No. 22-393

In The
Supreme Court of the United States

NETCHOICE, LLC, AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Cross-Petitioners,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Cross-Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF PROF. ERIC GOLDMAN IN SUPPORT OF CROSS-PETITIONERS

VENKAT BALASUBRAMANI
Counsel of Record
FOCAL PLLC
900 1st Avenue S, Suite 201
Seattle, WA 98134
venkat@focallaw.com
(206) 529-4827

November 23, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Prof. Eric Goldman is a law professor and Associate Dean for Research at Santa Clara University School of Law (writing on his own behalf, not on behalf of his employer or anyone else). Prof. Goldman has been researching and writing about Internet Law for thirty years, and his recent research focuses on the censorial consequences when government regulators impose and enforce transparency obligations on content publishers.[2] Prof. Goldman submits this *amicus* brief to highlight the Constitutional problems caused by Florida's demand for transparency from online publishers and the need for more clarity from the Court to address the imminent proliferation of compelled editorial transparency laws.

SUMMARY OF ARGUMENT

The name of Florida's "social media censorship" law, SB 7072, describes exactly what the law does. Florida censored the publishers of users' social media

[1] Counsel of record for all parties were given notice via email of *amicus*' intent to file this brief on November 17, 2022. While not 10 days notice, all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* funded its preparation or submission.

[2] Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203 (2022); Eric Goldman, Zauderer *and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE ___ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4246090.

content.[3] Florida did so directly by interfering with online publishers' content moderation decisions and overriding their editorial freedoms. Florida also implemented censorship indirectly by compelling publishers to disclose details about their editorial decision-making and operations—a novel policy solution that has no clear analogue in the traditional publishing world, where such intrusions would almost certainly be viewed as obviously and unacceptably censorial.

The Eleventh Circuit upheld most of SB 7072's disclosure obligations by citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). However, *Zauderer* does not apply to SB 7072's disclosure obligations because they do not meet the preconditions for the *Zauderer* test; and in the unlikely circumstance that the *Zauderer* test does apply, the provisions do not survive its scrutiny. The panel reached its conclusion only by misapplying both the *Zauderer* test's preconditions and factors.

While the panel's *Zauderer* analysis is problematic, it highlights how lower courts and regulators routinely misunderstand and misapply *Zauderer*. These problems will increasingly jeopardize the freedoms of

---

[3] Although social media "platforms" may structure their editorial operations differently than traditional print publishers, they unquestionably "publish" user-submitted content. *E.g.*, *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1186-87 (N.D. Cal. 2022) ("Like a newspaper or a news network, Twitter makes decisions about what content to include, exclude, moderate, filter, label, restrict, or promote, and those decisions are protected by the First Amendment.").

speech and press online as regulators ratchet up their censorial efforts. The Court should grant the cross-petition for certiorari to clarify that *Zauderer* does not apply to compelled disclosures about publishers' editorial decisions and operations.

ARGUMENT

I. Editorial Transparency Laws Are Proliferating Rapidly, Despite the Risks They Pose to Speech and Press Freedoms

In a broad effort to censor online speech, regulators are experimenting with diverse regulatory interventions to control the publication decisions of online publishers of third-party content. This includes compelled editorial transparency laws.

Editorial Transparency Defined

"Compelled editorial transparency" refers to "requirements for publishers to disclose information about their editorial operations and decisions." Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203, 1207 (2022). Compelled editorial transparency laws are a very recent phenomenon. There are few, if any, historical antecedents of regulators forcing disclosures about the editorial operations or decisions of traditional publishers such as newspapers or book publishers. Such intrusions were seemingly foreclosed by decisions like *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974),

which emphasized the primacy of publishers' editorial freedom. Those principles should still apply today.

Compelled editorial transparency provisions can be taxonomized into four categories, each of which poses risks of censorship (*see* Eric Goldman, Zauderer *and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE ___ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4246090 (draft at pp. 10-11)):

(1) *disclosures of the publisher's editorial standards*, such as a requirement that a publisher disclose its editorial policies and rules in its terms of service (TOS).

For example, Florida says a "social media platform must publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban." FLA. STATUTES § 501.2041(2)(a). Further, a "social media platform must inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days." *Id.* § 501.2041(2)(c). Also, a "social media platform must provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning." *Id.* § 501.2041(2)(g).

(2) *explanations* of the publisher's editorial decisions, such as explanations informing content authors why the publisher made its editorial decisions.

For example, Florida says a "social media platform may not censor or shadow ban a user's content or material or deplatform a user from the social media platform [w]ithout notifying the user who posted or attempted to post the content or material." *Id.* § 501.2041(2)(d). The notice must "[i]nclude a thorough rationale explaining the reason that the social media platform censored the user" and "a precise and thorough explanation of how the social media platform became aware of the censored content or material." *Id.* § 501.2041(3)(c)-(d).

