media platform" must allow users to opt out of its "post-prioritization" and "shadow-banning" algorithms. For users who opt out, the platform must display material in "sequential or chronological" order. *Id.* §501.2041(2)(f). "Post prioritization" refers to the practice of arranging certain content in a more or less prominent position in a user's feed or search results. *Id.* §501.2041(1)(e). The

"social media platform" must offer users the opportunity to opt out annually. *Id.* §501.2041(2)(g).

- ***Posts by or about candidates***. "A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about … a candidate." *Id.* §501.2041(2)(h).
- ***User data***. A "social media platform" must allow a "deplatformed" user to "access or retrieve all of the user's information, content, material, and data for at least 60 days" after the user receives notice of "deplatforming." *Id.* §501.2041(2)(i).
- ***Journalistic enterprises***. A "social media platform" may not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast." *Id.* §501.2041(2)(j). The term "journalistic enterprise" is defined broadly to include any entity doing business in Florida that (1) publishes in excess of 100,000 words online and has at least 50,000 paid subscribers or 100,000 monthly users, (2) publishes 100 hours of audio or video online and has at least 100 million annual viewers, (3) operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable subscribers, or (4) operates under an FCC broadcast license. *Id.* §501.2041(1)(d).

The penalties for violating S.B. 7072 are steep. On top of exposing violators to civil and administrative actions by the state attorney general, *id.* §501.2041(5),

the law creates a private cause of action that allows individual users to sue to enforce the "consistency" and "notice" mandates and authorizes awards of up to $100,000 in statutory damages for each claim, as well as actual damages, equitable relief, punitive damages, and in some cases attorneys' fees. *Id.* §501.2041(6). The law also authorizes the state elections commission to impose significant fines for violating the candidate "deplatforming" provision ($250,000 per day for "deplatforming" candidates for state office, $25,000 per day for "deplatforming" candidates for other office). *Id.* §106.072(3).

B. District Court Proceedings

Soon after Florida passed S.B. 7072 and weeks before its effective date, NetChoice and CCIA challenged the law in federal court. The district court entered a preliminary injunction barring Florida from enforcing all the principal provisions of the law, including both its mandates and its compelled disclosure requirements, holding that (among other things) S.B. 7072 likely violates the First Amendment.[3] Under Supreme Court precedent, the court explained, "a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner." Pet.App.86a. And the district court readily concluded that websites use "editorial judgment" when they "manage" content posted by users, "much as more traditional media providers use editorial judgment when choosing what

[3] The district court enjoined all of the law's operative provisions except for certain antitrust provisions, as to which it found no threat of imminent, irreparable injury. Pet.App.79a.

to put in or leave out of a publication or broadcast." Pet.App.82a. Indeed, the court found the legislative record "chock full of statements by state officials" recognizing that websites exercise editorial judgment and characterizing those judgments as "ideologically biased." *Id.* The law thus implicates the First Amendment: The "targets of the statutes at issue are the editorial judgments themselves," and the "State's announced purpose of balancing the discussion—reining in the ideology of the large social-media providers—is precisely the kind of state action held unconstitutional in *Tornillo*, *Hurley*, and *PG&E*." *Id.*

The district court also concluded that S.B. 7072 discriminates based on content, viewpoint, and speaker. The court noted that several provisions, such as restrictions on statements "about" a political candidate, are "about as content-based as it gets." Pet.App.89a. And it found "substantial factual support"—including the gerrymandered definition of "social media platform," the legislative findings complaining of "unfair" editorial judgments, and statements by the law's proponents—for the conclusion that "the actual motivation for this legislation was hostility to the social media platforms' perceived liberal viewpoint." Pet.App.89a. That viewpoint discrimination, the court explained, "subjects the legislation to strict scrutiny, root and branch." Pet.App.90a.

The district court concluded that S.B. 7072 comes "nowhere close" to surviving strict scrutiny. States have no legitimate interest in "leveling the playing field" by "promoting speech on one side of an issue or restricting speech on the other." Pet.App.91a-92a.

