25-2818

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL RETAIL FEDERATION,

Plaintiff-Appellant,

v.

LETITIA JAMES, in her official capacity as Attorney General of New York,

Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Chamber of Commerce of the United States of America hereby certifies that it has no parent corporation, and no publicly held company has 10% or greater ownership in it.

January 13, 2026 *<u>/s/Jeremy J. Broggi</u>*
Jeremy J. Broggi

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America 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 and its members have a strong interest in this case because New York's Algorithmic Pricing Disclosure Act ("the Disclosure Act") requires businesses to recite an ominous, government-mandated script whenever they use an algorithm to tailor prices and offers to individual customers. This speech compulsion creates the false impression that prices set by algorithm deserve suspicion. Even worse,

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. 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 the brief. *See* Fed. R. App. P. 29(a)(4)(E); Cir. Rule 29.1(b).

the Disclosure Act compels businesses to distribute New York's misleading message at the most critical moment for a company: when asking consumers for their business. The result will be to harm all businesses that use algorithmic pricing to offer potential customers a lower price. Consumers will be harmed, too, as many businesses are likely to forgo beneficial algorithmic pricing altogether rather than recite a state-mandated script that wrongly requires them to disparage their own offers. Because the district court failed to vindicate the First Amendment interests at stake, this Court should reverse the dismissal and remand for further proceedings.

ARGUMENT

I. The District Court Applied The Wrong First Amendment Standard

The district court applied the wrong First Amendment standard because it failed to appreciate the constitutional baseline and wrongly deemed the mandatory disclosure purely factual and uncontroversial. The Disclosure Act should have been subjected to strict scrutiny because it is content- and viewpoint-based and because *Zauderer* review cannot apply.

A. Strict Scrutiny Applies To The Disclosure Act

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." "Above 'all else, the First Amendment means that government' generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (plurality) (quoting *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Laws that regulate speech must meet a high standard. "As a general matter," "content-based regulations . . . are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 585 U.S. 755, 766 (2018) (capitalization altered). Laws that "discriminat[e] among viewpoints"—the most "blatant and egregious form of content discrimination"—must likewise satisfy "strict scrutiny." *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164, 168 (2015) (cleaned).

The Disclosure Act is both content- and viewpoint-based. *First*, a law "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163.

That describes the Disclosure Act because it "compel[s] individuals to speak a particular message" by mandating a script about the use of algorithmic pricing. *NIFLA*, 585 U.S. at 766 (cleaned). This Court "treat[s] a law compelling . . . speech like any other content-based regulation because mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Volokh v. James*, 148 F.4th 71, 84 (2d Cir. 2025) (cleaned up); *accord* Appellant's Br. 24–29.

The Disclosure Act is content-based for the additional reason that it "disfavors marketing, that is, speech with particular content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011); *see also Barr*, 591 U.S. at 619. Although covered organizations may employ "an algorithm that uses personal data" for all sorts of reasons, the Act's speech requirement only applies to marketing messages. *See* N.Y. Gen. Bus. Law §§ 349-a(1)(f), 349-a(2). The Act does not purport to regulate nonmarketing messages that use personal data. For example, the Act does not purport to regulate nonprofits that solicit donations at an amount set using algorithms and personal data—even though, presumably, these solicitations would trigger the same alleged state interests.

Second, the Disclosure Act regulates based on viewpoint. "[V]iewpoint discrimination is uniquely harmful to a free and democratic society." *NRA v. Vullo*, 602 U.S. 175, 187 (2024). Viewpoint-based laws regulate not just "subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

To assess whether a law is viewpoint discriminatory, courts consider its "practical operation" and its "purpose." *Sorrell*, 564 U.S. at 565. Both show viewpoint regulation here. On its face and in practical effect, the law forces businesses to ominously declare, "THIS PRICE WAS SET BY AN ALGORITHM USING YOUR PERSONAL DATA." *See* N.Y. Gen. Bus. Law § 349-a(2). The practical effect is thus to force them to communicate New York's view that use of algorithmic pricing is a relevant consideration in a purchasing decision and, further, that this is an objectionable practice worthy of a state-mandated warning.

The record shows New York's view is wrong (or at least subject to dispute). For example, an NRF member declared under penalty of perjury that the disclosure is "categorically false" in suggesting that the member is "misusing [customers'] information or not respecting their

privacy." A-31 (¶ 8). The State's misleading viewpoint is enabled by the statute's broad definitions of terms like "algorithm" and "personal data"—allowing the warning to reach indisputably innocuous pricing conditions, such as loyalty discounts. *See* N.Y. Gen. Bus. Law § 349-a(1)(a), (d). By "requir[ing] disclosure of [pricing] policies that reference or encompass the State's definition[s]," the law "require[s] companies to convey a policy view" about the propriety and fairness of algorithmic pricing. *See Volokh*, 148 F.4th at 93–94. "[V]iewpoint discrimination is" thus "inherent in the design and structure of this Act." *NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring).