(3) *statistics* about the publisher's editorial decisions and operations, such as the number of editorial actions the publisher took and why.

For example, Florida says a "social media platform must [p]rovide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts [and] [p]rovide, upon request, a user with the number of other individual platform participants who were provided or shown content or posts." *Id.* § 501.2041(2)(e).

(4) "*source data*" *disclosures* refer to the disclosure of materials the publisher gathered during the publication process, including material that ultimately was not published. Even if a statute doesn't expressly require publishers to archive their source data or share it with investigators or enforcers, source data disclosures are inherently required by other editorial transparency requirements because regulators often need

access to publishers' source data (such as the publisher's corpus of both published and rejected/removed user content) to verify the accuracy of a publisher's disclosures.

For example, Florida says: "[i]f the department, by its own inquiry or as a result of a complaint, suspects that a violation of this section is imminent, occurring, or has occurred, the department may investigate the suspected violation in accordance with this part . . . [T]he department's investigative powers include, but are not limited to, the ability to subpoena any algorithm used by a social media platform related to any alleged violation." *Id.* § 501.2041(5) & (8).

To better understand how source data access will arise in an investigation or enforcement, consider what materials related to a social media publisher's editorial operations would be relevant to the case. If the department claimed that a statutorily required explanation was not sufficiently "thorough," what materials would the department need to see? If the department claimed that a social media platform did not publish all of the "standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban," what materials would the department need to see?

The reality is that the enforcement of compelled editorial transparency potentially puts government enforcers into the middle of every publication decision by a social media platform. It facilitates the enforcer's access to both published and unpublished materials,

and it invites the enforcer to second-guess the publication decisions—such as whether or not the publisher followed its own editorial standards or properly prepared its statistics. Historically, government access to publishers' source data and second-guessing of the associated editorial decisions have been highly restricted because it was considered a major intrusion into editorial freedom; yet compelled editorial transparency laws ensure such access and second-guessing.

The Proliferation of Editorial Transparency Laws

Because of their bipartisan appeal, compelled editorial transparency laws targeting Internet publishers have been widely considered in the last few years. At least four have passed in the past two years:

State Law	ES	EX	ST	SDD
FL SB 7072	X	X	X	Implied
TX HB 20	X	X	X	Implied
NY AB 7865	X	Unclear		Implied
CA AB 587	X		X	Implied

Legend:

ES = editorial standards disclosures

EX = explanations

ST = statistics disclosures

SDD = source data disclosures (implied in all cases to permit enforcement of the other requirements)

If the Constitution permits compelled disclosures about editorial operations and decisions, regulators throughout the country will embrace them as a tool to govern how people talk with each other online. As evidenced by the proliferation of disclosure laws to states beyond Florida, that embrace has already started. Thus, the Court's disposition of this case will determine if this regulatory trend will accelerate or abate.

II. The Eleventh Circuit Improperly Applied and Analyzed the *Zauderer* Test

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) articulated a novel Constitutionality test for specific types of compelled commercial speech. However, the Court has used the *Zauderer* test only twice to uphold a disclosure obligation only twice—in *Zauderer* and *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229 (2010).[4] Due to the Court's limited guidance, a lot of lore and myth have developed about what the *Zauderer* test stands for and how to apply it. The Eleventh Circuit's decision reflects that jurisprudential confusion.

[4] *NIFLA* indicated that the statute at issue did not qualify for the *Zauderer* test and the regulation would not survive *Zauderer* scrutiny. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018).

A. *Zauderer* Applies in a Narrow Set of Circumstances, Which Do Not Include Compelled Editorial Transparency

Zauderer articulated four preconditions before the test applied: (1) the regulation governs the text of advertising; (2) the regulation requires the disclosure of purely factual information; (3) the regulation requires the disclosure of uncontroversial information; and (4) the regulation requires disclosure about the terms of the advertiser's services. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985); *see* Eric Goldman, Zauderer *and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE ___ (forthcoming 2023), p.6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4246090.

When all four preconditions are satisfied, then the regulation is unconstitutional if the disclosures: (i) are unjustified; (ii) are unduly burdensome; or (iii) do not reasonably relate to preventing consumer deception. *Id.*

Many details about *Zauderer* have not been defined by the Court. For example, the Court has never defined what constitutes an "unjustified" disclosure (as distinct from unduly burdensome).

