No. 24-1570

IN THE

United States Court of Appeals for the Ninth Circuit

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,
Plaintiff-Appellee,

v.

ANDREW STOLFI, in his official capacity as Director of the Oregon Department of Consumer and Business Services,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Oregon, No. 6:19-cv-01996-MO
Hon. Michael W. Mosman, U.S. District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in this appeal. The law at issue, Oregon House Bill 4005 ("HB 4005"), reflects a growing trend of state laws—in the pharmaceutical context and more broadly—that seek to compel speech by the Chamber's members on controversial policy issues. *E.g.*, *X Corp. v. Bonta*, --- F.4th ----, 2024 WL 4033063 (9th Cir. Sept. 4,

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

2024) (enjoining law compelling speech by social media companies on topics such as hate speech); *NetChoice, LLC v. Bonta*, --- F.4th ----, 2024 WL 3838423 (9th Cir. Aug. 16, 2024) (enjoining law compelling opinions by social media companies on whether speech is dangerous to children). HB 4005 and its implementing regulations require pharmaceutical manufacturers, including members of the Chamber, to speak publicly about price increases for prescription drugs, including by providing a narrative justification for an increase. ORS § 646A.689(3); OAC 836-200-0530(2)(h). This compels manufacturers to participate in a policy debate over drug pricing and to take a side on what factors may support drug prices and whether prices are too high relative to those factors.

The district court correctly held that this compelled-speech regime violates the First Amendment. This Court should affirm that holding.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Prescription drug pricing is a hotly disputed policy question throughout the United States. It is the subject of op-eds, negotiations in

[2] The Court should likewise affirm the district court's holding that HB 4005's "public-interest exception" violates the Fifth Amendment's Takings Clause. This brief, however, addresses only the district court's First Amendment holding.

Congress and state legislatures, and the policy platforms of the candidates for President of the United States.[3] There is robust disagreement among politicians, citizens, and market participants over the causes of, and appropriate responses to, drug prices. This is unsurprising, not least because drug prices result from a complex array of factors and market actors. Some believe that the government, directly or indirectly, should set prices based only on a small number of factors. Others believe that prices can best be set through competition in the free market.

As a result, States may take different positions on how best to attempt (or not) to regulate drug pricing, consistent with relevant statutory and constitutional constraints. And in a democracy, regulation comes with accountability: if a State's citizens disagree with its government's actions, legislators may face electoral blowback. That is how it should be, but legislators too often seek to avoid responsibility for their political decisions by compelling private actors to endorse the government's views. A State might, for example, require drug

[3] *See* Democrats, *Party Platform* (2024), https://democrats.org/where-we-stand/party-platform/; *2024 Republican Party Platform* (July 8, 2024), https://www.presidency.ucsb.edu/documents/2024-republican-party-platform.

manufacturers to claim sole responsibility for the prices of their drugs and to issue statements justifying these prices under a narrow set of State-selected factors. That way, the State can distort the public debate over drug pricing, mislead the public into believing that the *State*'s views are the *manufacturer*'s views, and shift accountability for those views from the government to the manufacturer.

That, in essence, is what Oregon did in HB 4005. That law requires drug manufacturers to publicly disclose information about factors that Oregon believes are relevant to drug prices. ORS § 646A.689(3). More than that, the regulations implementing HB 4005 require manufacturers to *justify* their prices in "a narrative description and explanation of all major financial and nonfinancial factors that influenced the decision to increase the wholesale acquisition cost of the drug product and to decide on the amount of the increase." OAC 836-200-0530(2)(h). HB 4005 requires drug manufacturers to take sides in the debate over drug pricing and directs the ire of its citizens—who Oregon concedes are "mad about" drug prices, ER-109—away from Oregon's government and onto manufacturers who disagree with the State's positions.

That compelled-speech regime violates the First Amendment. The "freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (cleaned up). By compelling drug manufacturers "to speak . . . when [they] would prefer to remain silent," HB 4005 violates that cardinal constitutional command. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586-87 (2023). It is accordingly subject to strict scrutiny, which Oregon tacitly concedes it cannot satisfy. Instead, Oregon requests "permissive" review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). AOB-27. But *Zauderer* applies only to laws that compel the disclosure of "purely factual and uncontroversial information" in "commercial advertising." *Zauderer*, 471 U.S. at 651. Oregon admits that HB 4005 "affects speech that is not an advertisement," AOB-29, and it compels speech on a contested policy question—drug pricing—that is anything but uncontroversial. No case applies *Zauderer* to circumstances like these, and to do so would enfeeble the First Amendment's prohibition on compelled speech.

