No. 24-271

United States Court of Appeals

for the

Ninth Circuit

X CORP.

Plaintiff-Appellant,

v.

ROBERT BONTA, ATTORNEY GENERAL OF CALIFORNIA, IN HIS OFFICIAL CAPACITY

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 2:23-cv-01939-WBS-AC
Honorable William B. Shubb Presiding

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Robert Corn-Revere*
Joshua A. House
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE
Suite 340
Washington, DC 20003
bob.corn-revere@thefire.org

**Counsel of Record*

Attorneys for Amicus Curiae *Foundation for Individual Rights and Expression*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, *NetChoice v. Bonta*, 2023 WL 6135551 (N.D. Cal. 2023), *appeal pending*, No. 23-2969 (9th Cir.); *Volokh v. James*, 656 F. Supp. 3d 431, 437–38 (S.D.N.Y. 2023), *appeal pending*, No. 23-0356 (2d Cir.); Brief of FIRE, National Coalition Against Censorship, and First Amendment Lawyers Association as *Amici Curiae* in Support of Respondents and Affirmance, *Murthy v. Missouri*, No. 23-411 (Feb. 9, 2024); Brief of FIRE as *Amicus Curiae* in Supp. of Petitioners in

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

No. 22-555 and Respondents in No. 22-277, *NetChoice, LLC v. Paxton*, Nos. 22-555 & 22-277 (Dec. 6, 2023).

BACKGROUND

A. California Law Imposes Accountability Requirements for Social Media Content Moderation.

California adopted A.B. 587 for the express purpose of pressuring social media companies to modify their moderation policies governing constitutionally protected speech and to make them more restrictive.[2] The proposal emerged from "growing concern around the role of social media in promoting hate speech, disinformation, conspiracy theories, violent extremism, and severe political polarization" (5 Excepts R. (ER) 746), with sponsors noting that "the clamor for more robust content moderation on social media has reached a fever pitch." (6 ER 903) Fraught as those topics are, they describe categories of speech the First Amendment protects. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

[2] A.B. 587 is codified at Cal. Bus. & Prof. Code § 22675 *et seq*.

The State lawmakers knew "posting on social networking and/or social media sites constitutes communicative activity" and that "any specific mandates to remove this broad swath of content could run afoul of the First Amendment." (6 ER 911) They also were aware previous "efforts to address online content moderation at the state level have often been frustrated by issues of federal preemption" under Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230. (5 ER 747) Consequently, the legislators endeavored to "write around" the First Amendment and Section 230 problems by imposing indirect means of control over moderation policies without direct content regulation. (6 ER 910 ("As the [bill] author references above, all of this occurs within tight quarters due to federal statutory and constitutional law."))

To achieve their legislative goal—forcing social media platforms to modify their moderation practices and standards—lawmakers imposed "disclosure" requirements. They were designed to foster "accountability" by requiring social media companies to post their Terms of Service (Posting Requirement) and to regularly

file detailed reports with the Attorney General on how those policies are enforced (Reporting Requirement). (5 ER 745)

Under the Posting Requirement, platforms must prominently post their Terms of Service, which must include "information about how users can ask questions, how they can flag content or users in violation, and a list of potential actions that the company might take in response." (6 ER 910); Cal. Bus. & Prof. Code § 22676. It also compels social media companies to compile data and submit twice yearly to the Attorney General "extremely detailed report[s]" that include "whether they define certain categories of content, including hate speech or racism; extremism or radicalization; disinformation or misinformation; harassment; and foreign political interference." (6 ER 910) The reports must contain (1) a "complete and detailed description of content moderation practices," (2) information on the number of items flagged, (3) the actions the company took in response based on each content category, (4) the type of media, and (5) "the number of times this content was viewed and shared by users." (6 ER 910); Cal. Bus. & Prof. Code § 22677.

The law Is enforceable by civil actions brought by the Attorney General or by city attorneys if a social media company fails to post Terms of Service according to the law's specifications, fails to submit timely reports to the Attorney General, or "materially omits or misrepresents required information in a report." Cal. Bus. & Prof. Code § 22678(a)(1). Violations are subject to injunctive relief as well as fines of up to $15,000 per day per violation. *Id*.