The four preconditions for the *Zauderer* test demonstrate its narrow applicability. It was not designed to be the general-purpose test for all compelled commercial disclosures. As *Zauderer* indicated, commercial speech regulations normally are evaluated using the *Central Hudson* test. *Central Hudson Gas &*

Electric Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980); and speech regulations of other corporate speech are often subjected to strict scrutiny.

B. Florida's Compelled Editorial Transparency Law Does Not Qualify for *Zauderer* Scrutiny

Given *Zauderer*'s limited application, Florida's compelled editorial transparency provisions unsurprisingly do not qualify for the *Zauderer* test. Indeed, the provisions do not satisfy *any* of the preconditions.

Advertising. *Zauderer* involved the regulation of advertising that the professional voluntarily chose to run. The subject regulations did not require the professional to create new advertising material; it instead sought to ensure that the advertising voluntarily disseminated by the advertiser did not mislead consumers due to a deceptive omission.

Florida's provisions do not limit themselves to advertising, nor do they apply only when the social media platform's voluntary disclosures may create deceptive omissions. For example, the required explanations could not be considered "advertising" under any prevailing Court definition. Furthermore, some of Florida's provisions require the social media platform to involuntarily create and disseminate new material, such as the provisions requiring view count statistics. Those statistics also are not advertising under any prevailing Court definition.

Purely Factual Disclosures. The Court has not clarified what are "purely factual" disclosures, but these should be extremely narrow. In the *Zauderer* opinion, the required disclosure was essentially a yes/no statement: does the attorney require the client to pay out-of-pocket costs? More complicated disclosures, such as how the contingency fee is computed, may not have been so simple and thus may not have been "purely factual." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 661 n.5 (1985). (Brennan, J., concurring and dissenting).

Florida's required disclosures are rarely as simple as yes/no. This is easiest to see with the required disclosures of a social media platform's editorial stanards, which are infinitely more complicated than whether costs are included in contingency fees. Pick virtually any controversial content category—such as "hate speech" or "privacy invasions"—and the publisher's policies are complex, nuanced, rapidly evolving, and based on substantial human judgment. Explanations often involve similar complexities. Statistics disclosures involve substantial judgment calls about how to classify the data, making them more like opinions than facts. None of these disclosures resemble the "purely factual" disclosures in *Zauderer* or *Milavetz*.

Uncontroversial Information. What constitutes uncontroversial information remains unclear. In *Zauderer*, disclosures about the interaction between contingency fees and out-of-pocket expenses was uncontroversial; in *NIFLA*, disclosures regarding

abortion services were about "anything but an 'uncontroversial' topic." *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018). There is a wide and unresolved gap between these two data points.

Florida's compelled editorial transparency provisions involve controversial information in several ways. First, there is enormous social controversy over what editorial standards should be adopted and enforced by online publishers. Indeed, Florida's social media censorship law was enacted in response to such controversies.

Second, all content moderation decisions are intrinsically controversial. Each decision unavoidably creates "winners" and "losers." The decision to leave content up rewards the author over objectors; a removal decision rewards objectors over the author. Whoever is on the "losing" side of the content moderation decision inevitably will criticize the outcomes and the decision-making process.

Controversy also inevitably follows from the partisan aspects of content moderation. Political partisans prefer content that champions them or their positions and object to content that champions their rivals or their rivals' views. As a result, partisans diametrically disagree on the preferred publication outcomes. This guarantees controversy over virtually every moderation decision.

Similarly, investigations into the accuracy of the disclosures can advance partisan agendas. For

example, the Attorney General of the State of Texas opened an investigation into Twitter's editorial practices in response to Twitter's suspension of then-President Donald Trump's Twitter account. *Twitter, Inc. v. Paxton*, 26 F.4th 1119 (9th Cir. 2022). Attorney General Paxton pretextually claimed that he was investigating inadequate editorial transparency, yet the investigation sought to punish Twitter for making a decision he politically disagreed with and to send the message that future editorial decisions should conform to his political agenda. *See* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203, 1226 (2022).

These investigation and enforcement risks apply regardless of which partisan team the enforcer supports. For example, the New York Attorney General could launch an investigation into the online publishers' handling of "hateful conduct" to encourage the removal of Constitutionally protected speech that does not support the AG's partisan agenda.

Given the intrinsically controversial nature of every publication decision, disclosures about editorial processes will never be "uncontroversial."

Disclosures About Offer Terms. *Zauderer*'s requirement of disclosures of offer terms makes sense in the context of advertising. This precondition becomes incoherent outside of "advertising," because the communicated information is not seeking to "offer" anything. Even so, it's obvious that some of Florida's required disclosures are not about offer terms. For example, the

explanations and statistics disclosures are about the publisher's past editorial decisions.

