No. 22-393

In the Supreme Court of the United States

NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL.,
Cross-petitioners,
v.
ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.,
Cross-respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Florida's petition asks the Court to review the Eleventh Circuit's decision enjoining under the First Amendment much of S.B. 7072, a Florida law that attempts to prevent the massive social-media platforms cross-petitioners represent from abusing their enormous power to censor speech. Cross-petitioners agree that the Court should grant review of that petition. Their cross-petition, however, asks the Court to review the Eleventh Circuit's decision to uphold the balance of Florida's law. Cross-petitioners principally rely on cherry-picked statements from the legislative record criticizing the abusive censorship practices of social-media companies, which cross-petitioners believe means that the law is "viewpoint-based" and hence invalid in full. The question the cross-petition presents is appropriately reformulated to present the following questions:

1. Whether the court of appeals correctly rejected cross-petitioners' bid to invalidate S.B. 7072 in its entirety based on the argument that a facially constitutional law is nonetheless subject to strict First Amendment scrutiny if there are legislative findings and history reflecting that a state wishes to stop abusive censorship by social-media companies.

2. Whether the court of appeals correctly held that the First Amendment permits Florida to require social-media companies to disclose their standards, inform users about changes to their rules, provide users with view counts for their posts, and inform candidates about free advertising under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

PARTIES TO THE PROCEEDING

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

Cross-respondents are the 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; and the Deputy Secretary of Business Operations of the Florida Department of Management Services, in their official capacity.

RELATED PROCEEDINGS

United States District Court (N.D. Fla.):

> *NetChoice v. Moody*, No. 4:21-cv-00220 (June 30, 2021)

United States Court of Appeals (11th Cir.):

> *NetChoice v. Moody*, No. 21-12355 (May 23, 2022)

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STATEMENT

The background relevant to this dispute is recounted in Florida's petition. *See* No. 22-277, Pet. 3–8. Cross-petitioners agree that the petition should be granted. Here, we recount only the background relevant to the questions cross-petitioners seek to add to this case beyond the questions presented in Florida's petition.

1. Social-media use has boomed in the last 20 years. That boom has "most powerfully" vested "the right to cut off speech" "in the hands of private digital platforms." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring).

In S.B. 7072, Florida took point in preventing social-media platforms from abusing their power over the public square. Its legislature found that "Floridians increasingly rely on social media platforms to express their opinions," and that "[s]ocial media platforms have become . . . important for conveying public opinion." S.B. 7072 § 1(3), (5) (enacted as Fla. Laws ch. 2021-32). Worrying, therefore, was the Florida legislature's finding that "[s]ocial media platforms have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians." *Id.* § 1(9). In response, S.B. 7072, as relevant here, requires disclosure about how and when the platforms censor speech and requires the platforms to host some speech that they would otherwise prefer not to host.

See No. 22-277, Pet. at 6 (outlining the Act's hosting rules).

The cross-petition mostly targets the statute's disclosure rules. Those rules require covered platforms[1] to "publish the standards . . . used for determining how to censor, deplatform, and shadow ban." Fla. Stat. § 501.2041(2)(a). Platforms must notify users when censoring, deplatforming, or shadow banning users or their posts, and provide the basis for the platform's action. *Id.* § 501.2041(2)(d)(1); *see also* No. 22-277, Pet. at 5 n.2 (citing provisions that define those terms). Platforms must also inform users of forthcoming changes to "user rules, terms, and agreements," which may not be made more than once every 30 days. Fla. Stat. § 501.2041(2)(c). And platforms must allow users to see how many other users have viewed their posts so that users can determine for themselves whether they have been censored or shadow banned. *Id.* § 501.2041(2)(e).

2. Cross-petitioners—two associations of internet companies—challenged S.B. 7072 in the Northern District of Florida days after it was enacted. They sought a preliminary injunction, arguing that they were likely to succeed on three claims: that S.B. 7072 is preempted by 47 U.S.C. § 230, that it violates the First Amendment on its face, and that it is unconstitutionally vague.