B. Constitutional Challenge to A.B. 587

X Corp. filed a pre-enforcement challenge to A.B. 587, claiming violations of the First Amendment, the dormant Commerce Clause, and Section 230. It characterized the Posting and Reporting Requirements as "impermissible attempt[s] by the State to inject itself into the content moderation editorial process" (Compl. (ECF No. 1) ¶¶ 28, 31), and alleged the Attorney General had already threatened to enforce A.B. 587 "to pressure the social media companies to regulate speech that the government does not like" (*id*. ¶ 50; *see also id*. ¶¶ 45–49, 64–65). It further alleged both requirements violate First Amendment restrictions against

compelled speech. (*Id.* ¶¶ 62–63) X Corp. moved for a preliminary injunction.

The district court denied the injunction in a brief opinion, finding plaintiff was not likely to succeed on the merits. *X Corp. v. Bonta*, 2023 WL 8948286 (E.D. Cal. 2023). In rejecting the First Amendment claim, the court focused only on compelled speech and concluded both the Posting and Reporting Requirements satisfied the test for compelled commercial speech under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). *See X Corp. v. Bonta*, 2023 WL 8948286, at *1–2. The court also rejected the Section 230 preemption claim, concluding A.B. 587 "does not provide for any potential liability stemming from a company's content moderation activities, per se." *Id.* at *3.

SUMMARY OF ARGUMENT

The district court opinion denying injunctive relief missed the forest for the trees. In rejecting X Corp.'s First Amendment arguments, the court focused solely on the compelled speech claims and reached incorrect legal conclusions, as explained below. But the larger point, as Appellant explained, is that A.B. 587 has the

illegitimate purpose of imposing an informal system of censorship over social media moderation practices.

As Appellant alleged, "[e]ven if AB 587 uses 'transparency' as its effectuating mechanism, it does *so for the purpose of* censoring particular viewpoints with respect to eight content categories in § 22677(a)(3)." (Compl. (ECF No. 1) ¶ 46) A.B. 587 is euphemistically called a "transparency measure" but "is *designed* to *generate* public controversy about the actions of the social media companies by framing a divisive debate in such a way that will pressure [them] to change their content-moderation policies to align with those desired by the State." Appellant's Br. at 2, 31.

In short, the governmental objective of A.B. 587, "to 'pressure' social media companies to 'become better corporate citizens by doing more to eliminate hate speech and disinformation,'" is "an illegal, unconstitutional, and illegitimate purpose." (Compl. (ECF No. 1) ¶¶ 46–55 (quoting Cal. Assemb. Comm. on Judiciary Report, 2021–22 Sess. (AB 587), April 27, 2021, at 4, available at 5 ER 746)) Such informal methods of censorship have long been held to violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58

(1963). The district court's failure to address this central premise is alone grounds for reversal.

Its conclusion that A.B. 587's "effectuating mechanism" is reconcilable with First Amendment rules against compelled speech is also erroneous. There is no question that A.B. 587 compels vast amounts of speech, contrary to the constitutional norm that equates forced speech with censorship. Rather than addressing that body of First Amendment law, the district court's conclusory analysis bypassed it entirely and instead applied *Zauderer*'s commercial speech exception for compelled disclosures. But A.B. 587's Posting and Reporting Requirements are not properly subject to *Zauderer*—and even if they were, they would fail that test.

The district court's *Zauderer* analysis is based on a flawed premise. A.B. 587's disclosure requirements do not relate to commercial speech, as that court concluded, but rather affect moderation policies and practices—editorial decisions, not commercial ones. Although California seeks to justify the law as a "transparency measure" to better inform social media users in choosing which platforms to use, the Supreme Court rejected this

rationale as the basis for invoking the commercial speech doctrine in *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

Even if *Zauderer* applied to A.B. 587, the law does not satisfy the required scrutiny because the disclosures do not relate to purely factual and uncontroversial information and are excessively burdensome. The law compels social media companies to compile data and report on their moderation policies regarding highly contentious and subjective topics as prescribed by the government. The point of the reports is to generate controversy to pressure the companies to alter their moderation policies. Given the millions of posts per day on the larger social media sites, the administrative tasks associated with the disclosures are alone excessively burdensome. But the chilling effect on social media platforms' First Amendment rights is an even greater burden. The district court should be reversed.

