No. 25-802

In the Supreme Court of the United States

FOOTHILLS CHRISTIAN MINISTRIES, et al.,
Petitioners,

v.

KIM JOHNSON, in her official capacity as Director of the California Department of Social Services, et al.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 10 OTHER STATES IN SUPPORT OF PETITIONERS

JOHN B. MCCUSKEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed after signature page]

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This case involves another collision between compelled speech and religious free exercise.

States have seen fit to impose a variety of disclosure requirements by way of their broad "inherent police powers." *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 588 U.S. 504, 527 (2019). That "traditional police power" includes "authority to provide for the public health, safety, and morals." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). And courts have long recognized the "historic primacy of state regulation of matters of health and safety." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996).

State governments have been "frequently" using their primacy and power to require entities to disclose various sorts of information to the public. Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 424 (2016). State legislatures "increasingly" see compelled disclosures as a good way "to regulate information." Mary Christine Brady, *Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard*, 67 EMORY L.J. 771, 784 (2018). Yet some of these laws—like the one here—are not related to "health," "safety," or "morals."

As these laws spread, a "growing number of circuit court[s]" have been forced to decide their constitutionality. Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 868 (2015). Courts have already seen a "wave" of these cases. Caroline Mala Corbin, *Compelled Disclosures,* 65 ALA. L. REV. 1277, 1277 (2014). But the volume isn't leading to easy answers. Our compelled-disclosure jurisprudence is fuzzy at best.

The States could thus use some help in exercising their traditional police powers lawfully and effectively. Ultimately, "[t]here is a great deal" of potential "governmental" regulation "riding on" how these standards shake out. Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 901 (2023). And this case—which involves a requirement that California daycares post certain language in their facilities to obtain a license—offers another good chance to draw some important lines in the First Amendment disclosure context.

In truth, the stakes are even higher here, as the California law at issue also directly implicates the free exercise of religion. California requires churches to tell everyone who enters a church-run preschool that they have an equal right to receive contrary religious services and opt out of Christian services. They're also to be told that they have a right to receive those services *at* the church's facilities from *other* clergy. But that equality-of-all-faiths philosophy is antithetical to a core tenet of many Christian faiths: that "there is salvation in no one else, for there is no other name under heaven given among men by which we must be saved." ACTS 4:12; *see also. e.g.*, EPHESIANS 4:4-6 ("There is … one Lord, one faith, one baptism, one God and Father of all."); JOHN 14:6 ("Jesus said to him, 'I am the way, and the truth, and the life. No one comes to the Father except through me.'").

California is thus compelling churches to repudiate one of the essentials of the Christian faith just to secure a license. That can't be right. The petition offers a chance to say that compelled speech should not be weaponized against religion in such a way.

The Court should therefore grant the petition.

SUMMARY OF ARGUMENT

I. America's compelled-disclosure jurisprudence needs clarity. Under *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), the Court doesn't apply strict (or even intermediate) scrutiny to compelled disclosures of commercial speech when the disclosures are "purely factual and uncontroversial," among other things.

In the 40 years since *Zauderer*, courts and scholars have offered different interpretations of its standards. Perhaps most relevant here, courts don't agree on what it means for a compelled statement to be "uncontroversial." The Court took a step in the right direction in *National Institute of Family & Life Advocates* v. *Becerra* ("*NIFLA*"), 585 U.S. 768, 769 (2018), when it affirmed that statements can't be "uncontroversial" when they engage with decidedly controversial subjects. But the Court did not have the chance to explain whether the lower courts' many other views of "uncontroversial" were valid, too. Left with that opening, some courts have defaulted to an unduly cramped conception of "controversial."

The Ninth Circuit erred in its understanding of "controversial" here. Its reading would have been flawed even before *NIFLA*. But it disregards the controversial-topic test that *NIFLA* endorsed. Had the Ninth Circuit correctly applied *NIFLA*'s test here, this case would have been a relatively easy one; religion is a hotly debated topic, after all. More to the point, the compelled statement at issue is the sort of government intrusion into a private relationship that *NIFLA* repudiated. It requires churches to endorse a universalism that's at odds with key parts of their faith.

