24-271

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

X CORP.,

Plaintiff-Appellant,

v.

ROB 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

No. 2:23-CV-01939-WBS-AC
William B. Shubb, Judge

ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

INTRODUCTION

The California Legislature enacted Assembly Bill (AB) 587 to provide transparency to California consumers regarding how large social media companies moderate the content posted on their platforms. It is a disclosure statute that requires companies to report facts about their existing, voluntary policies and practices. *See* Cal. Bus. & Prof. Code §§ 22676-22678. Specifically, AB 587 requires platforms to post their terms of service and to submit to the Attorney General "terms of service reports" containing certain high-level information about the platforms' content-moderation policies and practices. *Id.* §§ 22676-22677. Unlike laws recently enacted in other states, AB 587 does not dictate how platforms must or must not moderate content, nor does it give the Attorney General license to use his enforcement authority to coerce companies in this regard. *See id.*

The district court correctly determined that Plaintiff-Appellant X Corp. (formerly Twitter) is not entitled to a preliminary injunction. X Corp. is not likely to succeed on its First Amendment claim because, as a regulation requiring the disclosure of "purely factual and uncontroversial" information in the commercial context, AB 587 is subject to and satisfies the deferential standard of review set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nor is X Corp. likely to succeed on its

preemption claim. That claim, which is premised upon X Corp's speculation that the government may take enforcement action against it in the future, is unripe and fails on the merits. Finally, X Corp. has failed to establish that it will suffer irreparable harm absent a preliminary injunction or that the equities or public interest favor an injunction.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. On December 28, 2023, the district court entered an order denying Plaintiff's motion for a preliminary injunction. 1-ER-2. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Plaintiff timely filed its notice of appeal on January 12, 2024. 6-ER-1094; *see* Fed. R. App. P. 4(a)(1)(B)(i).

STATEMENT OF ISSUES

1. Whether Plaintiff is likely to succeed on its claim that AB 587's terms of service report requirements violate the First Amendment right to free speech.

2. Whether Plaintiff is likely to succeed on its claim that AB 587's terms of service report requirements are preempted by the Communications Decency Act, 47 U.S.C. § 230(c).

3. Whether failure to enjoin enforcement of AB 587's terms of service report requirements during the pendency of this litigation would

cause Plaintiff irreparable harm.

4. Whether enjoining enforcement of AB 587's terms of service report requirements during the pendency of this litigation is equitable and in the public interest.

CIRCUIT RULE 28.2.7 STATEMENT

All applicable constitutional provisions and statutes are contained in the addendum to Plaintiff's Opening Brief.

STATEMENT OF THE CASE

I. FACTUAL AND LEGAL BACKGROUND

A. Social Media Content Moderation and the *NetChoice* Cases

Social media platforms such as X Corp., Facebook, and YouTube have terms of service, including content-moderation rules, to which individuals must agree as a condition of using the platform. *See, e.g.*, *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1172 (N.D. Cal 2022), *aff'd sub. nom*. *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023), *pet. for cert. filed*, No. 22-1199 (U.S. June 8, 2023). Through these rules, platforms reserve the right to take action against content or users that violate the rules. *Id*. at 1186.

In recent years, content moderation by social media companies has drawn public concern, with numerous lawsuits filed by users whose accounts were limited or suspended for posting content that violated the platforms' rules. *See, e.g., Informed Consent Action Network v. YouTube, Inc.*, 582 F. Supp. 3d (N.D. Cal. 2022); *Yuksel v. Twitter, Inc.*, No. 22-cv-05415-TSH, 2022 WL 16748612 (N.D. Cal. Nov. 7, 2022).

Florida and Texas have enacted laws related to social media content moderation that include at least two types of requirements for social media platforms: 1) restrictions prohibiting social media platforms from banning, demoting, or otherwise limiting particular kinds of content, and (2) transparency provisions requiring specified factual disclosures about platforms' content-moderation policies and practices. *NetChoice, LLC v. Att'y Gen.* ("*NetChoice (Fla.)*"), 34 F.4th 1196, 1205-1207 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023); *NetChoice, LLC v. Paxton* ("*NetChoice (Tex.)*"), 49 F.4th 439, 445-446 (5th Cir. 2022), *cert. granted in part*, 144 S. Ct. 477 (2023).

The challenged Florida transparency provisions require platforms to, among other things: (1) "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform,

and shadow ban";[1] (2) "inform its users about any changes to its rules, terms, and agreements before implementing the changes"; and (3) provide individualized notice and explanation to users before the platform restricts their content. *NetChoice (Fla.)*, 34 F.4th at 1206-07 (internal quotation marks omitted).

The challenged Texas transparency provisions require platforms to: (1) publish an "acceptable use policy" and disclose certain information about the Platforms' content management practices; (2) publish a twice-yearly transparency report containing "high-level statistics about their content-moderation activities"; and, (3) institute a complaint-and-appeal process related to platforms' removal of content. *NetChoice (Tex.)*, 49 F.4th at 485.

In considering First Amendment challenges to the Texas and Florida content-moderation restrictions at the preliminary injunction stage, the Fifth and Eleventh Circuits reached divergent conclusions. *Compare NetChoice (Fla.)*, 34 F.4th at 1222-23 (invalidating Florida law), *with NetChoice (Tex.)*,

[1] The Florida statute defines the term "deplatform" as "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *NetChoice (Fla.)*, 34 F.4th at 1206. "Shadow banning" refers to any action to "limit or eliminate the exposure of a user or content or material posted by a user to other users of [a] ... platform." *Id.*

49 F.4th at 482 (upholding Texas law). However, both courts held that nearly all of the states' transparency provisions were likely constitutional. *See NetChoice (Fla.)*, 34 F.4th at 1230-31; *NetChoice (Tex.)*, 49 F.4th at 485-88.[2] The Supreme Court granted certiorari in part, agreeing to consider only the challenges to the content-moderation restrictions, and not the challenges to the transparency provisions. *See Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023); *NetChoice, LLC v. Paxton*, 144 S. Ct. 477 (2023); Brief for the United States as Amicus Curiae, Nos. 22-277, 22-393, 22-555, 2023 WL 5280330 (U.S. Aug. 14, 2023).

B. California Assembly Bill 587

The California Legislature enacted AB 587 in September 2022. Unlike the laws challenged in the *NetChoice* cases, AB 587 does not regulate social media platforms' content-moderation policies or practices; rather, it is *only* a transparency measure. 4-ER-405. The law requires social media companies, as defined, to post their terms of service and to submit semiannual reports to the Attorney General about their terms of service and content-moderation policies and practices. Cal. Bus. & Prof. Code

[2] The only transparency provision not upheld was Florida's user and notice-and-explanation provision. *NetChoice (Fla.)*, 34 F.4th at 1230-31. There is no comparable provision in AB 587.

§§ 22676, 22677. The Legislature's purpose was "to increase transparency around what terms of service social media companies are setting out and how it ensures those terms are abided by." 4-ER-499; 4-ER-459.

In other words, AB 587 is simply a disclosure statute intended to provide the public with information about social media platforms' voluntarily-adopted content-moderation policies and practices. *See* Cal. Bus. Prof. Code §§ 22676, 22677, 22678; *see also* 4-ER-458-59. The law informs users about "what social media platforms do to flag and remove certain kinds of content, which may affect what sites users prefer to use," and "what kind of content or conduct could lead to their being temporarily or permanently banned from using the social media service." 4-ER-405.

AB 587 achieves this transparency goal by creating specified disclosure requirements for social media companies that generate one hundred million dollars or more in gross revenue each year.[3] Cal. Bus. & Prof. Code §§ 22675-22677, 22680. The disclosure requirements generally fall into two categories: those in Business and Professions Code section 22676,

[3] AB 587 defines "social media company" as a person or entity that owns or operates one or more "social media platforms." Cal. Bus. & Prof. Code § 22675(d). A "social media platform" is a "public or semi-public internet-based service that has users in California and meets" specific criteria. *Id.* § 22675(e).

sometimes known as the "terms of service requirements" and those in section 22677, sometimes known as the "terms of service report requirements." In this appeal, X Corp. seeks to reverse the district court's ruling only as to the terms of service report requirements and the penalty provisions as they apply to those requirements. AOB 9.