ARGUMENT

I. A.B. 587's Posting and Reporting Requirements Are Unconstitutional Informal Speech Regulations.

A. A.B. 587's express purpose is to pressure social media companies to change their moderation policies.

California was entirely upfront about its rationale for enacting A.B. 587. Recognizing that direct content regulation would violate the First Amendment, the State imposed Posting and Reporting Requirements as "an important first step" to ensure that "social media companies . . . moderate or remove hateful or incendiary content." (5 ER 738 (Cal. Assemb. Comm. on Judiciary Report)) These "[f]ormal legislative findings" make clear A.B. 587's "express purpose and practical effect." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011).

Were these official statements too subtle, the Attorney General removed any doubt about the law's intended purpose. Shortly after passage, he reminded social media companies of their "responsibility" to combat what he described as "dissemination of disinformation that interferes with our electoral system," adding that the "California Department of Justice will not hesitate to

enforce" A.B. 587.[3] But the State ignored that such informal "nudge" tactics designed to restrict speech are unconstitutional. *See*, *e.g.*, *Smith v. California*, 361 U.S. 147, 154 (1959) (First Amendment prohibits laws that "tend to restrict the public's access to [speech] which the State could not constitutionally suppress directly").

B. Informal censorship schemes violate the First Amendment.

From the beginning of First Amendment jurisprudence, the Supreme Court recognized that protecting First Amendment rights requires evaluating the substance of government actions, not just the form those actions take. *Near v. Minnesota*, 283 U.S. 697, 708 (1931). A "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). In *Bantam Books, Inc. v. Sullivan*, a case strikingly similar to this one, the Court observed

[3] Letter from Attorney General Robert Bonta to Twitter, Inc., et al., at 4 (Nov. 3, 2022), http://oag.ca.gov/system/files/attachments/press-docs/Election%20Disinformation%20and%20Political%20Violence.pdf.

"[w]e are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." 372 U.S. 58, 67 (1963). It thus enjoined a Rhode Island law designed to evade First Amendment limits by authorizing only informal pressure, just like A.B. 587.

At the time, like California today, Rhode Island understood that direct regulation of disfavored literature faced invalidation as a First Amendment violation. In *Winters v. New York*, the Supreme Court struck down a state law prohibiting publications that contained, among other things, "pictures, or stories of deeds of bloodshed, lust or crime," holding "they are as much entitled to the protection of free speech as the best of literature." 333 U.S. 507, 508, 510 (1948). Not long thereafter, the Court voided a Michigan law that criminalized making available any book "tending to the corruption of the morals of youth," finding the law "reduce[d] the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Faced with this precedent, Rhode Island established a "Commission to

Encourage Morality in Youth" to exert government pressure on booksellers as a way to achieve the same ends in hopes of avoiding First Amendment scrutiny.

The Commission lacked any direct regulatory authority but could advise booksellers whether their wares "contain[ed] obscene, indecent or impure language, or manifestly tend[ed] to the corruption of the youth." *Bantam Books*, 372 U.S. at 59. Booksellers were free to ignore the "advice," but the Commission could recommend prosecution under state obscenity laws. And local police would pay follow-up visits to bookstores to see if they were selling any of the books on the Commission's list. *Id.* at 61–63. The Court acknowledged no books had been "seized or banned by the State, and that no one has been prosecuted for their possession or sale," but nevertheless held Rhode Island's scheme was "a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Id.* at 67, 69. The Court held the informal scheme for making booksellers accountable for their wares unconstitutionally

subjected "the distribution of publications to a system of prior administrative restraints." *Id*. at 70.

C. A.B. 587 violates the First Amendment by putting the State's thumb on the moderation scale.

A.B. 587 is expressly designed to operate the same way as the Rhode Island scheme in *Bantam Books*, using an even more robust mechanism for state oversight of private moderation decisions. Not only must social media create and post Terms of Service with particular features prescribed by law, they also must provide the Attorney General highly detailed reports twice a year on what their moderation policies require, how they implement them, and what specific actions the services took. The Attorney General or a city attorney may investigate or bring enforcement actions over any failure to post terms or to report—or for any material "omission" or "misrepresentation" therein. *See* Cal. Bus. & Prof. Code § 22678 (a)-–(b).

By this mechanism, the State may impose significant regulatory costs if it disagrees with how social media platforms interpret and apply moderation standards, based on subjective content categories the State prescribes. As Appellant explained, the

Attorney General "maintains nearly unfettered discretion to determine what constitutes a 'material[] omi[ssion] or misrepresent[ation]' in violation of the statute," and has "broad pre-litigation powers" under California law, "including but not limited to 'issu[ing] subpoenas' for the 'production of . . . documents,' the 'attendance of witnesses,' and 'testimony.'" Appellant's Br. at 45 (quoting Cal. Bus. & Prof. Code § 22678(a)(2)(C) and Cal. Gov't Code § 11181(a)).