Relevant here, the district court accepted two of cross-petitioners' arguments. Citing a statement by

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[1] Broadly, S.B. 7072 covers platforms that do business in Florida and have over $100 million in annual revenue or over 100 million users. Fla. Stat. § 501.2041(1)(g).

the Governor and a statement by the Lieutenant Governor, the district court concluded that the "actual motivation" for S.B. 7072 was the platforms' "liberal viewpoint." Pet. App. 89a–90a. Based on that, the district court applied "strict scrutiny," to the entire law "root and branch," Pet. App. 90a, including to the disclosure provisions, and invalidated it across the board.

In the alternative, the district court invalidated the entire statute under intermediate scrutiny in three quick paragraphs. Pet. App. 92a–93a. The district court's only mention of the disclosure provisions was in this discussion: it believed that "some" unspecified number of them "seem designed not to achieve any governmental interest but to impose the maximum available burden on the social media platforms." Pet. App. 92a.

3. The Eleventh Circuit affirmed in part and reversed in part.

As to cross-petitioners' broadside on the statute based on alleged illicit motives, the court of appeals reasoned—citing this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968)—that "courts shouldn't look to a law's legislative history to find an illegitimate motivation for an otherwise constitutional statute." Pet. App. 51a. The court also declined to find that the statute's legislative findings reflected illicit motives simply by virtue of stating that the statute targeted "unfair[ness]." Pet. App. 53a. And the court explained that S.B. 7072's application to large companies was not enough to trigger strict scrutiny because the law's "application to only the largest social-media platforms . . . might be based on . . . market power." Pet. App. 53a–54a. The court of appeals

was clear, however, that it "needn't—and [did]n't—decide whether courts can ever refer to a statute's legislative and enactment history to find it viewpoint-based." Pet. App. 54a n.21. It therefore declined to apply strict scrutiny "root and branch." Pet. App 54a.

Turning to the disclosure rules, the Eleventh Circuit applied this Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), which the court explained established a different standard of review to disclosure requirements as compared to affirmative limits on speech. Pet. App. 56a–57a. It concluded that "[w]ith one notable exception, it is not substantially likely that the disclosure provisions are unconstitutional." Pet. App. 63a. The court reasoned that the government has a legitimate interest in "ensuring that users—consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies." Pet. App. 63a. And most of the disclosure provisions—that platforms publish their content-moderation standards, inform users about changes to the rules, and the like—are not particularly burdensome. Pet. App. 63a–64a. The court did conclude, however, that it was overly burdensome, and therefore unconstitutional, to demand that the platforms provide

notice and a rationale each time they censor a user and thus invalidated that requirement. Pet. App. 64a.

REASONS FOR DENYING THE CROSS-PETITION

Not content to have invalidated the heart of Florida's attempt to stop social-media companies from abusing their power to censor speech, cross-petitioners ask the Court to hold that the First Amendment also entitles them to conduct those abuses in darkness. They seek to expand the questions presented to encompass their challenge to the modest disclosure provisions of Florida's law that the court of appeals upheld. They contend (at 28) that if S.B. 7072 were motivated by viewpoint discrimination, then the law would need to be "condemn[ed]" "*in toto*." Likewise, they assert (at 34) that "*none*" of the disclosure provisions should survive because the court of appeals erroneously applied the *Zauderer* standard to the law's disclosure provisions.

The court of appeals correctly rejected cross-petitioners' sweeping bid to condemn Florida's law in its entirety based on statements and legislative findings criticizing the "unfair" conduct of social-media platforms. The court of appeals' decision to reject their arguments is fact-bound and, unlike the questions presented in Florida's petition, implicates no circuit split. The cross-petition should be denied.

I. CROSS-PETITIONERS' VIEWPOINT-DISCRIMINATION CLAIM IS NOT WORTHY OF REVIEW.

1. Cross-petitioners urge (at 24) that the Court should also decide whether S.B. 7072 is viewpoint discriminatory because it "singl[es] out a subset of 'social

media platforms.'" They argue (at 24) that 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."

