No. 22-393

In the
Supreme Court of the United States

NETCHOICE, LLC, and the COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,
Cross-Petitioners,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,
Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR CROSS-PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

NetChoice has no parent corporation, and no publicly held corporation owns ten percent or more of its stock. The Computer & Communications Industry Association (CCIA) has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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SUPPLEMENTAL BRIEF

The United States agrees with the parties that the Court should review the Eleventh Circuit's decision holding that most of S.B.7072 violates the First Amendment. But like Florida, the United States seeks to artificially limit the Court's review to the provisions that the Eleventh Circuit invalidated, even though all of S.B.7072's provisions work hand-in-glove to punish a select handful of online services that the state indisputably disfavors. Worse still, rather than leave the questions presented to the parties, the United States proposes its own questions presented that draw artificial distinctions among the disclosure provisions in S.B.7072 (and Texas' H.B.20). While the United States may have its own reasons for avoiding questions about the scope of *Zauderer* given the myriad disclosure provisions in the U.S. Code, there is no valid basis to artificially constrain this Court's ability to consider the constitutionality of S.B.7072 in its entirety or to grant full relief. In reality, S.B.7072 does not distinguish between "general disclosure" provisions and "individualized explanation" requirements. All of S.B.7072's disclosure provisions are instead designed to work together to enforce the law's unconstitutional restrictions on editorial discretion. And all the law's provisions reflect the same viewpoint, content, and speaker discrimination that permeate, and should doom, the entire law. In short, the United States is correct to recommend plenary review but wrong to attempt to artificially constrain that review. This Court should grant the petition and cross-petition in this case and the petition in No. 22-555.

I. Granting The Cross-Petition Will Ensure That The Court Can Provide Effective Relief If It Concludes That S.B.7072 Discriminates Based On Viewpoint.

The United States never disputes that viewpoint discrimination permeates S.B.7072 in its entirety. Nor could it. On its face, S.B.7072 singles out certain speakers for disfavored treatment. Its size and revenue thresholds are gerrymandered to target "Big Tech" while exempting services with a different perceived ideological bent. The law's enacted findings explain that Florida focused on those services because they exercise their editorial judgment in ways the state disfavors, and the record the state compiled to justify the law reinforces that and more. The Governor stated during the official signing ceremony that the point of the law is to stop "Big Tech" from "discriminat[ing] in favor of the dominant Silicon Valley ideology." CA.App.1352. And though S.B.7072 originally exempted companies that owned a theme park in Florida, the state revoked that exemption after Disney executives criticized a different Florida law, making clear that the point of S.B.7072's gerrymander is to target speakers who espouse perceived viewpoints with which the state disagrees.

The Court need not grant the cross-petition to consider arguments that S.B.7072 discriminates based on viewpoint. Cross-petitioners fully preserved those arguments and may raise them as an alternative ground for affirmance. But if this Court is persuaded that viewpoint discrimination pervades S.B.7072, then the most appropriate remedy would be to broadly enjoin the law—including the disclosure provisions

that the Eleventh Circuit left standing—and to restore the district court's injunction in full. The Eleventh Circuit's stay of the mandate has kept that injunction in place pending this Court's review, so there is a strong argument that this Court could affirm it even without granting the cross-petition. But all parties agree that granting the cross-petition would avoid any doubt on that score. Given that dynamic, granting the cross-petition and avoiding any procedural skirmishing, while preserving the full range of remedial options, is the far better course.

The United States nevertheless argues that cross-petitioners' "viewpoint-discrimination challenges" "do not warrant review." U.S.Br.22. But that reflects a fundamental misunderstanding of the cross-petition. The cross-petition does not ask this Court to answer some distinct question about viewpoint discrimination that would not otherwise be before the Court. That issue is fully preserved and fairly encompassed by both of Florida's questions presented (and even by the federal government's reworked questions, on which it supports review). *See* Pet.i; U.S.Br.I. Cross-petitioners are entitled "to urge any grounds which would lend support to the judgment below," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977), including the argument that S.B.7072 discriminates based on viewpoint.

