24-271

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

X CORP.,

Plaintiff-Appellant,

—v.—

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

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

AG Bonta's Answering Brief ("AG Br.") does nothing to change the key facts and law that compel reversal in favor of X Corp. ("X"). Those are as follows:

Not Merely a Transparency Law: AG Bonta claims that AB 587[1] is a mere "transparency" law that does not compel social media companies to adopt any specific content-moderation policies and simply provides social media consumers with information to make informed choices about what platforms to use. AG Br. 1. According to AG Bonta, AB 587 is thus subject to and survives review under *Zauderer*. AG Br. 19–37. That argument misses the mark. While transparency about content moderation may be a good thing (and, indeed, X already publishes all of its content-moderation policies), ***compelled disclosure*** laws, like AB 587, that expressly ***target controversial but constitutionally protected content that is disfavored by the State*** (e.g., hate speech, racism, extremism, etc. (§22677(a)(3)'s categories)), present numerous First Amendment problems that trigger heightened scrutiny, which AB 587 cannot satisfy.

For starters, the undisputed record and AB 587's legislative history both make clear that AB 587—in diametric opposition to the purely factual, uncontroversial disclosures addressed in *Zauderer* and its progeny—is intended to and has the effect

[1] This appeal challenges AB 587's Terms of Service ("TOS") Report only, despite referring to "AB 587" generally throughout.

of applying public pressure to platforms, such as X, to reduce or eliminate these categories of so-called "awful but lawful" speech that are disfavored by the State.

AB 587's legislative record makes clear—and AG Bonta does not dispute—that one of the law's undisguised and intended purposes is to require platforms to disclose details about the most politically controversial categories of content (i.e., those "fraught with political bias" that will lead to public criticism of moderation decisions wherever lines are drawn), 4-ER-394, in the hopes and expectation that the disclosures will generate "public pressure" on them to "eliminate hate speech and disinformation," 5-ER-704–05. In other words, the State wanted to force the platforms to make controversial public disclosures, because doing so would generate public pressure on them to moderate content in conformance with the State's preferences. The stated intent was to pressure the platforms to limit or eliminate content within §22677(a)(3)'s categories ***indirectly***, because it would have been too obviously illegal for the State to do so ***directly***. 6-ER-911.

But AG Bonta never grapples with the fact that state laws attempting to circumvent this illegality by applying ***indirect*** pressure to discriminate against certain speech in conformance with the State's wishes are unconstitutional too. As the U.S. Supreme Court has long held, "what cannot be done directly" under the Constitution "cannot be done indirectly." *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1866). This is especially true in the First Amendment context, where statutory

regimes that indirectly pressure speakers to censor speech in ways desired by the government have repeatedly been struck down. *See, e.g.*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 68, 71 (1963) ("[p]eople do not lightly disregard public officers' thinly veiled threats," and "system[s] of informal censorship" may violate the Constitution); *Washington Post* v. *McManus*, 944 F.3d 506, 517 (4th Cir. 2019) ("when the onus is placed on platforms, we hazard giving government the ability to accomplish indirectly" what "it cannot do through direct regulation"); *Smith* v. *California*, 361 U.S. 147, 150–51 (1959) ("legal devices and doctrines" that are "in most applications consistent with the Constitution … cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression").

The undisputed record also shows that AB 587 is designed to facilitate, and already has been used by AG Bonta to apply, similar pressure ***by the government directly*** on social media companies to interfere impermissibly in their constitutionally protected editorial judgments and force them to regulate content as the State desires. In response, AG Bonta argues that this "theory of interference rests on the assumption that government officials will abuse their limited enforcement authority to pressure companies to adopt their preferred content-moderation policies." AG Br. 50.

The argument that the government is using such pressure in violation of the Constitution is not based on any such assumption, however; rather, it is based on (1)

the law's intent and structure and (2) a thinly-veiled and unmistakable threat already made by AG Bonta to enforce the law if the platforms fail to change their content-moderation policies in ways the State desires.

AB 587's vague enforcement provisions provide nearly unfettered discretion to AG Bonta to issue document demands or initiate enforcement actions based solely on a unilateral determination that a TOS Report may contain "material[] omi[ssions] or misrepresent[ations]." §22678(a)(2). That standard is so vague that it can be applied to almost any situation where AG Bonta disagrees with a company's content-moderation decisions.

AG Bonta has already used the prospect of enforcing AB 587 to pressure X to limit or eliminate content that the State disfavors. Specifically, in a November 2022 letter from AG Bonta to the CEOs of X and other social media companies, AG Bonta told the companies they had a "duty," "responsibility," and "obligation" to "do more" to "actually prevent disinformation and misinformation" (two of §22677(a)(3)'s categories) from appearing on their platforms. 6-ER-1069–70. He added that he "will not hesitate to enforce" AB 587 against platforms failing to abide. 6-ER-1070. It is unclear why, if AB 587 is "merely" a transparency statute, AG Bonta chose to remind the platforms of his ability to enforce it in the context of a letter "urging" them to ***change*** their content-moderation policies. This kind of

governmental pressure violates the First Amendment, because it has, as plainly intended, a chilling effect on free speech, regardless of follow-up.