The Eleventh Circuit correctly rejected that view. It explained that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated." Pet. App. 53a (alteration removed) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660–61 (1994)). It also observed that regulating the large social media companies could easily be explained by "their market power." Pet. App. 54a; *see also NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 484 (5th Cir. 2022) ("Texas reasonably determined that the largest social media platforms' market dominance and network effects make them uniquely in need of regulation to protect the widespread dissemination of information."). Given that explanation, the Eleventh Circuit refused to delve into "legislative history" to find "a viewpoint-discriminatory purpose." Pet. App. 54a. At the same time, it declined to lay down any categorical rule that a court can never infer a viewpoint-based motive for a facially constitutional law from a statute's history. Pet. App. 54a n.21.

2. That fact-bound holding does not warrant review. Cross-petitioners do not contend that the Eleventh Circuit's decision conflicts with any other circuit. Their viewpoint-based-motive argument is also wrong.

Contrary to cross-petitioners' approach, the Court should start with the text in discerning what motivated the Florida legislature. For most users, S.B.

7072 demands only that the platforms have content-moderation rules that operate consistently. Fla. Stat. § 501.2041(2)(b). In that respect, Florida's law is different from the Texas social-media-regulation law upheld by the Fifth Circuit in *Paxton*, which generally prohibits internet platforms from engaging in any viewpoint-based content moderation whatsoever. *See* 49 F.4th at 445–46 (citing Tex. Civ. Prac. & Rem. Code § 143A.002(a)). Florida's law, by contrast, leaves platforms largely free to impose viewpoint-discriminatory standards; they just need to apply them consistently.[2] A legislature bent on targeting certain viewpoints would hardly permit so much viewpoint-based discrimination.

In the face of that text, cross-petitioners' efforts to mine the legislative record to impugn the legislature's motives proves little. Consider, for example, *United States v. O'Brien*, 391 U.S. 367 (1968). There, Congress criminalized burning draft cards. *Id.* at 370. Following a prosecution, the defendant argued that the law was unconstitutional because it was "enacted" with the "purpose" of suppressing "speech." *Id.* at 382–83. This Court roundly rejected the claim, reasoning that it "will not strike down an otherwise constitu-

[2] Florida's law operates differently as to journalistic enterprises and candidates. The law prohibits a platform from "willfully deplatform[ing]" a candidate, Fla. Stat. § 106.072(2), and it also prohibits deplatforming a "journalistic enterprise based on the content of its publication or broadcast," Fla. Stat. § 501.2041(2)(j). S.B. 7072 also prohibits censorship and shadow banning of journalistic enterprises based on what they say, *id.*, and prohibits the use of algorithms to shadow ban material posted by or about candidates during the campaign, *id.* § 501.2041(2)(h).

tional statute on the basis of an alleged illicit legislative motive." *Id.* at 383; *see also Paxton*, 49 F.4th at 482 (relying on *O'Brien* to reject cross-petitioners' argument that the Texas legislature enacted a law similar to S.B. 7072 based on viewpoint motivations).

Cross-petitioners try (at 27) to distinguish *O'Brien* by claiming that they need not rely on legislative history because they rely on "codified legislative findings." That suggestion is hard to take seriously when cross-petitioners spent the previous two pages (at 25–26) discussing legislative history. And anyway, the supposedly discriminatory finding they point to is not viewpoint based: the Florida legislature found that the platforms had engaged in "unfair" censorship. Pet. App. 50a (quoting S.B. 7072 § 1(9), (10)). That does not signal support for any viewpoint; a legislature can rightly be concerned that platforms with enormous power to cut off speech are acting arbitrarily and inconsistently in any direction. And that is why the court of appeals found that the reference to unfair censorship was far from "damning." Pet. App. 53a.

Next, plucking (at 25–26) a single sentence from the Governor's signing statement, and a single legislator's statement, cross-petitioners claim to have found evidence of discriminatory intent. But those and similar statements cross-petitioners characterize as viewpoint-based (at 24–26) are reasonably construed to target the abuses of large social-media companies, not their views as such. Targeting abuse is viewpoint neutral even if it happens to be true that at the time of S.B. 7072's enactment cross-petitioners' members leaned largely leftward—the law applies equally to Twitter now that Elon Musk runs it as it did when

