

# First Amendment Tech Transparency Roadmap

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**T**ransparency is [often considered](#) the cornerstone of [good technology governance](#) and best industry practice – whether applied to social media platforms or AI developers and deployers. At the same time, when transparency mandates are imposed by the government, they can implicate the First Amendment. This guide intends to help policymakers effectively navigate rapidly developing and often contradictory First Amendment precedent to empower legislation that would mandate meaningful transparency about technology and the way it affects people's rights and lives.

## What is Compelled Speech?

Government requirements that individuals or entities “speak a particular message” are considered compelled speech. Compelled speech is generally subject to strict scrutiny - the most stringent form of First Amendment review. Courts recognize, however, that certain types of compelled speech are more justifiable than others – for example, relating to product disclosures. These more justifiable types of compelled speech, therefore, are subject to a lower standard of First Amendment review. Transparency mandates are one form of compelled speech.

Lawmakers should tailor transparency requirements to the appropriate level of First Amendment scrutiny to ensure the mandates stand on strong legal ground. Tech transparency requirements often fall into one of three categories, each with their own standard of First Amendment review:

- **Disclosures About Regulated Conduct.** The government often compels regulated entities to provide information about compliance with regulatory requirements - e.g., SEC filings. The Supreme Court has long recognized that compelled speech can be justified as [“part of a far broader regulatory system that does not principally concern speech.”](#) These disclosures are subject to a lenient form of First Amendment review. If the underlying regulatory requirement relates to speech itself – including editorial decision-making – then it may be better understood to be “speech about speech.”
- **Factual & Uncontroversial Commercial Disclosures.** Commercial speech is speech that “does no more than propose a commercial transaction” or that relates “solely to the economic interests of the speaker and its audience.” Common examples include advertising and product labels. Commercial speech is reviewed under an intermediate form of First Amendment review. One subset of commercial speech requirements, however – namely those that compel [“factual and uncontroversial information about the terms under which . . . services will be available”](#) – is subject to a lower standard of First Amendment review than other kinds of commercial speech.
- **Speech About Speech.** [“Speech about speech”](#) is a helpful way to think about transparency requirements (i.e., compelled speech) that implicate and burden underlying protected expression. Speech about speech comes up frequently in tech policy due to the editorial decision-making inherent to the design of social media platforms and AI models. Where transparency mandates are [“inextricably intertwined”](#) with and burden underlying fully protected expression, such as editorial decision-making by platforms and AI developers, those mandated disclosures are best understood as “speech about speech.” These disclosures are likely to be subject to stringent First Amendment review, including strict scrutiny.



**Figure 1. How to Navigate the First Amendment to Empower Transparency.**

Transparency mandates can implicate the First Amendment. The type of disclosure will determine how closely a court will scrutinize the requirement.

