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 a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF TECHFREEDOM, NATIONAL TAXPAYERS UNION, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF CROSS-PETITIONERS

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QUESTION PRESENTED

Whether SB7072 in its entirety, and its compelled disclosure provisions in particular, comply with the First Amendment.

Table of Contents

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION 6

I. THE COURT SHOULD CLARIFY THE *ZAUDERER* STANDARD 6

A. Disclosures in Advertising 8

B. "Uncontroversial" Disclosures 10

C. Correction of Deception 13

II. THE COURT SHOULD BAR GOVERNMENT ENTANGLEMENT IN PRIVATE ENTITIES' EDITORIAL CHOICES 14

A. Social Media Transparency Rules Entangle the State in Social Media Platforms' Editorial Processes 15

B. Social Media Transparency Rules Are Inseparable from Social Media Content Moderation Rules 20

C. Social Media Transparency Rules Are Inherently Subject to Abuse 23

CONCLUSION 26

Table of Authorities

Page(s)

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 18

Am. Beverage Ass'n v. San Francisco,
916 F.3d 749 (9th Cir. 2019) .... *passim*

Am. Hosp. Ass'n v. Azar,
983 F.3d 528 (D.C. Cir. 2020) 8

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

CTIA—The Wireless Ass'n v. Berkeley (*CTIA I*),
854 F.3d 1105 (9th Cir. 2017) 11

CTIA—The Wireless Ass'n v. Berkeley (*CTIA II*),
928 F.3d 832 (9th Cir. 2019) 11

Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012) 7

Evergreen Ass'n, Inc. v. City of N.Y.,
740 F.3d 233 (2d Cir. 2014) 11

Grocery Mfrs. Ass'n v. Sorrell,
102 F. Supp. 3d 583 (D. Vt. 2015) 10

Herbert v. Lando,
441 U.S. 153 (1979) 22

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 8, 21

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) 7, 13

N.A. of Wheat Growers v. Becerra, 468 F. Supp. 3d 1247 (E.D. Cal. 2020) 10

Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015) 8, 10, 11

NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) 9, 14, 20

NIFLA v. Becerra, 138 S. Ct. 2361 (2018) .... *passim*

Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1 (1986) 3

Riley v. Nat'l Fed. of Blind, 487 U.S. 781 (1988) 6

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) 12

Twitter, Inc. v. Paxton, 26 F.4th 1119 (9th Cir. 2022) 23

United States v. Utd. Foods, Inc., 533 U.S. 405 (2001) 3, 13

Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976) 18

Wash. Post v. McManus,
944 F.3d 506 (4th Cir. 2019).......................... *passim*

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

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Complaint, *NetChoice, LLC v. Moody*,
No. 4:21-cv-220 (N.D. Fla., May 27, 2021) 1

Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*,
Lawfare (Mar. 12, 2021) 1

Daphne Keller & Max Levy, *Getting Transparency Right*, Lawfare
(July 11, 2022)... 23

Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*,
99 Cornell L. Rev. 513 (2014) 12, 18

Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*,
73 Hastings L.J. 1203 (2022)..................... 23, 24, 25

Florida, AOB, *NetChoice, LLC v. Moody*,
No. 21-12355 (11th Cir., Sept. 7, 2021)................. 21

Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), available at
https://bit.ly/3cCVOFN 12

Note, *Repackaging* Zauderer, 130 Harv. L. Rev. 972 (2017)... 7

Off. of the Att'y Gen. of Tex., Consumer Prot. Div., Civil Investigative Demand to Twitter, Inc. (Jan. 13, 2021), available at https://bit.ly/3RnrcXu 23

Off. of the Att'y Gen. of Tex., Consumer Prot. Div., Civil Investigative Demand to Twitter, Inc. (June 6, 2022), available at https://bit.ly/3TDv5d0 24

Richard A. Epstein, *Should Platforms Be Treated as Common Carriers? It Depends*, AEI Digital Governance Working Group (July 2022) 25

Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org, Federal Trade Commission (July 19, 2004), available at https://bit.ly/3cpsWAZ 19

TechFreedom, Brief as *Amicus Curiae* ISO Appellees, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir., Nov. 15, 2021) 1

TechFreedom, Brief for *Amicus Curiae* ISO Emergency Application, *NetChoice, LLC v. Paxton*, No. 21A720 (U.S., May 17, 2022) 2

Twitter, Inc., AOB, *Twitter, Inc. v. Paxton*, No. 21-15869 (9th Cir., July 16, 2021) 24

Valerie C. Brannon, *Assessing Commercial Disclosure Requirements under the First Amendment*, Congressional Research Service (Apr. 23, 2019) 8

INTEREST OF *AMICI CURIAE*[*]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has been deeply involved in the debate over Florida's social media law, SB7072, since before the law was even passed. Its experts' work was cited in this action's complaint, see Compl. at 19 n.26, *NetChoice, LLC v. Moody*, No. 4:21-cv-220 (N.D. Fla., May 27, 2021) (citing Corbin K. Barthold & Berin Szóka, *No, Florida Can't Regulate Online Speech*, Lawfare (Mar. 12, 2021)), and it filed an *amicus* brief in both the district court and the court of appeals.