Jack Dorsey ran it. And apart from cross-petitioners' cherry-picked statements, the legislative record as a whole reflects that S.B. 7072 was designed to protect all "Floridians," "users," "the media," "consumers," "citizens," "candidates," and "constituents"—not only those with certain views.[3] Legislators stressed that the bill did not dictate the substance of social media platforms' terms of use; it merely protected against their arbitrary application.[4] Concern for arbitrariness

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[3] *E.g.*, *S. Comm. on Governmental Oversight and Accountability*, The Florida Channel 11:21-:26 ("Floridians"), 11:45-:58 ("users"), 13:05-:17 ("users"), 15:40-:16:15 ("duly qualified candidates"), 16:44-:53 ("the media"), 19:28-:59 (users), 28:15-:33 ("Florida consumers") (Apr. 6, 2021), https://tinyurl.com/4trz7stk; *S. Comm. on Appropriations (Part 2)*, The Florida Channel 27:17-:20 ("all users"), 40:03-:27 ("consumers," "all of our citizens," and "citizens in Florida"), 49:27-50:07 ("Florida citizens" and "candidates"), 53:35-:39 ("Florida citizens"), 57:51-58:10 ("constituents"), 1:14:35-:41 ("all of the citizens in Florida") (Apr. 19, 2021), https://tinyurl.com/2p9f8a99; *S. in Sess. (Part 2)*, The Florida Channel 1:37:14-:18 ("all users") (Apr. 22, 2021), https://tinyurl.com/35kx2vvs; *S. in Sess.*, The Florida Channel 1:57:25-:37 ("Floridians") (Apr. 26, 2021), https://tinyurl.com/27nsmebn; *H. in Sess.*, The Florida Channel 51:45-53:00 ("users"), 53:01-:26 ("Floridians"), 59:22-1:00:25 ("constituents"), 1:00:26-:01:08 ("Floridians"), 1:01:29-:04:07 ("Floridians" twice), 1:11:25-:56 ("Floridians"), 1:12:50-:57 ("Floridians"), 1:20:23-:27 ("Floridians"), 1:20:53-:58 ("Floridians") (Apr. 27, 2021), https://tinyurl.com/tpr7x6d2.

[4] *See S. Comm. on Governmental Oversight and Accountability*, The Florida Channel 11:45-:58 (The platforms "may continue to censor and de-platform according to their standards, but their standards have to be evenly applied."), 13:05-:17 (expressing concern about arbitrary actions), 19:28-:59 (similar), 20:37-:55 (similar) (Apr. 6, 2021), https://tinyurl.com/4trz7stk; *S. in Sess. (Part 2)*, The Florida Channel 1:37:14-:18 (similar) (Apr. 22, 2021), https://tinyurl.com/35kx2vvs; *S. in Sess.*, The Florida Channel

is not based on viewpoint, and the record as a whole demonstrates the former, not the latter.[5]

In any event, this Court has long declined to "void a statute" based on "what fewer than a handful of Congressmen said about it." *O'Brien*, 391 U.S. at 384. Contrary to cross-petitioners' approach, this Court presumes a valid legislative purpose, not invidious intent. *E.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Put differently, a statute is not "'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate." *Hill v. Colorado*, 530 U.S. 703, 724 (2000). A law is also not content- or viewpoint-based just because it has the "inevitable effect" of "restricting" some speech "more than speech on other subjects." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014).

All that makes sense. "Proving the motivation behind official action is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). Indeed, "this Court has recognized from Chief Justice Marshall to Chief Justice Warren that determining

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1:55:26-:34 (similar) (Apr. 26, 2021), https://tinyurl.com/27nsmebn; *H. in Sess.*, The Florida Channel 53:01-:26 (similar), 1:04:07-1:05:53 (similar) (Apr. 27, 2021), https://tinyurl.com/tpr7x6d2.