Strict Scrutiny Applies: A central issue in this case is the level of scrutiny that applies. AB 587 triggers strict scrutiny for each of the following reasons:

Content-Based: AG Bonta acknowledges AB 587 is a content-based law. AG Br. 44; 4-ER-373. Unlike other compelled transparency laws relied on by AG Bonta (those in the *NetChoice* cases[2]), AB 587 singles out particular, highly controversial, politically charged content for differential treatment for the express purpose of pressuring platforms to limit or eliminate it. Such laws are presumptively unconstitutional and subject to strict scrutiny, absent a recognized historical exception to this general rule. *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

Viewpoint-Based: AB 587 goes even further, targeting particular viewpoints within those content categories. It focuses on content that the State describes as the "most commonly restricted" and the type that "most consumers prefer to avoid." AG Br. 43. This description alone makes plain that the selected categories illustrate which content the State believes platforms should target for moderation. And the legislative history confirms that the law's goal is to "pressure" platforms to "do[]

[2] *NetChoice, LLC* v. *Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022); *NetChoice, LLC* v. *Paxton* ("*NetChoice (Tex.)*"), 49 F.4th 439 (5th Cir. 2022).

more to eliminate" such content. Because the State is "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others," *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)—"hate speech" or "racism," for example, as distasteful as they may be, are viewpoints—the law is viewpoint-based and subject to strict scrutiny.

Speech About Speech: Because AB 587 targets private "gatekeepers of speech" as part of an effort to pressure them to change their moderation policies, it threatens multiple sets of speech rights: those of the platforms to exercise editorial judgment and those of users both to post and read content free of governmental interference. Unlike compelled disclosure laws that try to change ***behavior*** (e.g., laws requiring restaurants to post health inspection grades), AB 587 targets ***speech itself***, thereby warranting heightened scrutiny.

No Exception Applies: The State concedes that strict scrutiny applies to content-based laws, absent an exception to the above-mentioned rule. AG Bonta asserts two exceptions—*Zauderer* and *Central Hudson*—but neither applies.

Non-Commercial Speech: *Zauderer* and *Central Hudson* apply only to regulations of commercial speech. Under controlling Supreme Court and Ninth Circuit precedent setting forth the test for commercial speech, these compelled disclosures—which propose no commercial transaction and fail to satisfy any of the commercial speech tests—do not suffice.

AG Bonta relies heavily (as did the district court) on the application of *Zauderer* in the *NetChoice* cases to Florida and Texas statutes that differ dramatically from AB 587. Those statutes, unlike AB 587, did not target particular categories of content for special treatment, let alone the most politically fraught and controversial ones that, as AB 587's legislative history makes clear, generate controversy no matter what position is taken about them. *Compare, e.g.*, *NetChoice (Tex.)*, 49 F.4th at 485 (compelling "high-level statistics" about "content-moderation activities") *with* §22677(a)(4)(A) (compelling a "detailed description" of whether "content-moderation practices" are "intended to address" hate speech, racism, etc.). This aspect of AB 587 also makes it impossible for X to publish a TOS Report without engaging in core political speech that, by its nature, will engender political controversy.

Zauderer Cannot Apply: *Zauderer* also cannot apply because (1) the TOS Report does not compel statements of pure fact—indeed, such an interpretation would destroy *Zauderer*'s "purely factual" requirement and allow governments to compel provocative opinions by framing them as "facts"—and (2) the compelled disclosures ***themselves***—i.e., the entire exercise of submitting a report detailing the platforms' opinions about how much these highly controversial topics should be moderated online—are highly controversial. The legislative record demonstrates that this is one of AB 587's main features: forcing disclosures to generate

controversy that will lead to more censorship of §22677(a)(3)'s categories. The disclosures are not merely ***tied*** to controversial topics; they are controversial themselves because they are ***designed*** to generate controversy.

The TOS Report Fails Any Level of Scrutiny: It was the State's burden to show, with at least ***some*** evidence, that consumers need or want these disclosures to help decide where to consume social media and that these disclosures will directly and materially advance a compelling or substantial governmental interest. The State has failed to satisfy its burden. Its factual record is entirely bare, and AB 587 fails constitutional muster accordingly.

Section 230: Section 230 protects X from liability for how it moderates content. By allowing AG Bonta to prosecute and investigate X based on the substance of its TOS Reports, AB 587 directly interferes with that protection and is thus preempted by Section 230.

ARGUMENT

I. AB 587 VIOLATES THE FIRST AMENDMENT AND ARTICLE 1, SECTION 2, OF THE CALIFORNIA CONSTITUTION

A. *Zauderer* And *Central Hudson* Do Not Apply

1. AB 587 Compels Non-Commercial Speech

AG Bonta concedes that *Zauderer* applies only to "compelled disclosures ***in the commercial context***." AG Br. 15.[3] Under controlling Supreme Court and Ninth Circuit precedent, the TOS Report's compelled disclosures are non-commercial speech, which precludes application of *Zauderer* and *Central Hudson*.