For these reasons, this Court should affirm the district court's holding that HB 4005's reporting requirements violate the First Amendment.

ARGUMENT

I. HB 4005 is subject to strict scrutiny because it compels non-commercial speech.

Although the district court correctly held that HB 4005 fails intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), HB 4005 is in fact subject to strict scrutiny. Indeed, laws compelling speech are "*presumptively* unconstitutional." *Nat'l Inst. of Family & Life Advocates* (*NIFLA*) *v. Becerra*, 585 U.S. 755, 766 (2018) (emphasis added); *accord Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023) ("Although commandeering speech may seem expedient, it is seldom constitutionally permissible."). That is because, "[w]hen a state 'compel[s] individuals to speak a particular message,' the state 'alter[s] the content of their speech,' and engages in content-based regulation." *X Corp.*, 2024 WL 4033063, at *6 (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). Any "government regulation compelling individuals to speak a particular message," therefore, "is a content-based

regulation that is subject to strict scrutiny." *Green v. Miss U.S. of Am., LLC*, 52 F.4th 773, 791 (9th Cir. 2022) (cleaned up).

HB 4005 is no different. It requires prescription drug manufacturers to speak on a particular topic—the causes of drug prices—in a way that no manufacturer would do absent government compulsion. And HB 4005 does so precisely to advance Oregon's views on drug-pricing policy, namely the proposition that manufacturers are setting drug prices based on factors other than those that Oregon believes to be appropriate. Because HB 4005 requires manufacturers "to convey [their] policy views on [an] intensely debated and politically fraught topic[]," it is subject to strict scrutiny. *X Corp.*, 2024 WL 4033063, at *8.

The district court applied intermediate scrutiny because it found that HB 4005 regulates commercial speech, but "regulation of commercial speech that is not content-neutral is still subject to strict scrutiny." *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020); *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (holding

that "content-based burden[s] on protected expression" are subject to "heightened scrutiny" even if they regulate only commercial speech).[4]

In any event, HB 4005 does *not* regulate only commercial speech. "Speech is commercial when it does no more than propose a commercial transaction." *NetChoice,* 2024 WL 3838423, at *11 (cleaned up); *accord Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021). And under HB 4005, "a covered business must do far more than propose a commercial transaction." *NetChoice,* 2024 WL 3838423, at *12 (cleaned up). In fact, the speech compelled by HB 4005 does not propose a commercial transaction at all—in the most basic terms, it is not an offer to "sell" a drug at a specified "price." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 761 (1976). Covered manufacturers must instead *explain* and *justify* their prices, untethered from any particular commercial transaction, including through "a narrative description and explanation of all major financial and nonfinancial factors that influenced the decision to increase the wholesale acquisition

[4] Even if *Central Hudson* did apply, HB 4005 does not satisfy intermediate scrutiny for the reasons stated in the district court's opinion and in PhRMA's brief. ER-35–38; ARB-34–40.

cost of the drug product and to decide on the amount of the increase." OAC 836-200-0530(2)(h).

As PhRMA explains, that speech about manufacturers' internal decisionmaking is not commercial speech under *any* recognized test. ARB-28–34. "To the extent [this] circuit has recognized exceptions to th[e] general rule" that commercial speech "does no more than propose a commercial transaction," those "exceptions are limited" to speech that "communicates the terms of an actual or potential transaction." *X Corp.*, 2024 WL 4033063, at *8 (explaining possible exceptions for "targeted, individualized solicitations," "contract negotiations," and "retail product warnings") (cleaned up). HB 4005 requires far more than a disclosure of the terms of a potential transaction—it requires the disclosure of factors that influence manufacturers' decisions about how to *set* the terms of transactions. Such speech that "express[es] a view *about*" the "terms of an actual or potential transaction" is not commercial speech. *Id.*