Under AB 587's terms of service report requirements, social media companies must submit to the Attorney General a semiannual "terms of service report" containing specific factual information. Cal. Bus. & Prof. Code § 22677(a)-(b).[4] The reports must include the "current version of the platform's terms of service" and a "detailed description of any changes to the terms of service since the previous report." *Id.* § 22677(a)(1)-(2). The report must include a "statement of whether the current version of the terms of service defines" a list of specific categories and "if so, the definitions of those categories." *Id.* § 22677(a)(3). The categories include: "[h]ate speech or racism," "[e]xtremism or radicalization," "[d]isinformation or

[4] On January 1, 2024, the first terms of service reports were due for social media companies subject to AB 587. Cal. Bus. & Prof. Code § 22677(b)(2). Accordingly, X Corp. filed its terms of service report on that date. *See* Request for Judicial Notice ("RJN") No. 1.

misinformation," "[h]arassment," and "[f]oreign political interference."[5] *Id.* § 22677(a)(3)(A)-(E). The reports must include a "detailed description of content moderation practices used by the social media company," including, among other things, "any existing policies intended to address the categories" enumerated above. *Id.* § 22677 (a)(4). Finally, the reports must include "information on content that was flagged by the social media company as content belonging to any of the categories," including the number of items of content that were "flagged" or "actioned" by the social media company, and how those items of content were "flagged" of "actioned," e.g., whether by company employees, artificial intelligence software, or users. *Id.* § 22676(a)(5), (a)(5)(B)(iv)-(v). The Attorney General must compile all terms of service reports and make them available to the public in a "searchable repository on its official internet website." *Id.* § 22676(c); *see also* RJN No. 1.

AB 587 creates a civil penalty for certain violations of the terms of service report requirements, which are enforceable by certain law enforcement officials in a court of law. Cal. Bus. & Prof. Code § 22678. In

[5] AB 587 was subsequently amended to add to this list "[c]ontrolled substance distribution." AB 1027, 2023-2024 Reg. Sess. (Cal. 2023). AB 587 has not otherwise been amended.

assessing the amount of any penalty, "the court shall consider whether the social media company has made a reasonable, good faith attempt to comply with the provisions of this chapter. *Id.* § 22678(c)(3). The law does not give the Attorney General any special authority to assess or collect penalties outside of a court action. *See id.* § 22678. Nor does the AB 587 confer on the Attorney General any special authority to investigate social media companies' compliance with AB 587 beyond the general powers attendant to his office. *See id.*[6]

AB 587 does not apply to social media companies with gross annual revenues of less than $100 million nor to companies with platforms "for which interactions between users are limited to direct messages, commercial transactions, consumer reviews of products, sellers, services, events, or

[6] X Corp. has referenced a November 2022 letter from the Attorney General to five of the largest social media companies, including X Corp. 6-ER-1067. This letter does not relate to or affect the constitutionality of AB 587. The Attorney General sent it shortly before the midterm elections of 2022, writing to express his concern about the spread of election disinformation on social media and the role it could play in chilling the democratic process. 6-ER-1067-68, 1074. The letter briefly mentions AB 587 only once, and in a footnote, in connection with stating (accurately) that "[i]n 2024, social media platforms will also have additional *transparency* obligations, as required by recent state legislation that requires *disclosures* on content moderation practices." 6-ER-1070 (emphases added).

places, or any combination thereof." *Id.* § 22681.

Nothing in AB 587 requires social media companies to disclose individual users' identities, information, or the substance of their specific posts. *See id.* §§ 22675-81. Nor does AB 587 dictate the substance of social media companies' terms of service or related policies, or control the actions that social media companies may take (or decline to take) against any item of content or user. *See id.*

II. PROCEDURAL BACKGROUND

A. X Corp.'s Complaint and Motion for a Preliminary Injunction

Plaintiff X Corp. owns the large social media platform X, formerly known as Twitter. AOB 7. On September 8, 2023, X Corp. filed its complaint against the Attorney General challenging the constitutionality of AB 587 and seeking declaratory relief and injunctive relief barring the law's enforcement. Complaint (ECF No. 1) at 1-2, 34-35, *X Corp. v. Bonta*, No. 2:23-cv-01939-WBS-AC (E.D. Cal. Sept. 8, 2023) ("Complaint"). The Complaint alleges three cause of action: (1) a violation of the free speech clauses of the U.S. and California Constitutions, *id.* at 28-31; (2) a violation of the dormant Commerce Clause, *id.* at 31; and (3) federal preemption under the Communications Decency Act, 47 U.S.C. § 230(c), Complaint at

33-34. X Corp. filed a motion for preliminary injunction based on its First Amendment and preemption claims, seeking to enjoin the Attorney General from enforcing any provision of AB 587 against it. 4-ER-595.[7]

B. The District Court's Order Denying X Corp.'s Motion for a Preliminary Injunction

The district court denied Plaintiffs' motion in a December 28, 2023 Memorandum and Order ("Order"). 1-ER-2. The court began its analysis with Plaintiffs' First Amendment claim. The court held that Plaintiff was unlikely to prevail because AB 587's terms of service report requirements (and its terms of service requirements) were subject to and satisfied the *Zauderer* test for compelled speech in a commercial context. 1-ER-5.

With respect to the terms of service report requirements, the court "[f]ollowed the lead of the Fifth and Eleventh Circuits" in determining that the *Zauderer* test applies. 1-ER-5 (citing *NetChoice (Fla.)*, 34 F.4th at 1230; *NetChoice (Tex.*) 49 F.4th at 485).

The court then concluded that the terms of service report requirements satisfy *Zauderer*. 1-ER-6. The court reasoned that the provisions require

[7] Because X Corp.'s motion for a preliminary injunction did not seek relief under the dormant Commerce Clause, *see* 4-ER-595, that claim is not relevant to this appeal.

speech that is "purely factual" and "uncontroversial" because they "merely require a social media companies to identify their existing content-moderation policies, if any, related to the specified categories" and the "mere fact that the reports may be 'tied in some way to a controversial issue' does not make the reports themselves controversial." 1-ER-5-6 (*quoting CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019)). The court rejected X Corp.'s argument that the terms of service report requirements are "unduly burdensome," explaining that "AB 587 does *not* require that a social media company adopt any of the specified categories" of speech, and that in any event "*Zauderer* is concerned not merely with logistical or economic burdens, but burdens on speech." 1-ER-6. It further held that the terms of service report requirements are "reasonably related to a substantial government interest in requiring social media companies to be transparent about their content-moderation policies and practices so that consumers can make informed decisions about where they consume and disseminate news and information." 1-ER-6.

The district court also determined that X Corp. had failed to show a likelihood of success on its claim that AB 587 is preempted by 47 U.S.C. § 230(c). The court observed that the purpose of section 230(c) "is to provide protection for 'Good Samaritan' blocking and screening of offensive

material" so that a website may "self-regulate offensive third party content without fear of liability." 1-ER-7 (internal quotations of section 230(c) omitted) (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851-52 (9th Cir. 2016)). The court concluded that AB 587 is not preempted because, under AB 587's plain language, it "does not provide for any potential liability stemming from a company's content moderation activities per se," only for failing to make AB 587's required disclosures. 1-ER-8.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, the plaintiff may obtain a preliminary injunction by showing that there are "serious questions going to the merits" and "the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). An order denying a preliminary injunction is reviewed for abuse of discretion; the district court's conclusions of law are reviewed de novo. *Id.* at 1131.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order denying X Corp.'s motion for a preliminary injunction. The district court did not abuse its discretion in concluding that X Corp. failed to establish that it was likely to succeed on its First Amendment or preemption claim, that it is at risk of irreparable harm, or that the equities and public interest tip in its favor.

AB 587 does not violate the First Amendment right to free speech.[8] The district court correctly determined that AB 587 is subject to the deferential *Zauderer* standard of review for compelled disclosures in the commercial context. To qualify for *Zauderer* review, the speech at issue must disclose "purely factual and uncontroversial information about the terms under which ... services will be available." *CTIA*, 928 F.3d at 845 (quoting *Zauderer*, 471 U.S. at 651).