AG Bonta asks this Court to dramatically expand the test for determining compelled commercial speech into one that is contrary to controlling law, defies common sense, and reaches far too broadly. According to AG Bonta, a law compels commercial speech if it "requires businesses" to "make factual disclosures to consumers about their services." *Id.* Nothing more is required.

That is not and cannot be the test. If it were, practically ***any*** compelled disclosure by ***any*** business about its activities would be commercial and subject to *Zauderer*. A hypothetical illustrates the point: imagine a law that, in the name of transparency and allowing pro-Israeli or pro-Palestinian students to make informed decisions about what college to attend, forced colleges to publish a semi-annual

[3] Unless otherwise indicated, emphases in quotes are added and internal citations and quotations are omitted.

report listing (1) how, if at all, the college defines "anti-Semitism" or "Islamophobia"; (2) all organizations on campus that support or oppose Israel's or Palestine's right to exist; (3) all professors, students, or campus speakers who took a public position in favor of or opposing Israel's or Palestine's right to exist in the past six months and the number of all such public statements known to the college; and (4) the number of students or faculty disciplined for engaging in "hate speech," "racism," or "harassment" toward Jews or Palestinians, or disciplined under policies "intended to address" those things.

Under AG Bonta's test, this law contains purely factual, uncontroversial compelled commercial disclosures under *Zauderer*, even if, like AB 587, it was passed to "pressure" colleges to do more to combat anti-Semitism/Islamophobia, even if the law imposed draconian fines on colleges for any "material misrepresentations or omissions" in the report, and even if the government wrote directly to top college presidents threatening to enforce the law against them if they failed to do more to combat anti-Semitism/Islamophobia. That is not, and cannot be, the correct test.

Even the authority cited by AG Bonta—*Ariix, LLC* v. *NutriSearch Corp.*, 985 F.3d 1107 (9th Cir. 2021); *First Resort, Inc.* v. *Herrera*, 860 F.3d 1263 (9th Cir. 2017)—makes clear that his postulation is not the proper commercial speech test. In *First Resort*, this Court stated that, as it had "previously explained, commercial

speech is defined as speech that ***does no more than propose a commercial transaction***." *Id.* at 1272. This Court similarly stated in *Ariix* that "[c]ommercial speech is 'usually defined as speech that does no more than propose a commercial transaction.'" 985 F.3d at 1115 (quoting *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001)).

The facts of *Ariix* and *First Resort* further support the conclusion that the compelled disclosures here are non-commercial. *Ariix* concerned whether a "Guide" that "compare[d] and review[ed] nutritional supplements" was commercial speech. *Id.* at 1111. The Court grappled with how to treat the "Guide" because, although it did not "appear to propose a commercial transaction," it was "essentially a sham marketing ploy intended to boost [certain allegedly favored] products." *Id.* at 1115. This Court, "guided by a common-sense distinction between protected speech and commercial speech," found that the Guide was commercial speech, and stated, "[t]o be clear, our decision today is a narrow one [] tied specifically to the troubling allegations in this case … the Guide is more like a sophisticated marketing sham rather than a product review guide." *Id.* at 1118–19.

AG Bonta relies heavily on *Ariix*—which assessed whether speech was commercial and thus actionable as false advertising under the Lanham Act—as setting forth the correct commercial speech standard. But AG Bonta ignores *Prager Univ.* v. *Google LLC*, 951 F.3d 991 (9th Cir. 2020), another Lanham Act false

advertising case with facts much closer to those here. In *Prager*, this Court rejected a Lanham Act false advertising claim against YouTube concerning whether YouTube abided by certain statements in its content-moderation policies, holding that such statements "do not constitute 'commercial advertising or promotion'" and "were made to explain a user tool, not for a promotional purpose." *Id.* at 999–1000. AG Bonta does not and cannot explain how, if *Ariix* provides the relevant commercial speech test, his arguments can be squared with *Prager*. *Prager* clearly supports the conclusion that the TOS Report's compelled disclosures are ***not*** commercial speech.

And in *First Resort*, this Court likewise found that an Ordinance regulated commercial speech where it "regulate[d] advertising," not "the exchange of ideas." 860 F.3d at 1273–74. Here, dissimilar to *Ariix* and *First Resort*, the "compelled disclosures are not advertisements, and social media companies have no particular economic motivation to provide them," as the district court correctly found. 1-ER-5. Instead, when guided by a "common-sense distinction between protected speech and commercial speech," *Ariix*, 985 F.3d at 1119, it is hard to see how the TOS Report's compelled disclosures qualify as commercial. Opening Br. 24 (the disclosures convey, among other things, X's principles about "what kind of speech" should "be tolerated on X").