TechFreedom's earlier briefs focused on the topic of common carriage. They explain "the history of common carriage, its core elements, the case law surrounding it, what it meant at common law, what it has meant in telecommunications law, and, above all, why it is not a useful concept in a discussion of social media and the First Amendment." Brief of TechFreedom as *Amicus Curiae* ISO Appellees at 2, *NetChoice, LLC v. Moody*, No. 21-12355 (11th Cir., Nov. 15, 2021). Anyone interested in the issue of common carriage should consult that brief—as the

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[*] No party's counsel authored any part of this brief. No person or entity, other than *amici* and their counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, *amici* notified each party's counsel of record of *amici*'s intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

court of appeals did. See Pet.App.40a (quoting TechFreedom's brief).

This Court recently granted an emergency application to block enforcement of Texas's HB20, a social media law modeled after SB7072. Supporting that application, TechFreedom filed an *amicus* brief setting forth the catastrophic consequences of letting HB20 take effect. Brief for *Amicus Curiae* TechFreedom ISO Emergency Application, *NetChoice, LLC v. Paxton*, No. 21A720 (U.S., May 17, 2022). Anyone interested in the adverse consequences of letting the very similar SB7072 take effect should consult that brief.

In this case, the court of appeals correctly understood that Florida may not treat social media platforms like common carriers. For that reason and others the court blocked SB7072's "content moderation" rules, thereby ensuring that those rules cannot (for now) wreak havoc on the Internet. In this brief, therefore, TechFreedom does not address common carriage or negative consequences. Instead it takes up another important issue: the court of appeals's flawed approach to SB7072's "transparency" rules. The court of appeals issued a landmark ruling on compelled commercial speech—and not in a good way. Anyone interested in protecting the First Amendment in the digital age should read on.

Founded in 1969 as a nonpartisan §501(c)(4) organization, National Taxpayers Union (NTU) is the "Voice of America's Taxpayers," educating the public, lobbying, and litigating on tax, spending, regulatory, and economic issues. NTU engages in matters

involving technology policy, supporting limited internet access taxes, free-market spectrum allocation, and a tax and regulatory climate that allows innovation to flourish.

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in important compelled-speech cases. See, e.g., *United States v. Utd. Foods, Inc.*, 533 U.S. 405 (2001); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986).

SUMMARY OF ARGUMENT

The court of appeals wrote an impeccable opinion, save for about three pages.

In enacting SB7072, Florida attempted to anoint itself the nation's social media speech cop. The law's main provisions fall into two buckets: (1) "content moderation" rules and (2) "transparency" rules. Both in the courts and in the media, the content moderation rules have attracted far more attention. They include a bar on deplatforming political candidates, a bar on removing posts by "journalistic enterprises" (with that term defined to sweep in most large websites), a requirement that platforms moderate content "in a consistent manner," and a requirement that platforms not change their terms of service "more than once every 30 days."

The transparency rules have been widely overlooked; yet they are immensely consequential.

They are the subject of this brief. They require platforms:

- to "publish the standards, including detailed definitions," that they use to moderate content;
- to publish, in advance, changes to their terms of service;
- to provide users the view counts of their posts;
- to disclose free advertising given to a political candidate; and
- to provide a "thorough rationale" for removing or downranking content.

Undoubtedly, there are distinctions between the content moderation rules and the transparency rules; but as we shall see, the two sets of rules form one cohesive scheme of speech regulation.

"Put simply," the Eleventh Circuit said at the outset of its opinion, "with minor exceptions, the government can't tell a private person or entity"—such as a social media platform—"what to say or how to say it." Pet.App.2a. So far, so good. The court then devoted thirty solid pages to explaining, correctly and at length, why SB7072 is likely subject to First Amendment scrutiny. (Just "likely" because the appeal is interlocutory.) And toward the end the court succinctly established that, when subjected to such scrutiny, the content moderation rules likely violate the First Amendment.

In between, however, the court ruled that the transparency rules—except the "thorough rationale" requirement—likely *satisfy* the First Amendment.