And the law is not remotely narrowly tailored; it represents "an instance of burning the house to roast a pig," and thus would fail even intermediate scrutiny. Pet.App.92a. The court thus enjoined Sections 2 and 4 in their entirety. Pet.App.94a-95a.

C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed most of the district court's preliminary injunction, concluding that S.B. 7072's candidate, journalistic-enterprise, consistency, 30-day restriction, and user opt-out provisions likely violate the First Amendment. It likewise concluded that the provision requiring websites to give users a detailed explanation of their editorial decisions likely violates the First Amendment. But in a brief discussion at the end of its opinion, the court found the other disclosure provisions—those requiring websites to disclose standards, rule changes, view counts, free advertising, and user data—likely constitutional, and thus vacated the injunction as to those.

Invoking longstanding precedent from this Court, the panel first rejected Florida's contention that S.B. 7072 should not be subject to any First Amendment scrutiny. The court explained "that a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment." Pet.App.23a. "Social-media platforms," the court continued, "exercise editorial judgment that is inherently expressive." Pet.App.26a. A platform's decision to remove content "necessarily convey[s] *some* sort of message—most obviously, the platform['s] disagreement with or disapproval of certain content, viewpoints, or users." Pet.App.28a-

29a. And "the driving force behind S.B. 7072 seems to have been a perception (right or wrong) that some platforms' content-moderation decisions reflected a 'left-ist' bias against 'conservative' views—which, for better or worse, surely counts as expressing a message." Pet.App.29a. "That observers perceive bias in platforms' content-moderation decisions is compelling evidence that those decisions are indeed expressive." *Id.*

In so holding, the Eleventh Circuit rejected Florida's argument that "social media platforms" are common carriers entitled to lesser First Amendment protection. Unlike telephone companies, railroads, and postal services, the court explained, "social media platforms" do not open their websites to the public on an indiscriminate and neutral basis—which is the hallmark of common-carrier status. Pet.App.41a-43a. Rather, like newspapers and cable networks, they make individualized content- and viewpoint-based decisions about which content to disseminate and how. *Id*. The court also rejected Florida's reliance on *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), and *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006) ("*FAIR*"), explaining that those cases did not involve the central problem with the law here: government restrictions on private parties' expressive editorial judgments. Pet.App.31a-36a

The panel then concluded that, with one exception, each of the challenged provisions triggers First Amendment scrutiny. The provisions that prohibit "deplatforming" candidates; deprioritizing and "shadow banning" content by or about candidates;

and "censoring," "deplatforming," or "shadow banning" "journalistic enterprises" "all clearly restrict platforms' editorial judgment by preventing them from removing or deprioritizing content or users and forcing them to disseminate messages that they find objectionable." Pet.App.46a. The consistency requirement, 30-day restriction on changes to standards, and user opt-out requirement likewise interfere with expressive editorial judgments by preventing "social media platforms" from removing or arranging content as they see fit. Pet.App.47a-48a.

The panel next concluded that S.B. 7072's disclosure obligations—the provisions requiring "social media platforms" to provide detailed explanations for their editorial decisions and to disclose their standards, rule changes, view counts, and advertising policies—implicate the First Amendment as well. *Id.* While the court did not think that those provisions "directly restrict editorial or expressive conduct," it recognized that they compel covered websites to disclose information they otherwise would not. *Id.* The court concluded, however, that the user-data-access requirement, which requires allowing a "deplatformed" user to "access or retrieve all of the user's information, content, material, and data for at least 60 days," Pet.App.12a, after "deplatforming," does not trigger First Amendment scrutiny, positing that it "doesn't … compel any disclosure." Pet.App.48a.

Turning to the proper level of scrutiny, the panel acknowledged that this Court is "deeply skeptical of laws that distinguish among different speakers," and it further acknowledged that S.B. 7072 "applies only

to a subset of speakers consisting of the largest social-media platforms" and that the law's proponents wanted "to combat what they perceived to be the 'leftist' bias of the 'big tech oligarchs' against 'conservative' ideas." Pet.App.50a, 53a. But the court nevertheless declined to subject the entire law to strict scrutiny as viewpoint discriminatory, largely because it read this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968), as foreclosing it from "look[ing] to a law's legislative history to find an illegitimate motivation" in the speech context. Pet.App.51a.