AB 587 satisfies each of these requirements. The law concerns commercial speech because it requires businesses (social media companies) to make factual disclosures to consumers about their services (i.e. online

[8] As explained above (*see supra* at 8), X Corp. seeks to reverse the district court's ruling only as to AB 587's terms of service report requirements in California Business and Professions Code section 22677 and the related penalty provisions. AOB 9. However, for ease of reference, this section and the Argument section will refer to the terms of service report requirements as "AB 587."

platforms). This speech is not inextricably intertwined with noncommercial speech because the law does not compel social media companies to make any statements apart from those disclosures. The disclosures are purely factual and uncontroversial because the information consists only of facts about the platforms' existing content-moderation policies and practices. The disclosures are "about the terms under which ... services will be available," *CTIA*, 928 F.3d at 845, because they provide information about platform's content-moderation policies and practices.

AB 587, moreover, satisfies *Zauderer* scrutiny. The disclosures it requires are "reasonably related to a substantial governmental interest." *CTIA*, 928 F.3d 832. As the district court recognized, AB 587 advances California's "substantial interest in requiring social media companies to be transparent about their content-moderation policies and practices so that consumers can make informed decisions about where they consume and disseminate news and information." 1-ER-6. AB 587 also is not so "unjustified or unduly burdensome" that it "chill[s] protected commercial speech." *Zauderer*, 471 U.S. at 651. Indeed, the law requires only factual disclosures and does not dictate whether or how platforms must moderate content.

Alternatively, AB 587 also satisfies *Central Hudson* intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). AB 587 "directly advances" the state's "substantial interest" in transparency for social media users. *Id.* And the law is "no more extensive than necessary," *see id.*, because its minimally-burdensome disclosure requirements are a proportional to this interest.

AB 587 is not subject to strict scrutiny, as X Corp. argues. Regardless of whether AB 587 is "content-based," such regulations are not subject to strict scrutiny where, as here, they qualify for *Zauderer* or *Central Hudson* review. *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017). AB 587 is, moreover, viewpoint neutral, because it does not mandate that X Corp. disclose any particular message. AB 587 also does not interfere with platforms' "editorial judgments" because it does not dictate—or give the government authority to investigate or prosecute—any content-moderation policies or practices. The statute merely requires platforms to accurately disclose the policies and practices they have voluntarily chosen to adopt. *See* Cal. Bus. Prof. Code § 22677(a).

Nor does section 230(c) of the Communications Decency Act preempt AB 587. Section 230(c) provides that no social media platform "shall be held liable on account of any action voluntarily taken in good faith to restrict

access to or availability of" content that is deemed objectionable or obscene. 47 U.S.C. § 230(c)(2)(A). X Corp. suggests that AB 587 makes platforms "liable" for their content moderation actions because the Attorney General's authority to investigate platforms' material omissions or misrepresentations in the terms of service reports pressures platforms to moderate content according to the State's preferences. That claim is both unripe and meritless. It is unripe because the Attorney General has not investigated or charged X Corp. with violating AB 587, nor has there been any "genuine threat of imminent prosecution." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (internal quotation marks omitted). And on the merits, X Corp's preemption claim fails because AB 587 creates liability only for platforms' failure to comply with their disclosure obligations, not for any act of moderating content.

Finally, X Corp. has not shown that it would suffer irreparable harm absent a preliminary injunction, or that the balance of the equities and public interest favor a preliminary injunction. *See Winter*, 555 U.S. at 20.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT X CORP. IS UNLIKELY TO SUCCEED ON ITS FIRST AMENDMENT CLAIM

A. The *Zauderer* Test for Commercial Disclosures Applies to AB 587

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court established a standard for analyzing government-mandated disclosures in the context of commercial speech. To qualify for *Zauderer* review, the speech at issue must disclose "purely factual and uncontroversial information about the terms under which ... services will be available." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (quoting *Zauderer*, 471 U.S. at 651); *accord Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018) ("*NIFLA*").

As explained below, the district court correctly determined that AB 587 meets each of these requirements for *Zauderer* scrutiny.

1. AB 587 regulates commercial speech

a. Under *Zauderer*, consumer product and service disclosures are generally treated as "commercial speech"

"Commercial speech is 'usually defined as speech that does no more than propose a commercial transaction.'" *Ariix, LLC v. NutriSearch Corp.*,

985 F.3d 1107, 1115 (9th Cir. 2021) (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)). However, this defines only the "core notion" of commercial speech – other communications may also constitute commercial speech. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983)). Courts therefore view this definition as "just a starting point" of the commercial speech analysis. *Id.*; *accord Ariix*, 985 F.3d at 1115. The full analysis "is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (internal quotation marks omitted).

"Because of the difficulty of drawing clear lines between commercial and non-commercial speech, the Supreme Court in *Bolger* outlined three factors to consider." *Ariix*, 985 F.3d at 1115; *see Bolger*, 463 U.S. at 66-67. These are whether (1) the speech is an "advertisement[ ]," (2) the speech refers "to a specific product," and (3) the speaker "has an economic motivation." *Bolger*, 463 U.S. at 66-67). "These so-called *Bolger* factors are important guideposts, but they are not dispositive." *Ariix*, 985 F.3d at 1116.

Indeed, if a law compels a business to make disclosures to prospective consumers or the general public regarding a product or service the business sells, courts generally treat this as sufficient to meet *Zauderer*'s commercial speech requirement. In these cases, courts often do not expressly apply the *Bolger* factors or the "do no more than propose a commercial transaction" test; rather, they proceed directly to considering whether the speech at issue meets *Zauderer*'s other requirements. In *CTIA*, for example, a city ordinance required cell phone retailers to provide a notice to customers about cell phone radiation. 928 F.3d at 843. This Court applied *Zauderer* scrutiny because the parties agreed that the compelled speech was commercial and the Court did not disagree. *Id.* at 841-42; *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (applying *Zauderer* scrutiny where the plaintiff did not dispute that labeling requirement for mercury-containing products involved commercial speech and court did not disagree). In many other cases, courts have analyzed whether a government-mandated disclosure by businesses meets *Zauderer*'s other requirements, apparently assuming that the commercial-speech

component of the test was satisfied.[9]

In contrast, X Corp. has cited no case from the Supreme Court, this Court, or any other federal court of appeals—and the Attorney General is aware of none—invalidating a government-mandated disclosure because the law did not "propose a commercial transaction" or satisfy the *Bolger* factors. X Corp. cites only one out-of-circuit district court case, *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023). AOB 27. But the law at issue in that case was not *solely* a disclosure mandate (as AB 587 is); rather, the challenged law required social media platforms to both create and to disclose a policy regarding "hateful" social media content. *Volokh*, 656 F. Supp. 3d at 437-38. Although the court concluded that the compelled speech was not commercial, it did not engage in a "fact-driven" analysis (*First Resort, Inc.*, 860 F.3d at 1272) or even apply the *Bolger* factors. *Volokh*, 656 F. Supp. 3d at 443. As the other cases above indicate, the mode of analysis and conclusion in *Volokh* is out of step with Ninth Circuit and other authorities, and the case is both distinguishable and not binding here.

[9] *See, e.g.*, *NIFLA*, 585 U.S. at 768-69; *Nat'l Wheat Growers Assn. v. Bonta*, 85 F.4th 1263, 1275-76 (9th Cir. 2023); *NetChoice (Fla.)*, 34 F.4th at 1230; *NetChoice (Tex.)*, 49 F.4th at 485; *Am. Hosp. Ass'n v. Azar,* 983 F.3d 528, 540-41 (D.C. Cir. 2020);

b. AB 587 requires disclosures to consumers about the social media platform's commercial services

AB 587 requires the same type of product or service disclosure to consumers that courts subject to *Zauderer* scrutiny as commercial speech. The statute obligates platforms to disclose their terms of service, information on the platform's content moderation practices, and, in some cases, high-level statistics about categories of content that the company actually flagged as violating their terms of service. Cal. Bus. & Prof. Code § 22677(a). AB 587 provides that the Attorney General must "make all terms of service reports submitted pursuant to this section available to the public in a searchable repository on its official internet website." *Id.* § 22676(c). In other words, the terms of service reports require businesses (large social media platforms) to disclose facts about how their own commercial *services* function.[10] And, the reports must be made available, in full, to the public that uses these services. Cal. Bus. & Prof. Code § 22677(c).

[10] X Corp.'s terms of service expressly state that they are part of a "legally binding contract" between X Corp. and its users. 5-ER-758. And, in cases between users and online platforms, the terms of service have been treated as enforceable contracts. *See, e.g., Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 913 (N.D. Cal. 2011); *King v. Facebook, Inc.*, 572 F.Supp.3d 776, 790 (2021); *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1038 (N.D. Cal. 2019).