The court did so because in a single paragraph its analysis went off the rails. In that paragraph the court decided that, rather than apply strict or even intermediate scrutiny to the transparency rules, it would apply the relaxed "undue burden" standard found in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

The Eleventh Circuit simply declared that *Zauderer* "is broad enough to cover S.B. 7072's disclosure requirements." Pet.App.57a. In addition to being wrong, that bare assertion glosses over the immense confusion and ceaseless controversy that the *Zauderer* test has produced and attracted. As we explain in Section I, the court of appeals took a firm (yet unexamined) position on three glaringly unresolved questions. First: can the test be applied to a law—like SB7072—that compels speech outside the context of advertising? Second: what does it mean for a law to compel "uncontroversial" speech? And third: does the test govern when a compelled commercial speech law seeks to promote consumer welfare *in general*, or only when such a law seeks to *correct* a commercial entity's false or deceptive statements? Each of these questions has generated division not only among the courts of appeals, but also between those courts and this Court.

In Section II, we take up the special problems that arise when the government attempts to tack "transparency" requirements onto an entity's First Amendment right of editorial discretion. Such requirements bring the state into an unhealthy entanglement with the editorial process: there is no logical limit to governmental demands to supervise

how platforms decide what speech to disseminate. What's worse, such requirements are just another way of *controlling* the editorial process. Florida admits as much; and even if it didn't, SB7072's transparency rules obviously aim to pressure platforms into making different content moderation decisions. Texas is already showing how this game is played, as it uses sweeping subpoenas and demands for "transparency" to punish editorial judgments its officials dislike. When imposed on the editorial function, intrusive transparency rules like those in SB7072 inevitably operate as a speech code. A speech code that's a little ragged, a little circuitous—but a speech code all the same.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. THE COURT SHOULD CLARIFY THE *ZAUDERER* STANDARD.

Normally a law that compels someone to speak is subject, at a bare minimum, to intermediate scrutiny. See, e.g., *Riley v. Nat'l Fed. of Blind*, 487 U.S. 781, 797-98 (1988). Here, however, the court of appeals subjected SB7072's transparency rules to the lower *Zauderer* standard, which, once triggered, requires merely that a law not be "unduly burdensome." 471 U.S. at 651.

Once triggered are the key words, though. When does *Zauderer* apply? The Eleventh Circuit gave that question short shrift. "Although [the *Zauderer*] standard is typically applied in the context of advertising and to the government's interest in

preventing consumer deception," the court wrote, "we think it is broad enough to cover S.B. 7072's disclosure requirements." Pet.App.57a. This statement is all the court said in defense of applying *Zauderer*. You would never know, from reading it, that the question of when *Zauderer* applies is a matter of deep puzzlement.

"[A] close examination of courts' treatment of *Zauderer* reveals a doctrine at odds with itself." Note, *Repackaging* Zauderer, 130 Harv. L. Rev. 972, 986 (2017). The courts disagree over both *Zauderer*'s scope (which compelled commercial speech laws it governs) and its substance (what makes a compelled commercial speech law unduly burdensome). *Id.* at 973. Some judges have questioned whether *Zauderer* was meant to create a distinct test to begin with. See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (Stranch, J., for the court). Some have called for it to be reexamined. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 254 (2010) (Thomas, J., concurring). See also *Am. Beverage Ass'n v. San Francisco*, 916 F.3d 749, 762 (9th Cir. 2019) (Ikuta, J., concurring in the judgment) (discussing an apparent shift, at this Court, toward a more originalist approach to compelled commercial speech).

Although there are many riddles about the *Zauderer* test, the Eleventh Circuit's decision highlights three in particular, each of which goes to the test's scope.

A. Disclosures in Advertising.

"The Supreme Court's opinion in *Zauderer*," Judge Randolph, writing for the D.C. Circuit in *National Association of Manufacturers v. SEC* (*NAM*), 800 F.3d 518 (2015), observed, "is confined to advertising, emphatically and, one may infer, intentionally," *id*. at 522. *Zauderer*, he noticed, "explicitly identified advertising as the reach of its holding no less than thirteen times." *Id*. Moreover, he added, the Court later confirmed in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), that *Zauderer* applies only in the "context" of "commercial advertising," 800 F.3d at 523 (quoting *Hurley*, 525 U.S. at 573). See Valerie C. Brannon, *Assessing Commercial Disclosure Requirements under the First Amendment*, Congressional Research Service, at 16 n.148 (Apr. 23, 2019) (*NAM* "held that *Zauderer* applies only to disclosures that are required in the context of voluntary commercial advertising").