II. Aside from free speech, Petitioners' case also implicates free exercise, doubly confirming that the law deserves strict scrutiny. Time and again, the Court has used a cumulative-rights approach to inform its constitutional analysis. In other words, when rights overlap, the Court will consider them interdependently and synergistically to produce a fuller understanding of the real interests at stake. The approach is more faithful to the Court's longstanding sliding-scale approach to rights, takes better account of real-world nuances, and allows the Court to decide cases more precisely. And at bottom, pairing the free speech and free exercise concerns here would be the better route given the Court's recent reinvigoration of the free exercise right.

ARGUMENT

I. The Court should grant the petition to clarify the *Zauderer* standard.

A. The First Amendment's "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 61 (2006). Most often, compelled disclosures are deemed content-based regulations that receive strict scrutiny. But "some laws that require professionals to disclose factual, noncontroversial information in their commercial speech" receive a less exacting standard. *NIFLA*, 585 U.S. at 768 (cleaned up) (citing *Zauderer*, 471 U.S. at 651). The Ninth Circuit applied the *Zauderer* standard to the law at issue here, finding that it satisfied the less demanding test. But its *Zauderer* analysis was flawed—and the errors that highlight how the States and others need the Court to clarify *Zauderer*.

Zauderer tried to place some guardrails on compelled disclosures in the commercial context. The Court there applied *Central Hudson*'s commercial-speech principles to a compelled-disclosure statute that required attorneys to explain in advertisements how they calculated contingency fees. *Zauderer*, 471 U.S. at 651. The Court found the statute constitutional because the disclosure forced the attorney to include only "purely factual and uncontroversial information about the terms under which his services will be available." *Id.* And Ohio had also shown that the disclosure was "reasonably related to the State's interest in preventing deception of consumers." *Id.*

Some have since expressed justified "skeptic[ism] of the premise on which *Zauderer* rests." *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 751 (2024) (Thomas, J., concurring in the judgment) (cleaned up). But despite those concerns, the test has become a routine part of First Amendment jurisprudence.

Yet courts struggled to consistently implement *Zauderer*'s "doctrine" and "scope." Erin Murphy, *The Impossibility of Corporate Political Ideology: Upholding SEC Climate Disclosures Against Compelled Commercial Speech Challenges*, 118 NW. U. L. REV. 1703, 1722 (2024). Indeed, "*Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic." *Repackaging Zauderer*, 130 HARV. L. REV. 972, 979 (2017). Courts have wrestled with questions like whether a given communication must be affirmatively (or only potentially) deceptive before a disclosure is required, whether actors can be required to disclose otherwise private information, and whether state interests far afield from deception can still justify a speech mandate.

Altogether, *Zauderer* has been a fertile source of circuit splits. Mark Chenoweth, *Expressions Hair Design: Detangling the Commercial-Free-Speech Knot*, CATO SUP. CT. REV., 2016-2017, at 227, 250; see also *CTIA-The Wireless Ass'n* v. *City of Berkeley*, 873 F.3d 774, 776 (9th Cir. 2017) (Wardlaw, J., dissenting from denial of rehearing en banc) (noting great "discord among" "circuits about" when "*Zauderer* applies"); Murphy, *supra*, at 1722 (noting circuit splits). These circuit splits have only grown more entrenched as a trend toward more protection for even commercial speech has taken hold in recent years. Mark Conrad, *Betting on Addiction Money: Can Sports Betting Advertising Be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?*, 15 HARV. J. SPORTS & ENT. L. 127, 169 (2024).