The district court ignored the First Amendment implications of such informal methods of control. In rejecting X Corp.'s Section 230 claim, it observed A.B. 587 "does not provide for any potential liability stemming from a company's content moderation activities per se." *X Corp. v. Bonta*, 2023 WL 8948286, at *3. But that is beside the point, even if read as responding to the constitutional claim (which it was not). A law like this violates the First Amendment because it identifies general categories of speech the State would like to suppress and provides ways to make it hurt if the target fails to get the hint. *Bantam Books*, 372 U.S. at 68 (stating "refusal to

'cooperate' would have violated no law," but "[p]eople do not lightly disregard public officers' thinly veiled threats").

Such an oversight mechanism poses constitutional problems even if the State lacks direct authority to regulate moderation. The D.C. Circuit addressed a similar question in invalidating a Communications Act provision requiring noncommercial broadcasters to make audio recordings of all broadcasts "in which any issue of public importance is discussed," and to provide a copy to any FCC Commissioner or member of the public who asks. *Community-Service Broad. of Mid-America v. FCC*, 593 F.2d 1102, 1104–05 (D.C. Cir. 1978) (en banc). The law did not empower the government to restrict public affairs programming, but the court found "the legislative history of Section 399(b) provides strong support for the view that the purpose of the recording requirement was related to suppression of free expression on issues of public importance." *Id.* at 1112 (Wright, C.J.). In this respect, it mirrored A.B. 587's stated purpose.

Like the Posting and Reporting Requirements here, the recording requirement in *Community-Service Broadcasting*

provided "a mechanism, for those who would wish to do so, to review systematically the content of public affairs programming" to incent those subject to it to "censor themselves to avoid official pressure and regulation." *Id.* at 1116–17 ("operation of the taping requirement serves to facilitate the exercise of 'raised eyebrow' regulation"); *see also Loveday v. FCC*, 707 F.2d 1443, 1457–58 (D.C. Cir. 1983) (reporting and disclosure requirement for advertising sponsors could be used to chill disfavored speech).

As the district court failed to address this constitutional problem, this Court should reverse for that reason alone.

II. A.B. 587 Unconstitutionally Compels Speech by Social Media Companies.

In addition to A.B. 587's illegitimate purpose, its "effectuating mechanism" of compelling speech is independently unconstitutional. The First Amendment limits the government's ability to compel speech just as it restricts state-sponsored censorship. The district court does not address the principal body of law governing compelled speech, but instead defaults to *Zauderer*'s standard applicable only to compelled *commercial* speech. But neither Terms of Service nor moderation reports constitute

commercial speech as a matter of law, making *Zauderer* inapplicable. Even if it applied, the State cannot satisfy even *Zauderer's* modest requirements.

A. The First Amendment equates compelled speech with censorship.

Freedom of speech necessarily comprises "the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988); *Janus v. Am. Fed'n of State, Cty. & Mun. Emps. Council*, 138 S. Ct. 2448, 2463 (2018) ("freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all'"); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). "Mandating speech that a speaker would not otherwise make necessarily alters the speech's content," *Riley*, 487 U.S. at 795, and "content-based regulations . . . 'are presumptively unconstitutional,'" *Nat'l Inst. of Fam. & Life Advocs.* (*NIFLA*) *v. Becerra*, 585 U.S. 755, 766 (2018) (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)).

The issue here is not just a question of whether social media companies must make available their preexisting Terms of Service or transparency reports—it is whether the State can compel them to post Terms of Service "in a specified manner and with additional specified information," Cal. Bus. & Prof. Code § 22676(a), and to compile detailed reports for the government describing how they implement moderation policies for subjective and highly charged content categories. *Id.* § 22677. This state intrusion into the management of private editorial policies ignores that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790–91. "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. "It is the presence of compulsion from the state itself that compromises the First Amendment." *Washington Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019).

