No. 25-1018

In the
Supreme Court of the United States

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,

Petitioner,

v.

SEAN O'DAY, in his official capacity as Director of the Oregon Department of Consumer and Business Services,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* X.AI LLC IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

X.AI LLC (xAI) is an artificial intelligence (AI) company founded in 2023. xAI develops generative AI models, which are software programs that simulate human intelligence to perform a wide range of tasks and that create original content based on user prompts. By developing cutting-edge AI models like xAI's flagship product Grok, xAI seeks to create tools that assist humanity in its quest for understanding and knowledge.

To train these models, xAI uses datasets—collections of information that derive from various sources that AI models memorize and extrapolate from to generate new content. Training is key to developing successful AI models. xAI has dedicated substantial resources to developing and safeguarding the unique datasets it uses to train its AI models, because protecting those datasets is critical to xAI's competitive position in the AI space. xAI accordingly has an acute interest in ensuring that the law provides adequate safeguards to prevent such proprietary information from being disclosed. As an outsider to the pharmaceutical industry who is nonetheless adversely affected by the decision below, xAI is uniquely situated to explain how the Ninth Circuit's reasoning undermines core constitutional rights that companies depend on to produce valuable products.

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[1] Pursuant to Rule 37.2, *amicus curiae* provided timely notice to all parties. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court has repeatedly cautioned against "mark[ing] off new categories of speech for diminished constitutional protection." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 767 (2018). The Court's approach to "commercial speech" is a notable exception. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part); *Rubin v. Coors Brewing*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in judgment). Perhaps for that reason, this Court has "defined" that category narrowly to reach only "speech that does no more than propose a commercial transaction." *United States v. United Foods*, 533 U.S. 405, 409 (2001). For decades, both this Court and lower courts have policed that definition "carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

The decision below eviscerates that careful approach. The Ninth Circuit took the remarkable position that an Oregon law requiring drug manufacturers to disclose their narrative justifications for their drug prices (as well as their confidential trade secrets) is a regulation of "commercial speech" subject to intermediate scrutiny. The panel acknowledged that the traditional definition of "commercial speech" is "inapt" here. Pet.App.27a. After all, H.B.4005 does not regulate "voluntary speech from a regulated commercial entity" that "propose[s] a commercial transaction"—it applies *even if the drug manufacturer is not speaking at all*. Pet.App.27a. The Ninth Circuit nevertheless held

that H.B.4005 regulates "commercial speech" because it requires drug manufacturers to "communicate product-specific economic information about prescription drugs that are available for purchase on the market." Pet.App.38a. And it held that the disclosure requirement satisfies intermediate scrutiny because it serves the state's purportedly substantial interest in reducing "information asymmetries" and "provid[ing] drug purchasers with leverage in negotiations with manufacturers." Pet.App.49a.

That decision "has no clear limiting principle." Pet.App.108a. Under the panel's approach, states could compel private parties to disclose all sorts of "product-specific economic information" about products "that are available for purchase on the market." Pet.App.38a. And because such information will by definition "improve[] the 'free flow of commercial information'" and "reduce information asymmetries," Pet.App.39a, 49a, virtually all requirements will satisfy intermediate scrutiny. Consumers would surely like to know why Hermès and Rolex price their goods the way they do, and how they select which customers get to purchase a coveted Birkin bag or Daytona watch. Consumers would also love to know whether Whole Foods actually sources its groceries sustainably, whether Apple's suppliers follow the labor laws, and how many hours the average junior banker at Goldman Sachs works. Under the Ninth Circuit's approach, there is "no end to the information that states could require manufacturers to disclose." *Am. Meat Inst. v. USDA*, 760 F.3d 18, 31-32 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring). Indeed, under the decision below, states in the Ninth Circuit could

compel disclosure of confidential and proprietary information about a company's design, manufacturing, pricing, and marketing of its products.

That disregard of basic First Amendment principles is bad enough. But it gets worse. While the Ninth Circuit acknowledged that H.B.4005 may compel the disclosure of confidential trade secrets, it rejected petitioner's Takings Clause claim on the theory that drug manufacturers lack "reasonable investment-backed expectations" in that information because they choose to operate in a "highly regulated" industry. Pet.App.67a. That conclusion conflicts with this Court's analysis in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and threatens grave consequences to boot. Under the Ninth Circuit's approach, states can force companies to disclose protected trade secrets so long as they have the temerity to operate in a "highly regulated" industry. Whether the law is about drug pricing (as it was below), proprietary information used to develop a product (*e.g.*, xAI's training data or Coca-Cola's secret formula), or even internal employee discussions about the potential viability of a product, all such information is now at risk of forced disclosure.