Viewpoint regulation is, after all, the statute's avowed purpose. A sponsor to the Disclosure Act's predecessor bill candidly asserted her mistaken view that all "[a]lgorithmic pricing is deceptive and unfair" because it "benefits retailers at the expense of consumers." S.B. S7033, 2025–26 Reg. Sess., Sponsor Memo (2025), https://tinyurl.com/mu5jdabe ("Senate Sponsor Memo"); *see also* D. Ct. Dkt. 30 at 21 n.10 (conceding that "the legislative history [for this bill] is instructive"). And in its brief below, New York even admitted that the law is intended to further its view "about fairness [and] personal privacy" with regard to algorithmic

pricing. D. Ct. Dkt. 30 at 14. The viewpoint regulation here is thus especially "constitutionally offensive" because it is designed to "stigmatize" certain pricing practices and "shape [the company's] behavior" through speech. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

Because the Disclosure Act regulates based on viewpoint, the district court should have subjected it to strict scrutiny regardless of whether it is "commercial speech." *See Matal v. Tam*, 582 U.S. 218, 251 (2017) (Kennedy, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring) ("commercial speech . . . does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality"); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018) ("*Matal* instructs that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context"); *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 139 (3d Cir. 2020) ("We realize, of course, that it may be appropriate to apply strict scrutiny to a restriction on commercial speech that is viewpoint-based."); *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015) ("merely wrapping a law in the cloak of 'commercial speech'

does not immunize it from the highest form of scrutiny due government attempts to discriminate on the basis of viewpoint"); *accord* Richard F. Duncan, *Viewpoint Compulsions*, 61 Washburn L.J. 251, 252 (2022) ("The [Supreme] Court has *never* upheld a law imposing a viewpoint-based restriction on free speech." (emphasis added)); *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1125 (9th Cir. 2023) (VanDyke, J., concurring) ("The Supreme Court has never invoked *Central Hudson* to apply intermediate scrutiny to a law that discriminates between viewpoints, even in the commercial context."); Appellant's Br. 23 n.6 ("NRF preserves the argument that strict scrutiny should apply"). But the district court never addressed this binding caselaw.

Instead, the district court defaulted to a more lenient standard of review under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). That gets things exactly backwards. The Supreme Court has made clear that *Zauderer* is an *exception* to the "stringent standard" that "general[ly]" applies when the Government "compel[s] individuals to speak a particular message." *NIFLA*, 585 U.S. at 766–69. It is thus the State's burden to show that *Zauderer* applies—

not, as the district court wrongly thought, the plaintiff's burden to show "that *Zauderer* does not apply." SPA-11.

The district court's error rests on two false premises. *First*, the district court wrongly believed that "disclosure mandates" warrant "more forgiving First Amendment scrutiny" than "restrictions" because the former are less harmful. SPA-9–10. But the Supreme Court has held otherwise. The "difference between compelled speech and compelled silence," the Court has explained, "is without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796–97 (1988) (recognizing "constitutional equivalence"). If anything, the "demeaning" nature of "[f]orcing free and independent individuals to endorse ideas they find objectionable" results in "additional damage" that warrants "*even more*" scrutiny "than a law demanding silence." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 893 (2018) (emphasis added); *see also id.* at 892 ("measures compelling speech are at least as threatening").

Second, the district court assumed—without analysis—that viewpoint discrimination "is not presented by this case." SPA-10 n.3. But the Disclosure Act *is* viewpoint-based for the reasons explained above.

By eliding the nature of the State's speech regulation, the district court rejected this Court's teaching "that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context." *Wandering Dago*, 879 F.3d at 39.

B. *Zauderer* Cannot Apply To The Disclosure Act

In addition to overlooking the reasons to apply strict scrutiny, the district court failed to recognize the "limits to *Zauderer*'s applicability." *Volokh*, 148 F.4th at 87–88. The Supreme Court explained in *NIFLA* that "*Zauderer* has no application" unless a disclosure is "[1] limited to purely factual and uncontroversial information [2] about the terms under which services will be available." 585 U.S. at 768–69 (alterations accepted; quotation marks omitted); *see id.* at 769 ("*Zauderer* does not apply outside of these circumstances").