The petition here focuses in on *when* the doctrine should apply—that is, whether *Zauderer* "reaches beyond deceptive and misleading communications." Pet.18. That focus is a sound choice, as this "Court has not yet settled the question whether deference under *Zauderer* is available only for regulations aimed at preventing consumer deception." Griffith, *supra*, at 900 (2023); see also Justin Pearson, *Censorship and Sensibility: Does the First Amendment Allow the FDA to Change the Meanings of Words?*, 17 GEO. J.L. & PUB. POL'Y 521, 535-36 n.97 (2019) (noting a "circuit split" as to whether "*Zauderer's* application could be extended beyond corrections of inherently misleading speech"). So the Court would do well to grant it just to address—at a minimum—that basic scope question. See Pet.i-ii (describing the first question presented as a compelled speech issue).

B. But aside from *when* to apply *Zauderer*, courts have also struggled with *how* to apply it—and especially its "uncontroversial" element. The term is "naturally open to interpretation," and the Court has offered few guiding "definitions or qualifications." Rakelle Shapiro, *Competing Free Speech Rights: Evaluating Compelled Disclosures on Food Packaging in a Way That Reflects Scientific Realities-or a Lack Thereof*, 41 CARDOZO L. REV. 2681, 2689 (2020). Lower courts cannot figure out how to define uncontroversial "precisely." See *Nat'l Ass'n of Mfrs.* v. *SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015) ("*NAM*"). And this hesitancy means courts routinely misapply *Zauderer*. *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 34 n.2 (D.C. Cir. 2014) ("*AMI*").

As then-Judge Kavanaugh noted, "it is unclear how [the Court] should assess and what we should examine to determine whether a mandatory disclosure is controversial." *Id.* at 34 (Kavanaugh, J., concurring). "So what does it mean for a disclosure to be … uncontroversial?" one court asked, answering: "Nobody knows exactly." *Kimberly-Clark Corp.* v. *District of Columbia*, 286 F. Supp. 3d 128, 140 (D.D.C. 2017) (cleaned up); accord *Nat'l Ass'n of Wheat Growers* v. *Becerra*, 468 F. Supp. 3d 1247, 1258 (E.D. Cal. 2020).

Left to their own devices, courts have interpreted "controversial" in several ways. See, e.g., *AMI*, 760 F.3d at 27 (ticking through many ways to satisfy "uncontroversial"). Some overlap. Some seem inconsistent. And many seem to present practical or doctrinal problems.

Several cases, for instance, have held or implied that the phrase "factual and uncontroversial" means just "factual"—that "uncontroversial" isn't an independent, standalone requirement. *Disc. Tobacco City & Lottery,*

Inc. v. *United States*, 674 F.3d 509, 569 (6th Cir. 2012) (holding that *Zauderer*'s applicability "turns on whether the disclosure conveys factual information," "not on whether the disclosure emotionally affects its audience or incites controversy"). Only opinion and rhetoric would fail this kind of test. This Court gestured towards that interpretation in *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010), where it held that *Zauderer*'s "essential features" are that the disclosure be "intended to combat" potential customer confusion and that it requires "an accurate statement." Accord *Grocery Mfrs. Ass'n* v. *Sorrell*, 102 F. Supp. 3d 583, 630 (D. Vt. 2015); Shapiro, *supra*, at 2689. But plenty of other cases decried that interpretation from the beginning, as *Zauderer*'s separate reference to "uncontroversial" matters implies it "must mean something different than 'purely factual.'" *NAM*, 800 F.3d at 528.

Others have said a disclosure was "controversial" when it required the speaker to make a highly subjective assessment. In *Entertainment Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006), for example, the court held controversial a requirement that game sellers place identifying stickers on video games that the seller determined met a "statute's definition of 'sexually explicit.'" The case was later read to reach disclosures that were "necessarily subjective and exclusively nonfactual." *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205, 1231 n.9 (D.C. Cir. 2012) (Rogers, J., dissenting), overruled on other grounds by *AMI*, 760 F.3d at 22. Again, this test risks blending the factual and controversial inquiry.

