No. 22-393

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

REPLY BRIEF FOR CROSS-PETITIONERS

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S.B. 7072 is a compendium of First Amendment problems that trigger strict scrutiny several times over. Those defects led the court of appeals to invalidate S.B. 7072's substantive provisions along with one of its disclosure provisions, and caused the district court to enjoin S.B. 7072 more broadly. Florida asks this Court to review the Eleventh Circuit's decision, but seeks to artificially limit the Court's review, such that it would consider content and speaker discrimination, but ignore evidence of viewpoint discrimination and limit its review to a subset of the law's disclosure requirements. Cross-petitioners agree with Florida that this Court should review the decision below, but it should review the decision in full and preserve for itself the full range of remedial options the lower court possessed.

Florida defends its law as neutral despite overwhelming evidence, including in the statutory text and the governor's official statement during signing, that S.B. 7072 targets the largest websites because of their purported "unfair and inconsistent" editorial decisions. Florida's effort is both unsuccessful and largely beside the point, as cross-petitioners will remain free to assail the law as viewpoint-discriminatory as an alternative ground to support the judgment below. Thus, the only question is whether this Court would be constrained in ordering full relief should it agree with cross-petitioner (and the district court) that S.B. 7072 is viewpoint discriminatory. Florida concedes that granting this cross-petition would eliminate any possible objection

to this Court granting full relief. That alone warrants granting the cross-petition.

But granting this cross-petition has the additional advantages of allowing this Court to consider the constitutionality of S.B. 7072 as a whole and to clarify the reach of *Zauderer*. By Florida's own admission, the Eleventh Circuit has invalidated the "heart" of S.B. 7072. BIO.5. S.B. 7072's disclosure provisions were never intended to operate independently of that statutory heart, but rather are designed to facilitate public and private enforcement of the provisions the Eleventh Circuit rightly recognized were unconstitutional. It makes little sense to review only a subset of those interlocking provisions. What is more, the circuits are split on the reach of *Zauderer*, and Florida insists that compelled disclosure requirements outside the commercial advertising context have become commonplace. In short, there is every reason for this Court to grant review of the Eleventh Circuit's decision, and no good reason to limit the scope of this Court's review or its remedial options.

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.

Cross-petitioners have consistently argued that S.B. 7072 discriminates not just on the basis of content and speaker, but on the basis of viewpoint as well. Those arguments about forbidden viewpoint discrimination have figured prominently at every stage of the proceedings. The district court agreed that S.B. 7072 discriminates on the basis of viewpoint

and as a result preliminarily enjoined the immediately operative provisions of S.B. 7072 *in toto*. And while the court of appeals reached a different conclusion on the viewpoint discrimination question, if the Court grants Florida's petition, cross-petitioners will be free to raise their viewpoint-discrimination arguments as an alternative basis for affirming the decision below. But granting this cross-petition will eliminate any argument that affirming the district court's injunction, which remains in force, would exceed the scope of this Court's remedial authority if it grants only Florida's petition.

Florida seeks to portray S.B. 7072 as a viewpoint neutral effort to regulate websites. That effort only underscores that this issue will be joined whether or not the Court grants this cross-petition. But Florida's effort to recharacterize S.B. 7072 as a neutral law unrelated to efforts to counteract the perceived biases of the targeted websites fails at every turn.

On its face, S.B. 7072 singles out certain disfavored speakers for disfavored treatment. The law's size and revenue requirements are gerrymandered to target the largest online services like Facebook and YouTube, while excluding smaller services with a different perceived ideological bent. S.B. 7072's formal findings underscore that the legislature singled out these large websites not because of neutral considerations of market power, but because it thought they were exercising their editorial discretion in a "inconsistent and unfair" manner. S.B. 7072 §§1(9)-(10). The Governor's signing statement reinforced what is evident on the law's face: The law is designed to provide "protection

against the Silicon Valley elites" and to prevent "Big Tech" from "discriminat[ing] in favor of the dominant Silicon Valley ideology." CA.App.1352. Florida then eliminated all doubt by including more than 800 pages in its appendix detailing supposedly biased editorial decisions that it does not like. CA.App.891-1693. By the state's own telling, then, it enacted S.B. 7072 to target viewpoints it perceives certain websites to espouse.