NRF correctly explains (at 32–40) that *Zauderer* is inapplicable under the first prong of *NIFLA*: the disclosure here is not "limited to purely factual and uncontroversial information." *NIFLA*, 585 U.S. at 768. For the reasons NRF explains and for many of the same reasons the law is viewpoint-based, the Disclosure Act compels a contested message in an area of deep controversy. But that is not all.

Zauderer is also inapplicable under the second prong of *NIFLA*. The State's compelled disclosure is not "about the terms under which services will be available." *NIFLA*, 585 U.S. at 768–69 (rejecting application of *Zauderer* on this ground); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263–64 (2d Cir. 2014) (similar). To be sure, *price* is a term under which a business's services will be made available, as this Court explained where a law required "the disclosure" of "item pricing." *Poughkeepsie Supermarket Corp. v. Dutchess Cnty., N.Y.*, 648 F. App'x 156, 158 (2d Cir. 2016). But the Disclosure Act does not require businesses to disclose their price. Instead, a business must disclose information about *how* the business *set* its price. That is a disclosure about a business's internal decisionmaking, not of a term under which a good or service will be sold. *See, e.g.*, *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (rejecting argument that First Amendment allows states to "require manufacturers to disclose" "information . . . about their production methods"); *Merck & Co. v. HHS*, 962 F.3d 531, 539 (D.C. Cir. 2020) (holding "disclosure of" a pricing input—"wholesale acquisition cost"—did not "promote[ ] price

transparency in any material way"). Accordingly, "*Zauderer* has no application here." *NIFLA*, 585 U.S. at 769.

The district court ducked this flaw with a single conclusory sentence. It asserted with no analysis that the "use [of] algorithmic pricing . . . is undoubtedly part and parcel of the terms on which the product is being offered to the consumer." SPA-20. But that unadorned assertion fails to grapple with the caselaw distinguishing the *terms* of a product offering with the *inputs* to those terms. *See, e.g.*, *Amestoy*, 92 F.3d at 74; *Merck & Co.*, 962 F.3d at 539. The district court's failure to recognize that distinction caused it to wrongly apply *Zauderer* and warrants reversal.

II. The Disclosure Act Fails Any First Amendment Standard.

Even if *Zauderer* review were the correct standard (it is not), the district court erred in how it applied that standard. It failed to hold New York to its burden—"[e]ven under *Zauderer*"—to put forward a "potentially real, not purely hypothetical" justification for its speech regulation and to fashion a disclosure that is neither "unjustified [n]or unduly burdensome." *See NIFLA*, 585 U.S. at 776; *see also id.* at 776–78 (equating *Zauderer* review with intermediate scrutiny and rejecting

disclosure requirement); *Am. Meat Inst. v. USDA*, 760 F.3d 18, 33 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (explaining *Zauderer* review is "far more stringent than mere rational basis review").

A. The District Court Wrongly Credited Mere Consumer Curiosity As A Legitimate Government Interest.

It is blackletter law in this Circuit that "consumer curiosity alone is" not "enough" to sustain a compelled disclosure requirement, in the commercial context or any other. *Amestoy*, 92 F.3d at 74. Yet here, that is precisely the interest wrongly credited by the district court.

The district court held that New York has an interest in "increas[ing] transparency." SPA-23 (quoting legislative history). But calling a law "a transparency measure" raises a question: "*transparency into what?*" *X Corp. v. Bonta*, 116 F.4th 888, 902 (9th Cir. 2024) (emphasis altered). After all, if merely "providing consumers with information" were a sufficient state interest, governments could compel disclosures about anything they want. That a speech compulsion provides consumers with some information about something is "true of any and all disclosure requirements." *Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh, J.).

But here, a desire for "transparency" alone was the beginning and the end of the supposed state interest credited by the district court. It characterized New York's goal as "ensuring that consumers are informed" about algorithmic pricing, SPA-21, "enhancing consumers' awareness" of such pricing, SPA-22 (alterations accepted), and facilitating "informed decisions," SPA-23. But that kind of "right to know" independent of the *reason* for obtaining the information—*i.e.*, transparency for transparency's sake—is *exactly* what this Court has deemed "insufficient to justify compromising protected constitutional rights." *Amestoy*, 92 F.3d at 73. Because New York did not advance a sufficient interest, the district court should have found the Disclosure Act unlawful even under *Zauderer*. *See* Appellant's Br. 44–45.