The disclosure provisions of the Florida and Texas transparency laws challenged in the *NetChoice* cases do not meaningfully differ from AB 587 for the purposes of the commercial speech analysis. *See* AOB 26. The Florida law requires platforms to, among other things, "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." *NetChoice (Fla.)*, 34 F.4th at 1206-07; *see* Fla. Stat. Ann. § 501.2041. The Texas law requires platforms to make bi-annual "transparency report[s]," which must include, among other things, high-level statistics reflecting the platform's actions to restrict content, categorized by the platform's rule that was violated. *NetChoice (Tex.)*, 49 F.4th at 485; Tex. Bus. & Com. Code Ann. § 120.053(a)(2), (b)(1). X Corp. argues that these laws differ from AB 587 because they do not require platforms to disclose whether they moderate content according to particular categories identified in the law. AOB 26. However, this difference does not make AB 587's required disclosures any less commercial. The required disclosures under all three state laws are commercial because they are made by a company to describe its service for the purpose of informing the service's consumers.

c. The commercial speech required by AB 587 is not "inextricably intertwined" with noncommercial speech

X Corp. argues that AB 587 is subject to strict scrutiny rather than *Zauderer* scrutiny because, even if the compelled disclosures are commercial speech, they are "inextricably intertwined" with noncommercial speech. AOB 38. Specifically, X Corp. asserts that disclosures about whether and how it moderates the categories of speech enumerated in the statute constitute noncommercial speech because they reveal X Corp.'s position on controversial political topics. *Id.*

However, "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger*, 463 U.S. at 68 (quoting *Cent. Hudson*, 447 U.S. at 563 n.5). 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 The law does not compel any political or otherwise noncommercial message.

X Corp. appears to take issue with three provisions of AB 587: California Business and Professions Code section 22677, subdivisions (a)(3), (a)(4)(A), and (a)(5). AOB 38-39. None of these requires X Corp. to make any political or otherwise noncommercial statement.

Subdivision (a)(3) requires X Corp. to disclose the definitions of content categories that X Corp. uses in its terms of service. Cal. Bus. & Prof. Code § 22677(a)(3) (requiring a "statement of *whether* the current version of the terms of service defines each of the following categories of content and, *if so*, the definitions of those categories" (emphasis added)). It therefore does not require X Corp. to provide any additional information that cannot be found in its terms of service. *Compare* 5-ER-758 (X Corp. terms of service) *with* RJN No. 1 (X Corp. January 2024 terms of service report). Not only has X Corp. elected not to appeal the district court's determination that AB 587 may constitutionally require X Corp. to post its terms of service on its own site under California Business and Professions Code section 22676, AOB 9, but X Corp. also concedes that it posts its terms of service voluntarily, AOB 12-13; 7-ER-1114.

Subdivision (a)(4)(A) requires a description of X Corp.'s "policies intended to address the categories of content" enumerated in the statute. In other words, it merely requires X Corp. to disclose its policy for how (if at all), as a matter of company operations, the platform addresses the specified content. The statute does not obligate the company to disclose the reason for that policy or the company's "mission." AOB 39.

Finally, subdivision (a)(5) requires high-level statistics "on content that was flagged by the social media company as content belonging to any of the [enumerated] categories." Since these statistics are not linked to any particular posts or messages by users, these numerical disclosures do not reveal X Corp.'s views on political topics. *See* RJN No. 1 at 5-11.

2. AB 587's required disclosures are "purely factual"

AB 587 also meets *Zauderer*'s requirement that the government-mandated disclosures at issue are "purely factual." 1-ER-5; *see also NetChoice (Tex.)*, 49 F.4th at 485(compelled disclosures were purely factual); *NetChoice (Fla.)*, 34 F.4th at 1227 (same).

X Corp. asserts that the required disclosures related to the statute's enumerated categories of content ("disinformation," "hate speech," etc.) are not purely factual. See AOB 28-34. The district court aptly summarized why that is wrong: "The reporting requirement merely requires social media companies to identify their existing content-moderation policies, if any, related to the specified categories. The statistics required if a company does choose to utilize the listed categories are factual, as they constitute objective data concerning the company's actions." 1-ER-5 (internal citation omitted). In other words, AB 587 requires only the disclosure of facts about the

company's actual policies and actual conduct, the accuracy of which is not subject to reasonable dispute.

X Corp. appears to argue that AB 587's required disclosures are not purely factual because it may sometimes be debatable whether particular user posts fall into the statute's enumerated categories. AOB 29. To be sure, there likely will be instances in which platforms must exercise discretion and judgment to determine whether individual posts violate their policies. But the fact remains that the *existence* of those policies, whatever they may be, is purely factual – and that is all AB 587 is concerned with. AB 587 does not seek to force X Corp. or any other platform to assess or disclose whether specific posts fall into certain categories or violate any policies.

X Corp. also argues that AB 587's requirement to disclose "[a]ny existing policy intended to address" the enumerated categories does not compel purely factual information, because of the word "intended." AOB 30 (quoting Cal. Bus & Prof. Code § 22677(a)(4)). But compliance with this requirement is not complex: X Corp. need merely disclose official company policies that actually address the categories. That is exactly what X Corp. did in its January 2024 terms of service report. RJN No. 1 at 2-3. AB 587 does not force X Corp. to speculate about whether certain policies were

subjectively intended to address the enumerated categories.

Finally, X Corp. argues that the high-level statistics AB 587 requires it to disclose are not purely factual "because placing a user's post in a particular category is itself an act of judgment." AOB 30. But AB 587 does not require X Corp. to exercise that judgment in any particular way, disclose how it categorized any particular posts, or "explain[] why posts were flagged." AOB 31. It merely requires X Corp. to report the numerical values of how many times the company actually *did*, as a matter of fact, place posts into a particular category. *See* Cal. Bus. & Prof. Code § 22677(a)(5)(A) (requiring "[i]nformation on content *that was* flagged by the social media company as content belonging to any of" the categories (emphases added)).

X. Corp. cites (AOB 30) *Book People, Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024), but that case is readily distinguishable because the compelled information there "require[d] vendors to undertake contextual analyses, weighing and balancing many factors to determine a [sexual content] rating for each book." *Id.* at 340. If, instead, the statute had required the vendors to disclose the number of books that the vendor had voluntarily and actually reviewed and rated as "sexually explicit," then, like here, the disclosure would have been purely factual.

3. AB 587's required disclosures are "uncontroversial"

AB 587's category-related requirements are also "uncontroversial" as *Zauderer* uses that term. 471 U.S. 626; *see* 1-ER-5-6; *NetChoice (Tex.)*, 49 F.4th at 485; *NetChoice (Fla.)*, 34 F.4th at 1227. In *CTIA*, this Court defined "uncontroversial" to mean that the compelled speech does not force the speaker to "convey a message fundamentally at odds with its mission." *CTIA*, 928 F.3d at 845. In *National Wheat*, the Court explained that, in addition to that "subjective" definition, "an objective evaluation of 'controversy'" should also be considered. 85 F.4th at 1277. Objective controversy exists whether there is robust "scientific debate" or other empirical disagreement about the factual accuracy of the speech. *Id.* at 1277-78; *id.* at 1279 n.12 ("the display of Warning Option 4 is controversial because Plaintiffs do not agree with its message *and* Plaintiffs' disagreement is currently supported by a majority of the authorities in this as-yet-unresolved scientific debate"). A disclosure is "uncontroversial" even if it "can be tied in some way to a controversial issue," and even if the disclosure may be used by others to support arguments "in a heated political controversy." *CTIA*, 928 F.3d at 845.

AB 587's disclosure requirements are "uncontroversial" under this framework. First, they are not "subjectively" controversial because they do not force X Corp. to convey any message at all apart from the fact of its policies existing, much less "a message fundamentally at odds with its mission." *Id*. And even if X Corp.'s factual disclosures could plausibly be understood to convey some sort of message (which they do not), those disclosures would be consistent with X Corp.'s mission because they reflect X Corp.'s own choices about what its policies are and how its commercial service should function.