In this way, the TOS Report's compelled disclosures are also materially distinct from those in the *NetChoice* cases. AG Bonta attempts to downplay the fact that AB 587 targets particular, highly controversial categories of content, while Florida SB 7072 and Texas HB 20 do not. AG Br. 24 ("[T]his difference does not make AB 587's required disclosures any less commercial."). But that distinction makes a dispositive difference. That AB 587 forces X to publish how, if at all, it defines §22677(a)(3)'s content categories; a "detailed description" of its content-moderation practices "intended to address" them; and to then sort through its content-moderation decisions and publish why it removed particular pieces of content, ***does*** make the TOS Report's compelled disclosures "less commercial." Not only do the TOS Report's content-specific disclosure requirements make it impossible for X to comply with the statute without engaging in fully protected core political speech (*see* Sec. I(A)(3) below), they are a far cry from the content-agnostic "high-level statistics" compelled by HB 20 and the general description of content-moderation "standards" compelled by SB 7072. These differences are significant to an analysis under the commercial speech doctrine, and it was error for the district court to ignore them and simply "[f]ollow[] the lead of the Fifth and Eleventh Circuits." 1-ER-5.

These differences also demonstrate that AB 587 warrants the same treatment as the New York law in *Volokh* v. *James*, 656 F.Supp.3d 431 (S.D.N.Y. 2023), which

was struck down under strict scrutiny and which, as AG Bonta concedes, also targeted particular content (there, hateful conduct). AG Br. 22. AG Bonta's attempts to distinguish *Volokh* fail. He concedes that *Volokh* engaged in a commercial speech analysis but criticizes that analysis as not "fact-driven." *Id.* Not so. *Volokh*'s analysis was fact-driven and further demonstrates why the disclosures here are non-commercial, as they also "compel[] a social media network to speak about the range of protected speech it will allow its users to engage (or not engage) in." 656 F.Supp.3d at 443. AG Bonta also criticizes *Volokh* for failing to apply the *Bolger* factors. But *Volokh* did not need to do so because the speech there was clearly non-commercial, and such analysis is reserved for when the commercial speech inquiry is a "closer question." *Bolger* v. *Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983).

2. The Compelled Disclosures Are Not Purely Factual, Uncontroversial Information

i. Not Purely Factual

AG Bonta maintains that the TOS Report's compelled disclosures are "purely factual" under *Zauderer* because they "merely require[] … numerical values of how many times the company" as "a matter of fact, place[d] posts into a particular category." AG Br. 29. But the TOS Report does not merely require companies to look up "numerical values." It also requires them to explain whether and how their policies define and are "intended to address" particular, highly controversial categories of content. If AG Bonta's position were the law, governments could

systematically avoid triggering heightened constitutional review by framing obligations as seeking only "'***the fact***' that [speakers] hold a viewpoint on any imaginable topic." Br. of *Amicus Curiae* Reporters Committee at 15. Such an approach would "eviscerate the constraint of *Zauderer*'s requirement that disclosures be factual" and eviscerate First Amendment protections against compelled speech more generally. *Id.* ("As then-Judge Kavanaugh observed, even if consumers 'might want to know the political affiliation of a business's owners,' and even though it can be objectively verified," the "First Amendment would forbid a state mandate to disclose that 'fact.'") (quoting *Am. Meat Inst.* v. *U.S. Dep't of Agriculture*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring)).

AG Bonta's attempt to distinguish *Book People, Inc.* v. *Wong*, 91 F.4th 318 (5th Cir. 2024)—along the way improperly leveraging X's TOS Report, which is outside of the factual record[4]—also fails. AG Bonta says that, had the statute in *Wong* "required the vendors to disclose the number of books" they had "actually reviewed and rated as 'sexually explicit,' then, like here, the disclosure would have been purely factual." AG Br. 29.

[4] AG Bonta filed a Request for Judicial Notice, asking this Court to "take judicial notice of the fact" that "X Corp. submitted [a TOS Report]" on January 1, 2024. While it may be proper for this Court to judicially notice the fact that this TOS Report was ***submitted***, AG Bonta's Answering Brief analyzes specific disclosures therein and attempts to draw legal conclusions from them. This goes beyond taking notice of the fact of submission and is improper.

But such a law would ***not*** be constitutional, because what qualifies as "sexually explicit" is not purely factual, and AG Bonta's example only demonstrates why compelling subjective opinions dressed up as "facts" (particularly from speech "gatekeepers," *see* Sec. I(B)(3) below) is so problematic from a First Amendment standpoint. AB 587 forces platforms to divulge how they define the most controversial topics of the day, which of their content-moderation policies are intended to address such content, and how often they have moderated content pursuant to those policies. These are editorial judgments, not "pure" facts any more than a college's statistics about how many students or faculty engaged in "hate speech" or "extremism" on campus would be. And, when viewed against a legislative record that confirms the State is using the statute to induce censorship of ***more*** content in §22677(a)(3)'s categories, it is clear the forced disclosures are not the sort of "government-created warning label[s]" that "the Supreme Court has approved" as "purely factual." *Wong*, 91 F.4th at 337.

ii. Not Uncontroversial

The TOS Report's compelled disclosures are both objectively and subjectively controversial, as this Court explained those terms in *Nat'l Ass'n of Wheat Growers* v. *Bonta*, 85 F.4th 1263 (9th Cir. 2023). In *Wheat Growers*, this Court stated that "the topic of the disclosure" ***and*** "its effect on the speaker is probative of determining whether something is subjectively controversial." *Id.* at

1277. The compelled disclosures flunk the first portion of the subjectivity inquiry quite dramatically. Opening Br. 33–34.