ARGUMENT

I. Compelled Speech Requirements Typically Trigger Strict Scrutiny.

1. The First Amendment's guarantee of free speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In "the context of fully protected expression," the "constitutional equivalence of compelled speech and compelled silence" is well "established." *Riley v. Nat'l Fed'n of*

the Blind, 487 U.S. 782, 796-97 (1988). The protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *Riley*, 487 U.S. at 795, compelled speech requirements typically trigger strict scrutiny. *See NIFLA*, 585 U.S. at 766-67.

That approach to compelled speech applies not just to "ordinary people" engaged in expression, but to "business corporations" too. *Hurley*, 515 U.S. at 574; *accord Citizens United v. FEC*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations."). "It is well settled that a speaker's rights are not lost merely because compensation is received." *Riley*, 487 U.S. at 801. And this Court has squarely rejected the notion that "professional speech" is "afforded less protection." *NIFLA*, 585 U.S. at 768.

These bedrock protections help ensure that businesses can control when and how they communicate with others. Given the nature of business, a company's right to stay silent is almost as important (if not more so) as its right to speak.

Take xAI. The unique combination of training data that xAI uses to develop its generative AI models helps make those models stand out relative to the models created by its competitors. But to preserve that competitive advantage and ensure that its unique models continue to outpace other models in the marketplace, xAI depends on its First Amendment

right to remain silent about the proprietary aspects of its data collection and training processes. After all, when proprietary and competitive information is at stake, speech is counterproductive; it would hand the keys to xAI's success to its rivals and thereby reduce the incentive to develop novel AI training methods in the first place. *See* 18 U.S.C. §1839(3)(B) (trade secrets constitute "information [that] derives independent economic value … from not being generally known"). While the government (and consumers) may well want to know how AI companies train their models and on what data, the First Amendment protects xAI's right not to speak about its AI training process—the secret sauce that gives xAI's models a competitive edge.

Other examples abound. The government and consumers may well want to know all sorts of information about a company's products. Consumers may be curious about a company's pricing or marketing strategies, or why it chose one product feature over others. Consumers may want to know what a company thinks of its competitors' products, how a particular design decision was made, and what internal analysis shows about a product's efficacy and its flaws. Similarly, the government (and consumers) may want to know a company's stance on the hottest social or geopolitical issues of the day, or whether its products are ethically sourced and produced. Some companies may well reveal that information voluntarily if they think doing so gives them an advantage in the marketplace. But given the vagaries of public opinion on the hottest issues of the day, many companies will inevitably prefer to remain silent. Ultimately, "whatever the reason" for staying silent,

"it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

2. To be sure, this Court has "applied more deferential review" to laws that require businesses to "disclose factual, noncontroversial information in their 'commercial speech.'" *NIFLA*, 585 U.S. at 768 (citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626 (1985)). In *Zauderer*, for example, the Court upheld a requirement that attorneys who advertise their willingness to represent clients for a contingency fee must disclose whether the client would have to pay court costs in the event of a loss. 471 U.S. at 639-53. The Court declined to apply strict scrutiny, reasoning that while "commercial speech" (*i.e.*, speech that "propose[s] a commercial transaction") is "entitled to the protection of the First Amendment," it is entitled to "protection somewhat less extensive than that afforded 'noncommercial speech.'" *Id.* at 637. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," an advertiser has only "minimal" interest in withholding information necessary to avoid misleading consumers. *Id.* at 651. And because the government can ban misleading advertising outright, *see In re R.M.J.*, 455 U.S. 191, 203 (1982), it follows that it may preclude misleading commercial advertisements by requiring disclosures of "purely factual and uncontroversial information" to "prevent[] deception of consumers," *Zauderer*, 471 U.S. at 651. Such disclosures constitute "one of the acceptable less

restrictive alternatives to actual suppression of speech." *Id.* at 651 & n.14.