X Corp. argues that AB 587 forces it to convey a message fundamentally at odds with its mission because the law purportedly "frame[s] the debate about content moderation." AOB 33. It is unclear exactly what that means, but even if AB 587 were viewed as influencing the public conversation about content moderation, that has no bearing on whether the specific information the law requires social media platforms to disclose is *itself* "controversial." X Corp. is not required to convey any message apart from the factual statements in its disclosure, much less any message that it fundamentally disagrees with. It must simply tell the truth about its own policies and has substantial leeway to describe and explain those policies as it chooses. *See* Cal. Bus. Code § 22677(a). Indeed,

X Corp. has identified no statement in its January 2024 terms of service report that is supposedly fundamentally at odds with its mission. *See* AOB 33.

Second, AB 587's disclosure requirements are not "objectively" controversial because the terms of X Corp.'s content-moderation policies are what they are; they are not the subject of unresolved empirical debate. *See Nat'l Wheat*, 85 F.4th at 1277-78. While there may be public debate, and even public pressure, about what subjects X Corp. *should* moderate (*see* AOB 31-32), that does not render the law "controversial" for the purposes of *Zauderer* scrutiny. It is insufficient for the compelled information to merely relate to controversial subject matter. *CTIA*, 928 F.3d at 845. This is logical from a practical perspective; the government often compels commercial disclosures to create transparency for consumers *because* there is controversy about what a product should contain or how a service should be provided. But that does not make the commercial disclosures themselves objectively controversial. *See, e.g.*, *CTIA*, 928 F.3d at 848 (notice to customers about cell phone radiation is "uncontroversial"); *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 114-115 (applying *Zauderer* to labeling requirement for certain mercury-containing products)); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 21, 27 (D.C. Cir. 2014) (en banc) (country-of-origin

label on meat is "uncontroversial"). Companies cannot avoid *Zauderer* scrutiny merely because they provide a service that may cause public concern.

4. AB 587 requires the disclosure of information about the terms under which social media platforms' services are made available to the public

Finally, AB 587 satisfies *Zauderer*'s requirement that the disclosures must be "about the terms under which ... services will be available." *CTIA*, 928 F.3d at 845 (quoting *Zauderer*, 471 U.S. at 651). In other words, the disclosures must "relate to the product or service that is provided by an entity subject to the requirement." *Id.*; *see id.* at 848 (rejecting argument that warnings about cell phone radiation "ha[ve] nothing to do with the terms upon which cell phones are offered").

Here, the disclosures under AB 587 relate to social media companies' own product or services, because they provide information about how companies' own platforms function. *See* Cal. Bus. & Prof. Code § 22677(a)(1)-(5).

X Corp. briefly argues that *Zauderer* scrutiny does not apply to AB 587's statistical requirements related to flagged content (*see* Cal. Bus. & Prof Code § 22677(a)(5)) because they are "backward-looking statements

that do not provide information about the terms under which the X platform will be made available." AOB 34. However, even though the conduct of flagging content occurred in the recent past, the statistical information is probative of how X Corp. presently enforces its terms of services and moderates content. For example, if only a few months prior, X Corp. flagged very few posts belonging to a certain prohibited category, that strongly suggests that if a user posts that type of content today, it would probably not be restricted. If the statistics are consistent across two or more terms of service reports, that makes the evidence even stronger. And to the extent that changes in a platform's policies or practices may call into question the relevance going forward of a particular statistical disclosure, the platform is free to include that information in its disclosure if it wishes to do so.

B. AB 587 Satisfies *Zauderer* Scrutiny

The district court also correctly concluded that AB 587 satisfies *Zauderer* scrutiny. 1-ER-6-7. To satisfy *Zauderer* scrutiny, the compelled information must be "reasonably related to a substantial governmental interest." *CTIA*, 928 F.3d 832. The regulation must also not be so "unjustified or unduly burdensome" that it "chill[s] protected commercial speech." *Zauderer*, 471 U.S. at 651; *NIFLA*, 585 U.S. at 776.

AB 587 satisfies each of these requirements.

1. AB 587's requirements are reasonably related to a substantial state interest

AB 587 satisfies *Zauderer*'s deferential standard of review because the law is "reasonably related to a substantial governmental interest." *CTIA*, 928 F.3d at 845. Courts recognize that states have a substantial interest in facilitating transparency for consumer products and services. *See, e.g.*, *NetChoice (Fla.)*, 34 F.4th at 1230; *NetChoice (Tex.)*, 49 F.4th at 485; *see also, e.g., Am. Hosp. Ass'n*, 983 F.3d at 540-41; *Am. Meat Inst.*, 760 F.3d at 26; *Nat'l Elec. Mfrs. Assn.*, 272 F.3d at 115).

Indeed, the consumer transparency interests served by AB 587 are the same as those the Eleventh and Fifth Circuits identified in upholding Florida and Texas's disclosure requirements in the *NetChoice* cases. The Eleventh Circuit recognized Florida's interest in requiring platforms to publish their content-moderation standards because the requirement ensures that "consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation." *NetChoice (Fla.)*, 34 F.4th at 1230. Similarly the Fifth Circuit reasoned that Texas' transparency

provisions "advance the state's interest in enabling users to make an informed choice regarding whether to use the Platforms." *NetChoice (Tex.)*, 49 F.4th at 485.

Similarly here, the district court correctly concluded that California "has a substantial interest in requiring social media companies to be transparent about their content-moderation policies and practices so that consumers can make informed decisions about where they consume and disseminate news and information." 1-ER-6. The goal of AB 537 was to advance this interest. 4-ER-459 ("This bill seeks to increase transparency around what terms of service social media companies are setting out and how it ensures those terms are abided by"); 4-ER-405 ("[i]n essence, AB 587 is a transparency measure"). And AB 587 does advance that interest, by requiring companies to disclose and explain their terms of service and to report high-level information about their content-moderation policies and practices. Cal. Bus. Prof. Code § 22677(a)(1)-(5). This helps inform consumers about what types of content platforms are restricting, to what extent, and particularly with respect to certain types of content such as hate speech and disinformation that most consumers would prefer to avoid. Rather than merely serve "consumer curiosity" (*see* AOB at 35), AB 587 provides important information to help consumers decide which platforms to

use and which to avoid.

X Corp. argues that not all information required by AB 587 will likely to be particularly useful to consumers. AOB 36-37. But the applicable standard is whether AB 587's requirements are "reasonably related" to the State's interest. *CTIA*, 928 F.3d at 845. This is a low bar, since *Zauderer* is a form of "rational basis review." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017). Deference to the California legislature's predictive judgment is required here, particular since X Corp.'s preliminary injunction motion was a "pre-enforcement motion." *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009), *aff'd sub nom. Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011); *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997). And here, the Legislature reasonably determined that AB 587 would aid consumers in ascertaining how social media platforms are moderating user content. *See e.g.* 4-ER-405-06; 4-ER-430-33; 4-ER-459-60.

2. AB 587's requirements are not unjustified or unduly burdensome

A disclosure requirement could violate the First Amendment if it was so "unjustified or unduly burdensome" that it "chill[s] protected commercial speech." *Zauderer*, 471 U.S. at 651; *see CTIA*, 928 F.3d at 848-49. AB 587

is not such a requirement.

X Corp. argues that AB 587 purportedly "pressures X Corp. to moderate content in a particular way and thereby interferes with its constitutionally protected editorial judgment." AOB 54. It does no such thing; as discussed in detail below (*see infra* at 49-50), the statute does not coerce X Corp. in any way, and to the extent the company may voluntarily choose to adopt certain content-moderation policies as a result of the transparency AB 587 provides, that is not the kind of concern that this prong of the *Zauderer* framework seeks to address. *See CTIA*, 928 F.3d at 848-49.

X Corp. also briefly asserts that AB 587 is unduly burdensome because it purportedly chills the speech of X Corp. users. However, it does not explain at all why user speech would be chilled and only cites *Volokh* for the proposition that imposing a hate speech policy on a platform (which AB 587 does not do) would chill user speech. AOB 54 (citing *Volokh*, 656 F. Supp. 3d at 445).

C. Alternatively, AB 587's Challenged Provisions Are Permissible Under *Central Hudson*

"The Supreme Court recognizes two levels of scrutiny governing compelled commercial speech," namely *Zauderer* scrutiny and intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Service*

Commission of New York, 447 U.S. 557, 564 (1980). *Nat'l Wheat*, 85 F.4th at 1275. If a court determines that a law compelling commercial speech does not qualify for *Zauderer* scrutiny, it should then apply *Central Hudson* scrutiny to determine the law's constitutionality. *See id.* at 1282. Here, even if AB 587 did not qualify for *Zauderer* scrutiny, it would still be subject only to *Central Hudson* scrutiny, which it satisfies.

