Nos. 22-277 and 22-555

In the Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL., PETITIONERS

v.

NETCHOICE, LLC, DBA NETCHOICE, ET AL.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., PETITIONERS

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Eleventh Circuits

BRIEF OF PROFESSOR ERIC GOLDMAN AS *AMICUS CURIAE* IN SUPPORT OF NETCHOICE AND CCIA

Michael S. Kwun
Counsel of Record
KWUN BHANSALI LAZARUS LLP
555 Montgomery Street
Suite 750
San Francisco, CA 94111
(415) 630-2350
mkwun@kblfirm.com

December 5, 2023

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Professor Eric Goldman is a law professor and Associate Dean for Research at Santa Clara University School of Law. (He writes on his own behalf, not on behalf of his employer or anyone else.) Professor 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' editorial decisions.[2] Professor Goldman submits this amicus brief to highlight the constitutional problems caused by Florida's and Texas's explanations requirements and why they do not qualify for using deferential constitutional scrutiny under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

SUMMARY OF ARGUMENT

The Florida and Texas laws at issue purport to restrict "censorship" by "social media platforms." They

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[1] No counsel for a party has authored this brief in whole or in part. No such counsel or a party made a monetary contribution intended to fund this brief's preparation or submission. No one other than *amicus curiae* has made such a monetary contribution.

[2] Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203 (2022) [hereinafter, *Mandating Editorial Transparency*]; Eric Goldman, Zauderer *and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE 80 (2023) [hereinafter, *Compelled Editorial Transparency*].

instead censor publishers[3] of users' social media content by stripping them of editorial discretion and otherwise distorting their editorial decision-making.

The Florida and Texas laws censor publishers *directly* by interfering with online publishers' content moderation decisions and overriding their editorial freedoms. The laws also impose censorship *indirectly* by compelling publishers to disclose details about their editorial decision-making and operations, which motivates publishers to change their decisions to please regulators. This censorship-by-transparency approach is a novel policy solution that has no clear analog in the traditional publishing world, where such intrusions have always been recognized as unacceptably censorial.

This brief focuses specifically on the statutory "explanations" requirements. The Florida and Texas laws generally obligate publishers to provide explanations to users regarding content moderations decisions. This brief calls those statutory provisions the "explanations obligations."

Both the Fifth and Eleventh Circuits analyzed the explanations obligations using the relaxed test for constitutional scrutiny articulated in *Zauderer*, but they reached opposite conclusions. The Eleventh

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[3] Although social media "platforms" may structure their editorial operations differently than traditional print publishers, they unquestionably *publish* user-submitted content. "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." *O'Handley v. Padilla,* 579 F. Supp. 3d 1163, 1186–87 (N.D. Cal. 2022). This brief therefore uses the descriptor "publisher" rather than the statutory term "social media platform."

Circuit struck down Florida's explanations obligation as unduly burdensome, even under the deferential *Zauderer* test. The Fifth Circuit, in contrast, upheld the explanations obligation in Texas's social media censorship law.

Both courts, however, misunderstood *Zauderer*. Because of the conditions precedent to its application, the *Zauderer* test never should have been applied to either state's law. The Court's cases confirm that *Zauderer* scrutiny is applicable only in a narrow set of circumstances.

Over-expansive application of the *Zauderer* test would jeopardize the freedoms of speech and press online because regulators are imposing a wide range of disclosure obligations with the intent and effect of dictating editorial standards to publishers, with dire consequences for publishers' editorial freedoms. The Court should confirm that explanations obligations don't meet the preconditions for *Zauderer* scrutiny. That declaration would establish that legislatures cannot, consistent with the First Amendment, use editorial transparency obligations to censor publishers' editorial choices.

ARGUMENT

I. Explanations obligations are unprecedented and undermine publishers' editorial discretions.

In a broad effort to censor online publishers' First Amendment rights, regulators are experimenting with novel mandates that control or restrict the editorial discretion of online publishers of third-party content. This includes compelled editorial transparency laws.