It is a testament to the confusion over *Zauderer*'s scope that, these clear statements in *NAM* notwithstanding, the D.C. Circuit recently applied *Zauderer* outside the realm of advertising. Because there is a "conflict in the circuits regarding the reach of *Zauderer*," *NAM* contains "an alternative ground for [its] decision." *Id*. at 524; see *id*. at 524-30 (finding that the law in question compelled controversial statements and lacked any means-ends fit). *American Hospital Association v. Azar*, 983 F.3d 528 (D.C. Cir. 2020), ignores *NAM*'s primary holding, cites *NAM*'s alternative holding, and then insists that "our court

has not … limited the [*Zauderer*] standard" to "advertising and point-of-sale labeling," *id*. at 541.

The Ninth Circuit, too, has muddied the waters. True enough, *American Beverage Association*, 916 F.3d 749, addresses a law that indisputably regulated advertising. Still, the court seemed to go out of its way to remove the advertising element from the *Zauderer* test. See *id*. at 755. In a separate opinion, Judge Ikuta was quick to take note. "The majority errs," she protested, "by skipping over the threshold question regarding *Zauderer*'s applicability, namely whether the notice requirement applies to commercial advertising." *Id*. at 763 (Ikuta, J., concurring in the judgment).

Here, to repeat, the Eleventh Circuit claimed that *Zauderer* is "*typically* applied in the context of advertising," but that it is "broad enough"—the court "think[s]"—to cover more. Pet.App.57a (emphasis added). And the Fifth Circuit, addressing another social media speech law, Texas's HB20, recently took a similar approach. It found that HB20's transparency rules are not "unduly burdensome," under *Zauderer*, without acknowledging that *Zauderer* might not apply outside the context of advertising. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 485-88 (5th Cir. 2022).

Oddly enough, the Fifth, Ninth, Eleventh, and D.C. Circuits are removing from the *Zauderer* test an element that this Court seems recently to have retained. *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), reiterates that "the disclosure requirement" in *Zauderer* "governed only 'commercial advertising,'" *id*. at 2372, and that *Zauderer* itself "emphasize[s]" that

the speech before it "would have been 'fully protected' if … made in a context other than advertising," *id.* at 2374 (quoting *Zauderer*, 471 U.S. at 637 n.7).

One would think, given the Court's fresh guidance in *NIFLA*, not to mention the Court's observations in *Hurley*, not to mention the Court's thirteen clarifications in *Zauderer* itself, that everyone would understand that the *Zauderer* test does not apply outside of advertising. Yet even in the short time since *NIFLA* was decided, three circuits have rejected, and a fourth has noticeably chafed at, that seemingly straightforward conclusion. Perplexity reigns.

B. "Uncontroversial" Disclosures.

For *Zauderer* to apply, a required disclosure must be "uncontroversial." 471 U.S. at 651. But what is an "uncontroversial" disclosure? No one knows. "It is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial." *NAM*, 800 F.3d at 528 (quoting *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment)). Compare *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 628 (D. Vt. 2015) (claiming that courts do not "affix[] the 'controversial' label lightly"), with *N.A. of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1258 (E.D. Cal. 2020) (acknowledging that "what … 'uncontroversial' means has not been completely explained by the Supreme Court").

For a time the Ninth Circuit maintained that "uncontroversial" refers merely "to the factual

accuracy of the compelled disclosure," rather than "to its subjective impact on an audience." *CTIA—The Wireless Ass'n v. Berkeley* (*CTIA I*), 854 F.3d 1105, 1117 (2017). The D.C. Circuit, meanwhile, disagreed, concluding that "uncontroversial" must refer to whether "a message … is controversial for some reason other than a dispute about simple factual accuracy." *NAM*, 800 F.3d at 527-30 & n.28. (After all, *Zauderer* requires that a disclosure be *both* "factual" *and* "uncontroversial.")

NIFLA seemed to nix the Ninth Circuit's position. The law at issue there required pregnancy clinics "to disclose information about … abortion [services], anything but an 'uncontroversial' *topic*." 138 S. Ct. at 2372 (emphasis added). "Accordingly," the Court said, "*Zauderer* has no application here." *Id.* But "*NIFLA* did not define 'uncontroversial,'" *Am. Beverage Ass'n*, 916 F.3d at 761 (Ikuta, J., concurring in the judgment), and the Ninth Circuit has construed the decision as narrowly as possible. "We do not read the [*NIFLA*] Court," the Ninth Circuit declares, "as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial." *CTIA—The Wireless Ass'n v. Berkeley* (*CTIA II*), 928 F.3d 832, 845 (2019). This position places the Ninth Circuit in conflict not only with *NIFLA* itself, but also with those courts that place outside *Zauderer* a law that "mandates *discussion* of controversial political topics." *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 249-50 (2d Cir. 2014) (emphasis added).