Florida insists that S.B. 7072 is not viewpoint discriminatory because it applies to the targeted websites regardless of the viewpoint expressed. But that ignores that the websites covered by S.B. 7072 are subject to the statute's onerous requirements only because of their perceived viewpoints, and other websites with different perceived biases are wholly unregulated. A law that imposed a burdensome tax on daily newspapers above a specified circulation level would not be deemed viewpoint neutral if the state made clear that it was tired of the bias and "inconsistent and unfair" editorial policies of some of the nation's largest newspapers. Laws that draw distinctions among speakers give rise to an obvious inference of viewpoint discrimination, and when state actors remove all doubt about the law's motivation, courts need not ignore the resulting viewpoint discrimination just because a law treats all large websites or newspapers alike. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-65 (2011).

Florida cannot deny that S.B. 7072 singles out specific speakers for disfavored treatment, but it attempts to dismiss those distinctions as innocuous because they discriminate on the basis of purported

"market power" rather than viewpoint. BIO.6. That contention might be credible in defense of a broadly applicable law addressing competitive concerns. But in a law targeted to a subset of companies engaged in First Amendment activity Florida deems "inconsistent and unfair," passing off viewpoint discrimination as market-power concerns does not work. That is particularly true given that the original version of the law carved out two companies with market power, and that carve-out was repealed not because those companies flexed such power, but because one of them criticized an unrelated state law. Cross.Pet.9-10.

Florida suggests that legislative findings and official statements criticizing websites for "unfair" censorship and "arbitrary" exercises of editorial judgment are "not viewpoint based." BIO.8. But that argument cannot be squared with precedent or common sense. In *Sorrell*, for example, the Court held that a state law was viewpoint discriminatory in part because its formal legislative findings complained that the disfavored speakers' actions were "often in conflict with the goals of the state." 564 U.S. at 565. S.B. 7072's official findings are far worse, complaining that the targeted websites exercise editorial judgment in an "inconsistent and unfair manner"—*i.e.*, in ways Florida does not like.

Like the Eleventh Circuit, Florida asserts that *United States v. O'Brien*, 391 U.S. 367 (1968), precludes courts from looking to the "legislative record to impugn the legislature's motives." BIO.7. But nothing in *O'Brien* requires courts to ignore codified legislative findings or official signing statements, particularly when a law singles out disfavored

speakers and content on its face. *See Sorrell*, 564 U.S. at 565. Florida insists that "this Court presumes a valid legislative purpose, not invidious intent." BIO.10. While that may be true in the ordinary course, it is certainly not true when speaker-based discrimination is undeniable. This Court is "deeply skeptical" of speaker-based discrimination, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2378 (2018) (*NIFLA*), and demands a searching inquiry into whether speaker preferences reflect a viewpoint preference, *see Sorrell*, 564 U.S. at 565. Here, evidence of viewpoint discrimination is ample and unmistakable, and in evaluating whether S.B. 7072's limitation to certain websites reflects viewpoint discrimination against the perceived bias of "Big Tech," "[j]udges are not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.).

Florida is thus left arguing that granting this cross-petition would "distract from review of the questions presented" in its own petition. BIO.16. In reality, it is *denying* the cross-petition that would open the door to needless and distracting procedural disputes. Florida insists that cross-petitioners "cannot advance" a viewpoint-discrimination argument *at all* "absent a granted cross-petition." BIO.17. That is plainly incorrect, as cross-petitioners are entitled "to urge any grounds which would lend support to the judgment below." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977). Here, the viewpoint-discrimination arguments not only were urged below, but are the basis for the district court's injunction, which remains in effect. And it would be

strange to draw a line between impermissible contentions about viewpoint-discrimination and permissible arguments about content- and speaker-discrimination when this Court has repeatedly concluded that viewpoint, speaker, and content discrimination have an unfortunate tendency to work hand-in-glove and are sometimes difficult to differentiate. *See Sorrell*, 564 U.S. 564-65; *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995).