"Compelled editorial transparency" refers to "requirements for publishers to disclose information about their editorial operations and decisions." *Mandating Editorial Transparency, supra* note 2, at 1207. Consideration of any such regulation must take into account that private publishers that "provide[] a forum for [third-party] speech" have a protected right to "editorial discretion." *Manhattan Cmty. Access Corp. v. Halleck,* 139 S. Ct. 1921, 1930 (2019). A state generally cannot compel private actors "to publish that which reason tells them should not be published." *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256 (1974) (cleaned up).

Compelled editorial transparency provisions can be taxonomized into four categories, each of which can clip publishers' constitutionally protected editorial discretion. *See Compelled Editorial Transparency, supra* note 2, at 87–88. One category is "explanations of the publisher's editorial decisions, such as why the service chose to reject, remove, or deprioritize a user's content." *Id.* at 88.

The Florida and Texas laws both impose explanations obligations on publishers. Florida obligates publishers to provide "a thorough rationale explaining the reason that the social media platform censored the user" and details about how the platform became aware of the user's content. FLA. STAT. § 501.2041(2)–(3). Texas obligates publishers to "notify the user who provided the content of the removal and explain the reason the content was removed." TEX. BUS. & COM. CODE § 120.103(a)(1).

These explanations obligations impose *sui generis* duties on online publishers. Newspapers don't routinely explain why they rejected letters to the editor,

law review journals almost never explain why they didn't accept articles for publication, and book publishers don't explain why they declined to publish book manuscripts submitted to them. In all of these circumstances, the publishers have a "reason" for not publishing the work, but their motivations may be as vague as "the work didn't meet their subjective editorial standards" or "they don't think their audience would be sufficiently interested." No legislature, however, has tried to force publishers like newspapers, law reviews, or book publishers routinely to provide explanations to authors they don't publish.

1. Explanations obligations increase a publishers' costs. Those costs would be worrisome at the scale of an offline publisher like a traditional print publisher, who might receive thousands of submissions per year. At the scale of the internet, where publishers can receive billions of content items a day and make content moderation decisions for each, the cost of explanations obligations would be massive. That cost would be borne by publishers even for content submitted in bad faith by trollers, spammers, and other malefactors who have no interest in engaging in prosocial conversations. Those explanations would benefit no one, imposing a social cost with no countervailing benefit. The additional costs of providing explanations could drive publishers out of the industry or encourage them to change their content sourcing strategies to more cost-effective options.

2. Mandated explanations expose publishers to litigation risk. Spurned content submitters have shown a great willingness to file lawsuits under a variety of

legal theories challenging publishers' proffered explanations.[4] Even if publishers win those cases, the desire to avoid litigation will nonetheless distort their behavior. Publishers will change their editorial underlying decision to avoid future legal fights, or will proffer generic and unenlightening explanations that are less likely to spark litigation but that will negate any benefits from the disclosures in the first place.

3. Any government enforcement of purported violations of explanations obligations will have potentially costly and serious ramifications for publishers. For example, regulators may argue that the proffered explanations were not accurate or were inconsistently applied. Any discovery will enable the government to take a deep and troubling look into the targeted publisher's editorial processes. Worse, some enforcements will be initiated for improper motivations, such as censorship or partisanship. Publishers will seek to minimize the risk of these investigations and enforcements by changing their editorial decisions to more closely align with the regulators' interests. *See Mandating Editorial Transparency*, *supra* note 2, at 1216–17. In other words, because the cost and distraction of potential investigations and enforcement could be devastating, publishers will anticipatorily change their editorial decisions to conform to the censors' wishes.