The Eleventh Circuit simply announced that SB7072's transparency rules require disclosure of

"uncontroversial" information. The Fifth Circuit did the same as to HB20. But if social media is fundamentally expressive—and, elsewhere in its opinion, the Eleventh Circuit found that it is—then what these laws really require is that platforms divulge their editorial processes ("thorough[ly]" and "in detail," in the case of SB7072). Those processes are hardly an "uncontroversial" topic.

When he signed SB7072 into law, Governor Ron DeSantis proclaimed that the transparency rules "hold Big Tech accountable" for "discriminat[ing] in favor of the dominant Silicon Valley ideology." *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech* (May 24, 2021), available at https://bit.ly/3cCVOFN. He was plainly trying to regulate speech "because of disagreement with the message it conveys." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). "Where the government orders disclosures as a way to advance its side in a controversial matter," it makes sense that "the disclosure mandate" should "bear[] greater constitutional scrutiny." Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 Cornell L. Rev. 513, 552 (2014).

And even if one ignores the obvious partisan dynamics behind SB7072 specifically, disclosure requirements for social media *in general* are a topic of controversy. As we explain below, social media transparency rules *inherently* regulate social media editorial practices. Disclosures related to an entity's editorial judgment are bound to be intensely controversial. Imagine a law requiring the *New York*

Times or the *Washington Post* to explain why they choose to run one story (or letter to the editor) and not another, and the point becomes obvious.

NIFLA says that a disclosure law regarding a controversial topic falls outside the *Zauderer* test. The Fifth, Ninth, and Eleventh Circuits apparently disagree. Here, then, is another area where multiple circuits' post-*NIFLA* reading of *Zauderer* conflicts with *NIFLA*'s—and other circuits'—reading of *Zauderer*.

C. Correction of Deception.

Does the *Zauderer* test apply only when the government demands a disclosure to *correct* an entity's false or deceptive statements? Or can the government invoke the test whenever a law requires disclosures aimed at serving consumer welfare more generally?

Zauderer appears to limit its holding to speech that is "false or deceptive." 471 U.S. at 638. And *Milavetz*, 559 U.S. 229, seems to confirm that the *Zauderer* test applies when a disclosure law is "directed at *misleading* commercial speech," *id.* at 249; see also *Utd. Foods, Inc.*, 533 U.S. at 416. In restating the *Zauderer* test, however, *NIFLA* never mentions a "correction of deception" requirement—and this has generated confusion.

In *American Beverage Association*, Judge Nguyen objected to the Ninth Circuit's "expansion" of the *Zauderer* test "to commercial speech that is not false, deceptive, or misleading." 916 F.3d at 767 (concurring opinion). In Judge Nguyen's view, the *Zauderer* test is

not triggered whenever a law is, broadly speaking, a consumer protection measure. It applies, she explained, when the issue is a "commercial message's accuracy"—"not its completeness." *Id.* at 767-68. In the very same case, however, Judge Ikuta issued a separate opinion in which she seemed to accept that, after *NIFLA*, *Zauderer* no longer contains a correction-of-deception element.

The Eleventh Circuit followed Judge Ikuta's route, rather than Judge Nguyen's. SB7072's transparency rules will ensure that users will be "fully informed," and won't be "misled," about platforms' terms of service, the court said. Pet.App.63. Likewise, the Fifth Circuit accepted Texas's claim that HB20 would help users "make an informed choice" about "whether to use the Platforms." *Paxton*, 49 F.4th at 485. To put it in Judge Nguyen's terms, these are "completeness" rationales; not "accuracy" ones. They do not identify any false or deceptive statements (or even material omissions) that the states aim to *correct*.

So is *Zauderer* limited to laws that seek to correct false or deceptive statements? This Court seems unsure, and thoughtful circuit judges disagree.

The Court should offer guidance on the *Zauderer* test. It can do so by granting review.

II. THE COURT SHOULD BAR GOVERNMENT ENTANGLEMENT IN PRIVATE ENTITIES' EDITORIAL CHOICES.

SB7072's transparency rules are a straightforward instance of unconstitutional compelled speech. They improperly "force elements of civil society to speak

when they otherwise would have refrained." *Wash. Post v. McManus*, 944 F.3d 506, 514 (4th Cir. 2019). In upholding most of these rules, the Eleventh Circuit erred. But there's a deeper problem with such transparency rules—a problem that warrants this Court's immediate attention.