Ultimately, the court found that the appropriate level of scrutiny did not matter for many of the law's provisions, as most "do not further any substantial government interest—much less a compelling one." Pet.App.58a. The state has no legitimate interest in "leveling the expressive playing field," as the concept that the government can "restrict the speech of some elements of our society in order to enhance the relative voice of others" is "wholly foreign to the First Amendment." Pet.App.59a (alteration omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). And even if Florida could establish that interfering with the editorial judgment of websites serves a substantial governmental interest, most of its chosen means are "the opposite of narrow tailoring." Pet.App.62a.

But the court reached a different conclusion as to most of S.B. 7072's disclosure requirements. In the court's view, those provisions are subject only to the more relaxed scrutiny for compelled disclosures in the misleading advertising context set forth in *Zauderer v.*

Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985). Under *Zauderer*, laws that require disclosure of "purely factual and uncontroversial information about the terms under which … services will be available" are permissible unless they are "unjustified or unduly burdensome." *Id.* at 651. The court acknowledged that *Zauderer* "is typically applied in the context of advertising and to the government's interest in preventing consumer deception," but it concluded that *Zauderer* "is broad enough to cover S.B. 7072's disclosure requirements." Pet.App.57a.

The panel concluded that requiring websites to provide notice and a detailed explanation for every one of their millions of daily editorial decisions is unduly burdensome and therefore unconstitutional. Pet.App.64a-65a. But it held that the rest of the disclosure obligations are likely constitutional, reasoning that Florida has a legitimate interest in ensuring that users "are fully informed … and aren't misled about platforms' content-moderation policies." Pet.App.63a. The panel did not point to any evidence that users are likely to be misled, even though this Court's cases expressly "require disclosures to remedy a harm that is 'potentially real and not purely hypothetical.'" *Nat'l Inst. of Family Life Advocates v. Becerra*, 138 S.Ct. 2361, 2377 (2018) ("*NIFLA*"). And though this Court's precedents require *the state* to prove that its disclosure requirements are "neither unjustified nor unduly burdensome," *id.*, the panel faulted *cross-petitioners* for failing to establish that the disclosure obligations are unduly burdensome. Pet.App.63a. The court accordingly vacated the preliminary injunction as to those provisions. The

court subsequently granted the parties' joint motion to stay the mandate, thus leaving the district court's broader preliminary injunction in place pending resolution of Florida's petition for certiorari. Order, *NetChoice LLC v. Attorney Gen.*, No. 21-12355 (11th Cir. June 22, 2022).

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

NetChoice and CCIA agree with Florida that this Court should review the Eleventh Circuit's decision and provide clear guidance concerning Florida's efforts to control the editorial discretion of select social media websites whose perceived views Florida evidently disfavors. To that end, they have acquiesced in Florida's petition for certiorari (No. 22-277). But there is no reason for this Court to review half a loaf. While the Eleventh Circuit correctly condemned the core of S.B. 7072 as incompatible with the First Amendment, it nonetheless allowed certain burdensome disclosure requirements to go into effect. That was error. Those disclosure provisions are designed to work hand-in-glove with the provisions that directly countermand these disfavored companies' editorial discretion and force them to disseminate offensive and inappropriate speech with which they disagree. The disclosure provisions are infected with the same viewpoint and speaker-based discrimination that permeates the law. And the disclosure provisions are unconstitutional in their own right, as they impose onerous burdens that promote no legitimate, let alone compelling, state interest. Finally, S.B. 7072's one-two punch of editorial mandates and burdensome disclosure provisions

designed to enforce those mandates is the same combination employed by Texas and other states that may follow Florida's lead. Thus, all the reasons that justify plenary review of S.B. 7072 support granting both Florida's petition and this cross-petition and reviewing all the law's operative provisions.