Because the *Zauderer* standard is permissive, this Court has strictly circumscribed its application. First, *Zauderer* applies only when the speaker is engaged in "commercial speech." *Id.* at 651. The mere "reference" or tangential connection "to a specific product does not by itself render the [speech] commercial." *Bolger*, 463 U.S. at 66. Nor does the speaker's financial motivation. *See Riley*, 487 U.S. at 795-96. Instead, "*the test* for identifying commercial speech" is whether it "does no more than propose a commercial transaction." *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422-23 (1993). This Court has "described the category … narrowly," *id.*, and "carefully" to "ensure that speech deserving of greater constitutional protection is not inadvertently suppressed," *Bolger*, 463 U.S. at 66; *accord Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

Second, this Court has "emphatically and, one may infer, intentionally" confined *Zauderer* to the context of correcting misleading advertising. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522-23 (D.C. Cir. 2015). Indeed, this Court has never applied *Zauderer* outside that context. To the contrary, it 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); *see also Hurley*, 515 U.S. at 573 (describing *Zauderer* as permitting government to "requir[e] the dissemination of 'purely factual and uncontroversial information'"

only in the context of "commercial advertising"). And it has repeatedly declined to apply *Zauderer* when the required disclosure is not "necessary to make voluntary advertisements nonmisleading for consumers." *United Foods*, 533 U.S. at 416.[2]

3. Applying those principles, this should have been an easy case. As the petition explains, H.B.4005 compels drug manufacturers to disclose detailed (and highly sensitive) information about how and why a company arrived at its drug-pricing decisions. *See* Pet.6; Or. Rev. Stat. §646A.689. Under this Court's precedents, H.B.4005 should have triggered strict scrutiny. It compels drug manufacturers to speak when they otherwise would not. And it dictates the content of that speech by forcing drug manufacturers to "recast [their] pricing strategies in language prescribed by Oregon." Pet.App.87a. There is no basis for applying any lesser form of First Amendment scrutiny. H.B.4005 does not compel the disclosure of "purely factual and uncontroversial information" when the manufacturer is voluntarily engaged in commercial speech. *Zauderer*, 471 U.S. at 651. To the contrary, H.B.4005 compels speech (and dictates the content of that speech) even when the drug manufacturer *is not speaking at all.*

II. The Ninth Circuit's Approach Has No Limiting Principle.

Although this Court has established clear guideposts to govern the commercial-speech and

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[2] "[H]ealth and safety warnings" may also fall within the scope of *Zauderer* given their historical pedigree. *NIFLA*, 585 U.S. at 775.

compelled-disclosure analyses, the decision below wholly jettisoned that framework. The panel ostensibly recognized that public-disclosure laws that compel companies to disseminate speech to consumers that falls outside the traditional "commercial speech" definition are presumptively subject to strict scrutiny. *See* Pet.App.17a-18a. Yet it nevertheless held that laws that compel disclosures about a company's products are always "commercial speech," no matter how disconnected that speech is to a consumer transaction. Left standing, that reasoning would eviscerate the careful distinctions this Court has drawn to prevent the "inadvertent[] suppress[ion]" of protected expression. *Bolger*, 463 U.S. at 66.

A. The Ninth Circuit Has Radically Expanded What Speech Qualifies as Commercial.

1. The Ninth Circuit acknowledged that government disclosure requirements typically trigger strict scrutiny. Pet.App.16a-17a. And it did not dispute that *Zauderer* is inapplicable because H.B.4005 has nothing to do with correcting misleading advertising. It nevertheless applied intermediate scrutiny under *Central Hudson Gas & Electric v. Public Service Commission of N.Y.*, 447 U.S. 530 (1980), on the theory that H.B.4005 regulates "commercial speech." Pet.App.45a. That logic is flawed in multiple respects.

For starters, the Ninth Circuit's application of intermediate scrutiny under this Court's commercial-speech precedents is a category error. This Court has only ever applied "the relaxed scrutiny of commercial speech analysis" to *restrictions* on commercial speech;

"the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled." *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 163 (6th Cir. 2003), *vacated on other grounds*, 544 U.S. 1058 (2005). That makes sense. When a company is voluntarily engaging in commercial speech such as advertising or speech at the point-of-sale, the government can sometimes restrict that speech or compel the speaker to include certain factual and uncontroversial information to make that speech nonmisleading. *Zauderer*, 471 U.S. at 651. But the relaxed scrutiny for commercial speech has no role to play when the company *is not speaking at all*. In that context, a government disclosure requirement that compels a company to speak is not "regulat[ing]" "commercial speech." *Central Hudson*, 447 U.S. at 562. It is just compelling speech. *See Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 474 n.18 (1997) ("The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech."); *cf. United Foods*, 533 U.S. at 410 ("[E]ven viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case."). And when it does so in a way that dictates the content of the company's speech (as here), strict scrutiny applies. *See NIFLA*, 585 U.S. at 766; *Riley*, 487 U.S. at 795.