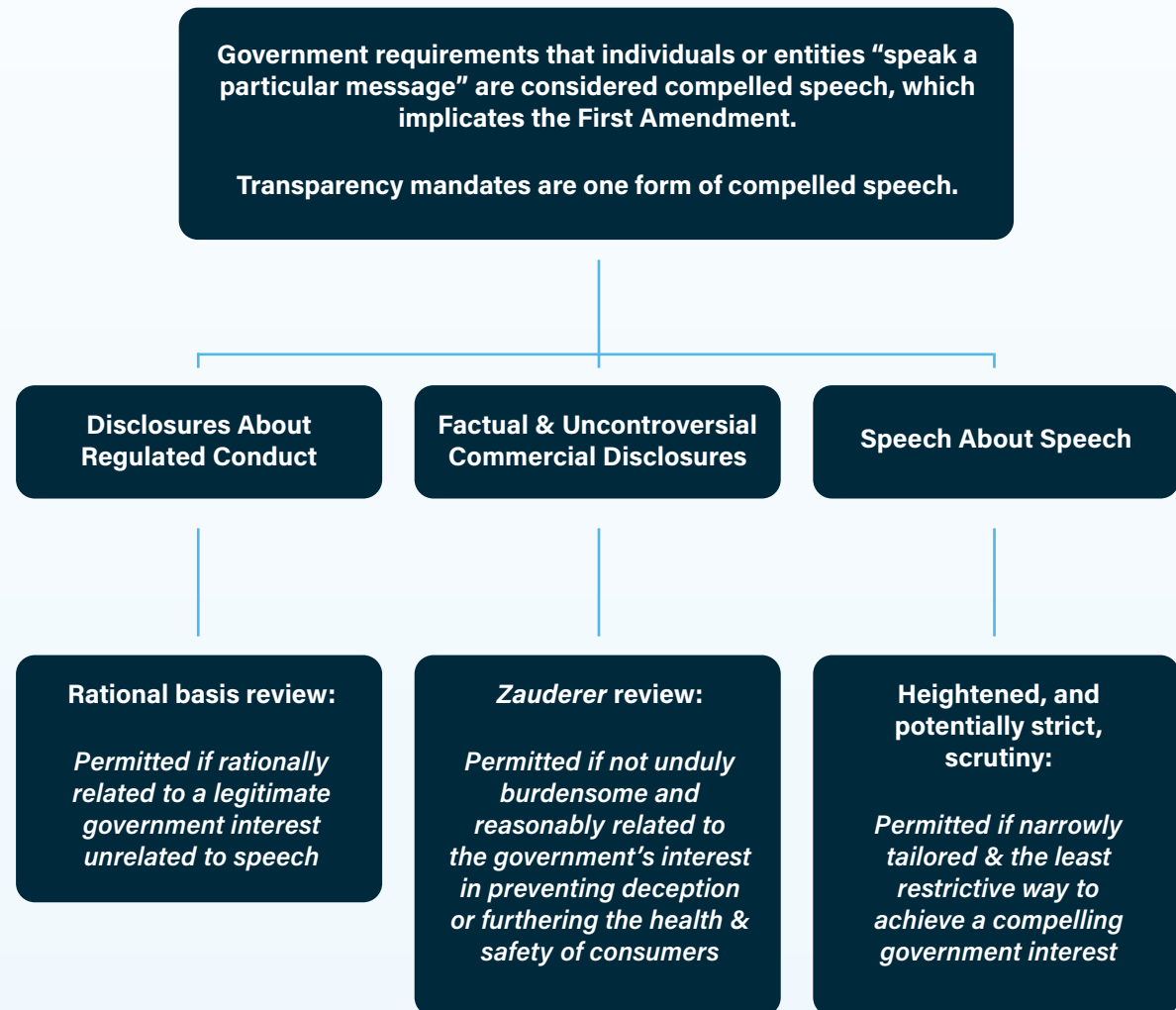
*This chart provides an overview of these possibilities – Table 1 goes into more detail examining each.*

**Does the requirement compel speech?**

**What kind of speech does the transparency requirement compel?**

**What is the likely standard of First Amendment review?**

## What Standard of Review Likely Applies?



Transparency Type	Examples	Likely Standard of Review
Disclosures About Regulated Conduct	<ul style="list-style-type: none"> <li>Requiring a deployer of AI that screens job applications to submit evidence of compliance with Title VII of the Civil Rights Act to the Equal Employment Opportunity Commission (EEOC), which is then posted publicly.</li> <li>Requiring an AI developer to submit documentation demonstrating its compliance with a newly-enacted requirement that its data centers be powered by at least 50% renewable energy.</li> </ul>	<p><b>Rational Basis Review</b></p> <p>Disclosures necessary to effectuate a broader regulatory regime, unrelated to speech, are evaluated under varying standards. If tailored appropriately, however, regulatory disclosures should be subject to a lenient standard of review if rationally related to a legitimate government interest. These mandates are most likely to survive First Amendment review if they are closely related to underlying regulatory requirements.</p> <p><b>Tailoring Considerations</b></p> <p>Recent litigation has called <a href="#">some regulatory disclosures</a> into question. To ensure regulatory disclosures are subject to a lower standard of review and to minimize the risk of litigation, policymakers should tailor regulatory disclosures as closely as possible to regulatory requirements.</p> <p><b>Helpful Case Law</b></p> <ul style="list-style-type: none"> <li><a href="#">University of Pennsylvania v. EEOC</a> – holding that the burden of disclosing tenure discussion records was justified as part of the EEOC’s statutory authority to “detect and remedy instances of discrimination.”</li> <li><a href="#">Glickman v. Wileman Brothers &amp; Elliot, Inc.</a> – upholding compelled speech (in the form of monetary contributions) as part of a broader regulatory scheme unrelated to speech.</li> </ul>



Table 1. How to Navigate the First Amendment to Empower Transparency.