I. Granting This Cross-Petition Will Ensure That The Court Can Provide Effective Relief If It Concludes That S.B. 7072 Discriminates Based On Viewpoint.

Under this Court's cases, the threshold question in any First Amendment challenge is what level of scrutiny to apply. Here, multiple factors point to strict scrutiny, especially given the viewpoint discrimination that pervades S.B. 7072. In fact, S.B. 7072 discriminates based on content, speaker, and viewpoint. And while the law's content-based distinctions are most evident in particular provisions—*e.g.*, forcing companies to disseminate posts "about a candidate"—the speaker-based distinctions and viewpoint-based discrimination that explain why certain speakers were singled out pervade and condemn the entire law. The Eleventh Circuit's refusal to accept the viewpoint discrimination evident on the face of the statute and official signing statements was plainly erroneous and cannot be reconciled with decisions of this Court or others.

1. It is bedrock First Amendment law that the government cannot regulate speech "because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). While a law that "singles out specific subject matter for differential

treatment" is problematic enough, *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015), one that "targets … particular views taken by speakers on a subject" is even worse, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This Court has accordingly emphasized that viewpoint discrimination is an "egregious form of content discrimination." *Id.* The government must "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*; *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001). Viewpoint-discriminatory laws thus receive the strictest of scrutiny. *Rosenberger*, 515 U.S. at 830.

Like content discrimination, viewpoint discrimination is not always unmistakable on the face of a law. But just as a "facially content-neutral restriction … may be content based" if "there is evidence that an impermissible purpose or justification underpins" it, *City of Austin v. Reagan Nat'l Adver. of Austin*, 142 S.Ct. 1464, 1475 (2022), a facially viewpoint-neutral restriction may still be viewpoint-based if it has the "stated purpose[]" or "inevitable effect" of singling out disfavored viewpoints for differential treatment, *Sorrell*, 564 U.S. at 565; *cf. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). Moreover, laws that draw content-based distinctions on their face invite further scrutiny to determine whether those distinctions reflect efforts to disfavor particular viewpoints. *Sorrell*, 564 U.S. at 563-65.

Laws that draw speaker-based distinctions similarly pose a particularly acute risk of viewpoint

discrimination. After all, a "speaker" and her "viewpoints" are so often "interrelated" that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). And "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" *NIFLA*, 138 S.Ct. at 2378 (quoting *Sorrell*, 564 U.S. at 580). Accordingly, this Court has been deeply skeptical of laws that "distinguis[h] among different speakers," even when they are not otherwise facially viewpoint-discriminatory. *Id.* And it has made clear that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 170.

2. S.B. 7072 discriminates based on viewpoint. On its face, the law discriminates against certain speakers, singling out a subset of "social media platforms" and saddling only them with a slew of onerous burdens. Its size and revenue requirements are carefully crafted to target "Big Tech," while exempting smaller companies with a different perceived ideological bent and, in its original form, providing a further carve-out for large companies with strong business interests in the state.

The reason for that speaker-based distinction is undeniable and undisguised: The state does not like the viewpoint that it perceives "Big Tech" to espouse. That is evident in S.B. 7072's text and completely undisguised in the official statements accompanying S.B. 7072's signing. *Cf. Sorrell*, 564 U.S. at 564-65

(relying on law's "stated purposes" and "record" in litigation to find viewpoint discrimination).

S.B. 7072's formal legislative findings leave no doubt that Florida enacted the law because it disliked how certain social media websites have exercised their editorial judgment. The findings explain that the state singled out large companies because it thought they were exercising that First Amendment right in an "inconsistent and unfair" manner—in other words, in ways the state does not like. S.B. 7072 §§1(9)-(10). Indeed, as both the district court and the court of appeals recognized, one of S.B. 7072's key premises is the perception that certain large social media companies exercise their editorial discretion in an "ideologically biased" manner. Pet.App.29a, 82a.