Many courts have said a disclosure is "controversial" when its factual accuracy is contested. See *AMI*, 760 F.3d at 27. In *Kimberly-Clark*, 286 F. Supp. 3d at 140-41

(D.D.C. 2017), the court found a disclosure about wipes' flushability controversial because "whether the wipes can be flushed—and the harms they might cause to sewers—is subject to serious debate." Contrast with *Prof'l Compounding Ctrs. Of Am., Inc.* v. *Sodergren*, No. 2:25-CV-02799, 2026 WL 194519, at *6 (E.D. Cal. Jan. 26, 2026) (holding that regulation satisfied *Zauderer* where it "charge[d] Plaintiff with revealing basic information" that was not the subject of "any debate among reputable sources"). In *NAM*, 800 F.3d at 528, the court recognized that settling the veracity of some facts will be hard, especially when a disclosure incorporates facts whose validity and controversiality shift over time. See also *id.* at 537-38 (Srinsivan, J., dissenting) (saying "controversiality" extends to those "disclosures whose accuracy is contestable"). At least one First Amendment scholar said the "best" interpretation of "uncontroversial" is "as a description of the epistemological status of the information." Post, *supra*, at 910.

Some other courts said a disclosure is controversial when it *misleads* the consumer. In *AMI*, 760 F.3d at 27, the court kept open "the possibility that some required factual disclosures could be so one-sided or incomplete" that they become controversial. And in *Associated Builders and Contractors of Southeast Texas* v. *Rung*, No. 1:16-cv-425, 2016 WL 8188655, *10 (E.D. Tex. Oct. 24, 2016), requiring entities to count and disclose pending investigations as labor-law "violations" was controversial because it was misleading. Similar cases abound. See, e.g., *Milavetz*, 559 U.S. at 231 (saying *Zauderer* applied because disclosure was "inherently misleading"); accord *Nat'l Retail Fed'n* v. *James*, No. 25-CV-5500, 2025 WL 2848212, at *5 (S.D.N.Y. Oct. 8, 2025); *Masonry Bldg. Owners of Or.* v. *Wheeler*, 394 F. Supp. 3d 1279, 1302 (D. Or. 2019).

The most popular interpretation has been a holistic, context-sensitive analysis of how the disclosure *portrays* the facts. In that view, "uncontroversial information" means "factual information, uncontroversially described." Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 755 (2020). In *AMI*, 760 F.3d at 27, for instance, the D.C. Circuit was sensitive to the idea that forcing meat processors to use the term "slaughter" instead of "harvest[]" "might convey a certain innuendo." And in *NAM*, 800 F.3d at 546, the court found that labeling products "not [DRC] conflict free" was "a metaphor that conveys moral responsibility for the Congo war"; it required "an issuer to tell consumers that its products are ethically tainted, even if … only indirectly." Effectively requiring a speaker to admit it had "blood on its hands" and "publicly condemn itself" was controversial. *Id.*; see also *R.J. Reynolds*, 696 F.3d at 1216-17 (saying a disclosure is "controversial" when it is "inflammatory," like a proposed FDA cigarette-package warning designed to "evoke emotion … and browbeat consumers into quitting"); *Kimberly-Clark*, 286 F. Supp. 3d at 141 (holding flushability disclosure controversial because "the term 'flushable' carries its own baggage" and was "a lightning rod for those in the know").

Finally, some courts had held that "uncontroversial" referenced the disclosure *topic*. In *Evergreen Ass'n, Inc.* v. *City of New York*, 740 F.3d 233, 238 (2d Cir. 2014), the court considered requirements that prolife pregnancy centers encourage women to consult with licensed providers and disclose whether "they provide or provide referrals for abortion, emergency contraception, or prenatal care." The court found controversiality because the centers had "to state the City's preferred message" and mention "controversial services" they "oppose." *Id.*

at 245 n.6. See also *SEC* v. *City of Rochester, New York*, No. 6:22-CV-06273, 2024 WL 1621541, at *11 (W.D.N.Y. Apr. 15, 2024) (reaffirming that *Evergreen* considered the statements controversial because they "arose in the 'context [of] a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated … provide alternatives'" (cleaned up)). And *NAM*, 800 F.3d at 529, opined that *AMI* consistently supports this view, too.