Although Oregon concedes that HB 4005 regulates speech that does not propose a commercial transaction, it argues that speech is commercial because it "pertains to a particular product" and "is economically motivated, as the manufacturer must comply with the

disclosure requirements in order to profitably sell that drug product in the state of Oregon." AOB-29. But if that is true, it is true only because *HB 4005 requires* manufacturers to speak with respect to particular products in order to sell those products. Like the law compelling speech from social media companies that this Court enjoined in *X Corp.*, HB 4005 does not require manufacturers to "merely disclose existing commercial speech"—it compels manufacturers to create *new* speech related to their products that they would not voluntarily engage in. 2024 WL 4033063, at *8. Absent HB 4005, manufacturers would have no "clear economic motivation to provide these opinions" about the reasons for their prices. *NetChoice*, 2024 WL 3838423, at *12. That is why a "reference to a specific product does not by itself render [speech] commercial," *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983), and why "[t]he mere fact that a business may earn revenue from its services is 'insufficient by itself' to render its opinions about those services 'commercial,'" *NetChoice*, 2024 WL 3838423, at *12 (quoting *Bolger*, 463 U.S. at 67).

Oregon may not compel speech that a manufacturer would never voluntarily make, then rely on the compulsion itself to render that speech

"commercial." Otherwise, States could compel companies to endorse any number of highly political statements about their products as a condition of selling those products in the State, and "basically any compelled disclosure by any business about its activities would be commercial and subject to a lower tier of scrutiny." *X Corp.*, 2024 WL 4033063, at *8. California could require social media companies to state that the speech on their platforms is harmful to children. *Cf. NetChoice*, 2024 WL 3838423, at *11-12 (enjoining a California law doing that). Or Texas could require book publishers to declare that certain books are "offensive," "deviate," or "[in]decen[t]." *Book People, Inc. v. Wong*, 91 F.4th 318, 325-26, 339-40 (5th Cir. 2024) (enjoining a similar Texas law). Such bootstrapping would expose the marketplace for ideas to rampant government distortion and would all but eliminate the prohibition on compelled speech for private companies.

Strict scrutiny thus applies to HB 4005, and Oregon correctly does not contend that it can satisfy strict scrutiny. The Court should affirm the district court's decision for that reason alone.

II. *Zauderer* does not apply to HB 4005.

Although the district court erroneously found that HB 4005's reporting requirements are not subject to strict scrutiny, the court correctly rejected Oregon's argument that those requirements are subject only to relaxed scrutiny under *Zauderer*.[5]

This Court has explained more than once that "*Zauderer* [i]s an 'exception for compelled speech'" that is "only available 'in certain contexts.'" *Wheat Growers*, 85 F.4th at 1275 (citations omitted). *Zauderer*'s more lenient standard applies only when the government regulates "commercial advertising" by requiring the advertiser to disclose "purely factual and uncontroversial information about the terms under which his services will be available." 471 U.S. at 651. "[O]utside that context," *Zauderer* does not apply. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *see also NIFLA*, 585 U.S. at 771 (explaining the statements at issue in *Zauderer* "would have been 'fully protected' if they were made in a context other than advertising").

[5] Oregon cannot satisfy *Zauderer* in any event, as PhRMA explains. ARB-45–46.

HB 4005 is not eligible for *Zauderer* review because, as Oregon concedes, it "affects speech that is not an advertisement." AOB-29. HB 4005 applies to any "person that manufactures a prescription drug that is sold in [Oregon]," ORS § 646A.689(1)(e), (3), regardless of whether the manufacturer *advertises* that drug in Oregon. And it compels disclosures directly to the State, not in "voluntary commercial advertising." *Nat'l Ass'n of Manufs. v. SEC*, 800 F.3d 518, 523 (D.C. Cir. 2015). This lack of a nexus to commercial advertising alone distinguishes *Zauderer*. The Supreme Court has held that *Zauderer* does not apply to statements "made in a context other than advertising." *NIFLA*, 585 U.S. at 771; *see United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (rejecting application of *Zauderer* to state law not regulating "voluntary advertisements"). Oregon even concedes that *"Zauderer* has typically been applied only to core commercial speech, meaning speech involved in negotiating contracts or in packaging or advertising products for sale." AOB-31. Because it is undisputed that HB 4005 compels "speech outside of strictly defined commercial transactions," AOB-32, *Zauderer* does not apply. Oregon cites no case holding otherwise.