But it is not just the TOS Report's topics that are controversial. The entire exercise of creating and publishing the report is steeped in controversy. Indeed, it will cause X to be "equally maligned" by members of the public "no matter" what. 5-ER-746; *see also* 7-ER-1113–14. To that end, the TOS Report forces X to make disclosures that "convey a message fundamentally at odds with its mission" and "business," *Wheat Growers*, 85 F.4th at 1277–78, by framing the debate about content moderation as the State would like it framed. AG Bonta says it is "unclear exactly what that means," AG Br. 31, but it is clear on the face of the statute that the government wants to frame the content-moderation debate in terms of platforms' efforts to police certain prioritized categories (e.g., hate speech, misinformation, etc.) and not their efforts to address others (e.g., political censorship, child safety, etc.).

The compelled disclosures also force X to take "sides in a heated political controversy." *CTIA - The Wireless Ass'n* v. *City of Berkeley, California*, 928 F.3d 832, 845 (9th Cir. 2019). The compelled disclosures in X's TOS Report will cause X to be maligned ***no matter what***, because they necessarily open X to critiques that it does either too much or too little to regulate content. For those favoring few speech restrictions, X may be criticized for engaging in "censorship and suppress[ing]

speech." 4-ER-394. For those supporting more extensive content moderation, X will be criticized for "fostering a toxic, sometimes dangerous community." 4-ER-394.

Second, the disclosures are ***objectively*** controversial. There is clearly robust debate about whether and how §22677(a)(3)'s controversial topics should be defined and whether or how much they should be moderated online. There will likely also be "empirical disagreement" about the factual accuracy of the contents in X's TOS Report. For instance, given the newsworthiness of X's decision-making in this arena, *see* 6-ER-1091, scholars and advocacy groups may attempt to critique X's submission, questioning whether X "actioned" or "flagged" as many posts pursuant to a particular policy as they believe it should have and whether the statistics are therefore incorrect or misleading. And AB 587's legislative history makes plain that the legislature wanted the law to generate such controversy and pressure platforms to change how they moderate content. Such an effort by a state legislative body contravenes the First Amendment, which safeguards the ability to set and express values free from government interference.

3. AB 587 Compels Speech That Is Inextricably Intertwined With Otherwise Fully Protected Speech

X cannot make the TOS Report's compelled disclosures without revealing its views about whether and how the most politically controversial categories of content should be defined and moderated online. Because such views are fully protected

core political speech, neither *Zauderer* nor *Central Hudson* applies. *Riley* v. *Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988) (strict scrutiny applies when political speech is "inextricably intertwined" with commercial speech).

AG Bonta's attempt to leverage *Bolger* fails. AG Bonta cites *Bolger* for the proposition that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." AG Br. 25. But the advertisements for contraceptives at issue in *Bolger* bear no resemblance to the compelled disclosures here. In *Bolger*, the Supreme Court found that unsolicited contraceptive advertisements were commercial speech, even though there was controversy about their propriety, because (1) they were advertisements, (2) they referenced a particular product, ***and*** (3) the speaker had an economic motivation for mailing the advertisements. 463 U.S. at 66–68. Here, dissimilarly, the compelled disclosures "are not advertisements," and companies have "no particular economic motivation to provide them," as the district court correctly found. 1-ER-5.

Second, AG Bonta argues that "AB 587 compels only commercial disclosures about X Corp.'s commercial service, i.e., how it treats the content that users post to the platform." AG Br. 25. But AG Bonta's own statement—which concedes that X's TOS Report conveys "how it treats" §22677(a)(3)'s controversial topics—

demonstrates that X cannot submit a TOS Report without revealing its ***views*** on the extent to which such politically fraught content should be moderated online.

B. Strict Scrutiny Applies

1. Content- And Viewpoint-Based

AG Bonta concedes that AB 587 is content-based. AG Br. 44; 4-ER-373. AG Bonta raises only two exceptions to the rule that content-based laws trigger strict scrutiny—*Zauderer* and *Central Hudson*—but neither applies. Accordingly, strict scrutiny applies, which AB 587 cannot satisfy.