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[4] *E.g., Stossel v. Meta Platforms, Inc.,* 634 F. Supp. 3d 743 (N.D. Cal. 2022); *Shared.com v. Meta Platforms, Inc.,* No. 22-cv-02366-RS, 2022 WL 4372349 (N.D. Cal. Sept. 21, 2022); *Margolies v. Rudolph,* No. 21-CV-2447-SJB, 2022 WL 2062460 (E.D.N.Y. June 6, 2022); *Mac Isaac v. Twitter, Inc.*, 557 F. Supp. 3d 1251 (S.D. Fla. 2021); *Song Fi v. Google, Inc.*, No. 14-cv-05080-CW, 2018 WL 2215836 (N.D. Cal. May 15, 2018); *Bartholomew v. YouTube, LLC*, 17 Cal. App. 5th 1217 (Cal. Ct. App. 2017).

Similarly, in situations where regulators formally challenge the explanations proffered by publishers, the publishers will prefer to acquiesce than risk a fight.

It is easy to romanticize an explanations obligation, i.e., to imagine that the requirement will motivate publishers to engage in a healthy dialogue with authors that improves the discourse. In this romanticized view, publishers would handcraft artisanal feedback to authors that improves their creative processes or helps authors identify or correct any editorial errors.

The reality is far less idyllic. Publishers will automatically generate "industrial" and generic explanations to minimize the preparation costs and litigation risk. To the extent that a law forces publishers to prepare individual explanations manually, costs will skyrocket—an especially inappropriate resource allocation when bad-faith submissions are involved. In either case, publishers' fears of government enforcement will distort both the explanations and the underlying decisions. Collectively, the publishers' most likely countermoves to an explanations obligation have significant and deleterious implications for the entire content ecosystem.

Due to their speech effects, compelled editorial transparency (including explanations obligations) qualitatively differs from standard compelled commercial disclosures that routinely survive legal challenges. Explanations obligations target publishers' decision-making processes, so any changes to those decisions create significant First Amendment effects. In contrast, most compelled commercial disclosures have no implications for a publisher's speech offerings. For

example, if a soda manufacturer changes the amount of sugar in its soda in response to compelled nutrition disclosures, the product reconfiguration does not affect the manufacturer's constitutionally protected speech. The opposite is true if explanations obligations change a publisher's editorial decisions. The substantial First Amendment risks posed by explanations obligations are precisely the reason why courts should examine them critically.

II. The Florida and Texas laws do not qualify for *Zauderer* scrutiny.

The *Zauderer* test is a specialized test for a specialized set of the circumstances. The Court has used the *Zauderer* test only twice to uphold disclosure obligations—in *Zauderer* and in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).[5] Due to the limited guidance provided by the Court's *Zauderer* jurisprudence, a lot of lore and myth have developed about what the *Zauderer* test stands for and how to apply it. The Fifth and Eleventh Circuit opinions reflect some of that mythology. Going back to what the Court has actually said about *Zauderer,* the Florida and Texas explanations obligations do not satisfy the preconditions for the specialized *Zauderer* constitutional scrutiny.

A. The *Zauderer* test only applies in a narrow set of circumstances.

Zauderer did not announce a generally applicable test for constitutional review. Indeed, the *Zauderer*

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[5] *NIFLA v. Becerra* indicated that one requirement at issue did not qualify for the *Zauderer* test and another requirement would not survive *Zauderer* scrutiny. 138 S. Ct. 2361, 2372 (2018).

opinion itself applied its new test to only one of the three regulations at issue. For the other two regulations, the Court first reiterated that commercial speech is protected by the First Amendment, "albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" 471 U.S. at 637. The "general approach" to restrictions on commercial speech was then and is now "well settled"; commercial speech that is not false or deceptive and that does not concern unlawful activity "may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id.* at 638 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557 (1980)).

The Court applied the *Central Hudson* test to Ohio's regulations that restricted attorney advertising that (1) recommended the attorney's services to those who had not sought a referral from the attorney, or (2) included illustrations. *Id.* at 637–49. The Court concluded that Ohio had not shown that the first regulation was "necessary to the achievement of a substantial governmental interest." *Id.* at 644. Ohio likewise failed to show that "the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban." *Id.* at 648. Neither regulation survived the heightened scrutiny required by *Central Hudson.*

The Court fashioned its new, specialized *Zauderer* test only for the third attorney advertising restriction at issue, requiring certain disclosures in attorney advertising. *Id.* at 650. The Court began its consideration of this third regulation by acknowledging that "in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on

speech." *Id.* (citing *Wooley v. Maynard,* 430 U.S. 705 (1977); *Tornillo,* 418 U.S. 241; *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943)).