Whatever doubts might remain as to why S.B. 7072 singled out certain companies for intrusive and burdensome regulation were eliminated by official statements accompanying the law's signing and subsequent events. In Florida, as in most states, a bill cannot become law unless the governor signs it (or otherwise complies with presentment requirements). Here, the governor's statement during signing left no doubt about his understanding of what prompted the law and how it would operate. The governor stated that S.B. 7072 provides "protection against the Silicon Valley elites," and that if "Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable." CA.App.1352.

While the governor was candid about his motivations for signing the bill into law, statements by individual legislators were more colorful and more

transparent still. For example, one of S.B. 7072's sponsors stated: "Day in and day out, our freedom of speech as conservatives is under attack by the 'big tech' oligarchs in Silicon Valley. But in Florida, we said this egregious example of biased silencing will not be tolerated." *Id.*

Finally, the state's decision to initially exempt entities that own and operate Florida theme parks, only to revoke that exemption after Disney executives criticized a different Florida law, underscores that the entire point of S.B. 7072's gerrymander is to punish speakers who hold viewpoints with which the state disagrees, while leaving "unburdened those speakers whose messages are in accord with its own views." *NIFLA*, 138 S.Ct. at 2378.

The record the state created to try to justify its law reinforces that conclusion. Florida included an extraordinary 800 pages of materials in its appendix detailing supposedly biased editorial decisions that the state disapproves of, ranging from Facebook's decision to limit satirical content by *The Babylon Bee* to Twitter's decision to suspend former President Trump. *See, e.g.*, C.A.App.891-1693; Fla.CA.Br.3-4. By the state's own telling, it seeks to regulate those decisions not in spite of, but because of the viewpoints they convey. *United States v. Eichman*, 496 U.S. 310, 315 (1990). Viewpoint discrimination does not get much clearer than that. *See Sorrell*, 564 U.S. at 565 (finding viewpoint discrimination because "[f]ormal legislative findings" complained that the "goals" of the regulated speakers convey messages that "are often in conflict with the goals of the state").

3. The Eleventh Circuit did not deny the copious evidence that S.B. 7072 discriminates based on viewpoint. To the contrary, it readily acknowledged that "S.B. 7072's application to only the largest social-media platforms might be viewpoint motivated." Pet.App.53a-54a. But the court nonetheless declined to condemn the law on that basis because it deemed itself precluded by *O'Brien* from "look[ing] to a law's legislative history to find an illegitimate motivation." Pet.App.51a. That logic is doubly mistaken.

First, while courts are rightfully careful to avoid imputing the motives of "a handful of Congressmen" to the entire legislature, *O'Brien*, 391 U.S. at 384, that hardly means that courts must ignore codified legislative findings that necessarily reflect the official views of the body that enacted it, or official statements that reflect the official views of the sole executive who signed it. *See Sorrell*, 564 U.S. at 565; *cf. Turner Broad. Sys. v. FCC*, 512 U.S. 622, 646 (1994). Second, *O'Brien* did not involve facial content-based and speaker-based discrimination, each of which *demands* an encompassing inquiry into whether the content distinction reflects viewpoint discrimination or the "speaker preference reflects a content [or viewpoint] preference." *Reed*, 576 U.S. at 170. That is why this Court has routinely looked beyond the text for evidence of improper viewpoint discrimination when evaluating laws that, unlike the provision in *O'Brien*, draw facial distinctions on the basis of content or speaker. *See, e.g.*, *Sorrell*, 564 U.S. at 565; *cf. Church of Lukumi Babalu Aye*, 508 U.S. at 534-35. *O'Brien* thus in no way compels courts to turn a blind eye to context when there is obvious speaker discrimination afoot.

While that mistake did not stop the Eleventh Circuit from recognizing that the bulk of S.B. 7072 is unconstitutional, cross-petitioners remain free to continue to argue before this Court that the law is viewpoint-discriminatory. And a finding that S.B. 7072 is viewpoint-discriminatory would require condemning the law *in toto*, especially given that the entire law discriminates among speakers. While the Court might be able to reach that result and affirm the district court's broad injunction even without granting this cross-petition, there is no need to create any remedial doubt on that score. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Instead, this Court should grant both Florida's petition and this cross-petition to ensure that if this Court concludes that S.B. 7072 is viewpoint-discriminatory, there will be no even arguable obstacle to ordering the appropriate remedy: enjoining S.B. 7072 in full.