The TOS Report also discriminates against particular viewpoints among §22677(a)(3)'s categories. According to AG Bonta, AB 587 is not a viewpoint-based law because it does "not mandate that the disclosed information include any particular message or substance." AG Br. 45–46. That, however, is not the test for determining whether a law is viewpoint-based. So long as a law "regulate[s] speech in ways that favor some viewpoints or ideas at the expense of others," the "First Amendment forbids" it. *Lamb's Chapel*, 508 U.S. at 394. And crucially, a law need not "impose a complete prohibition" on particular viewpoints to be constitutionally infirm, because the "distinction between laws burdening and laws banning speech is but a matter of degree." *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000). On this point, even AG Bonta appears to agree. AG Br. 45 ("A regulation

engages in viewpoint discrimination when it ***regulates*** speech 'based on the specific motivating ideology or perspective of the speaker.'").

AB 587 is clearly viewpoint-discriminatory under this test. On its face, the law singles out categories of speech that the State believes are those "most commonly restricted" and that "most consumers prefer to avoid." AG Br. 43. Since one of AB 587's main purposes is to "pressure" X to "eliminate" such content because the State views it as problematic, 5-ER-738, it is hard to take seriously any argument that the law treats equally racist speech and speech promoting racial harmony or extremist and centrist speech. The very selection of §22677(a)(3)'s categories evinces viewpoint discrimination, because it demonstrates that the State believes (as it has admitted) those categories ***should be*** limited or eliminated.

Finally, this Court should reject AG Bonta's request to ignore AB 587's legislative record, which confirms the viewpoints that the law favors and disfavors. *See Reed*, 576 U.S. at 166 ("[S]trict scrutiny applies … when the purpose and justification for the law are content based[.]"). AG Bonta cites *Interpipe Contracting, Inc.* v. *Becerra*, 898 F.3d 879, 899 (9th Cir. 2018), for support, but it supports X instead. Under *Interpipe*, where, as here, a law is "underinclusive[]," courts may "consider extrinsic evidence" to "determine whether the California legislature did, in fact, act with discriminatory intent." *Id.* By targeting content

moderation of only particular content, as opposed to content-moderation efforts generally regardless of content, AB 587 is clearly underinclusive.

2. Impermissible Interference With Constitutionally Protected Editorial Judgment

AG Bonta's attempt to brush aside the fact that the State has already used, and continues to use, AB 587 to interfere with platforms' constitutionally protected editorial judgment, fails. He argues that AB 587 does not interfere with editorial judgments because "it does not dictate—or give the government authority to investigate or prosecute—any content-moderation policies or practices." AG Br. 17. AG Bonta is wrong on both counts.

First, AG Bonta ***does*** have the authority to prosecute and investigate platforms over their content-moderation policies and practices. He may do so for any "material[] omi[ssion] or misrepresent[ation]" in a TOS Report. §22678(a)(2)(C). This standard is so vague that it allows AG Bonta to investigate or bring an enforcement proceeding whenever he disagrees with a platform's content-moderation decisions.

AG Bonta does not dispute that he has the authority under California Government Code §11180, et seq., to investigate potential violations of California law, which includes whether a platform made a "material[] omi[ssion] or misrepresent[ation]" in a TOS Report. §22678(a)(2)(C); *see* Pet. to Enforce Investigative Subpoena, *Brown* v. *Moody's Investor Services, Inc.*, 2010 WL

1557650 (Cal. Super. Ct., L.A. Cnty. Apr. 16, 2010) (California AG has "broad pre-litigation powers" under "section 11180," including "broad discretion" to "investigate merely on suspicion that the law is being violated, or even just because he wants assurances that it is not."). These investigatory powers chill speech, particularly when coupled with AB 587's vague compliance standards, because companies are well aware that, to avoid a costly and intrusive investigation, the safe bet is to toe the government line.

Second, AG Bonta has already used AB 587 to pressure platforms to regulate content as he prefers. He criticizes X for allegedly failing to assert and provide evidence that AB 587 "has actually affected its content-moderation policies or decisions." AG Br. 50. This critique ignores the unrebutted record evidence, which makes clear that X has reasonably interpreted AG Bonta's November 2022 letter as a "threat" that X will "face enforcement" if it does not "regulate constitutionally-protected content in ways that the State wants or insists upon." 6-ER-1064–65. Such threats chill speech, regardless of whether the State follows up on them. *Bantam Books*, 372 U.S. at 68 ("[p]eople do not lightly disregard public officers' thinly veiled threats").

AG Bonta's second counter-argument on this point—that X's theory of interference fails because it "rests on the assumption that government officials will abuse their limited enforcement authority," AG Br. 50—is simply wrong. X need

make no such assumption. Because AG Bonta has already told the platforms that he will "not hesitate to enforce" AB 587 against them if they do not do more to eliminate disfavored content targeted by the statute, 6-ER-1070, 74, the impermissible pressure and interference have already occurred. X need not wait for the filing of the AG's enforcement action, 3-ER-318–19, which the AG would be unlikely to bring ***with this litigation pending***.