Even setting that aside, there is no basis to conclude that H.B.4005 compels commercial speech. H.B.4005 compels drug manufacturers to disclose detailed (and highly sensitive) information about how

and why they arrived at their drug-pricing decisions. *See* Pet.6; Or. Rev. Stat. §646A.689. That is not even close to "commercial speech" under this Court's "test for identifying commercial speech"—*i.e.*, whether the speech "propose[s] a commercial transaction." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989). It is not even in the same postal code.

The Ninth Circuit admitted that "the submission of information to the government pursuant to a government reporting requirement typically does not '*propose* a commercial transaction.'" Pet.App.27a. And it recognized that because "the commercial speech doctrine originated in this advertising context, the traditional legal tests for determining whether speech is 'commercial' reflect this paradigm." Pet.App.26a. It also acknowledged the "conceptual mismatch" between the application of the "commercial speech" doctrine to laws like H.B.4005. Pet.App.27a. But it nevertheless held that any information that "improves the 'free flow of commercial information,'" even if it is (at best) merely "incidental to a commercial transaction," qualifies as commercial speech and thereby receives less First Amendment protection. Pet.App.39a-40a & n.18. The panel recognized no exception to that rule—even when the information is sensitive business information (such as trade secrets or proprietary business strategies), touches on "controversial public policy issues," or involves confidential, "internal decisionmaking." Pet.App.40a-41a, 43a-44a.

2. The new approach the Ninth Circuit announced "has no clear limiting principle," Pet.App.108a, as any "product-specific" information can easily be found to

"improve[] the 'free flow of commercial information,'" Pet.App.39a. If all that matters for the "commercial speech" inquiry is, as the Ninth Circuit seems to think, whether a consumer may factor such information into her decision whether to purchase a product, all information will—"almost by definition"—qualify. Pet.App.92a. For example, many consumers would reasonably adjust their purchasing behavior if they knew that a car manufacturer believed a competitor's SUV was superior to one it offers. Who better to determine what motor vehicle is best than the car manufacturer itself? Or take the recent consumer trends suggesting that a segment of the public is interested in sustainable products. Knowledge about how much a clothing brand spends on electricity annually to fabricate its products could affect whether an eco-conscious consumer patronizes that business.

Examples like this abound because any proprietary information can conceivably be connected to a company's product. Whether it is a company's strategies, its research and development into potential future ventures, or even internal company analysis about the viability of a future product compared to a competitor's, such information may affect a consumer's calculus as to whether to complete the transaction. And if such information need have only an "incidental" impact on a commercial transaction, then it does not matter whether a company is already speaking, let alone whether it is communicating with the public, a governmental entity, or just a consumer at the point-of-sale.

The Ninth Circuit's test is also entirely circular. Any information that has an "incidental" connection to

a commercial transaction will "improve the free flow of commercial information." After all, any information that helps consumers make informed decisions about commercial transactions necessarily supplies "information about those transactions." Pet.App.37a. And in turn, any information that "improves the free flow of commercial information" also necessarily has at least an "incidental" impact on such commercial transactions. Because both prongs are always satisfied in this context, the test does no meaningful work. Under the Ninth Circuit's approach, commercial speech is thus no longer about the context within which the speech occurs (*i.e.*, commercial transactions); it is about the identity of the speaker (*i.e.*, any company that creates products). That is a dangerous reworking of the doctrine, as it guarantees that certain speakers (namely, those in the business of creating products) receive less First Amendment protection when they wish to stay silent. But as this Court has explained time and again, discrimination based on speaker is a First Amendment vice, not a virtue. *See Citizens United*, 558 U.S. at 341.