B. A.B. 587 unconstitutionally compels speech.

A.B. 587 compels speech in two ways: first, it requires social media companies to disclose their content moderation policies and, second, it forces them to submit detailed reports to the State about how they implement those policies. Under the Posting Requirement, websites must prominently display their terms of service, which must include the sites' "commitments" to responding to complaints about content. Cal. Bus. & Prof. Code § 22676(a), (b). And they must say whether the site will "ban[]" users or "remov[e]" certain content. *Id.* The law's Reporting Requirement compels companies to submit semiannual reports to the Attorney General that state whether and how the terms of service define a host of controversial subjects: "[h]ate speech or racism," "[e]xtremism or radicalization," "[d]isinformation or misinformation," "[h]arassment," and "[f]oreign political interference." *Id.* § 22677(a)(3), (5).

The reports must state whether and how "existing policies [are] intended to address" content in the specified categories, or "[h]ow the social media company would remove individual pieces of

content . . . that violate the terms of service." *Id.* § 22677(a)(4). In addition, sites must collect and report data on any items of content that might violate those terms. *Id.* § 22677(a)(5). That data must include the number of times: that the site's editors or users reported content as violating the content policies, that the site removed a piece of content or a user for content violating site policies, that users appealed the removal, and the number of times each piece of removed content was viewed before removal. *Id.*

While compelling one to speak "necessarily alters the content of the speech" and is therefore treated "as a content-based regulation," *Riley*, 487 U.S. at 795, A.B. 587 is content-based on multiple levels. It requires sites to report their views on *only* particular topics and to report their editorial practices *only* for certain kinds of content. Cal. Bus. & Prof. Code § 22677(a)(5). It is thus presumptively unconstitutional, because "[w]hen the government seeks to favor or disfavor certain subject-matter because of the topic at issue, it compromises the integrity of our national discourse and risks bringing about a form of soft

censorship." *McManus*, 944 F.3d at 513 (citing *Reed*, 576 U.S. at 163).

That is why the Fourth Circuit applied these principles in *McManus* to invalidate disclosure requirements for political advertisements on "online platforms." 944 F.3d at 511. Maryland had imposed a "publication requirement" that required platforms to post specified information about political ads (purchaser identity, persons exercising control over the purchaser, amounts paid), and an "inspection requirement" that required platforms to compile data regarding political ad purchases and make it available to Maryland's Board of Elections. *Id.* at 512.

The court held these publication and inspection requirements "present compelled speech problems twice over" because "they force elements of civil society to speak when they otherwise would have refrained." *Id.* at 514. It observed that the "publication requirement and [the] state inspection requirement are functionally distinct, but they operate as part of a single scheme." *Id.* at 512 (citation omitted). The same is true of A.B. 587's Posting and Reporting Requirements.

The inspection requirement was problematic in particular because it required platforms "to turn over information to state regulators," forcing them "to provide Maryland with no less than six separate disclosures." *Id.* at 518–19. This brought "the state into an unhealthy entanglement with news outlets" and lacked "any readily discernable limits on the ability of government to supervise the operations." *Id.* By placing disclosure obligations on platforms, the court concluded "we hazard giving government the ability to accomplish indirectly . . . what it cannot do through direct regulation." *Id.* at 517; *see Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

Applying the same rationale, the U.S. District Court for the Southern District of New York enjoined that state's Hateful Conduct Law, which required social media companies to provide complaint mechanisms for reporting "hateful conduct," defined as communications that vilify, humiliate, of incite violence against specified groups and to disclose "how [the company] will respond to

any such complaints." *Volokh v. James*, 656 F. Supp. 3d 431, 437–38 (S.D.N.Y. 2023), *appeal pending*, No. 23-0356 (2d Cir.). The court held the law "at a minimum, compels Plaintiffs to speak about 'hateful conduct'" and forced social media companies to "weigh in on the debate about the contours of hate speech when they may otherwise choose not to speak." *Id.* at 441–42.

A.B. 587's Posting and Reporting Requirements suffer from the same constitutional defects. The requirement to post Terms of Service "in a specified manner and with additional specified information," Cal. Bus. & Prof. Code § 22676(a), deprives social media platforms "'of their right to communicate freely on matters of public concern' without state coercion." *Volokh*, 656 F. Supp. 3d at 442 (quoting *Evergreen Ass'n. Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014)). This violates the "freedom of speech [that] prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 570 U.S. 205, 213 (2013) (citation omitted).