Finally, AG Bonta's attempt to distinguish *McManus* fails. He argues that *McManus* is distinguishable because the "transparency law" there (1) was "burdensome," because it required platforms to post certain information for "every political ad"; (2) "subject[ed] to state inspection" platforms' records related to such content; (3) "singled out" particular speech "for regulation"; and (4) provided injunctive penalties for noncompliance. AG Br. 51–52. Each such characteristic is present here. First, AB 587 is equally, if not more, burdensome because it requires X to disclose up to 161 categories of information, 5-ER-665, from a platform with, on average, 221 billion posts annually, 7-ER-1107. Second, AB 587 similarly subjects X's internal records (about content moderation) to state inspection under California Government Code §11180, et seq. Third and fourth, AB 587 "singles out" particular categories of information and punishes noncompliance through injunctive penalties, among others.

3. AB 587 Regulates "Speech About Speech"

AG Bonta's attempt to dismiss X's "speech about speech" arguments by nitpicking minor factual dissimilarities in X's cited cases misses the point. As AB 587's legislative history confirms, the law attempts to "pressure" X and other social media companies to "do[] more to eliminate hate speech and disinformation." 4-ER-405. The speech about speech authority cited by X demonstrates that laws pressuring speech "gatekeepers" impact multiple layers of speech, thus raising additional concerns about censorship that warrant heightened scrutiny. Opening Br. 47–50. It matters not whether that pressure comes directly from the State (6-ER-1067–74) or indirectly through its effect on the public (5-ER-704–05).

C. AB 587 Fails Any Level Of Scrutiny

Regardless of the level of scrutiny, it was the State's burden to present evidence justifying AB 587, and it has utterly failed to do so. Its factual record is bare, and AB 587 is unconstitutional under any level of scrutiny.

1. Strict And Intermediate Scrutiny

The TOS Report cannot withstand strict or even intermediate scrutiny under *Central Hudson*. First, the State's purported interest is not compelling or substantial. It says the "need for this transparency is real and not hypothetical," but its purported support consists only of (1) a single online opinion piece containing no studies or objective facts (instead relying only on anecdotes) and (2) a quote from the bill's

author that asserts, with no citation or factual support, that "platforms rarely provide detailed insight into their content moderation practices." AG Br. 40.

This is nothing but the type of "anecdotal evidence and educated guesses" that cannot satisfy the State's burden. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995). The State claims there is a "substantial interest in requiring ***all*** subject companies" to make the compelled disclosures, AG Br. 41, but there is ***nothing*** in the record showing that even one company subject to the law does not already make its content-moderation policies public. It is certainly not the case for X. 7-ER-1114–16.

And even if the State's asserted interest were compelling or substantial (it is not), AG Bonta comes nowhere close to meeting the "high bar" for demonstrating that the law "'materially' and 'directly' advances" it, *Junior Sports Mags. Inc.* v. *Bonta*, 80 F.4th 1109, 1113 (9th Cir. 2023), or that the law is "narrowly tailored to serv[ing]" it, *Reed*, 576 U.S. at 163. Nothing in AG Bonta's bare legislative record or single online opinion piece addresses why ***these*** disclosures will help consumers make informed decisions about which platform to use. Nor is there evidence that consumers actually want them or that transparency on ***these*** topics is needed.

AG Bonta argues that he need not demonstrate with "empirical data" that the law will directly and materially advance the State's purported interest, and that "history, consensus, and simple common sense" are enough. AG Br. 41 (quoting

Fla. Bar v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995)). He neglects that this aspect of *Fla. Bar* is dicta, because the defendant justified its speech regulation with "data—both statistical and anecdotal—supporting [its] contentions." 515 U.S. at 626. Moreover, AG Bonta's assertion that "history, consensus, and simple common sense" suffice derives from *Burson* v. *Freeman*, which concerned the "fundamental right" to vote "in an election free from the taint of intimidation and fraud." 504 U.S. 191, 211 (1992). There, the Supreme Court held that a "***long*** history, a ***substantial*** consensus, ***and*** simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right." *Id.* Here, there is no "history" in the record, let alone a "long" one, or any "consensus," let alone a "substantial" one, and it is certainly not "simple common sense" that social media companies should be forced to disclose their editorial positions on AB 587's controversial categories. Indeed, if "history, consensus, and common sense" demonstrate anything, it is that AB 587 will chill speech as intended.

Accordingly, in *Junior Sports*, this Court acknowledged *Fla. Bar* but nonetheless found that states "can invoke 'common sense' only if the connection between the law restricting speech and the government goal is so direct and obvious that offering evidence would seem almost gratuitous." 80 F.4th at 1118. Where, as here, the "government's justifications for a regulation become more attenuated," the "state needs to provide evidence." *Id.*

Finally, the TOS Report's compelled disclosures are "more extensive than [] necessary to further [its] interest," *id.* at 1116, and "less restrictive alternative[s] would serve the Government's purpose," *IMDb.com Inc.* v. *Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020). There is no evidence in the record that the State actually tried (or even considered) X's proposed less-restrictive alternatives or any others—including those being tried in Florida and Texas in the *NetChoice* cases—such that it could meaningfully assert that no "[w]orkable alternatives to the [TOS Report] exist." *W. States Med. Ctr.* v. *Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001).