Even if HB 4005 were somehow limited to commercial advertising, *Zauderer* still would not apply, because it compels "subjective opinions," not "purely factual and uncontroversial" information. *NetChoice*, 2024 WL 3838423, at *12 (quotation marks omitted). Although HB 4005 requires the disclosure of *some* facts, it does so in the context of explaining manufacturers' internal drug-pricing decisions—which is why the statute's implementing regulations require a "narrative description" of price increases. ORS § 646A.689(3); OAC 836-200-0530(2)(h). Whether and how various factors justify drug prices is not the sort of mundane fact—such as "country-of-origin labels," *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc), or "whether a particular chemical is within any given product," *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006)—to which *Zauderer* applies. Instead, price-setting involves "contextual analyses" and "weighing and balancing many factors," which is "anything but the mere disclosure of factual information." *Wong*, 91 F.4th at 340.

Moreover, as the district court recognized, prescription drug pricing is a deeply "controversial topic." ER-33–34. It is, by Oregon's own admission, "a subject people are mad about." ER-109. By requiring the

disclosure of only certain information, and from drug manufacturers alone, HB 4005 endorses one view among many regarding which decisionmakers and factors are relevant to drug prices. *See Wheat Growers*, 85 F.4th at 1279 (rejecting *Zauderer* review of "a compelled statement of a hotly disputed scientific finding"); *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 & n.10 (9th Cir. 2022) (same, for disclosure on topic subject to "robust disagreement"). By requiring manufacturers to explain and justify their prices, HB 4005 and its implementing regulations require manufacturers to "convey [their] policy views on intensely debated and politically fraught topics," *X Corp.*, 2024 WL 4033063, at *8, such as whether drug prices are appropriate or (as Oregon believes) too high. And by publicizing the information manufacturers provide, HB 4005 invites the use of manufacturers' compelled disclosures as a basis to criticize them or to call for increased regulation or other concerted action, thus "skew[ing] public debate" and "stigmatiz[ing] and shap[ing] [manufacturers'] behavior." *Nat'l Ass'n of Manufs.*, 800 F.3d at 530.

Oregon's defense of this unconstitutional regime reflects a troubling trend by States (and some courts) to treat *Zauderer* as an invitation to

obstruct free debate in the marketplace of ideas. The Supreme Court and this Court have repeatedly rejected California's attempts to target disfavored actors and activities through compelled speech. *E.g.*, *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021); *NIFLA*, 585 U.S. 755; *X Corp.*, 2024 WL 4033063; *NetChoice*, 2024 WL 3838423; *Wheat Growers*, 85 F.4th 1263. The Supreme Court recently had to correct "errors" that the Fifth Circuit made when upholding Texas's explicit attempt to protect "conservative viewpoints and ideas" by "correct[ing] the mix of speech that the major social-media platforms present." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399, 2407 (2024) (quotation marks omitted). Texas also erroneously invoked *Zauderer* to require businesses to label library books with "ratings" based on their offensiveness, attempting to analogize its politically charged scheme to a "nutrition label." *Wong*, 91 F.4th at 326-27, 339 (enjoining law). In Connecticut, a district court erroneously invoked *Zauderer* to uphold a law requiring businesses to "promote the product of a competitor." *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263-64 (2d Cir. 2014) (reversing district court). In Florida, a state trial court erroneously invoked *Zauderer* to uphold an ordinance compelling companies to report their customers to law enforcement for

civil infractions. *Mgmt. Props., LLC v. Town of Redington Shores*, 352 So. 3d 909, 913-14 (Fla. Dist. Ct. App. 2022) (reversing trial court).

In all of these cases, legislators sought to force businesses to speak as a means of advancing a controversial policy agenda. And there is every reason to think that onerous compelled disclosures will proliferate absent judicial intervention. After all, "consumers might want to know the political affiliation of a business's owners," or "whether their U.S.-made product was made by U.S. citizens." *Am. Meat*, 760 F.3d at 32 (Kavanaugh, J., concurring in the judgment). "These are not far-fetched hypotheticals," *id.*, and this Court should not invite them by adopting Oregon's watered-down standard of review.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limitations of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1 because this brief contains 3,182 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in 14-point Century Schoolbook font.

Date: September 11, 2024

s/Jeffrey S. Bucholtz
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