The district court rejected this outcome because it misread two of this Court's decisions. First, it purported to distinguish *Amestoy*, asserting: "the disclosure here reasonably bears on the 'final product' and therefore rises above mere gratification of 'consumer curiosity.'" SPA-24–25. But that is a non-sequitur. That the disclosure in *Amestoy* was about "a production method" that did not impact the "final product" helped to show that the State lacked a "'real' harm[ ]" and so had to resort

to "consumer interest alone." 92 F.3d at 73. But that does not mean every disclosure about a final product is *not* limited to consumer curiosity—as this case shows. Whether about a production method or a final product, the Court "h[e]ld that consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context." *Id.* at 74 (citation omitted).[2]

The district court next misread *National Electrical Manufacturers Association (NEMA) v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). It cited that case for the proposition that "better informing consumers about the products they purchase . . . satisfied *Zauderer* review." SPA24–25 (quotations omitted). But that omits the actual "substantial interest" upheld by *NEMA*: "protecting human health and the environment from mercury poisoning." 272 F.3d at 115 n.6. The law there sought to "increas[e] consumer awareness of the presence of mercury in a variety of products" as a means to "reduce the amount of mercury released into

[2] In any event, the means by which a business sets its prices is analogous to the "production method" at issue in *Amestoy*. *See supra* I.B.

the environment."[3] *Id.* at 115. Here, the law does not increase consumer awareness as a means to further a health-and-safety (or any other) interest. Transparency is the *entire* goal, and that, this Court explained, cannot sustain a commercial disclosure. *Amestoy*, 92 F.3d at 74 ("consumer interest *alone*" not "sufficient" (emphasis added)); *Am. Meat Inst.*, 760 F.3d at 32 (Kavanaugh, J.) ("I agree with the Second Circuit's statement in *Amestoy* that 'consumer curiosity alone is not a strong enough state interest' to sustain a compelled commercial disclosure.").

To accept the district court's contrary analysis would invite "no end to the information that states could require." *Amestoy*, 92 F.3d at 74. States, in the name of "help[ing] consumers make informed decisions," Senate Sponsor Memo, could require disclosures about all sorts of contentious topics—such as "whether their U.S.-made product was made by U.S. citizens and not by illegal immigrants" or information about "the political affiliation of a business's owners," *Am. Meat Inst.*, 760 F.3d at

[3] This Court's decision in *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009), employed a similar analysis. There, the Government required calorie disclosures to further its demonstrated "interest in preventing obesity" and so, unlike here, offered an interest "other than the gratification of consumer curiosity." *Id.* at 134 (quotations omitted).

32 (Kavanaugh, J.); *see ibid.* ("These are not far-fetched hypotheticals, particularly at the state or local level."). This Court should not bless the district court's departure down that slippery slope.

Thus, New York's consumer-curiosity interest does not suffice—even under *Zauderer*.

B. The District Court Did Not Require Adequate Tailoring

The district court also erred because it failed to hold the Government to its burden on tailoring. Under *Zauderer*, the State must show that its disclosure requirement is not "unjustified or unduly burdensome." 471 U.S. at 651; *see also NIFLA*, 585 U.S. at 776 ("Importantly, [the State] has the burden to prove that the [disclosure requirement] is neither unjustified nor unduly burdensome."). New York failed to meet that burden here.

First, New York failed to show that the Disclosure Act was justified. To make that showing, it needed to "demonstrate[ ] . . . cognizable harms," *Amestoy*, 92 F.3d at 74, that the Disclosure Act "remed[ies]," *NIFLA*, 585 U.S. at 776. As explained above, the only "harm" asserted by the State is that consumers will not know why they are being charged a given price. *See* Senate Sponsor Memo ("Consumers should not be

charged differently for the same product *without knowing why*." (emphasis added)). Even assuming that such a harm is real and cognizable, *but see supra* Section II.A, the Disclosure Act fails to "alleviate [it] to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). That is because even with the State's disclosure, a consumer will lack meaningful insight into price setting decisions. Indeed, many factors influence prices, including basic principles of supply and demand, and even with the state-mandated disclosure, consumers will never know which factor contributed most to a particular difference in price.

Although New York cannot show the Act *remedies* any consumer harm, there is ample evidence the Act will *cause* consumer harm. Algorithmic pricing benefits consumers. As NRF points out (at 34 & n.10), the quintessential algorithmic-pricing use cases are "loyalty programs," and the retailers represented in this suit use these and other programs to *reduce* prices. Research bears this out. In a report to the Organisation for Economic Co-operation and Development ("OECD"), the federal government concluded that "personalized pricing" "tend[s] to improve total welfare"—including "consumer welfare"—by, *inter alia*, "enhancing competition." Personalised Pricing in the Digital Era – Note

by the United States, OECD, ¶ 13 (Nov. 2018), https://tinyurl.com/yc3cdmfk; *see id.* ¶ 20 ("personalized pricing, in and of itself, provides no justification for [regulatory] intervention"). And a recent study that analyzed "pricing data for around 50,000 grocery products" found "genuine savings" for the "overwhelming majority" of products when businesses employed "loyalty schemes." U.K. Competition & Markets Authority, Loyalty Pricing in the Groceries Sector, Summary, ¶¶ 4–5 (Nov. 27, 2024), https://tinyurl.com/yv5cspd4. And this is to say nothing of the benefits of algorithmic pricing documented in the complaint. *See* A-15 (Compl. ¶ 15 & nn.1–2).