Transparency rules that pry into how social media platforms moderate content are intrinsically problematic. Such rules don't work as *transparency* rules at all. Instead, they entangle the state with platforms' editorial decisions about speech. Both here and in general, such rules cannot be distinguished from obviously unconstitutional provisions—such as the ones the court of appeals blocked here—that directly govern content moderation. Indeed, because social media transparency rules are *intended* to influence social media content moderation, it should come as no surprise that such rules are abused by the government.

A. Social Media Transparency Rules Entangle the State in Social Media Platforms' Editorial Processes.

Even if one were to assume that social media transparency rules are distinct from social media content moderation rules—an assumption that, as we'll see in a moment, is untenable—such transparency rules unconstitutionally entangle the state in platforms' editorial decisions.

Take *McManus*, 944 F.3d 506. A Maryland law required large websites to publish, and retain for state inspection, lists identifying who had bought political

ads and how much they had paid. Writing for the court, Judge Wilkinson found that the law contained "a compendium of traditional First Amendment infirmities." *Id.* at 513. The law was a "content-based regulation on speech"; it "single[d] out political speech"; and it "compel[led] speech." *Id.* at 513-14. *In addition* to these obvious constitutional violations, though, the law's inspection requirement *also* brought "the state into an unhealthy entanglement with news outlets." *Id.* at 518. As Judge Wilkinson explained:

> The core problem with this provision of the Act is that it lacks any readily discernable limits on the ability of government to supervise the operations of the newsroom. As it stands now, the Act requires news outlets to provide Maryland with no less than six separate disclosures, each assertedly justified by the state's interests in informing the electorate and enforcing its campaign finance laws. But with its foot now in the door, Maryland has offered no rationale for where these incursions might end. Today the state asks for information about the targeted audience; tomorrow perhaps the names and addresses of all officers or corporate affiliates of the ad purchaser; the day after the identities of donors to those purchasers.

Id. at 518-19.

The same problem exists with regard to social media transparency rules. Today the state wants "the

standards, including detailed definitions," a platform uses for content moderation, Pet.App.11a; tomorrow it will demand records setting forth the internal deliberations behind each change to those standards. (Indeed, Texas is already pursuing such material, as we'll see.) Several of SB7072's transparency rules already "seem designed … to impose the maximum available burden on the social media platforms." Pet.App.92a. But "with its foot now in the door," Florida "offer[s] no rationale" for why it could not go yet further. *McManus*, 944 F.3d at 519.

The court of appeals blocked one of SB7072's transparency rules—a requirement that platforms offer a "thorough rationale" whenever they remove or downrank a piece of content—as unduly burdensome. Pet.App.64a. But an *undue*-burden test cannot solve the entanglement problem. Improper state/speech entanglement is not just about the size of the burden the government imposes on the speaker. It is also, and mainly, about the government looking over the speaker's shoulder and monitoring the internal editorial process. *That* is what, under the First Amendment, the state is not allowed to do.

Yet that is precisely what SB7072's transparency rules are all about. The rules operate, in effect, as a window on platforms' editorial practices. Those rules are, therefore, nothing like laws that slap a disclosure on an advertisement or a product. The distinction here is a crucial one. It is the divide between potentially lawful disclosure (government: "here, put this label on your product") and grossly unlawful entanglement (government: "how do you decide what to say? tell us all about it").

The presence, in this case, of *entanglement* confirms that the court of appeals should not have applied the *Zauderer* test. The "greater 'objectivity' of commercial speech" is what "justifies" affording that speech a lower standard of First Amendment protection. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (quoting *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 771 n.24 (1976)). But a defining characteristic of editorial judgment is the *absence* of such "objectivity." To "burden platforms' editorial judgment," even "*indirectly*," Pet.App.47a, is to burden speakers' subjective evaluations about contested norms—core subjects of First Amendment protection. Cf. Goodman, *supra*, 99 Cornell L. Rev. at 551 ("Disclosure as ideology"—that is, disclosure warranting full First Amendment protection—"takes its purest form where the facts disclosed are themselves evaluative facts embodying a contested norm.").

Suppose a state passed a law requiring newspapers or news channels to publish "the standards, including detailed definitions," that they use for determining which op-eds they publish or which guests they put on the air. No matter how hard they tried, these outlets could not produce genuinely "objective" criteria for their decisions. The criteria themselves, as well as the choices made under them, would be open to endless challenge and debate from rejected would-be contributors, from pundits and other onlookers, and from the state itself. This hypothetical law would serve not as an "anti-deception" measure, but as a means of pressuring outlets into making different editorial decisions.