The Reporting Requirement is even more intrusive, requiring platforms to compile data in seven separate areas and to report how

they evaluated content in specified content categories and to specify what actions they took. Cal. Bus. & Prof. Code § 22677(a)(5). The requirements *McManus* invalidated pale by comparison, 944 F.3d at 519 (requiring disclosure in "six separate disclosures"), and A.B. 587 goes even further by compelling platforms to disclose their editorial judgments on politically fraught content categories specified by the law. Such compulsion is unconstitutional. *See*, *e.g.*, *Book People, Inc. v. Wong*, 91 F.4th 318, 340 (5th Cir. 2024) ("Balancing a myriad of factors that depend on community standards is anything but the mere disclosure of factual information.").

The district court erred by failing to address these basic issues of First Amendment doctrine.

C. A.B. 587's compelled speech requirements are not saved by *Zauderer*.

The district court erroneously held plaintiff was unlikely to succeed on its claims because A.B. 587's disclosure requirements burdened only "commercial speech," and incorrectly concluded California's "substantial government interest" in "transparency" satisfied the level of constitutional scrutiny *Zauderer* requires. *X*

Corp. v. Bonta, 2023 WL 8948286, at *1–2. That analysis fails at the threshold because neither A.B. 587's Posting or Reporting Requirements relate to commercial speech, and even if they did, it fails to meet even *Zauderer*'s modest requirements that disclosures constitute (1) "purely factual and uncontroversial information about the terms under which . . . services will be available" and (2) that they avoid being "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. A.B. 587 satisfies neither condition.[4]

[4] *Zauderer*'s intrusion on First-Amendment-protected speech was justified solely by "the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. In recent years, however, *Zauderer* has undergone "mission creep," with some circuit courts (including this one) holding compelled commercial disclosures may be imposed to serve more general government interests. *See*, *e.g.*, *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Nat'l Ass'n Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); *Am. Beverage Ass'n v. City and County of San Francisco*, 871 F.3d 884 (9th. Cir. 2017); *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019). The Supreme Court has not yet addressed this trend specifically but has made clear *Zauderer* remains confined to the commercial speech context. *See NIFLA*, 585 U.S. at 768–69 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)); *see also Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1266 (9th Cir. 2023) ("[Zauderer] applies to compelled commercial speech that is 'purely factual and uncontroversial'"). Appellant noted the Supreme Court has not approved the application of *Zauderer* outside the issue of consumer deception, and specifically preserved this issue for appeal. Appellant's Br. at 35 n.7.

1. *Zauderer* is Inapplicable Because Social Media Moderation Policies Are Not Commercial Speech.

A.B. 587 does not involve "commercial speech," which does no more than "'propose a commercial transaction.'" *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473 (1989) (*"SUNY"*) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020). Rather the speech subject to A.B. 587 relates to social media platforms' *editorial* policies, which are "different in character and kind from commercial speech and amounts to more than the mere disclosure of factual information." *Volokh*, 656 F. Supp. 3d at 443; *see Hurley*, 515 U.S. at 570 ("[T]he presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First Amendment scrutiny.").

A platform's moderation policies and how it enforces them reflect its views of the type of speech community it wants to foster. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022) (*NetChoice (Florida)*) ("Platforms employ editorial judgment to convey some messages but not others and thereby cultivate

different types of communities that appeal to different groups."). While websites may have "economic motivation" for hosting speech, that alone does not render their expressive activities "commercial." *See Va. Pharmacy*, 425 U.S. at 761. Mere economic motivation, or reference to an economic product or service, does not convert noncommercial speech into commercial speech. *Riley*, 487 U.S. at 796; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) ("[E]conomic motivation . . . would clearly be insufficient by itself to turn the materials into commercial speech.").

Settled law governing compelled speech overwhelms the district court's cursory analysis. The court acknowledged that Terms of Service do not constitute advertising but still applied *Zauderer*, reasoning the terms "are directed to potential consumers and may presumably play a role in the decision of whether to use the platform." *X Corp. v. Bonta*, 2023 WL 8948286, at *1. The Supreme Court rejected precisely that argument in *Riley*, where the state claimed the more relaxed standard for commercial speech should apply to professional charitable fundraisers. 487 U.S. at 795–96. The Court acknowledged the amount of the donation the

charity receives "might be relevant to the listener" and "could encourage or discourage the listener from making a political donation," but still applied stricter scrutiny because "a law compelling its disclosure would clearly and substantially burden the protected speech." *Id.* at 798.