C. In *NIFLA*, this Court offered its own hint about the meaning of "uncontroversial." California had ordered crisis pregnancy centers to tell patients that California provided certain "free or low-cost services, including abortions," "give them a phone number to call," and say that "California ha[d] not licensed the clinics to provide medical services." *NIFLA*, 585 U.S. at 7661. The Court held that this requirement fell outside *Zauderer* for two reasons. First, it "in no way relate[d] to the services that licensed clinics provide." *Id.* at 7669. And second, it wasn't uncontroversial because it required "information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic." *Id.*

Unfortunately, though, *NIFLA* still didn't clarify *Zauderer*'s "controversial" element. Murphy, *supra*, at 1719 (saying *NIFLA* didn't foster a "clear" compelled-disclosure doctrine); Griffith, *supra*, at 901. The case didn't explain, for instance, how to measure whether a topic is sufficiently controversial. Klein, *supra*, at 204; accord Danielle Zoellner, *Criminalizing the Doctor-Patient Relationship*, 65 B.C. L. REV. 1143, 1163-64 (2024). Nor did it explain whether its interpretation of "controversial" forecloses all other interpretations, what other ways to show "controversiality" are still valid, or if its interpretation must be considered in every case.

Compare *First Amendment-Freedom of Speech-Compelled Speech*-National Institute of Family & Life Advocates v. Becerra, 132 HARV. L. REV. 347, 352-53 (2018) (assuming the first, but noting that *NIFLA* didn't "clarify"), with Andra Lim, *Limiting NIFLA*, 72 STAN. L. REV. 127, 186 (2020) (saying that "at a minimum" *NIFLA* applies); cf. Catherine L Fisk., *Compelled Disclosure and the Workplace Rights It Enables*, 97 IND. L.J. 1025, 1043 (2022) (*NIFLA* "may" have been transformative). Because *NIFLA* "left open the question of … what makes speech controversial," Murphy, *supra*, at 1719, there continues to be significant "uncertainty regarding the interpretation and application of the conditions in *Zauderer*, leading to circuit splits and varying approaches to regulations of compelled commercial speech," Shapiro, *supra*, at 2689. *NIFLA* might have endorsed *Evergreen*'s broader "controversial *topic*" approach to controversialness. But even that's just conjecture because *NIFLA* "expressly declined to address" the contours of "controversial," thus "leaving in place the circuit split" on that point. Pearson, *supra*, at 553 n.97.

And some courts refuse to take the hint. The Ninth Circuit, for instance, insists that *NIFLA* can't be "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. *City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019). *CTIA* instead thinks *NIFLA*'s real problem was that the disclosure "took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission." *Id.*; see also *id.* at 848 (holding the cellphone-radiation disclosure uncontroversial because it did "not force … retailers to take sides in a heated political controversy"). But that spin can't really be found in any straightforward reading of *NIFLA*.

Other courts, perhaps wary of the implications of a tougher test, have simply kept their pre-*NIFLA* interpretations of "controversial." The Fifth Circuit, for example, still applies a provable-fact standard, dubbing a statement controversial when "the truth of the statement is not settled." *R.J. Reynolds Tobacco Co.* v. *FDA*, 96 F.4th 863, 881 (5th Cir. 2024) see also *Free Speech Coal., Inc.* v. *Paxton*, 95 F.4th 263, 282 (5th Cir. 2024) (finding that a disclosure is noncontroversial when it "is not subject to good-faith scientific or evidentiary dispute" (pre-*NIFLA* standard) and where it "is not an integral part of a live, contentious political or moral debate" (*NIFLA* standard)). But that's hard to square with *NIFLA*, too; for instance, the "truth" of the phone number that had to be disclosed was not readily debatable.