Indeed, when, in 2004, a pair of liberal activist groups urged the Federal Trade Commission to bar Fox News from claiming its coverage is "fair and balanced," FTC Chair Timothy Muris spotted the constitutional problem immediately. In a statement issued the same day the request was filed (and rejected), he wrote: "There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency." *Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org*, Federal Trade Commission (July 19, 2004), available at https://bit.ly/3cpsWAZ.

As with news outlets, so with social media. A state that requires platform transparency as to editorial judgment would inevitably be called upon to assess whether a platform's disclosures are complete and accurate. Like most other forms of editorial judgment, however, content moderation resists objective quantification. (The disclosed standard claims to bar "graphic" content. Is footage of a mass grave "graphic"? How about a woman committing suicide? A teen showing her scars from "cutting"? A man swallowing a live rat?) The completeness and accuracy of the disclosures could not be assessed without second-guessing the platform's subjective value judgments. Social media transparency rules inherently entangle the state in matters of free expression.

True, addressing HB20, the Fifth Circuit reframed platforms' First Amendment right to editorial control over their own products as a revocable "privilege to

eliminate speech that offends the Platforms' censors." *Paxton*, 49 F.4th at 455. That attempt to overthrow decades of First Amendment jurisprudence should be rejected for the reasons set forth by the Eleventh Circuit and by the dissenting judge in the Fifth Circuit.

B. Social Media Transparency Rules Are Inseparable from Social Media Content Moderation Rules.

In any event, it is simply not the case that social media transparency rules are unconnected, functionally or analytically, from social media content moderation rules. The transparency rules are *meant* to affect platforms' content moderation decisions. They are *meant* to "manipulat[e] the marketplace of ideas." *McManus*, 944 F.3d at 515.

SB7072 proves the point. It states, as one of its findings, that "social media platforms have *unfairly* censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians." Pet.App.8a (emphasis added). SB7072's transparency rules are part of Florida's effort to "fix" this purported *editorial* "unfairness." The rules are part of, and cannot be separated from, the state's unconstitutional effort to insert itself into the editorial process.

In its brief on appeal, Florida confirmed that SB7072's transparency rules are part and parcel of SB7072's effort to control platforms' editorial discretion. The first paragraph of Florida's statement of the case argues "that social media platforms arbitrarily *discriminate against disfavored*

speakers"—a claim that clearly goes to editorial judgment. Florida AOB at 3, *NetChoice, LLC v. Moody* No. 21-12355 (11th Cir., Sept. 7, 2021) (emphasis added). In the next paragraph, the brief explains that SB7072 prevents platforms "from abusing their power"—that "abuse" plainly being the purported speech "discriminat[ion]" discussed the paragraph before. *Id.* at 4. "The Act *does this*," the brief then says, "by *mandating disclosure*." *Id.* (emphasis added). Putting all this together, SB7072 aims to *alter editorial decisions*—making them less "discriminatory," in the eyes of the state—by imposing *transparency requirements*.

There's more. "*Related to all this disclosure*," the brief goes on, "the Act requires that platforms apply their own content moderation rules consistently." *Id.* at 5 (emphasis added). "This ensures that the disclosed rules are actually the rules applied by the platforms." *Id.* By Florida's own admission, then, the transparency rules are inextricably intertwined with the consistency rule—a rule that orders platforms to *treat expression a certain way*. SB7072's transparency rules are simply a backdoor effort to question platforms' content moderation decisions.

Notice that the court of appeals *blocked the consistency rule*. The state has no valid interest, the court explained, in requiring a platform to host content simply because it hosted similar content in the past. Pet.App.61a (citing *Hurley*, 515 U.S. at 573-74). A similar rationale doomed SB7072's requirement that platforms not change their rules more than once every 30 days. The right to editorial judgment, the

court found, includes the right to change one's editorial standards as often as one pleases. *Id*.

But in the absence of the consistency and 30-day-wait rules, the transparency rules make no sense. In its effort to rescue (most of) them from invalidity, the court of appeals shifted the basis for those rules from content moderation to consumer protection. Pet.App.63a. Transparency rules or no, however, the First Amendment guarantees platforms' right to moderate content as they see fit. Since the state cannot order platforms to enforce their rules consistently, or to freeze them in place for set periods, the consumer protection rationale for transparency rules is significantly undermined. (Never mind that, as we saw earlier, a generalized consumer protection rationale might not trigger the lenient *Zauderer* standard of review in the first place.)

With the consumer protection rationale rendered hollow, a defender of the law might try to fall back on a "curiosity" or "informational interest" rationale—but those are constitutionally invalid. *Herbert v. Lando*, 441 U.S. 153, 174 (1979); *Am. Meat Inst.*, 760 F.3d at 31-32 (Kavanaugh, J., concurring in the judgment).