Likewise, despite noting the moderation reports to the Attorney General here "are not advertisements" and that "social media companies have no particular economic motivation to provide them," *X Corp. v. Bonta*, 2023 WL 8948286, at *2, the district court "[f]ollow[ed] the lead of the Fifth and Eleventh Circuits" in applying *Zauderer*. *Id.* The district court cited but did not analyze the *Zauderer* discussions in *NetChoice, LLC v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022) (*NetChoice (Texas)*) and *NetChoice (Florida)*, 34 F.4th at 1223. *See X Corp. v. Bonta*, 2023 WL 8948286, at *2. But it is not enough just to "follow the lead" of other courts that merely announced they were applying *Zauderer*, without explaining why it is the correct test.

The Eleventh Circuit at least acknowledged *Zauderer* "is typically applied in the context of advertising and to the

government's interest in preventing consumer deception," but added without embellishment that "we think it is broad enough to cover [the Florida law's] disclosure requirements." *NetChoice (Florida)*, 34 F.4th at 1227. It suggested only that a reduced level of scrutiny is justified because the provisions only "*indirectly* burden platforms' editorial judgment by compelling them to disclose certain information." *Id.* at 1223. But this has nothing to do with *Zauderer*, and as explained in Part I.B. *supra*, such indirect "nudge" policies designed to restrict speech do not receive lessened scrutiny. For its part, the Fifth Circuit merely concluded social media moderation is not the same as a newspaper's editorial process, *NetChoice (Texas)*, 49 F.4th at 487–88, but said nothing about how compiling detailed reports on moderation practices for the government is in any way *commercial*—*Zauderer*'s essential precondition.

In this case (as well as in the Fifth and Eleventh Circuits), the most the courts can muster is to suggest knowledge of a social media platform's moderation policies may affect a consumer's use of the service. But that is the same rationale the Supreme Court

rejected in *Riley* for treating disclosures concerning charitable donations as "commercial." *Riley*, 489 U.S. at 795–96, 798. And a requirement to prepare detailed reports for regular submission to the State has nothing to do with commercial speech. Accordingly, *Zauderer* does not apply.

2. A.B. 587 Cannot Survive Scrutiny Under *Zauderer*.

Even if A.B. 587 did regulate solely commercial speech, it would fail either of *Zauderer*'s requirements that compelled disclosures involve "purely factual and uncontroversial information about the terms under which . . . services will be available" and not be "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

a. The speech A.B. 587 compels is not "purely factual" and "uncontroversial."

The district court's conclusory statements that "reports required by AB 587 are purely factual" because they "constitute objective data concerning the company's actions" and are "uncontroversial," *X Corp. v. Bonta*, 2023 WL 8948286, at *2, are simply not credible. These unexplained conclusions ignore that the "content . . . categories" for which reports are required include inherently subjective and controversial subjects like "[h]ate speech

or racism," "[e]xtremism or radicalization," "[d]isinformation or misinformation," "[h]arassment," and "[f]oreign political interference." Cal. Bus. & Prof. Code § 22677(a)(3), (5). If anything, generating controversy is the point.

The California legislature mandated reports on how platforms moderate these categories precisely *because they are subjective and hard to define*. They are, according to the legislative history, "far more difficult to reliably define, and assignment of their boundaries is often fraught with political bias." Consequently, "both action and inaction by these companies seems to be equally maligned: too much moderation and accusations of censorship and suppressed speech arise; too little, and the platform risks fostering a toxic, sometimes dangerous community." (5 ER 746 (Cal. Assembly Comm. On Privacy & Consumer Protection Report)) So, the legislature compelled platforms to submit detailed reports on their moderation practices *to leverage* concerns that their efforts have been "opaque, arbitrary, biased, and inadequate." *Id*.

In other words, the express purpose of A.B. 587 is to provide a mechanism to second-guess editorial decisions in highly charged,

subjective content categories the State prescribes. This is the opposite of "purely factual and uncontroversial." Although the State has tried to equate this with food labeling (and thereby justify diminished scrutiny), the comparison is inapt. (6 ER 911) The Supreme Court has rejected efforts to equate food and drug labeling to speech regulation, observing "there is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Smith*, 361 U.S. at 152 (cleaned up).