So "[w]hat constitutes … uncontroversial information under *Zauderer*" appears just as "open to interpretation" as before. Nora Klein, *TikTok Is Not Your Doctor: Reprioritizing Consumer Protection in Pharmaceutical Advertisement Regulation*, 11 BELMONT L. REV. 166, 203 (2023). And courts aren't alone; scholars are just as confused. See, e.g., George A. Kimbrell, *Cutting Edge Issues in 21st Century Animal Food Product Labeling*, 27 DRAKE J. AGRIC. L. 179, 251 (2022) (saying *Zauderer*'s "scope" and the "rigor of its application" are "currently an open question"); Shiffrin, *supra*, at 751 (saying "uncontroversial" after *NIFLA* "isn't at all clear" and is, in fact, "perplexing"); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1380 (2019) ("What makes a disclosure controversial? The circuits disagree."); Carl Wiersum, *No Longer Business As Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD & DRUG L.J. 486, 569 n.410 (2018) ("The meaning of … 'uncontroversial' … has never been made entirely clear.").

And even with several spins on the doctrine already in play, other theories abound. Some say it involves the "suspect nature of ideological content" or "political bias" of the speech. Rebecca Krumholz Gottesdiener, *Reimagining* NIFLA v. Becerra*: Abortion-Protective Implications for First Amendment Challenges to Informed Consent Requirements*, 100 B.U. L. REV. 723, 764 (2020); Wiersum, *supra*, at n.410 (saying "uncontroversial" targets "ideological speech"). Others say only speech that "implicate an individual's 'most deeply held' ethical or religious beliefs." Lauren Fowler, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651, 1684 (2019). Or perhaps it's a discrete list of "controversial subjects" like "climate change," "sexual orientation and gender identity." Haan, *supra*, at 1387 (cleaned up)). Ultimately, *NIFLA* has left us with a solid circuit "split" over "when commercial speech is" controversial. Anne E. Kettler, *The Promise and Peril of State Corporate Climate Disclosure Laws*, 54 ENVTL. L. REP. 10293, 10299-300 (2024).

D. The opinion below exemplifies this confusion—and the poor results that flow from it. The decision articulates a narrow, pre-*NIFLA*-like vision of "controversial." App.16a-17a. The decision highlights how the statement is "literally true." App.16a. Though it acknowledges that a factual statement might be still be controversial—they're two distinct elements of the test, after all, *NAM*, 800 F.3d at 528—it then links "controversy" with being forced to "take[] sides in a heated political controversy" in a way that is "at odds with [the speaker's] mission" (as the Ninth Circuit had done before). App.17a. It distinguishes *NIFLA* on the sole ground that "the law at issue in *NIFLA* did not merely require the disclosure of statutory rights." App.17a.

The decision seems to stumble at the start in assuming that a laxer commercial speech test is even relevant here. Church-run preschool doesn't fit the standard mold of traditional goods and services; the enterprise is driven by spiritual and theological motives rather than monetary ones. Even under the Ninth Circuit's conception of *Zauderer*, the court below had good reason to question whether "this speech communicate[d] the terms of an actual or potential transaction." *X Corp.* v. *Bonta*, 116 F.4th 888, 901 (9th Cir. 2024). But it didn't. And while California might suggest that the strength of the interest in child welfare or the like calls for a lower standard, that's not right. Courts decide the standard by examining the speech regulation's character; courts then evaluate the government's interest under whatever standard that yields, not the other way around.

But having made the choice to apply *Zauderer*, the Court then *mis*applied it. It ignored both the context of the disclosure and the interests animating *Zauderer*. *Zauderer* was designed to permit compelled disclosures of the kind that are genuinely neutral. But the statement here is not that kind of message. It is a normative claim about children's autonomy and religious liberty. It embeds a contestable position: that a child enrolled in a religiously affiliated preschool should be understood to retain an independent right to choose a *different* religious identity or practice than the one the institution exists to cultivate and communicate. The requirement even forecloses subtlety, as the disclosure must be posted "in a prominent, publicly accessible area." App.5a (quoting Cal. Code Regs. tit. 22, § 101223(b)). In other words, the requirement directly contradicts the institution's fundamental purpose of elevating its own religious message. And if *Zauderer* was concerned about deception, there's none to be found here. After all, how

could a parent who deliberately chooses a church-run preschool claim they were deceived about the preschool's preference for its own church?