3. The impact of the decision below on businesses writ large is no hypothetical risk. Courts in the Ninth Circuit are already relying on the decision below to uphold exceedingly sweeping disclosure requirements. xAI is challenging a recent California law, A.B.2013, that compels AI companies to publicly disclose highly sensitive information regarding the training datasets that they use to develop their AI models—information in which xAI holds a trade-secret property interest. *See X.AI v. Bonta*, 2026 WL 626926, at *1-2 (C.D. Cal. Mar. 4, 2026). The district court nonetheless felt bound by the Ninth Circuit's (capacious) definition of

commercial speech in this case when it analyzed xAI's compelled-speech arguments. *Id.* at *6-7.

It thus did not matter that xAI does not wish to communicate to the public (or really anyone) about its trade secrets. Nor did it matter to the district court that the speech A.B.2013 compels—*i.e.*, the training dataset information that xAI uses to develop its AI models—is not tethered to any commercial transaction.[3] Under the Ninth Circuit's newly minted definition of "commercial speech," the fact that xAI produces a product and that xAI's internal, proprietary methods for developing its product could theoretically inform a consumer's decisions whether to use xAI's models means that A.B.2013 compels xAI to disclose only "commercial speech." *Id.* at *7.

As xAI's own litigation experience shows, there is no end to the mischief that could be caused by this fundamental reworking of the understanding of "commercial speech." The effects of the decision below are not limited to the pharmaceutical industry, as states are now free to craft all manner of disclosure laws that will trigger a lower tier of scrutiny simply because the speaker being targeted creates and sells products. To make matters worse, that lower scrutiny will apply even if such laws target the entire universe of proprietary information that a company relies on to formulate its marketing and distribution strategies that long precede the consumer's interaction with the end product. The number of steps between the

[3] Training data is essential to the process xAI uses to *create* its product. And as highly sensitive trade secrets, that is data that xAI goes to great lengths to keep confidential.

information sought and the consumer transaction is simply irrelevant under the Ninth Circuit's approach.

That reasoning is far removed from the doctrinal foundations this Court has outlined—and that other circuits have sought to faithfully follow. *See* Pet.12-14. As noted above, the reason states have authority to regulate speech made at the point-of-sale is because the commercial transaction itself has "traditionally [been] subject to government regulation." *Bolger*, 463 U.S. at 64. But now, with no commercial transaction to speak of to ground the "commercial speech" doctrine, the Ninth Circuit has effectively disregarded this Court's admonition that courts must be "reluctant to mark off new categories of speech for diminished constitutional protection," especially when doing so exempts the challenged law "from the normal prohibition on content-based restrictions." *NIFLA*, 585 U.S. at 767.

This Court's intervention is needed to prevent the Ninth Circuit's dangerous deviation from the core principles underlying the "commercial speech" doctrine from taking root.

B. The Ninth Circuit's Watered-Down Intermediate Scrutiny Standard Undercuts Important First Amendment Protections Against Compelled Speech.

The Ninth Circuit's errors did not end with redefining "commercial speech." Its intermediate scrutiny analysis likewise puts the thumb on the scale in favor of government efforts to compel companies to disclose all manner of business information.

The court nominally recognized that mere "consumer curiosity" cannot support a compelled-

disclosure mandate, Pet.App.47a—a position dictated by this Court's precedent, *see Riley*, 487 U.S. at 798 (the "interest" in "informing donors how the money they contribute is spent" is "not as weighty as the State asserts"). Yet, in the same breath, it concluded that the state's interest in "reducing [informational] asymmetries" suffices so long as more information (again) could facilitate "informed commercial transactions." Pet.App.47a-48a.

The panel did not explain the difference between a government interest in satisfying consumer curiosity and a government interest in supplying information that consumers may find useful when engaging in commercial transactions, *see* Pet.21-22, likely because (as other courts have recognized) there is no daylight between the two, *see* Pet.19-20. On top of that, the court forgave the state for failing to identify "empirical evidence linking drug pricing transparency laws to lower drug prices." Pet.App.49a. Oregon's own *ipse dixit* (and judicial "common sense") that strategic drug-pricing information conceivably could enable consumers to make informed decisions about what drugs to purchase was all the court needed to conclude that Oregon's disclosure obligation cleared intermediate scrutiny. Pet.App.49a. In other words, because such information *could* be valuable to consumers, the court not only held that the state's interest in drug-pricing transparency was substantial, but also that it had chosen a reasonable means to advance that goal—compelled disclosure of such information so consumers who care to learn it can. *See* Pet.App.47a-51a.