2. *Zauderer*

The TOS Report also fails scrutiny under *Zauderer*. First, as the Supreme Court made clear in *NIFLA*, *Zauderer* requires that compelled disclosures "remedy a harm that" is "not purely hypothetical" and extend "no broader than reasonably necessary." 585 U.S. 755, 776 (2018). For the reasons set forth above, the supposed harms purportedly remedied by AB 587 are insufficient, which precludes application of *Zauderer* in itself. Opening Br. 34–38.

The compelled disclosures here are also so "unduly burdensome" and "[u]njustified" that they will "chill[] protected speech." *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010). In its Opening Brief, X explained that the district court's finding on this point was based on a cramped interpretation of *Zauderer* focused on whether compelled disclosures physically

covered up too much of an advertisement. Opening Br. 53–54. The district court ignored that the TOS Report is "unduly burdensome" for a different reason: it pressures companies to alter their content moderation. *Id.*

In response, AG Bonta merely states that these speech harms are "not the kind of concern" that *Zauderer* "seeks to address." AG Br. 38 (citing *CTIA*, 928 F.3d at 848–49). But *CTIA*'s ***analysis*** of whether certain-sized "posted notice[s]" and "handout[s]" would take up too much physical space, 928 F.3d at 849, does not preclude other types of "undue burden," which, as *Milavetz* makes clear, include anything that "chill[s] protected speech," 559 U.S. at 250.

II. SECTION 230 PREEMPTS AB 587

AG Bonta asserts incorrectly that X's Section 230 preemption claim is unripe, because X is not subject to a "'genuine threat of imminent prosecution' under AB 587." AG Br. 56 (quoting *Wolfson* v. *Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)). Analyzed correctly, however, the three factors cited by the AG demonstrate a "genuine threat of imminent prosecution."

First, X has alleged a concrete plan to violate the law in question. *See* Complaint ¶¶ 68–69 ("X maintains that AB 587 is illegal and unconstitutional," and that "[AG] Bonta claims otherwise" and "intends to enforce, AB 587, even though it violates the First Amendment"). X submitted its first TOS Report under protest and maintains that AB 587 is unconstitutional.

Second, AB 587's "prosecuting authorit[y]" (AG Bonta) has already "communicated a specific warning or threat to initiate proceedings." *Wolfson*, 616 F.3d at 1058. Specifically, AG Bonta already communicated ***to X directly*** that he "will not hesitate to enforce" AB 587 against X. 6-ER-1070. He may now bring an enforcement action against X at any time, so long as he believes, in his sole unfettered discretion, that X's TOS Report contains a "material[] omi[ssion] or misrepresent[ation]." The third factor—"history of past prosecution or enforcement under the challenged statute," *Wolfson*, 616 F.3d at 1058—is inapplicable and cannot sway in either direction. Accordingly, X's Section 230 preemption claim is ripe.

AG Bonta also argues that X's Section 230 preemption claim fails on the merits. He is wrong. That argument rests on the faulty premise that any liability faced by X under AB 587 would be for failing to "mak[e] a disclosure in compliance with the law," rather than "for any of its content-moderation decisions." AG Br. 60. That is a distinction without a difference. AG Bonta's determination of whether X's TOS Report contains a "material[] omi[ssion] or misrepresent[ation]"—and the "costly and protracted legal battle[]" that will flow therefrom, *Fair Hous. Council of San Fernando Valley* v. *Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008)—inherently derives from how X has moderated content during the applicable period and whether its TOS Report, in AG Bonta's view, accurately reflects that moderation activity. Opening Br. 57–58.

Finally, AG Bonta's Answering Brief fails to deal with X's express preemption argument under 47 U.S.C. §230(e), and with *Roommates.com*, wherein this Court stated that "[S]ection 230 must be interpreted to protect websites ***not merely from ultimate liability, but from having to fight costly and protracted legal battles***." 521 F.3d at 1175; *see also Republican Nat'l Comm.* v. *Google*, *Inc.*, 2023 WL 5487311, at *3, *8 (E.D. Cal. Aug. 24, 2023) (considering this language in analyzing "liability" under Section 230(c)(2)). Section 230 protects X from AG Bonta's investigation into any "material[] omi[ssions] or misrepresent[ations]" in its TOS Report, which, as stated, is liability ***for moderating content in a manner different than that proscribed by the State*** (i.e., without AB 587's dictated transparency). Section 230 prohibits such liability and interference with the ability of interactive computer service providers to self-regulate content on their platforms.

CONCLUSION

This Court should reverse.

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

This brief complies with the word length limits permitted by Ninth Circuit Rule 32-1, as it contains 7,000 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I caused this document to be electronically filed on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. All registered case participants will be served via the Appellate Electronic Filing system.

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