Under *Central Hudson*, government regulation of commercial speech will be upheld so long as: (i) the government asserts a "substantial" interest, (ii) the regulation "directly advances" the government's interest, and (ii) the regulation is "not more extensive than necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 566.

When applying intermediate scrutiny, courts give "substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks and citation omitted); *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) ("Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments"). The legislature may rely on evidence "reasonably believed to be relevant to the problem" (*id.* at 51) and such evidence need not be empirical (*see, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.

425, 439 (2002) (plurality opinion) (city did not need empirical data to support its conclusion that adult-bookstore ordinance would lower crime)).

1. AB 587 serves a substantial government interest in social media platform transparency

As discussed above in the context of *Zauderer* scrutiny, AB 587 serves California's substantial interest in "requiring social media companies to be transparent about their content-moderation policies and practices so that consumers can make informed decisions about where they consume and disseminate news and information." 1-ER-6.

The need for this transparency is real and not hypothetical. *See* AOB at 51. An article from the MIT Technology Review, cited in the legislative history, explains "social media has become the terrain for a low-grade war on our cognitive security, with misinformation campaigns and conspiracy theories proliferating." Joan Donovan, *Why social media can't keep moderating content in the shadows*, MIT Technology Review, Nov. 6, 2020[11]; 4-ER-458. However, social media platforms "rarely provide detailed insight into their content moderation practices." *Id.* at 12.

X Corp. asserts that the public has no interest at all in learning more

[11] https://www.technologyreview.com/2020/11/06/1011769/social-media-moderation-transparency-censorship/ (last viewed March 13, 2024).

about how social media platforms moderate user content because X Corp. is already sufficiently transparent by posting its terms of service. AOB 51. However, a statute does not violate the First Amendment merely because one particular company previously complied with parts of the law voluntarily. There is still a substantial interest in requiring *all* subject companies to continue to make the required disclosures. Moreover, there is also a strong public interest in transparency regarding how platforms' publicly available content-moderation policies are actually enforced, and that interest is documented in the legislative history. *See, e.g.*, 4-ER-429-431, 4-ER-458-460.

2. AB 587 directly advances the interest in social media platform transparency

The second *Central Hudson* prong is also satisfied. For this requirement, a state must show "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 762 (1993). Nevertheless, "empirical data [need not] come . . . accompanied by a surfeit of background information," and such restrictions may be "based solely on history, consensus, and simple common sense." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal quotation marks omitted).

As explained above in the context of *Zauderer* scrutiny, AB 587 directly advances the state's interest in ensuring transparency in social media companies' content-moderation policies and practices. X Corp. does not appear to dispute that this prong of *Central Hudson* is satisfied.

3. AB 587 is not "more extensive that necessary" to serve the interest in social media platform transparency

A restriction on commercial speech must also not be "more extensive than necessary to serve the interests that support it." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). "The test is sometimes phrased as requiring a reasonable fit between government's legitimate interests and the means it uses to serve those interests." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825 (9th Cir. 2013) (internal quotation omitted). But the law need "not necessarily [be] the single best disposition but one whose scope is in proportion to the interest served." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). So long as a statute falls within those bounds, courts "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

The disclosure requirements in AB 587 are a "reasonable fit" with the state's interest in ensuring transparency in social media companies' content-moderation policies and practices. Their scope is modest and their burden

on the large, well-resourced social media companies to which they apply is minimal because, rather than prescribe any terms of service or content moderation practices, the law merely requires companies to disclose their terms of service and generally report on what they are already doing to moderate content.

X Corp. briefly proposes three less-restrictive alternatives. AOB 53. Under *Central Hudson*, the State is not required to show that AB 587 is the least restrictive means available to advance the state's interest. Regardless, none of X Corp.'s suggested alternatives would be sufficient to advance the State's transparency interests, and therefore none is a "reasonable fit." *Valle Del Sol*, 709 F.3d at 825. First, a review by the State of social media companies' content-moderation policies would provide no insight into how companies actually enforce those policies, or any policies that are not publicly available. The report would also fail to account for policy changes over time. Second, applying AB 587 only to companies that do not already disclose their policies would also fail to provide transparency into actual content moderation practices. Third, omitting AB 587's requirements related to the enumerated categories would eliminate consumers' ability to make comparisons between platforms with respect to the type of content that is most commonly restricted (and which most consumers prefer to avoid).

D. AB 587 Is Not Subject to Strict Scrutiny

X Corp. offers several theories to support its argument that strict scrutiny applies to AB 587. AOB 40-50. None of these theories has merit.

1. Strict scrutiny does not apply to "content-based" laws in the context of commercial speech or disclosures subject to *Zauderer* review

AB 587 requires large social media platforms to disclose specified types of factual information. Even if this were to render the requirements "content-based" to some degree, content-based restrictions are "not necessarily subject to strict scrutiny." *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016).

It is true that many content-based speech regulations are subject to strict scrutiny under the First Amendment. However, as the Supreme Court explained in *NIFLA*, *Zauderer* set forth an exception to this rule for content-based regulations in the context of required commercial disclosures. *NIFLA*, 138 S. Ct. at 2365-66 (citing *Zauderer*, 471 U.S. at 651). Thus, content-based regulations that qualify for *Zauderer* review are not subject to strict scrutiny. *See id.* This Court, too, has concluded that strict scrutiny does not apply to all content-based compelled disclosures, and that an exception applies when *Zauderer* or *Central Hudson* scrutiny is appropriate. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017). Other courts have reached the same conclusion. *See, e.g.*, *Greater*

Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 721 F.3d 264, 283 (4th Cir. 2013); *S.E.C. v. AT&T, Inc.*, 626 F. Supp. 3d 703, 743 (S.D.N.Y. 2022).

X Corp. offers no authorities supporting the argument that commercial disclosure requirements are subject to strict scrutiny merely because they may be "content-based" to some extent. *See* AOB 40-41. The cases upon which it relies—*Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015), and *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018)—did not involve commercial speech at all, much less commercial disclosures that qualified for *Zauderer* review.

2. AB 587's disclosure requirements are viewpoint neutral

AB 587 is also not subject to strict scrutiny as viewpoint discriminatory (*see* AOB 40-41), because the law is viewpoint neutral. "A regulation engages in viewpoint discrimination when it regulates speech 'based on the specific motivating ideology or perspective of the speaker.'" *First Resort*, 860 F.3d at 1277 (quoting *Reed*, 576 U.S. at 168).

AB 587 is facially viewpoint neutral. Although its requirements direct companies to provide certain types of information, the requirements do not

mandate that the disclosed information include any particular message or substance. *See* Cal. Bus. & Prof. Code § 22676-22677. In other words, the requirements do not require platforms to disclose prescribed terms of service or content regulation policies or outcomes. They merely require companies to disclose the policies and practices that they have actually and voluntarily put into place.

X Corp. argues that AB 587's legislative history and statements by the Attorney General establish that the law discriminates based on viewpoint. However, "[i]t is a familiar principle of constitutional law that [the Supreme] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *accord First Resort*, 860 F.3d at 1278. Where, as here, a law is facially neutral, a court "will not look beyond its text to investigate a possible viewpoint-discriminatory motive." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018). A court may only turn to the legislative history and other extrinsic evidence of legislative intent if the law includes "indicia of discriminatory motive." *Id.* The Court here therefore need not, and should not, look beyond AB 587's text to conclude that it is

viewpoint neutral.[12]

Even if the Court were to consider legislative history, however, it would reach the same conclusion. Courts "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [the courts] to conclude that they could not have been a goal of the legislature." *Am. Fuel & Petrochem. Mfrs. v. O'Keefe*, 903 F.3d 903, 912 (9th Cir. 2018). As the Legislature put it, AB 587 is "[i]n essence . . . a transparency measure." 4-ER-405. The Legislature's express purpose in enacting the bill was "to increase transparency around what terms of service social media companies are setting out and how it ensures those terms are abided by." 4-ER-459.