Transparency Type	Examples	Likely Standard of Review
<b>Factual &amp; Uncontroversial Commercial Disclosures</b>	<ul style="list-style-type: none"> <li>Requiring the deployer of a subscription chatbot to include a disclaimer that responses are generated with AI and may contain errors.</li> <li>Requiring a social media platform to post its terms of service.</li> </ul>	<p><b>Zauderer Review</b></p> <p>Requirements to convey “<a href="#">factual and uncontroversial information about the terms under which . . . services will be available</a>” relating to the economic interests of the speaker and its audience are often evaluated by the test set out in the case <i>Zauderer v. Office of Disciplinary Counsel</i>. Under the <i>Zauderer</i> line of cases, the government may require such transparency so long as it is not unduly burdensome and is reasonably related to the State’s interest in preventing deception or furthering health and safety of consumers.</p> <p><b>Tailoring Considerations</b></p> <ul style="list-style-type: none"> <li>Disclosures must serve a legitimate government interest, which may not include the suppression of lawful speech or “<a href="#">ideological balance</a>.”</li> <li>Disclosure mandates that require companies to convey messages with which they disagree or convey a moral message may not be considered “factual” or “uncontroversial” and, therefore, may be subject to a higher standard of review – e.g.:             <ul style="list-style-type: none"> <li>Requiring a social media platform to include a Surgeon General Warning on its homepage stating that social media use is harmful to children.</li> <li>Requiring a generative AI developer to include in its terms of service that AI is rapidly developing and its use may pose existential risks to humanity.</li> </ul> </li> <li>Even factual and uncontroversial speech compulsions can be struck down if they are too burdensome. Lawmakers should consider how burdens might be experienced differently depending on company size to avoid anticompetitive effects.</li> </ul> <p><b>Helpful Case Law</b></p> <ul style="list-style-type: none"> <li><i>CTIA v. City of Berkeley</i> – upholding a requirement that cell phone retailers provide consumers with a safety warning about radio frequency exposure.</li> <li><i>NIFLA v. Becerra</i> – striking down mandated disclosures about reproductive health services and holding that <i>Zauderer</i> could not be satisfied because mandating disclosure about abortion was “anything but “uncontroversial.”</li> <li><i>Entertainment Software Association v. Blagojevich</i> – holding that a requirement compelling speech about sexually explicit video games was not “purely factual and uncontroversial” and thus subject to a higher level of First Amendment scrutiny.</li> </ul>



Table 1 (cont.). How to Navigate the First Amendment to Empower Transparency.

Transparency Type	Examples	Likely Standard of Review
Speech About Speech	<ul style="list-style-type: none"> <li>Requiring a social media platform to disclose how it moderates content or employs editorial tools to mitigate harm to children.</li> <li>Requiring a generative AI developer to disclose its policies and model training procedures to prevent outputs that are hate speech or might include political misinformation.</li> </ul>	<p><b>Heightened, and Potentially Strict, Scrutiny</b></p> <p>While case law is still developing, the Supreme Court’s recent decision in <a href="#">Moody v. NetChoice</a> and other legal precedent suggests that transparency requirements aimed at particular kinds of content and how entities employ First Amendment protected editorial decision-making (e.g., content moderation decisions on social media news feeds) may be subject to heightened judicial scrutiny – up to and including strict scrutiny. Where a transparency mandate is “<a href="#">inextricably intertwined</a>” with fully protected speech, the transparency mandate may be subject to the most stringent form of First Amendment review - strict scrutiny. Under a strict scrutiny review, the government must prove that the disclosure is the least restrictive means of advancing a compelling government interest. Laws subject to strict scrutiny rarely survive legal review.</p> <p><b>Tailoring Considerations</b></p> <ul style="list-style-type: none"> <li>Even in the commercial context, transparency that burdens speech entitled to full First Amendment protection may need to pass a strict scrutiny test.</li> <li>Content-based compulsions of speech – including about particular kinds of speech – are generally subject to strict scrutiny.</li> <li><a href="#">Moody v. NetChoice</a> makes clear that editorial decision-making (e.g., content moderation) is entitled to First Amendment protection. Prior case law suggests that transparency requirements that are “inextricably intertwined” with editorial decision-making may be subject to heightened judicial scrutiny.</li> </ul> <p><b>Helpful Case Law</b></p> <ul style="list-style-type: none"> <li><a href="#">X Corp. v. Bonta</a> – enjoining transparency mandates about constitutionally-protected content moderation activities and the treatment of certain kinds of speech, including misinformation and hate speech.</li> <li><a href="#">Herbert v. Lando</a> – stating that “no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest” would survive constitutional scrutiny.</li> <li><a href="#">Riley v. Nat’l Fed’n of Blind</a> – observing that where compelled commercial speech is “inextricably intertwined” with otherwise fully protected speech, the mandate is subject to the test for fully protected expression, not more deferential commercial speech principles.</li> </ul>



Table 1 (cont.). How to Navigate the First Amendment to Empower Transparency.

# Find out more about CDT's work on the freedom of online expression at [cdt.org/free-speech](https://cdt.org/free-speech).

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