The United States resists that conclusion, contending that, "in the absence of a granted cross-petition, a respondent cannot advance an alternative argument for affirmance 'if the *rationale* of the argument would give the satisfied party more than the judgment below, even though the party is not asking

for more.'" U.S.Br.24 (quoting Stephen M. Shapiro et al., *Supreme Court Practice* §6.35, at 6-134 (11th ed. 2019)). But the decisions cited in its source for that dubious claim stand only for the much more limited proposition that a cross-petition is necessary when a respondent "*seeks* … to change" the judgment below. *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364-65 (1994) (emphasis added); *see also Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013); *id.* at 82 n.1 (Kagan, J., dissenting). And avoiding questions about whether that murky line has been crossed, and eliminating any debate about the issues properly before the Court, is precisely why cross-petitioners filed their cross-petition. Particularly given the preliminary injunction posture of this case, there is every prospect that the lower courts will adjust the scope of the injunction based on what this Court says in its opinion. Nothing would be gained by injecting confusion about whether cross-petitioners or this Court can state that viewpoint discrimination pervades the entirety of S.B.7072 rather than just the parts that the Eleventh Circuit enjoined. In short, granting the cross-petition will avoid any procedural side-shows and keep the focus on the substance.

Even if the United States were right that denying the cross-petition would somehow preclude cross-petitioners from raising their viewpoint discrimination argument, that would be all the more reason to grant it. The line that separates content and viewpoint discrimination is hardly pellucidly clear. Indeed, this Court has described viewpoint discrimination as simply an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Moreover, both

forms of discrimination trigger strict scrutiny, and the kind of speaker distinctions S.B.7072 draws is a telltale sign of both. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Nat'l Inst. of Fam. Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2378 (2018) ("*NIFLA*"). The Court thus often considers content, speaker, and viewpoint discrimination together, without any artificial separation. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-65 (2011); *NIFLA*, 138 S.Ct. at 2371, 2378. And in this very case, the district court enjoined the state from enforcing S.B.7072 after recognizing that the purpose and effect of its content and speaker distinctions is to single out specific services because of their perceived viewpoints. Pet.App.89a-91a.[1] Indeed, even if (contrary to fact) cross-petitioners had not raised viewpoint discrimination arguments below, they could still make those arguments in support of their claim that S.B.7072 violates the First Amendment. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (regulatory taking arguments were preserved by general Takings Clause argument below). Confining cross-petitioners to arguments about content and speaker discrimination would thus be artificial in the extreme.

That artificiality is confirmed by the Texas case, where there is no cross-petition, and viewpoint discrimination is just one of the fully preserved arguments as to why H.B.20 violates the First Amendment. It would make no sense to consider viewpoint discrimination in one case and not the other. Moreover, the fact that viewpoint

[1] Pet.App. cites are to the appendix to Florida's petition in No. 22-277.

discrimination looms large in both cases not only is no accident, but undermines the federal government's suggestion that the viewpoint discrimination issue is "case-specific." U.S.Br.23. In both Florida and Texas, the state was not content to regulate all services, but rather only those that exercised their editorial discretion in perceived ways that the state disfavored. Both states directed the restrictions on editorial discretion and all the attendant disclosure provisions at disfavored services. And the fact that the details differ on the margins is why the United States agrees that this Court would benefit from granting plenary review in both cases. But it would make little sense to have viewpoint discrimination on the table in one case but not the other, and it would make even less sense to artificially excise viewpoint discrimination arguments from both.

In all events, the real question is not whether this Court should consider whether S.B.7072 discriminates based on viewpoint, but whether the Court should have a full complement of remedies available should it decide that it is. The United States offers no compelling reason to artificially constrain this Court's ability to grant whatever relief the arguments before it may support.

II. Granting This Cross-Petition Will Provide The Court With An Opportunity To Clarify The Scope And Application Of *Zauderer* And Eliminate Artificial Distinctions Among Disclosure Provisions.