The court also failed to apply *NIFLA*'s controversial-topics test. But that test is met here, as religion is one of the most controversial subjects known. Wars break out over it. So requiring a church-run enterprise to communicate that a person's choice of religion should be supported no matter what is a controversial proposition. It calls into question "the faith and mission of the church itself" (at least when it comes to a religion, like most forms of Christianity, that proclaims just one true God). *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 190 (2012). It espouses an orthodoxy of religious pluralism. Yet "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 753-54 (2020). So as in *NIFLA*, California's law "compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these." *NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring); see also *Volokh* v. *James*, 148 F.4th 71, 87 (2d Cir. 2025) (explaining how the *NIFLA* disclosure "require[d] centers to mention controversial services that some pregnancy services centers … oppose[d]").

Altogether, *Zauderer* does no good if no one knows what it means. And as this case shows, many are struggling to figure out when exactly it applies and what many of the test's most important terms mean. The Court should step in.

II. This case's free exercise implications reinforce and magnify the compelled-speech concerns.

A. If the compelled speech problems here were not enough reason to ring the alarm bell, there's another reason to do so here: the free exercise concerns raised by this law support more intense scrutiny, too.

Make no mistake: free exercise problems are at the forefront of this case. The First Amendment forbids States from "discriminat[ing] against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963). The government likewise may not condition a benefit—like a license to operate a daycare—on a person's willingness to violate their faith. *Id.* at 404; *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947). Anything else would allow the government to place an "unmistakable" "pressure" on individuals to surrender "precepts of [their] religion." *Sherbert*, 374 U.S. at 404. And that pressure would unconstitutionally "penalize" people for exercising their First Amendment rights. *Id.* at 406.

The First Amendment thus gives "special solicitude to the rights of religious" groups and individuals. *Hosanna-Tabor*, 565 U.S. at 189. And even when a State exercises its "broad police power" to further important government interests, the First Amendment imposes stiff limits. *Wisconsin* v. *Yoder*, 406 U.S. 205, 214, 220 (1972). "[A]reas of conduct protected by the Free Exercise Clause" are often "beyond the power of the State to control." *Id.* at 220. "At its heart, the Free Exercise Clause of the First Amendment protects the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of religious acts." *Mahmoud* v. *Taylor*, 606 U.S. 522, 546 (2025) (cleaned up).

Reading one right to reinforce another isn't novel. The Court often uses cumulative or hybrid rights to inform its constitutional analysis—"deriving an overall conclusion of constitutional validity (or invalidity) from … two or more constitutional provisions." Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016). Sometimes, "multiple rights-based provisions of the Constitution might" invalidate a "government action that would be permitted if each provision were considered in isolation." *Id.*

The paradigmatic example of this approach is *Employment Division* v. *Smith*, 494 U.S. 872 (1990). See Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1328 (2017). Many have rightfully criticized *Smith* for its milquetoast approach to the Free Exercise Clause. But its approach to cumulative rights is sound, and *Smith* isn't alone in recognizing the occasional usefulness of a hybrid-rights approach. This Court has long "experimented" with approaches to constitutional interpretation "that traverse[]" provisions' "boundary lines." M. Coenen, *supra*, at 1070. A "number of the most commonly litigated constitutional theories involve cumulative theories." Abrams, *supra*, at 1354; see also *id.* at 1309 ("Cumulative constitutional rights are ubiquitous."); *id.* at 1353 ("Aggregation of constitutional rights is a pervasive feature of constitutional litigation.").