The district court missed these issues because it failed to properly scrutinize New York's asserted harm. In the district court's view, it was enough for the State to show that companies do in fact "use personalized algorithmic pricing." SPA-23. But that simply assumes the State's conclusion that algorithmic pricing is in fact harmful and alleviated by a disclosure requirement—with nothing in the record to substantiate those claims. As Appellants explain (at 19, 40–41), whether the Disclosure Act satisfies the First Amendment is "an 'extremely fact-specific analysis'" that at minimum entitled Appellants to discovery. Thus, the district

court erred because it credited "the harms [New York] recite[d]," without requiring the State to "demonstrate that" they "are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770–71.

Second, New York failed to show that the Disclosure Act is not unduly burdensome. Despite the benefits of algorithmic pricing, New York's speech compulsion appears to be designed to deter the practice. *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019) (explaining courts "are not required to exhibit a naiveté from which ordinary citizens are free" (quotations omitted)). Although framed as a transparency measure, the legislative history shows that New York thinks "[a]lgorithmic pricing is" categorically "deceptive and unfair." Senate Sponsor Memo. That mistaken viewpoint appears to have motivated a compelled message that is designed to denigrate goods and services sold using algorithmic pricing. *See supra* Section I.A.

The burden is apparent from the State's mandatory script. Forcing a business to recite that its "PRICE WAS SET BY AN ALGORITHM USING YOUR PERSONAL DATA," N.Y. Gen. Bus. Law § 349-a(2), implies a nefarious scheme involving sensitive, private information. But

the State's capacious definitions of "algorithm" (any pricing rule) and "consumer data" (anything about a customer), *id.* § 349-a(1)(a), (d), cover obviously innocuous practices like senior discounts, reduced prices for students, customer-loyalty programs, shopping-cart price cuts, and more. The average person would hardly take offense to these practices and would be unlikely to think that a student discount was "set by an algorithm using your personal data."

Courts routinely reject as too-clever-by-half government attempts to justify such burdensome, harmful disclosures through bespoke definitions. *See, e.g.*, *Nat'l Ass'n of Mfrs.*, 800 F.3d at 529 ("If the law were otherwise . . . companies could be compelled to state that their products are not 'environmentally sustainable' or 'fair trade' if the government provided 'factual' definitions of those slogans—even if the companies vehemently disagreed that their products were 'unsustainable' or 'unfair.'" (cleaned up)); *cf. Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) ("Even if one assumes that the State's definition of 'sexually explicit' is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term.").

Not only is the State's message ominous on its face, but the statute requires it to be delivered in a manner evidently designed to maximize harm to the business's own message. Specifically, the State requires that its script be displayed "clear[ly] and conspicuous[ly]" on *any* communication that "directly or indirectly" discusses a "good or service" sold using a personalized algorithmic price. N.Y. Gen. Bus. Law § 349-a(2). Thus, New York's compelled message must be delivered precisely when a company seeks prospective customers' business. Indeed, for many businesses, the State's burdensome message will "effectively rule[ ] out the possibility of having [a pricing message] in the first place." *NIFLA*, 585 U.S. at 778 (quotations omitted).

The district court erred because it rejected this practical business reality. It claimed without support in the record (or the complaint, taken as true) that this onerous disclosure requirement "does not 'interfere with plaintiffs' members' greater message or mission." SPA-25 (alterations accepted). But the complaint's plausible allegations (not to mention sworn testimony) flatly contradict that bare judicial assertion, Appellant's Br. 53–54, and so does "simple common sense," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). An ominous, all-caps

message about the customer's "personal data" at the point of sale will obviously undermine a business's message to consumers.

CONCLUSION

The Court should reverse the dismissal and remand for further proceedings.

January 13, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, on January 13, 2026, that:

1. This document complies with the word limit under Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29.1(c) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,328 words.

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/s/ Jeremy J. Broggi
Jeremy J. Broggi

CERTIFICATE OF SERVICE

I certify that on January 13, 2026, a true and correct copy of this Brief was filed and served electronically upon counsel of record registered with the Court's CM/ECF system.

/s/ Jeremy J. Broggi
Jeremy J. Broggi