The United States agrees with cross-petitioners that the Eleventh Circuit correctly invalidated one of S.B.7072's disclosure provisions, and that the

constitutionality of that disclosure provision merits plenary review. But it then posits another artificial distinction, this time between what it calls the "individualized explanation" provision and the "general disclosure" provisions, and then uses that distinction to urge this Court to deny the cross-petition and limit the scope of its review in No. 22-555. S.B.7072 draws no such distinction. It imposes *all* of its disclosure requirements on the services (and only those services) whose perceived exercise of editorial discretion the state disfavors. And all of them work together to help the state enforce S.B.7072's direct restrictions on editorial discretion. While the United States may have its own reasons for wanting to limit what this Court says about disclosure requirements, its effort to rewrite the parties' questions presented and artificially limit review to a subset of S.B.7072's disclosure provisions has nothing to recommend it.

The Eleventh Circuit's decision to uphold most of S.B.7072's disclosure provisions under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), is wrong and conflicts with decisions from several courts of appeals. The United States does not dispute that this Court has never applied *Zauderer* to uphold a speech mandate outside the context of correcting misleading commercial advertising. In fact, the Court 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). Nor does the United States dispute the importance of clarifying *Zauderer*'s scope given the sheer number of state and

federal programs that mandate disclosure. Cross.Pet.36. If the Eleventh Circuit's decision on this issue is left standing, nothing would limit its application to online services. Lawmakers who think newspapers, book publishers, and broadcast news channels exercise editorial judgment in a biased manner may well seek to compel sweeping disclosures of their editorial policies too.

The United States nevertheless insists that the Court should deny review of some—but not all—of S.B.7072's disclosure provisions for various reasons. None has merit.

It first contends that the parties and the Eleventh Circuit devoted insufficient attention to these issues. U.S.Br.20. But cross-petitioners devoted page after page to explaining why strict scrutiny applies to S.B.7072 *in toto*—including all its disclosure requirements that apply only to those services whose editorial discretion S.B.7072 targets, C.A.Opp.Br.25-47—and the Eleventh Circuit devoted several pages to addressing those arguments, Pet.App.50a-54a, 56a-57a. Nor did cross-petitioners separate out the so-called "individualized explanation" provision (as to which the federal government favors review) for special, extended treatment.

The United States notes that the Eleventh Circuit did not seriously grapple with cross-petitioners' argument that *Zauderer* is limited to the context of correcting misleading advertising. U.S.Br.20. But that is hardly an argument in favor of leaving this aspect of its decision standing, *see Yee*, 503 U.S. at 534, particularly given the confusion among the courts of appeals over *Zauderer*'s reach and scope. *See, e.g.*,

Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080, 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari) (recognizing need for "guidance" on the "oft-recurring" and "important" issue of the First Amendment treatment of "state-mandated disclaimers"); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (recognizing "conflict in the circuits regarding the reach of *Zauderer*"); *CTIA—The Wireless Ass'n v. City of Berkeley*, 873 F.3d 774, 776 n.1 (9th Cir. 2017) (Wardlaw, J., dissenting from denial of rehearing en banc) (noting the "discord among our sister circuits" over *Zauderer*'s scope).

The United States next insists that the Court's review would be "impaired by the pre-enforcement posture" and "the underdeveloped state of the present record." U.S.Br.20. But it fails to explain why the record is sufficiently developed to review the editorial discretion restrictions and the "individualized explanation" disclosure provision but no other disclosure provision. U.S.Br.18-20. That argument also ignores the fact that the state has principally defended S.B.7072 on the bold, but deeply flawed, theory that the law in general and its disclosure provisions in particular are not subject to traditional First Amendment scrutiny. Even assuming that *Zauderer* applies, moreover, the *state* would still bear the burden of proving that its disclosure requirements are "neither unjustified nor unduly burdensome." *NIFLA*, 138 S.Ct. at 2377. Thus, to the extent the record is insufficiently developed to justify those provisions, that is a reason to restore the district court's injunction in full, not a reason to deny review of the Eleventh Circuit's grounds for narrowing it.