Take a few examples. In *Bearden* v. *Georgia*, 461 U.S. 660, 665 (1983), for instance, the Court said indigent prisoners were owed certain access to post-trial proceedings because "[d]ue process and equal protection principles converge[d]." In *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978), the Court observed that the First Amendment issues demanded "scrupulous exactitude" in

its Fourth Amendment inquiry. Scholars note that holdings in landmark cases like *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Batson* v. *Kentucky*, 476 U.S. 79 (1986), are "[g]rounded in an intersection of the Sixth Amendment" and Fourteenth Amendment. Abrams, *supra*, at 1344. And *Plyler* v. *Doe*, 457 U.S. 202 (1982), reached combined equal protection rights with federal supremacy and federalism. These are just some of many, but the point is the same: rights can build on one another, and it's wrong to focus myopically on one over another.

B. The freedom of speech is "already" often "paired with" various "constitutional provisions" "to give rise to clause-combining protections." Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1600 (2017). In *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 385 n.2 (1992), the Court noted that it "has occasionally fused the First Amendment into the Equal Protection Clause." Viewing rights together allows the central First Amendment claim to "take[] on an added dimension." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (reading the rights to privacy and speech synergistically).

Free speech and free exercise can be easily paired in just that way, as "the First Amendment inextricably intertwines free exercise and free speech." *Polk* v. *Montgomery Cnty. Pub. Schs.*, No. 25-1136, 2026 WL 216479, at *18 (4th Cir. Jan. 28, 2026) (Wilkinson, J., dissenting); see also, *e.g.*, B. Jessie Hill, *Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 IND. L.J. 913, 925 (2022) ("[T]he free speech and free exercise rights are 'cognate' rights."). "The right of freedom of thought *and of religion* as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government

may require it for the preservation of an orderly society." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (emphasis added). For good reason, the two rights travel together in the First Amendment. Because they involve "closely related harms," the Court would be right to view them "as mutually reinforcing" here, too. Abrams, *supra*, at 1354. And considering the nature of any affected constitutional right bakes in nicely to *Zauderer*'s requirement to consider whether disclosure requirements are "unduly burdensome." *Zauderer*, 471 U.S. at 651.

A cumulative- or hybrid-rights framework works here. "[M]uch of the Court's constitutional work" uses "a sliding scale conception" of rights. M. Coenen, *supra*, at 1095. So "the key underlying premises of" reviewing the issues together would "enjoy strong doctrinal support." *Id.* And real-world regulations often don't fit into neat boxes. When a government action falls into the middle of a "kind of constitutional Venn diagram," Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2221 (2005), and two provisions each "partially" speak to it, it's logical to consider whether "the two provisions might together prohibit" that action. M. Coenen, *supra*, at 1073. "[C]onstitutional combinations" often yield helpful answers to tough cases for just those reasons. Brannon P. Denning, *Have Gun-Will Travel?*, 83 LAW & CONTEMP. PROBS. 97, 116 (2020). The Court shouldn't "be reluctant to consider the" Free Exercise Clause's "impact … on the analysis" and use it to "magnify" the free speech concerns. Abrams, *supra*, at 1315, 1353.

In the end, the free speech and free exercise "interests … overlap and inform each other," so they should

"sensibly" be considered "interdependently" and "together." *Parker* v. *Hurley*, 514 F.3d 87, 98 & 99 n.13 (1st Cir. 2008). As in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943), where the anti-soliciting rule burdened Jehovah's Witnesses freedoms of speech and religion, "[i]t is more than [just the religious context]; it is more than distribution of [compelled] literature. It is a combination of both" that demands strict scrutiny. *Id.* at 109. And as in *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 602 (2023), a state cannot "force" someone to "speak in ways that align with [the State's] views but defy [the speaker's] conscience." Unfortunately, the Ninth Circuit never gave any thought to that interplay. The Court need not decide *exactly* how the rights work with one another at this stage, but granting the petition would at least give the Court the chance to engage that question at the merits stage.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted.

JOHN B. MCCUSKEY
Attorney General

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

STEPHEN J. COX
Attorney General
State of Alaska

JAMES UTHMEIER
Attorney General
State of Florida

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

LIZ MURRILL
Attorney General
State of Louisiana

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota