No. 24-271

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

Robert Corn-Revere*
JWashington, 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

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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 State lawmakers knew

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

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

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 p*

(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

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

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, anla it

Attorney General "maintains nearly unfettered discretion 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 s.5 (lT128 (r)4x)]TJ-0[(r

provided "a mechanism, for those who would wish to do so, to review

commercial speech as a matter of law, making *Zauderer* inapplicable. E

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 tho

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*

Corp. v. Bonta, 2023 WL 8948286, at *1–2. That

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)).

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.").

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charity receives “might be relevant to the listener” and “could

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

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

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. EntmZrnleressgge*

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

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