Florida is on stronger ground in suggesting that, without granting this cross-petition, questions could arise about the proper scope of relief in the event this Court agrees with the district court that S.B. 7072 is viewpoint discriminatory. But that is a reason to grant the cross-petition, not to deny it, as the Court should not create even an arguable question about the scope of its remedial authority. Cross.Pet.28. Instead, the Court should preserve for itself the full range of remedial options that the lower courts had available by granting this cross-petition.

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

Even apart from its mistaken refusal to invalidate S.B. 7072 in full because of the viewpoint-discrimination that pervades the law, the Eleventh Circuit's decision to uphold most of S.B. 7072's disclosure provisions under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), is wrong and conflicts with decisions from multiple courts of appeals. Florida does not

dispute that this Court has *never* applied *Zauderer* to uphold a speech mandate outside the context of correcting misleading commercial advertising. In fact, the Court has consistently 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). Florida nevertheless insists that *NIFLA* somehow broadens *Zauderer* to govern "speech that 'relates to the services' that a commercial actor provides." BIO.14. But *NIFLA* was hardly a victory for states seeking to impose novel disclosure requirements; it merely distinguished *Zauderer* en route to condemning the disclosure requirement at issue there as inconsistent with the First Amendment. *NIFLA*, 138 S.Ct. at 2372 (distinguishing *Zauderer* because, among other things, the requirement in *NIFLA* "in no way relate[d] to the services" the regulated actor provided).

Florida contends that limiting *Zauderer* to the commercial advertising context "conflicts with *Zauderer*'s rationale," and claims that *Zauderer* rested on the "'material differences between disclosure requirements and outright prohibitions on speech.'" BIO.14 (quoting 471 U.S. at 650). But this Court has *never* read *Zauderer* to apply to *all* disclosure requirements. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797-98 (1988) (exacting scrutiny); *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2383 (2021) (same). More broadly, this Court has not endorsed compelled disclosures as consistent with the First Amendment, but has instead made clear that the "right to speak

and the right to refrain from speaking" are two sides of the same constitutional coin. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

It is thus no surprise that the section of *Zauderer* that Florida selectively excerpts was articulating why compelled speech "in commercial advertising" differs from other compelled speech cases. 471 U.S. at 651. As the Court explained, when the state "has attempted only to prescribe what shall be orthodox *in commercial advertising*," the First Amendment "interests at stake" "are not of the same order as" in traditional compelled speech cases. *Id.* (emphasis added). After all, an advertiser has only "minimal" interest in withholding "purely factual" information necessary to avoid misleading consumers "in his advertising." *Id.* That logic does not even begin to translate to efforts to force websites to disclose all manner of details to empower individuals to police editorial consistency via actions seeking substantial statutory damage awards.

Florida insists that limiting *Zauderer* to the commercial advertising context would "threaten" mandatory "health and safety warnings." BIO.14. This Court dispatched that concern in *NIFLA*, explaining that certain types of health and safety warnings have a long historical pedigree. 138 S.Ct. at 2376; *cf. United States v. Stevens*, 559 U.S. 460, 468-69 (2010). There is no comparable historical tradition of laws compelling private parties to disclose how they choose to exercise their editorial discretion—let alone laws compelling them to do so to make it easier to sue them for perceived inconsistencies. Cross.Pet.31. Florida insists that disclosure obligations outside the

commercial-advertising context have become "commonplace," BIO.14, but that would just underscore the need for this Court to clarify *Zauderer*'s scope. Cross.Pet.36.

The Eleventh Circuit's extension of *Zauderer* conflicts not only with this Court's precedent, but with decisions from other circuits. Florida concedes (with considerable understatement) that "[t]here is … some debate on how far *Zauderer* extends." BIO.13. And it does not deny that multiple circuits have held that heightened scrutiny applies when a law singles out some participants in the marketplace for disseminating speech. Cross.Pet.32. Florida insists that those decisions do not conflict with the decision below because "*Zauderer is* a form of heightened scrutiny." BIO.12-13. But both the First and D.C. Circuits applied forms of truly heightened scrutiny (*i.e.*, intermediate scrutiny or strict scrutiny) in lieu of *Zauderer*'s lax standard. *See Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607, 615, 617 (1st Cir. 2021) (instructing district court to determine on remand whether intermediate or strict scrutiny applies); *Time Warner Entm't v. FCC*, 56 F.3d 151, 186 (D.C. Cir. 1995) (applying intermediate scrutiny); *see also NIFLA*, 138 S.Ct. at 2372-75 (distinguishing *Zauderer* scrutiny from intermediate scrutiny).

Florida cannot credibly deny that the decision below conflicts with the D.C. Circuit's decision in *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), which squarely limits *Zauderer* to the commercial advertising and point-of-sale labeling contexts. *Id.* at 524. Florida derides that decision as dictum and tries to limit it to its facts,

BIO.13, but the court's decision to limit *Zauderer* to commercial advertising was central to its holding. The question there was "whether *Zauderer* … reaches compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *Id.* at 522. The court answered "no," *id.* at 524, explaining that "*Zauderer* is confined to advertising, emphatically and, one may infer, intentionally," *id.* at 522. That is why the dissent complained that the majority constrained "*Zauderer* … to a *sub*-category of commercial speech: advertisements and product labels." *Id.* at 535 (Srinivasan, J., dissenting) (emphasis added). Florida minimizes S.B. 7072's required disclosures as "akin to" "product label[s]." BIO.13. But much of what S.B. 7072 demands (*e.g.*, thorough explanations, view counts, user data, and information about free advertising) is far more demanding and constitutionally problematic.

The Eleventh Circuit not only wrongly extended *Zauderer*, but misapplied it to boot. Florida does not deny that the *state* has the burden to prove that its disclosure requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 138 S.Ct. at 2377. Nor does it deny that the Eleventh Circuit improperly shifted the burden to cross-petitioners to establish that the disclosure obligations are unduly burdensome. Cross.Pet.20, 33-34. Instead, Florida seeks to rehabilitate the court's decision by arguing that it *could* have found the state's burden satisfied had it asked the right question. BIO.15. But that concedes that the court below asked the wrong question and placed the burden on the wrong party. Moreover, Florida's "evidence" consists of a handful of newspaper articles detailing editorial decisions that

the state dislikes and an amicus brief. BIO.15. Those materials do not come close to carrying the state's burden.

Finally, Florida makes a half-hearted argument that cross-petitioners "did not below dispute that *Zauderer* applied." BIO.12. That is incorrect. Cross-petitioners argued in the Eleventh Circuit that strict scrutiny applies to the entire law—including its disclosure provisions. Appellees' Br. 29-31, *NetChoice LLC v. Moody*, No. 21-12355 (11th Cir.). After canvassing the law's substantive mandates, they argued that the "Act's remaining provisions"—including its disclosure provisions—"similarly trigger strict scrutiny," both because they "impose burdensome and intrusive speech requirements … in service of intruding on editorial judgments" and because "the Act's aim was to discriminate based on viewpoint." *Id.* 29-30. Both the proper level of scrutiny and the constitutionality of the disclosure provisions were thus both pressed and passed upon below.

In the end, there is no basis for this Court to limit its review to the provisions invalidated by the Eleventh Circuit. Viewpoint-, content-, and speaker-based distinctions permeate S.B. 7072. All of its provisions govern only the "Big Tech" websites perceived to have "unfair and inconsistent" editorial policies, and none of its provisions saddle other websites engaged in comparable First Amendment activity. What is more, the disclosure provisions were not designed to operate in isolation, but were designed to facilitate public and private enforcement of the restrictions on editorial discretion that the court of

appeals correctly invalidated. There is no reason for this Court to limit its review to a subset of S.B. 7072's interlocking provisions or to limit its remedial discretion.

CONCLUSION

For the foregoing reasons, this Court should grant this cross-petition along with Florida's petition in No. 22-277.

Respectfully submitted,

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