Plaintiff argues that the main purpose of AB 587 is to pressure social media platforms to eliminate certain types of speech on their platforms. AOB 41. The Legislature noted that, by requiring greater transparency about platforms' content-moderation rules and decisions, AB 587 may encourage—*though not require*—social media companies to "become better

[12] This is particularly so here, where X Corp. argues that the face of AB 587 discriminates against companies that moderate content using the enumerated categories, but that the legislative history shows an intent to favor those companies. *See* AOB 40-41.

corporate citizens by doing more to eliminate hate speech and disinformation" on their platforms. 4-ER-405. But any *public* pressure from consumers that results from the factual disclosures does not equate to discriminatory treatment by the *state* through AB 587. Many business disclosure statutes are designed to create transparency with the understanding that consumers may not react favorably to the disclosed information. *See, e.g.*, *S.F. Apartment Ass'n v. City & Cnty. of S.F.*, 881 F.3d 1169, 1176-77 (9th Cir. 2018) (upholding ordinance requiring landlords to provide tenants with information about tenants' rights organizations before engaging in lease buyout negotiations); *Am. Meat Inst.*, 760 F.3d at 27 (upholding regulation requiring disclosure of country-of-origin information for meat); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding ordinance requiring restaurants to post calorie content on menus).

3. The "editorial judgments" theory does not apply to AB 587

X Corp. argues that AB 587 is subject to strict scrutiny because its requirements purportedly interfere with X Corp.'s "editorial judgment" about content. AOB 42. This argument is unavailing here, just as it was in the *NetChoice* cases, where both the Fifth and Eleventh Circuits refused to

apply that theory to the states' disclosure requirements. *NetChoice (Fla.)*, 34 F.4th at 1233; *NetChoice (Tex.)*, 49 F.4th 487-88.

AB 587 does not interfere with social media companies' exercise of editorial judgment. AB 587 only requires social media platforms to make truthful factual disclosures about their content moderation. *See* Cal. Bus. & Prof. Code §§ 22676-22677. The statute does not dictate how platforms must moderate content, either in policy or practice. Nothing in AB 587 requires that social media companies take, or prohibits them from taking, any action whatsoever against any item of content or user. And nothing in AB 587 requires that social media companies' terms of service define any categories of content. Platforms may restrict or not restrict content as they see fit. AB 587 creates potential liability only if a social media platform: "(A) Fails to post terms of service in accordance with Section 22676"; "(B) Fails to timely submit to the Attorney General a report required pursuant to Section 22677"; or, "(C) Materially omits or misrepresents required information in a report submitted pursuant to Section 22677." Cal. Bus. & Prof. Code § 22678(a)(2). The statute does not empower the government to investigate or prosecute any other conduct including any failure to conform company policies to the state's supposed preferences.

X Corp. cites a commentator's theory that disclosure laws such as AB 587 will purportedly cause platforms to change their editorial practices to conform to state preferences to avoid investigations to enforce the statute. AOB 43-44. Tellingly, though, X Corp. does not assert that—and has submitted no evidence that—AB 587 has actually affected its content-moderation policies or decisions. And even it had done so, 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. AOB 57. This assumption is unwarranted, given the "presumption of regularity in the performance of their duties by government officials." *Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198, 202-03 (9th Cir. 1989).

Nor is this theory supported by the record. The Attorney General has not used AB 587 "to try to coerce" X Corp. to change its content-moderation policies. AOB 42. X Corp.'s only supposed evidence of coercion is the Attorney General's November 2022 letter to five large social media companies. AOB 44-45. That letter merely listed AB 587 as one of numerous state statutes that the Attorney General would enforce to protect California's voters from election disinformation. 6-ER-1070. At most, the reference to AB 587 suggests that the Attorney General would require these

social media companies to make the informational disclosures required by the statute. *See id.* ("[i]n 2024, social media platforms will also have additional *transparency* obligations, as required by recent state legislation that requires *disclosures* on content moderation practices" (emphases added)). The letter did not in any way threaten to investigate or prosecute X Corp. (or any other platform) under AB 587 if content-moderation policies did not change.

The cases X Corp. cites (AOB 46-47) do not support its argument. *Herbert v. Lando* is a defamation case that merely describes the editorial judgment theory in dicta. 441 U.S. 153, 174 (1979). *Miami Herald Pub. Co. v. Tornillo* merely stands for the proposition that the First Amendment does not allow the state to compel a newspaper to publish political speech that it disagrees with. 418 U.S. 241, 244 (1974).

Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019), is also distinguishable. *See NetChoice (Tex.)*, 49 F.4th at 488 n.38. That case involved burdensome campaign finance regulations of political speech. *McManus*, 944 F.3d at 510-12. Specifically, for every political ad posted by an online platform (including news outlets), the law required the platform to post "the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad." *Id.* at 511. It also

required platforms to collect and retain records regarding the political ad purchasers, which were subject to state inspection. *Id.* at 512. While expressly noting the narrowness of its ruling (*id.* at 513), the Fourth Circuit emphasized that the regulatory scheme was unconstitutional, in large part, because it singled out political speech—"campaign-related speech"—for regulation. *Id.* at 513-14. It also emphasized that the law implicated constitutional protections for anonymous political speech (*id.* at 515) and that noncompliance would result in an injunction to remove the political ad and, possibly, criminal penalties (*id.* at 514).

AB 587 does not implicate these concerns. Unlike the law challenged in *McManus*, AB 587 does not require platforms to respond to political content on the platforms; it does not give the government unlimited power to inspect platforms' records in connection with particular political content on its site; and, it does not provide any penalties based on the content on the platform, much less criminal penalties.

4. AB 587 is not analogous to the laws challenged in X Corp.'s "speech about speech" cases

AB 587 is also not subject to strict scrutiny for purportedly regulating "speech about speech." AOB 47. Because, as explained above, the law does not interfere with platform's content moderation choices, AB 587 also does

not interfere with the public's right to access constitutionally protected speech.

X Corp.'s cited cases (AOB 47-50) do not support applying the "speech about speech" theory here. *Smith v. California* did not involve commercial speech or government-mandated consumer disclosures, but rather an ordinance imposing strict criminal liability on booksellers for selling books containing obscene material. 361 U.S. 147, 148-49 (1959). The Court concluded that the statute would have the functional effect of banning books that were not obscene, and thus, constitutionally protected. *Id.* at 152. Again, AB 587 does not functionally require X Corp. to change its content-moderation policies or restrict any content.

In *Entertainment Software Ass'n v. Blagojevic*, 469 F.3d 641 (7th Cir. 2006), *Book People*, 91 F.4th at 340, and *Motion Picture Ass'n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the challenged laws were invalidated not because they were "speech about speech," but because the laws compelled the expression of subjective opinions about others' speech, rather than facts. In *Entertainment Software Ass'n*, the court concluded that "sexually explicit" video game labeling requirements did not qualify for *Zauderer* scrutiny because they required retailers to make disclosures that were subjective and "opinion-based" rather than purely factual and

uncontroversial. 469 F.3d at 652. In *Wong*, the court came to the same conclusion with respect to a law compelling vendors to disclose their opinions on each book's "sexual content rating." 91 F.4th at 340. And in *Specter*, which predated *Zauderer*, the court held that a state law violated the First Amendment where it criminalized a film exhibitor's misrepresentation that a film is "suitable for family viewing," because that standard was entirely subjective. 315 F. Supp. at 825-26.

Unlike in the laws in those cases, AB 587 qualifies for *Zauderer* scrutiny because the required disclosures are factual and uncontroversial, not subjective or opinion-based. *See supra* at 27-33. The law is therefore not subject to strict scrutiny merely because it purportedly compels "speech about speech."

II. THE DISTRICT COURT CORRECTLY RULED THAT X CORP. IS UNLIKELY TO SUCCEED ON ITS FEDERAL PREEMPTION CLAIM

X Corp. claims that section 230(c) of the Communications Decency Act preempts AB 587. Section 230(c) provides that no social media platform "shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of" content that is deemed objectionable or obscene. 47 U.S.C. § 230(c)(2)(A). X Corp. contends that AB 587 makes platforms "liable" for their content moderation actions under

section 230(c) because the Attorney General's authority to investigate platforms' material omissions or misrepresentations in the terms of service reports pressures platforms to moderate content according to the State's preferences. AOB 57, 59.