The United States next argues that granting the cross-petition would "further complicate what would already be a complex process of merits briefing and argument." U.S.Br.21. Hardly. What would complicate review is accepting the federal government's invitation to rewrite the parties' questions presented and draw artificial distinctions among S.B.7072's disclosure provisions. If the Court follows the federal government's recommendation to grant Florida's petition to consider both S.B.7072's substantive provisions and its "individualized explanation" requirement (as it should), then it will already have before it both cross-petitioners' argument that viewpoint discrimination infects the law and their argument that *Zauderer* does not apply to the law's disclosure provisions. Granting the cross-petition thus would ensure that the Court could grant full relief if it agrees with either or both arguments.

It also bears emphasis that both Florida and Texas designed the disclosure provisions to enforce the restrictions on editorial discretion. The states did not distinguish between disclosure requirements that require individualized explanations versus requirements to disclose more general information. Nor did either state make any of the disclosure provisions applicable to services other than those that it targeted for restrictions on their editorial discretion. In both states, the provisions countermanding editorial judgments and the provisions demanding onerous disclosures were part of a single legislative plan. It is thus no surprise that the artificial distinction the United States tries to draw between "individualized explanation" and "general disclosure" provisions breaks down in practice. *See*

NetChoice.Supp.Br.6-9, No. 22-555 (filed Aug. 30, 2023).

Perhaps the United States will be able to persuade this Court that *Zauderer* applies differently to the "individualized explanation" provision. But it should have to make that case on the merits, not have this Court assume it by rewriting the questions presented. In fact, the United States is coy about whether it thinks the other disclosure provisions are constitutional, which is all the more reason to reject its effort to inject a nonsensical distinction into the questions presented. This Court should fully preserve the option of concluding that all the disclosure provisions fall together by granting the cross-petition and eschewing artificial distinctions among those provisions in either case.

Finally, the United States tries to downplay the circuit split on the scope of *Zauderer*. But it does not and cannot deny that *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), concluded that "*Zauderer* is confined to advertising, emphatically and, one may infer, intentionally." *Id.* at 522. It instead contends that the D.C. Circuit walked back its holding in later cases. But each of those cases upheld a disclosure requirement on the ground that it would *prevent misleading consumers*. *See, e.g.*, *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020) (upholding disclosure requirement that helped prevent consumer "confusion and frustration" about hospital prices); *United States v. Philip Morris USA, Inc.*, 855 F.3d 321, 324, 328 (D.C. Cir. 2017) (upholding court-mandated disclosure to correct misleading advertisements by cigarette

manufacturers). Far from undermining the split, those cases reaffirm that *Zauderer* is limited to the context of correcting misleading commercial advertising in the D.C. Circuit but not the Eleventh Circuit.

The United States is thus left observing that neither *Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607 (1st Cir. 2021), nor *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) (per curiam), involved disclosure requirements or addressed *Zauderer*. U.S.Br.22. But cross-petitioners never suggested otherwise. They instead cited those cases because they "concluded that, at the very least, intermediate scrutiny is required *when a law singles out just some participants in a marketplace for disseminating speech*." Cross.Pet.32 (emphasis added). The United States neither denies that each of those cases did so hold nor makes any effort to reconcile those holdings with the Eleventh Circuit's decision to apply *Zauderer* to S.B.7072's disclosure provisions notwithstanding their speaker discrimination. That decision thus implicates not one, but two circuit splits, which is more than enough to justify this Court's review.

In the end, the case for truly plenary review of all of S.B.7072's disclosure provisions and all of its defects, including viewpoint discrimination, is overwhelming. There is no need to invite procedural skirmishing or inject artificial distinctions among disclosure provisions that are designed to enforce restrictions on editorial discretion that the United States recognizes are incompatible with the First Amendment.

CONCLUSION

For these reasons, the Court should grant this cross-petition along with Florida's petition in No. 22-277 and the petition in No. 22-555.

Respectfully submitted,

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