II. Granting This Cross-Petition Will Provide The Court With An Opportunity To Clarify The Scope And Application Of *Zauderer*.

Even setting aside the viewpoint discrimination that infects the entire law, the Eleventh Circuit's decision to subject S.B. 7072's disclosure provisions to only relaxed scrutiny under *Zauderer* conflicts with decisions of this Court and others—and the court misapplied the *Zauderer* test to boot. The Court should grant this cross-petition so it can correct that mistake before other courts follow the Eleventh Circuit's lead in extending *Zauderer* to far-removed contexts where it has no application.

1. The "constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression" is well "established." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988). In short, "[t]he right to speak and the right to refrain from speaking" are two sides of the same constitutional coin. *Wooley*, 430 U.S. at 714. It is also well established that the protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Thus, just as laws compelling speech bearing a particular message are subject to at least exacting scrutiny, so too are laws compelling statements of fact. *See, e.g.*, *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2383 (2021); *Citizens United*, 558 U.S. at 366-67; *Riley*, 487 U.S. at 797-98.

While laws compelling disclosures are generally treated no differently from any other law compelling speech, *see, e.g.*, *NIFLA*, 138 S.Ct. at 2377, this Court's decision in *Zauderer* provides a narrow exception to that rule, permitting compelled disclosures in the commercial advertising context. There, the Court upheld a requirement that attorneys who advertise their willingness to represent clients for a contingency fee must disclose whether the client would have to pay court costs in the event of a loss. *See Zauderer*, 471 U.S. at 639-53. The Court declined to apply traditional heightened scrutiny, reasoning that "[b]ecause 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 has only "minimal"

interest in withholding "purely factual" information necessary to avoid misleading consumers. *Id.* at 651.

This Court has never applied *Zauderer* to uphold a speech mandate outside the context of correcting misleading advertising. To the contrary, the Court has consistently and repeatedly described *Zauderer* as limited to efforts to "combat the problem of inherently misleading commercial advertisements" by mandating "only an accurate statement." *Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229, 250 (2010); *see also, e.g.*, *Hurley*, 515 U.S. at 573 (describing *Zauderer* as permitting the government only to "requir[e] the dissemination of 'purely factual and uncontroversial information'" in the context of "commercial advertising"); *United States v. United Foods*, 533 U.S. 405, 416 (2001) (declining to apply *Zauderer* where compelled subsidy was not "necessary to make voluntary advertisements nonmisleading for consumers"); *In re R.M.J.*, 455 U.S. 191, 205 (1982) (invalidating commercial-speech mandate where advertising "ha[d] not been shown to be misleading").

This Court has never applied *Zauderer* when the service or product is speech itself—let alone when only a limited subset of purveyors of speech are compelled to disclose. To the contrary, the Court has made clear that laws that single out some but not all those in the business of disseminating expression demand especially close scrutiny. *See, e.g.*, *Turner*, 512 U.S. at 640-41; *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 228-31 (1987); *Minneapolis Star & Tribune v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). After all, laws that "discriminate among media, or among different speakers within a single medium, often

present serious First Amendment concerns" because they present very real "dangers of suppression and manipulation" of the medium. *Turner*, 512 U.S. at 659, 661. Such distinctions are inherently dangerous, as they tend to skew the presentation of issues. A law that singles out the *New York Times* and the *Washington Post* but not the *Wall Street Journal* or the *New York Post* will skew debate regardless of why that distinction was drawn. So too of a law that burdens weekly magazines but not daily newspapers.