C. The Eleventh Circuit Incorrectly Adopted the *Zauderer* Standard

As the prior subpart illustrates, Florida's compelled editorial transparency provisions do not qualify for *Zauderer*. The Eleventh Circuit nevertheless concluded that *Zauderer*'s preconditions were satisfied—by ignoring the actual preconditions.

The Eleventh Circuit opinion says: "Although this [*Zauderer*] standard is typically applied in the context of advertising and to the government's interest in preventing consumer deception, we think it is broad enough to cover S.B. 7072's disclosure requirements—which, as the State contends, provide users with helpful information that prevents them from being misled about platforms' policies." *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1227 (2022).

This passage essentially eliminates the "advertising" precondition and interprets it to apply to any corporate disclosure that might help consumers. This is not consistent with the precedent. Advertising was the *sine qua non* of the Court's analysis in both *Zauderer* and *Milavetz*. As the majority observed in *Zauderer*, the "State has attempted only to prescribe what shall be orthodox in commercial advertising" and noted that its ruling only circumscribed "an advertiser's rights." *Zauderer*, 471 U.S. at 650-51. The Court in *NIFLA* reconfirmed that the *Zauderer* jurisprudence applies

only to regulations of "advertising." *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2374 (2018) ("the Court emphasized that the lawyer's statements in *Zauderer* would have been 'fully protected' if they were made in a context other than advertising").

Furthermore, the Eleventh Circuit did not discuss how the required disclosures were "purely factual," "uncontroversial," or related to offer terms. Essentially, the panel ignored the three other *Zauderer* preconditions. In total, then, the Eleventh Circuit panel analyzed only one of the four *Zauderer* preconditions and essentially negated that one.

Thus, the Eleventh Circuit opinion did not properly determine the law's eligibility for *Zauderer*'s deferential level of Constitutional scrutiny. The Court should grant the cross-petition for certiorari to ensure that a compelled editorial transparency law satisfies *all* of the preconditions for the *Zauderer* test before entitlement to the test's deferential scrutiny.

D. The Eleventh Circuit Incorrectly Evaluated the *Zauderer* Factors

Zauderer says a disclosure regulation that qualifies for its scrutiny will be unconstitutional if the disclosures: (i) are unjustified; (ii) are unduly burdensome; or (iii) do not reasonably relate to preventing consumer deception. The Eleventh Circuit mishandled all three factors.

Unjustified. The panel ignored this factor entirely.

Unduly Burdensome. The panel said that NetChoice didn't meet its burden to show that some of the disclosure provisions are unduly burdensome, but the panel provided no standard for distinguishing between burdensome and unduly burdensome disclosures. It nevertheless determined that the explanations requirement is unduly burdensome because it "imposes potentially significant implementation costs [and] exposes platforms to massive liability," *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1230 (2022). That is surely true. However, the other disclosure provisions also impose significant implementation and ongoing maintenance costs and expose platforms to substantial legal risks (and are problematic in many other ways), and the panel did not explain why only the explanations provision was unduly burdensome. The panel also underweighted the chilling effects and other speech burdens caused by Florida's compelled editorial transparency provisions.

Preventing Consumer Deception. The Eleventh Circuit credited Florida's goal of "ensuring that users . . . are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies." *NetChoice, LLC v. Attorney Gen*., 34 F.4th 1196, 1230 (2022). However, the statute cited no evidence that consumers were being "misled" by the existing disclosures, so the panel did not cite or point to any evidence that the required disclosures will correct any consumer deception. Furthermore, every disclosure regulation can be justified by the claim that it

will "better inform" consumers; that standard would read the factor out of the test. And the panel didn't show that the disclosures would "fully" inform consumers, or even inform them of anything that matters to them.

The Court should grant the cross-petition for certiorari to guide courts on how to apply the *Zauderer* test factors with respect to compelled editorial transparency laws (or to reiterate that such laws are categorically ineligible for the *Zauderer* test).

CONCLUSION

In 1979, the Court said: "There is 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; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed." *Herbert v. Lando*, 441 U.S. 153, 174 (1979).

That passage perfectly anticipated Florida's compelled editorial transparency provisions. At best, Florida has weakly and pretextually justified the disclosure requirements as advancing a "general end such as the public interest." The Constitution doesn't permit Florida to make such intrusions into the editorial process.

Because the Eleventh Circuit used *Zauderer* to permit those intrusions, and that legal standard will

permit other impermissible intrusions into Constitutionally protected editorial activities, this Court should grant the cross-petition for a writ of certiorari.

Respectfully submitted,

VENKAT BALASUBRAMANI
Counsel of Record
FOCAL PLLC
900 1st Avenue S, Suite 201
Seattle, WA 98134
venkat@focallaw.com
(206) 529-4827

November 23, 2022