[5] Citing nothing, cross-petitioners speculate (at 26) that the Florida legislature was motivated by viewpoint-based animus in repealing an exemption in the statute for companies that operate Florida theme parks. The argument has a heads-I-win-tails-you-lose flavor, as cross-petitioners successfully urged the district court to accept their argument that the presence of the theme-park exemption demonstrated viewpoint-based motive. *See* Pet. App. 91a. That the legislature repealed an aspect of the law a federal district court found especially problematic hardly demonstrates animus.

the subjective intent of legislators is a perilous enterprise." *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting) (citations omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) (declining to rely on "the subjective motivations of the *lawmakers*" to strike down a law under the Free Exercise Clause). "[I]n the real political world," laws "are often prompted by particular actions performed by actors with a particular ideological perspective—anti-abortion protesters, Westboro Baptist Church funeral picketers, corporate contributors to election campaigns, anti-globalization protesters, and more." Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 448–49 (2021) (footnotes omitted). In fact, cross-petitioners' view that a court must condemn in full an otherwise constitutional law regulating social-media companies based on statements or findings that their practices are "unfair" would itself chill speech from one viewpoint. It would chill criticism of social-media censorship.

II. CROSS-PETITIONERS' *ZAUDERER* CLAIM IS NOT WORTHY OF REVIEW.

Cross-petitioners also argue (at 28–34) that the court of appeals erred in upholding some of S.B. 7072's disclosure requirements under this Court's decision in *Zauderer*, which held that a "commercial disclosure requirement must be reasonably related to the State's interest in preventing deception of consumers and must not be unjustified or unduly burdensome such that it would chill protected speech." Pet. App. 63a

(cleaned up) (applying *Zauderer*). They argue that some more stringent standard governs the constitutionality of S.B. 7072's disclosure requirements. That argument also does not merit review.

1. For starters, cross-petitioners did not below dispute that *Zauderer* applied, *see* Br. for Appellees at 44, *NetChoice LLC v. Moody*, 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355), and the court of appeals understandably did not address the issue they now raise. That alone warrants denying review. *See Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983).

2. Beyond that, cross-petitioners err in contending (at 32–33) that the circuits are split on whether *Zauderer* applies to a disclosure requirement of this kind. In fact, the only court to have addressed a comparable question is the Fifth Circuit, which agreed with the Eleventh Circuit that *Zauderer* governs disclosure requirements designed to inform the public about the platforms' censorship practices. *See Paxton*, 49 F.4th at 485.

The cases on which cross-petitioners rely, by contrast, do not split with either the Eleventh or the Fifth Circuit on this point. Cross-petitioners first cite (at 32) cases that apply some form of heightened scrutiny to laws that apply to a segment of the press. *E.g.*, *Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607, 615 (1st Cir. 2021); *Time Warner Ent. v. FCC*, 56 F.3d 151, 179 (D.C. Cir. 1995). But even setting aside that social-media censorship is not the same thing as newspaper editing, *see* No. 22-277, Pet. 19–23, that contrast falls flat because *Zauderer is* a form of heightened scrutiny, which the Eleventh Circuit

properly recognized, Pet. App. 63a. Then-Judge Kavanaugh agreed. *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 33 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) ("When the Supreme Court applies rational basis review, it does not attach a host of requirements of the kind prescribed by *Zauderer*."); *id.* at 23 (majority op.); *accord United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005); Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 Ariz. L. Rev. 421, 436 (2016).

Cross-petitioners next point (at 33) to a statement in a D.C. Circuit opinion that *Zauderer* applies only to advertising and product labels. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015). There is, as the D.C. Circuit noted, some debate on how far *Zauderer* extends. *See id.* at 524 & n.16. But *National Association of Manufacturers* addressed an SEC disclosure regime requiring issuers to disclose information on the specific topic of conflict minerals, *id.* at 522—a matter far afield from what we have here. It is thus far from clear that the D.C. Circuit would have disagreed with the Eleventh Circuit had the D.C. Circuit been faced with a comparable question. Indeed, S.B. 7072's disclosure requirements "relate to the good or service offered by the regulated party" and so would qualify for *Zauderer* scrutiny even under D.C. Circuit law. *Am. Meat Inst.*, 760 F.3d at 26. A disclosure of the rules of the forum and attendant details is akin to a product label—it tells a consumer what they are buying into when they visit a social-media site.