All that makes this the very last context in which anything less than exacting scrutiny and its narrow tailoring requirement should apply. S.B. 7072's disclosure requirements have nothing to do with advertising, let alone with preventing misleading advertising. Rather, the point of the disclosure requirements is to make it easier for parties to sue websites for perceived inconsistencies in how they exercise their editorial discretion. It is one thing to require a commercial entity that voluntarily advertises its services to include information that makes the advertisement non-misleading. Because the government can *ban* misleading advertisements without running afoul of the First Amendment, *see R.M.J.*, 455 U.S. at 203, it follows that it may preclude misleading commercial advertisements by requiring disclosures to ensure accuracy. *See Zauderer*, 471 U.S. at 651. But it is an entirely different thing, and entirely unjustified, to compel speech in furtherance of more government regulation of the speech—particularly when the entity has not engaged in any advertising at all, let alone any misleading advertising. Under S.B. 7072, a large company—a.k.a., "Big Tech"—must disclose even if it refrains

from advertising, while a smaller company need not disclose even in connection with advertising. That makes no sense and underscores the inapplicability of *Zauderer*.

2. The Eleventh Circuit's extension of *Zauderer* far beyond the commercial advertising context conflicts not only with this Court's precedent, but with decisions from other circuits. Multiple circuits have concluded that, at the very least, intermediate scrutiny is required when a law singles out just some participants in a marketplace for disseminating speech. In *Comcast of Maine/New Hampshire v. Mills*, 988 F.3d 607 (1st Cir. 2021), for example, the First Circuit considered a state law that required cable operators to allow cable subscribers to purchase cable channels and programs individually, rather than bundled together in a channel or package of channels. Cable operators and programmers sued, claiming a violation of the First Amendment, and the district court granted a preliminary injunction. In affirming, the First Circuit explained that laws that single out "a segment of the media" are "*always* subject to at least some degree of heightened scrutiny." *Id.* at 615 (quoting *Turner*, 512 U.S. 640-41).

The D.C. Circuit has likewise recognized that laws singling out only some speech disseminators trigger traditional heightened scrutiny. In *Time Warner Entertainment v. FCC*, 56 F.3d 151, 179 (D.C. Cir. 1995), the court evaluated the constitutionality of cable rate regulations issued by the FCC. And it too concluded that "laws of less than general application aimed at the press or elements of it" trigger traditional

heightened scrutiny. *Id.* at 181 (citing *Turner*, 512 U.S. at 640).

Even outside the speech-dissemination context, the D.C. Circuit has expressly rejected the proposition that "*Zauderer* … reaches compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015). As it explained, "*Zauderer* is confined to advertising, emphatically and, one may infer, intentionally." *Id.* Extending *Zauderer* to efforts to compel some but not all social media websites to disclose how they exercise their constitutionally protected editorial discretion thus breaks with the governing law in multiple circuits. *See id.* at 524 (pointing out "conflict in the circuits regarding the reach of *Zauderer*").

3. Making matters worse, the Eleventh Circuit not only wrongly extended *Zauderer*, but misapplied it too. As this Court recently reiterated, the *state* has the burden to prove that its disclosure requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 138 S.Ct. at 2377. Yet the Eleventh Circuit barely even tried to explain how S.B. 7072's disclosure requirements are "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Neither the court nor the state pointed to anything to suggest that the websites have misled consumers about their editorial policies. Just as California "point[ed] to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals" in *NIFLA*, 138 S.Ct. at 2377, Florida

has pointed to nothing suggesting that consumers do not know that websites exercise editorial discretion.

Nor did the state even try to demonstrate that its onerous disclosure rules are not unduly burdensome vis-à-vis any legitimate interests they may serve—a concern that should have been front and center given the sheer volume of the mandated disclosures. In fact, the disclosure requirements serve little interest beyond making it easier for parties to bring lawsuits alleging violations of the law's (unconstitutional) direct restrictions on the exercise of editorial discretion. That not only underscores why *Zauderer* is such a poor fit here, but reinforces the conclusion that *none* of the disclosure requirements is either "reasonably related to … preventing deception of consumers" or not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