That is no test at all. Under that approach, the mere fact that the state believes consumers will value information—and that fact alone—does all the heavy lifting: Consumer transparency constitutes a substantial governmental interest that can override a company's desire to remain silent. And it ensures that any state-mandated disclosure obligation will always sufficiently advance that interest. After all, if consumer transparency *qua* transparency is a valid end, the best means to accomplish that goal is to force such information out in the open. Under the Ninth Circuit's approach, the state just needs to assert that consumers will benefit from the information disclosed. That alone suffices to survive intermediate scrutiny.[4] Such a "circular formulation w[ill] drain" intermediate scrutiny "of any meaning in the context of compelled commercial disclosures," which is why other circuits have rejected it. *Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh, J., concurring in the judgment).

Unless this Court steps in and resolves this circuit split, there is a serious risk that states will feel free to declare open season on all manner of proprietary information held by companies across the circuit—and do so with impunity. The decision below has made intermediate scrutiny all about consumers' desire for product information—giving short shrift to companies' interest in heeding the adage that sometimes saying less is more. That approach is particularly alarming because it flips the compelled-speech doctrine on its

[4] The need for "consumer transparency" about a business's product is also why the Ninth Circuit labels such compelled speech "commercial" and subjects it to intermediate scrutiny in the first place. *See supra* Section II.A.

head. If Oregon had passed a law *banning* drug manufacturers from providing narrative justifications for their pricing decisions to the public, it is hard to imagine the Ninth Circuit applying anything other than strict scrutiny. By applying intermediate scrutiny to a law *compelling* drug manufacturers to provide such justifications, the Ninth Circuit impermissibly treated the right not to speak as less constitutionally valuable than the right to speak—even though the Court has repeatedly emphasized the "constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression." *Riley*, 487 U.S. at 797; *accord Wooley*, 430 U.S. at 714.

Again, that is no academic concern. The district court's intermediate scrutiny analysis in xAI's challenge to A.B.2013 evinced little concern about the threatened loss of xAI's First Amendment right not to disclose its highly sensitive proprietary information. *See X.AI*, 2026 WL 626926, at *8. Following the lead of the decision below, the district court believed that the mere fact that a consumer could theoretically make use of training dataset information to evaluate xAI's models is enough for California to clear intermediate scrutiny and infringe on xAI's speech rights. *See id.* As xAI's experience shows, the Ninth Circuit's watered-down intermediate scrutiny analysis threatens the rights of businesses everywhere—not just in the pharmaceutical industry. This Court should intervene and reaffirm that the right to "decide 'what not to say'"—a right "enjoyed by business corporations generally"—merits the same constitutional protection as the right to choose what to say. *Hurley*, 515 U.S. at 573-74.

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In sum, the Ninth Circuit has essentially given consumers—and by extension, the government—unchecked power to decide what information companies can be forced to disseminate. And because the cat is out of the bag once disclosure occurs, the Ninth Circuit's pro-disclosure regime renders other circuits' *greater* protection of companies' right to remain silent nugatory. This Court should not "countenance a government that can compel an unwilling speaker to speak simply because [some] … would like to hear." Pet.App.109a.

III. The Ninth Circuit's Takings Analysis Makes Things Worse.

The Ninth Circuit's First Amendment analysis is reason enough to grant review. But when combined with its Takings Clause analysis, this case cries out for this Court's intervention.

Even taking as a given that states have more leeway under the First Amendment to compel speech in the name of consumer transparency (they do not), that reasoning could not empower states to compel the disclosure of trade secrets. Such disclosures would eviscerate *property* rights in such information, which is precisely what the Takings Clause is supposed to check. When government seeks to use private property rights to advance public objectives, the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Yet the Ninth Circuit has sealed off this safety valve entirely.

1. The Ninth Circuit stumbled from the start. It dismissed out of hand the notion that the *per se* takings doctrine could apply to intangible property interests like trade secrets. *See* Pet.App.60a-61a. But as others have observed, there is "no principled reason to refrain from extending per se takings analysis to alleged takings of trade secrets." *Philip Morris v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (en banc) (Selya, J., concurring in judgment). After all, trade secrets derive value from an owner's right to exclude, *id.*—the same right that this Court has characterized as the "*sine qua non*" of real property, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149-150 (2021). Indeed, when confronted with a takings claim in the trade-secrets context, this Court held that a single factor—an owner's investment-backed expectation that his trade secrets would remain confidential—was dispositive in determining whether a taking occurred. *Ruckelshaus*, 467 U.S. at 1013-14 (disclosure of trade secrets that were under an "explicit assurance of confidentiality" effects a taking). In other words, this Court engaged in "a per se takings analysis" in holding that compelled disclosure of trade secrets may violate the Takings Clause. *Reilly*, 312 F.3d at 51 n.26 (Selya, J., concurring in judgment).[5]

Even under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the panel's decision makes no sense. Its analysis never accounted for the fact trade secrets derive their core economic value from being held in confidence, *see* Or. Rev. Stat.