X Corp.'s preemption claim fails for two primary reasons. First, the claim is unripe because the Attorney General has not investigated or charged X Corp. with violating AB 587, nor has there been any "genuine threat of imminent prosecution." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (internal quotation marks omitted). Second, even if the claim were ripe, it would fail on the merits because AB 587 creates liability only for platforms' failure to comply with their *disclosure* obligations, not for any act of moderating content.

A. X Corp.'s Preemption Claim Is Unripe

At the threshold, X Corp.'s preemption claim is nonjusticiable because it is unripe.[13] Unlike the company's First Amendment claim, which

[13] Although the district court did not consider the ripeness of X Corp.'s preemption claim, lack of ripeness nevertheless provides a proper ground here to affirm the denial of the preliminary injunction. *See DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006) (ripeness is a "jurisdictional issue[] that may be raised at any time").

challenges the constitutionality of the required disclosure itself, its preemption claim is premised on a hypothetical future investigation or enforcement action by the Attorney General. But X Corp. has not alleged, and cannot allege, that it is subject to a "genuine threat of imminent prosecution" under AB 587. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (internal quotation omitted). Neither the "mere existence of a proscriptive statute" nor a "generalized threat of prosecution" satisfies this requirement. *Id.* When evaluating whether a claimed threat of prosecution is genuine, courts consider: "(1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute." *Id.*

Here, all three factors support a conclusion that X Corp. is under no "genuine threat of imminent prosecution" under AB 587. The first and third considerations clearly are not present here: X Corp. has not "articulated a concrete plan to violate" AB 587 and there is no history of the Attorney General prosecuting anyone under AB 587.

Nor has the Attorney General ever communicated to X Corp. "a specific warning or threat to initiate proceedings" under AB 587. *Id.* As

discussed above in the context of the "editorial judgment" argument, the Attorney General's November 2022 letter did not threaten to investigate or prosecute X Corp. for purported misrepresentations in terms of service reports that would not be due for over a year. 6-ER-1070. The letter merely reminded all five social media companies that, starting more than a year later in 2024, they would have "additional transparency obligations" related to their content moderation practices. *Id.* Even if the letter could be understood as an implicit statement that the Attorney General intends to carefully monitor platforms' compliance with AB 587, absent any indication that X Corp. has some plan to violate the statute, it does not suffice to meet Article III's ripeness standard.

B. Even if X Corp.'s Preemption Claim Were Ripe, It Fails on the Merits

In any event, X Corp.'s preemption claim under section 230(c) lacks merit. The purpose of section 230(c) "is to provide 'protection for "Good Samaritan" blocking and screening of offensive material.' That means a website should be able to act as a 'Good Samaritan' to self-regulate offensive third party content without fear of liability." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (quoting 47 U.S.C. § 230(c)). As this Court has explained, Congress enacted this provision

largely in response to a 1995 New York state court decision that held an internet service provider liable for "offensive content on its message boards because it deleted some offensive posts but not others," thereby effectively forcing websites to "choose between voluntarily removing some offensive third-party content, which would expose the site to liability for the content it did not remove, or filtering nothing." *Id.*

This Court has cautioned that the immunity conferred by section 230(c) must not be too broadly construed. *See, e.g.*, *Internet Brands*, 824 F.3d at 852-53. Section 230(c) does not declare "a general immunity from liability" broadly relating to third-party content. *Id.* at 852. Rather, the statute's protections must be limited to "its narrow language and its purpose." *Id.* at 853.

X Corp. argues that section 230(c) preempts AB 587 because AB 587's enforcement provisions purportedly pressure platforms to moderate content in line with the State's preferences. AOB 55-56. X Corp. appears to suggest that platforms are "liable" under section 230(c) if they do not accede to the State's preferences because, otherwise, the Attorney General will purportedly investigate platforms for material omissions or misrepresentations in their terms of service reports. *Id.* These arguments are without merit.

Conflict preemption occurs only when: (1) "compliance with both federal and state regulations is a physical impossibility" or (2) "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *CTIA*, 928 F.3d at 849. The conflict preemption analysis "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion) (internal quotation marks omitted).

First, it is entirely possible for X Corp. to comply with both section 230(c) and AB 587. *See CTIA*, 928 F.3d at 849. Since section 230(c) does not impose any obligations on X Corp., to comply with both statutes, it need only comply with AB 587's disclosure requirements. *See* Cal. Bus. Code §§ 22676, 22677.

Second, AB 587 is not an obstacle to the congressional purpose underlying section 230(c). *See CTIA*, 928 F.3d at 849. That purpose is to allow service providers to remove objectionable third-party content without being subject to liability for doing so or for failing to remove other third-party content. *Internet Brands*, 824 F.3d at 852. But AB 587 does not make social media platforms liable for restricting (or for not restricting) any

content. Liability arises only if X Corp. fails to timely make the statute's required disclosures or if those disclosures include material omissions or misrepresentations. Cal. Bus. & Prof. Code § 22678(a)(2). AB 587 therefore continues to allow platforms "act as [] 'Good Samaritan[s]' to self-regulate offensive third party content without fear of liability." *Internet Brands*, 824 F.3d at 852 (quoting 47 U.S.C. § 230(c)). It does not create an obstacle to section 230(c) immunity.

AB 587 does not make platforms "liable" under section 230(c) merely because the Attorney General has the authority to investigate whether platforms' terms of service reports contain material omissions or misrepresentations. Such an investigation would presumably be premised on a material omission or misrepresentation in the platform's disclosures, not on the platform's content moderation itself. To the extent X Corp. or any other platform may be held "liable" for anything under AB 587, it would be only for not making a disclosure in compliance with the law, not for any of its content-moderation decisions.

X Corp.'s hypothetical related to COVID-19 "disinformation" does not advance its argument. AOB 57. The scenario supports neither an as-applied constitutional challenge, since it has not occurred here, nor a facial challenge, in which "the challenger must establish that no set of

circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (applying *Salerno* standard to facial preemption challenge). In any event, AB 587 provides guardrails for this scenario: it requires platforms to disclose how they define "disinformation" (if they do at all, which they are not required to) and to provide "a detailed description of [their] content moderation practices," without limiting how that description is provided. Cal. Bus. & Prof. Code §§ 22677(a)(3), (4). To the extent a platform may have a unique or idiosyncratic understanding of "disinformation," all the platform must do is disclose its *own* definition and how it relates to content moderation.

Finally, X Corp. appears to suggest that AB 587's enforcement provisions create "liability" under section 230 because the government may abuse its investigative powers to pressure companies to adopt its preferred content-moderation policies. AOB 57. As explained above, this assumption is untrue, untenable, and not supported by the record. *See Red Top Mercury Mines*, 887 F.2d at 202-03 (presumption of regularity in government officials' performance of their duties). It certainly does not provide a basis for any *facial* preemption challenge to the statute.

III. THE DISTRICT COURT CORRECTLY RULED THAT X CORP. HAS NOT ESTABLISHED THE REMAINING *WINTER* FACTORS NECESSARY FOR PRELIMINARY INJUNCTIVE RELIEF

Even if X Corp. had demonstrated a likelihood of success on the merits as to any claim, it would still need to show that it would suffer irreparable harm absent a preliminary injunction, and that the balance of the equities and public interest favor a preliminary injunction. *See Winter*, 555 U.S. at 20. The district court correctly determined that X Corp. established none of these.

It is true that the loss of First Amendment freedoms constitutes irreparable injury for purposes of seeking injunctive relief. See AOB 60. However, as demonstrated above, and as the district court correctly determined, AB 587 does not violate X Corp.'s First Amendment rights. And X Corp. has not argued or shown that it will suffer any other irreparable harm absent preliminary injunctive relief.

X Corp. also has not shown, and cannot show, that the balance of the equities and the public interest weigh in its favor. The public interest favors transparency by social media platforms so that consumers can make more informed decisions about where they consume and disseminate news and information. And, because section AB 587 only obligates large social media platforms to disclose their content-moderation policies and practices, any

burden it imposes on them is minimal.

CONCLUSION

The district court's denial of X Corp.'s motion for a preliminary injunction should be affirmed.

Dated: March 13, 2024

Respectfully submitted,

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24-271

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

X CORP.,

Plaintiff-Appellant,

v.

ROB BONTA, Attorney General of California, in his official capacity,

Defendant-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: March 13, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-271

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