For this reason, numerous courts have invalidated supposedly "factual" disclosure requirements involving speech that required an underlying subjective judgment. Most recently, the Fifth Circuit rejected the state's effort to compare compulsory book ratings to nutrition labeling because the law "requires vendors to undertake contextual analyses, weighing and balancing many factors to determine a rating for each book." *Book People,* 91 F.4th at 340. The court explained, "[b]alancing a myriad of factors that depend on

community standards is anything but the mere disclosure of factual information. And it has already proven controversial." *Id.* The Seventh Circuit in *Entertainment Software Assoc. v. Blagojevich*, 469 F.3d 641, 651–54 (7th Cir. 2006) invalidated a requirement that video game retailers affix "18" stickers to games defined as "sexually explicit" under the law because they communicated a "subjective and highly controversial message."[5] Requiring disclosures of subjective judgments about speech—as A.B. 587 does—cannot compare to purely factual disclosures like calorie counts. *N.Y. State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (contrasting "opinion-based" definition of "sexually explicit" in *Blagojevich* with disclosure of fact-based calorie counts on menus).

Nor are A.B. 587's required disclosures uncontroversial. To the contrary, the legislative history makes clear California selected the prescribed categories defining the Posting and Reporting

[5] This Court likewise invalidated labeling for violent video games because it did not convey "factual" information and thus failed scrutiny under *Zauderer*. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966–67 (9th Cir. 2009), *aff'd on other grounds*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

Requirements' parameters precisely *because* they generated controversy. It is not, as the district court gingerly suggests, that the reports are "tied in some way to a controversial issue." *X Corp. v. Bonta*, 2023 WL 8948286, at *2 (citing *CTIA*, 928 F.3d at 845). The required disclosures in CTIA merely required cell phone vendors to make factual statements about what FCC regulations said about radiation and public health. 928 F.3d at 847. Here, however, social media platforms are required to periodically disclose their own subjective judgments on a range of hot-button topics.

The entire point of the requirement is to put social media platforms into a damned-if-you-moderate-damned-if-you-don't situation. This is hardly the "brief, bland, and non-pejorative disclosure[s]" *Zauderer* contemplates. *See Evergreen Ass'n*, 740 F.3d at 250 (citation omitted).

b. A.B. 587 is unduly burdensome.

The district court also erred in concluding A.B. 587 is not unduly burdensome. Although it acknowledged the Reporting Requirement "appear[s] to place a substantial compliance burden

on social media companies," it deemed *Zauderer* satisfied because the disclosure does not "effectively rule out the speech it accompanies." *X Corp. v. Bonta*, 2023 WL 8948286, at *2 (cleaned up). That misstates *Zauderer*, under which compelling speech is unduly burdensome if it would *chill* protected speech. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) ("Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech.").

There is no question A.B. 587 would chill social media platforms' moderation decisions—that is precisely what California designed the law to do. *See supra* Part I.B. It seeks to pressure platforms' content moderation decisions, and is backed by threat of costly investigations, monetary penalties, and possible injunctions. It is thus immaterial that the disclosure requirements do not suppress platforms' editorial judgment completely.

The administrative burdens of the semi-annual reports to the Attorney General are alone daunting. As legislative history noted, "the largest social media platforms are faced with thousands, if not millions of similarly difficult decisions related to content

moderation on a daily basis." (5 ER 746 (Cal. Assemb. Comm. on Privacy & Consumer Protection Report)) X Corp. alone receives approximately 420,000 posts per minute, 604.8 million posts per day, and 221 billion posts per year. (7 ER 1107 ¶ 10, 1111 ¶ 20) A.B. 587 thus requires it to compile vast amounts of data to characterize how it moderates these posts, to analyze the data for each of the prescribed content categories, and to regularly report this information to the government.

Considering such a burden, the Eleventh Circuit held Florida's requirement for social media platforms to "explain" their moderation decisions was "unconstitutional under *Zauderer*." *NetChoice (Florida)*, 34 F.4th at 1230–31. Although that court erred in making *Zauderer* the applicable standard, *see supra* Part II.C.1, it correctly held such a detailed reporting requirement was "unduly burdensome and would chill protected speech platforms exercise of editorial judgment." *Id.* (cleaned up). The entire purpose of A.B. 587 was to empower the State to peer over the shoulders of social media companies in their content moderation decisions. That is an unconstitutional burden.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and preliminarily enjoin A.B. 587.

Dated: February 21, 2024

/s/ Robert Corn-Revere

Robert Corn-Revere
Joshua A. House
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org

**Counsel of Record*

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Dated: February 21, 2024

/s/ Robert Corn-Revere

Robert Corn-Revere*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org

**Counsel of Record*