[5] That *Ruckelshaus* referenced the *Penn Central* factors does not alter this reality. That decision came at a time when every takings claim was analyzed through the prism of *Penn Central*.

§646.461(4)(a); 18 U.S.C. §1839(3)(B), such that their disclosure would eviscerate the key feature of what makes trade secrets valuable property interests—*i.e.*, their secrecy. That disregard for the unique features of trade secrets also led the court to hold that the character of the government action weighed against finding that Oregon's drug-pricing-disclosure law effects a taking. Pet.App.72a-73a. The court was correct to note that the forced disclosure of trade secrets would not result in a *physical* invasion—they are, after all, intangible property rights. But that does not mean state-mandated disclosure, which categorically destroys the trade-secret property right, is not the "functional[] equivalent" of a "classic taking" where government "directly appropriates private property." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This Court's own cases strongly suggest otherwise. *See Armstrong*, 364 U.S. at 48-49 (government action that eviscerated an owner's liens effected a taking because "[b]efore the liens were destroyed, the lienholders admittedly had compensable property," and "afterwards, they had none"); *accord Hodel v. Irving*, 481 U.S. 704, 715-17 (1987).

Worse still, the Ninth Circuit botched the analysis under the investment-backed-expectations prong—the most important factor in the trade-secrets context. To the Ninth Circuit, the mere fact that the drug market is highly regulated should suffice to put manufacturers on notice that "regulat[ors] may [one day] enact[]" laws that compel the disclosure of their trade secrets. Pet.App.64a. That analysis cannot be squared with *Ruckelshaus*. After all, pesticide manufacturers had operated in a highly regulated

industry *for decades*, yet this Court still concluded that they had valid expectations that their trade secrets would remain confidential. 467 U.S. at 991-97, 1013. And the Court deemed those expectations reasonable *even though* the companies had operated under a prior regime that put such information at risk of public disclosure. *Id.* at 1012-14. Following this Court's lead, the First Circuit also rejected the idea that heavy regulation can foreclose a trade-secrets takings claim. It held that tobacco companies—the quintessential highly regulated industry—could bar disclosure of their trade secrets in the ingredients they use in their tobacco products, even though the ingredients *themselves* have been subject to heavy scrutiny due to public health concerns. *See Reilly*, 312 F.3d at 39-41.

2. The sweeping nature of the panel's holding underscores the need for a course correction. The Ninth Circuit has given trade-secrets rights the back of the hand at every turn, making it nigh impossible to mount a trade-secrets takings claim. Under that regime, companies can never be sure that their trade secrets are secure from disclosure—or that they will receive compensation for the loss of those property rights.

Indeed, the most egregious aspect of the decision below is that it allows a state to force companies to disclose (and thereby destroy) their trade secrets based solely on its asserted interest in regulating an industry. Under that distorted conception of takings law, a regulatory interest alone purportedly overcomes any expectations that trade secrets will remain confidential. Once again, the risk that states

will take advantage of that opening and compel companies to disclose their trade secrets is not idle speculation. Emboldened by the decision below, California made this exact argument to rebut xAI's takings challenge to A.B.2013. *See* Cal.PI.Opp'n.12-13, *X.AI v. Bonta*, No.2:25-cv-12295 (C.D. Cal. Feb. 2, 2026) (though "generative AI is novel," xAI "should have expected that it would face increased regulatory scrutiny"), ECF.No.30. If that were really the law, then no trade secret is safe.

* * *

In short, the decision below is a recipe for gutting trade-secrets protections. In the Ninth Circuit's view, states can simply express a general interest in forcing an industry to share information and effectively survive any compelled-speech and takings challenge. Moreover, with silence off the table, companies are truly left powerless to prevent the loss of all manner of proprietary information. Such wide-ranging and cross-industry effects underscores the need for this Court's review.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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