So there is no getting around what Florida has already told us: the transparency rules belong to a cohesive statutory scheme. They cannot be uncoupled, or rescued, from SB7072's unconstitutional content moderation rules. Nor is this problem unique to Florida's law. As already noted, social media transparency rules demand, in effect, that platforms explain, to the government and to the world, how they

decide how to speak. Social media transparency rules are just thinly veiled speech codes.

C. Social Media Transparency Rules Are Inherently Subject to Abuse.

To recap: social media transparency rules entangle the state in platforms' editorial process, and they invariably wind up regulating content moderation itself. Given these facts, it should come as no surprise that such rules are also inherently subject to abuse.

"State actors might use nominally neutral transparency rules to pressure platforms to restrict or privilege particular speech." Daphne Keller & Max Levy, *Getting Transparency Right*, Lawfare (July 11, 2022). Actually, such misuse is all but inevitable. Consider the retaliatory investigation that Texas is undertaking against Twitter. Days after Twitter banned Donald Trump from its service for fomenting the January 6 riot, Texas attorney general Ken Paxton launched a sweeping investigation of Twitter's content moderation policies. Paxton vowed to "fight" Twitter with "all I've got." *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1122 (9th Cir. 2022). The Civil Investigative Demand (CID) that Texas served on Twitter seeks, among other things, "all policies and procedures related to content moderation on your platform." Off. of the Att'y Gen. of Tex., Consumer Prot. Div., Civil Investigative Demand to Twitter, Inc., Ex. C ¶2 (Jan. 13, 2021), available at https://bit.ly/3RnrcXu. The CID effectively "demand[s] every document regarding every editorial decision that Twitter has ever prepared." Eric Goldman, *The Constitutionality of*

Mandating Editorial Transparency, 73 Hastings L.J. 1203, 1226 (2022).

Texas sent Twitter another CID earlier this year. Off. of the Att'y Gen. of Tex., Consumer Prot. Div., Civil Investigative Demand to Twitter, Inc. (June 6, 2022), available at https://bit.ly/3TDv5d0. Once again the demand is dressed in the garb of "consumer protection"—an ostensible concern that "Texas consumers" have been "deceive[d] … over fake bot accounts." *Id*. Once again, though, this is plainly a pretext for politically motivated harassment—this time in relation to Elon Musk's now-abandoned bid to renege on his bid to purchase Twitter. See *id.* ("Twitter has received intense scrutiny in recent weeks"—*because of Musk*—"over claiming … that fewer than 5% of all users are bots.").

Each of Texas's CIDs is "continuing in nature." These "ongoing" CIDs put "Twitter in an impossible position, because every editorial choice it makes might simultaneously trigger disclosure via the CID. This has an unquestionably chilling effect." Goldman, *supra*, 73 Hastings L.J. at 1227. "Any time a Twitter employee thinks about writing something related to content moderation," after all, "the employee knows that AG Paxton has already demanded production of whatever the employee chooses to write[.]" *Id*. (quoting Twitter, Inc., AOB at 23, *Twitter, Inc. v. Paxton*, No. 21-15869 (9th Cir., July 16, 2021)).

"Through actual or threatened enforcement" of transparency rules, "regulators can influence what content Internet services publish—and punish Internet services for making editorial decisions the

regulators disagree with." Goldman, *supra*, 73 Hastings L.J. at 1227. And the thing is, that's *a feature*, not a bug, of imposing transparency rules on social media platforms. Such rules will *primarily* be used to attack platforms for their expressive choices. Indeed, such rules are the unconstitutional gift that keeps on giving. The government can use them (1) to impose onerous reporting burdens on disfavored platforms and (2) to dredge up material that can be used in publicity campaigns maligning those platforms, all while (3) claiming to act out of concern for consumers, rather than—the true motive—animus toward the disfavored platforms for their perceived political opinions.

*   *   *

Social media transparency rules, by their very nature, bring "the state into an unhealthy entanglement" with the editorial process. *McManus*, 944 F.3d at 518. They are *meant* to influence that process—they are content moderation rules in cheap disguise. They will be used as political weapons, because they are political weapons. Such rules are "ridiculously inappropriate" and should be "off-limits and unconstitutional." Richard A. Epstein, *Should Platforms Be Treated as Common Carriers? It Depends* at 7, AEI Digital Governance Working Group (July 2022). The Court should take this case and say so.

CONCLUSION

The cross-petition should be granted.

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Respectfully submitted,

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