3. Cross-petitioners also claim (at 29–31) that this Court's cases limit *Zauderer* to disclosures related to

advertising. That contention conflicts with this Court's recent explanation that *Zauderer* applies to speech that "relates to the services" that a commercial actor provides. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

It also conflicts with *Zauderer*'s rationale. *Zauderer* was based on the recognition that there are "material differences between disclosure requirements and outright prohibitions on speech." 471 U.S. at 650. A disclosure requirement, after all, does not prevent any speech; it requires only that regulated parties "provide somewhat more information than they might otherwise be inclined to present." *Id.* That logic is why the circuits have applied *Zauderer* beyond advertising. *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 850–52 (9th Cir. 2019) (disclosure of radiation levels); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009) (disclosure of "calorie content").

Accepting cross-petitioner's view that disclosure laws outside advertising are subject to even more exacting scrutiny than the Eleventh Circuit applied would broadly threaten commonplace government regulation. Mandatory "health and safety warnings" have "long [been] considered permissible." *NIFLA*, 138 S. Ct. at 2376. But on cross-petitioners' view, it is hard to see why those rules are lawful—they do not apply only to advertisements.

4. Without a split or conflict, cross-petitioners are left to request (at 33–34) review of the Eleventh Circuit's fact-bound conclusion that some of S.B. 7072's disclosure rules survive *Zauderer*. They say (at 33)

that the circuit court "misapplied" *Zauderer* by not demanding evidence that consumers were misled by the platforms' content-moderation policies. But the court of appeals had that evidence. It saw, for example, evidence that the social-media companies' censorship decisions were so opaquely made that even the platforms themselves frequently reversed course. *E.g.*, Pet. App. 118a, 122a–123a, 125a–126a. Beyond that, the State need only "point to any harm that is potentially real, not purely hypothetical." *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (1994). As the cross-petitioners' own amicus below explained, concerns about the platforms' lack of transparency are real and legitimate, which is why "researchers, advocates, and regulators have proposed that the platforms be required to share certain categories of information with credentialed researchers or the public." *See* Br. for the Knight First Amendment Institute at Columbia University at 24, *NetChoice LLC v. Moody*, 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355). And thus, the Eleventh Circuit was correct to uphold the disclosure provisions under *Zauderer*.[6]

[6] Cross-petitioners have acquiesced in Florida's request for this Court to review the Eleventh Circuit's decision to strike down under *Zauderer* its requirement that platforms notify users when they are censored. *See* No. 22-277, Pet. i, 27. That decision, unlike the cross-petition's *Zauderer* argument, merits review because the Fifth Circuit upheld under *Zauderer* a very similar disclosure requirement applicable to social-media companies established under Texas law. *See Paxton*, 49 F.4th at 486–87. There is thus a circuit split on the *Zauderer* issue Florida's petition presents.

III. GRANTING THE CROSS-PETITION WOULD NEEDLESSLY DISTRACT FROM REVIEW OF THE QUESTIONS PRESENTED IN THE PETITION.

The Court should deny review of the cross-petition as well because accepting it would be needlessly distracting. Florida's petition presents clean legal issues son on which the circuits are split and that cry out for review. The efforts of the parties—and what surely will be an army of amici—should be focused on assisting the Court in resolving those important questions. Granting the cross-petition would impede, rather than advance, that endeavor.

Cross-petitioners suggest (at 28), however, that their viewpoint-based argument "might" be in the case no matter what, because it may be an alternative ground of affirmance. That is incorrect. "A cross-petition is required . . . when the respondent seeks to alter the judgment below." *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994). That rule applies not just when a respondent formally seeks a different judgment, but also when "[a]lteration would be in order" if the respondents' argument were accepted. *Id.*; *accord Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013).

Thus, for example, in *Strunk v. United States*, the federal government sought to defend a judgment reducing a defendant's sentence against a challenge that vacatur was required. *See* 412 U.S. 434, 436–37 (1973). To do that, the government argued that there had been no constitutional violation in the first place, and thus no need to vacate. *Id.* This Court rejected that effort, reasoning that absent a cross-petition, the

government could not press an argument that would necessarily alter the judgment. *Id.*

The same is true here. Accepting the argument in the cross-petition that S.B. 7072 is void in its entirety would expand the judgment. And thus, absent a granted cross-petition, cross-petitioners cannot advance it.

CONCLUSION

The cross-petition should be denied.

Respectfully submitted.

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