III. Granting This Cross-Petition Will Allow The Court To Review All Aspects Of This Exceptionally Important Case.

This "first-of-its-kind law," which has been followed by other states, *see* H.B. 20 (Tex. 2021); A.B. A7865A (N.Y. 2022); A.B. 587 (Cal. 2022), presents questions of profound importance across the board. That is true not just of a subset of the law's provisions, but of its disclosure requirements as well, which have been copied elsewhere and share the same improper motivations. This Court recognized as much when it vacated the Fifth Circuit's stay of an order preliminarily enjoining Texas from enforcing H.B. 20. *See Paxton*, 142 S.Ct. at 1715-16. This Court did not limit that relief to the direct restrictions on editorial discretion or allow the disclosure provisions to take

effect. It restored the injunction in full. Moreover, even three of the dissenting Justices acknowledged that the issues these burgeoning laws pose are "of great importance" and "will plainly merit this Court's review." *Id.* at 1716 (Alito, J., dissenting). That observation extends to the entirety of H.B. 20 and S.B. 7072, especially since both laws envision the primary mandates and disclosure provisions working hand-in-glove to empower the state and private litigants to check the perceived leftward bias of "Big Tech." The same can be said of other states contemplating a similar path; they are tempted to replicate not just half of the law, but the one-two punch of controlling editorial discretion and mandating disclosure to facilitate the control.

Every issue this cross-petition raises has importance that extends beyond this case. "[V]iewpoint discrimination" is always "a matter of serious constitutional concern," *NIFLA*, 138 S.Ct. at 2378 (Kennedy, J., concurring), for it is a "poison to a free society," *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019) (Alito, J., concurring). Viewpoint discrimination is particularly pernicious, moreover, when it arises in the context of speech on matters "of great public importance." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emp., Council 31*, 138 S.Ct. 2448, 2475 (2018). Viewpoint discrimination pervades S.B. 7072, including the disclosure provisions that the decision below left intact. Indeed, one of the evident purposes of the disclosure obligations is to supply information that will facilitate private lawsuits challenging exercises of editorial discretion that Florida has deemed "unfair."

Whether the disclosure provisions in laws like S.B. 7072 are subject to the less demanding and malleable scrutiny this Court articulated in *Zauderer* is critically important in its own right. Again, even most the Justices who voted against vacating the Fifth Circuit's stay of the preliminary injunction against Texas's similar law opined that the constitutionality of its "disclosure requirements" turns on questions that "could have widespread implications with regard to other disclosures required by federal and state law." 142 S.Ct. at 1718 (citing *Zauderer*). Other Justices have also noted the need for guidance on *Zauderer*'s scope. *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). As the Second Circuit explained two decades ago, "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (collecting examples). Since then, such laws have only proliferated, and compelled "[c]ommercial disclosures have become ubiquitous." Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 Fordham Urb. L.J. 1201, 1224-25 (2013).

By expanding *Zauderer* beyond recognition and eschewing more demanding levels of scrutiny, the decision below invites Florida and other states (not to mention the federal government) to burden businesses with an ever-expanding list of disclosure requirements. If that aspect of the decision is left standing, there is no reason its approach will be limited to social media websites. One need not look

hard for lawmakers who perceive editorial bias and inconsistency when it comes to large newspapers or newscasts or the like. And if *Zauderer* is not limited to the context of correcting misleading commercial advertising, then it is hard to see what would stop states, Congress, or federal agencies from invoking it to compel all manner of "disclosures" designed to force private parties to help advance their policy preferences, be it their preferred views on climate change, firearms, or any of the many other issues on which reasonable minds can and do differ.

In the end, though, the most compelling reason to grant this conditional cross-petition is to ensure that this Court can consider all aspects of S.B. 7072. The law's direct interference with editorial discretion and its disclosure requirements are designed to work together to achieve the objective of government manipulation to "level the playing field" by counteracting the perceived bias of large social media websites. Cross-petitioners firmly believe that the entirety of that effort is anathema to First Amendment values. But whether the Court ultimately agrees, there is no reason to artificially limit the scope of this Court's review. This Court should grant plenary review, and that review should be truly plenary, not limited to only half of Florida's effort to regulate private speech.

CONCLUSION

For the foregoing reasons, this Court should grant this cross-petition if it grants Florida's petition.

Respectfully submitted,

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