The Court noted, however, that Ohio's disclosures applied only to (1) "commercial advertising," and compelled the inclusion only of (2) "purely factual" and (3) "uncontroversial" information about (4) "the terms under which [the advertiser's] services will be available." *Id.* at 651; *see Compelled Editorial Transparency, supra* note 2, at 83–85. When those four preconditions were satisfied, the Court concluded that the First Amendment interests implicated were "not of the same order" as the interests discussed in *Wooley, Tornillo,* and *Barnette.* 471 U.S. at 651.

The Court confirmed the necessity of the four preconditions in its later cases, stating, for example, that outside the context of regulating commercial advertising by compelling the dissemination of purely factual and uncontroversial information, a state "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 573 (1995). In *NIFLA,* the Court again reiterated that the *Zauderer* test is limited to "commercial advertising," and cannot compel speech that is not limited to uncontroversial topics. 138 S. Ct. at 2372. Other commercial speech regulations are instead subject to the default *Central Hudson* test, while speech regulations of other corporate speech are often subjected to strict scrutiny.

B. Explanations obligations do not qualify for *Zauderer* scrutiny.

The Florida and Texas explanations obligations do not satisfy the four preconditions for application of the

Zauderer test. Indeed, the obligations do not satisfy *any* of the four preconditions.

1. The explanations obligations are not about advertising.

Zauderer involved the regulation of ad copy that the advertiser voluntarily chose to run. The subject regulation did not require the advertiser to manufacture completely new ad copy. Instead, the regulation required that attorneys, in their advertising, "provide somewhat more information than they might otherwise be inclined to present." 471 U.S. at 650. Rather than requiring that businesses involuntarily create and disseminate new content, the regulation sought to correct any deceptive omissions in ad copy the advertiser already planned to disseminate.

The regulation's applicability only to advertising was critical to the Court's holding. Had the attorney made the same statements "in another context" than an attorney ad, that would have been "fully protected speech." *Id.* at 637 n.7. In *Milavetz,* the Court reiterated this point, describing the "problem of inherently misleading commercial advertising" as a shared "essential feature[] of the rule at issue in *Zauderer*." 559 U.S. at 250.

The disclosures mandated by the Florida and Texas explanations obligations are not ads voluntarily created by the publishers. First, the obligations require their creation from whole cloth. Unlike in *Zauderer* and *Milavetz*, the mandated explanations do not fix deceptive omissions in existing ad copy. Second, the required explanations simply are not ads. They do not seek to increase demand for the publishers' offerings. When a publisher seeks to terminate the user's account, the explanation is literally the opposite of

advertising—it's indicating that the publisher no longer wants a relationship with the user at all.

To the extent that the *Zauderer* test applies to "commercial speech" and not just "advertising," the outcome is the same. Commercial speech is speech that proposes a commercial transaction. *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 455–56 (1978); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976). "By definition," commercial speech is "linked inextricably" to commercial transactions. *Friedman v. Rogers,* 440 U.S. 1, 10 n.9 (1979). The explanations obligations are not "commercial speech"; in explaining an editorial decision, publishers propose no commercial transaction. Instead, the laws force the publishers to divulge details about their editorial decisional processes. The fact that the publishers may be commercial enterprises does not transform their editorial decisions into commercial speech. A publisher's profit motive does not make its speech commercial speech; "[s]uch a basis for regulation clearly would be incompatible with the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.,* 413 U.S. 376, 385 (1973).

2. The compelled speech is not purely factual.

The Court has not clarified what constitutes "purely factual" disclosures, but these should be extremely narrow. In *Zauderer*, the required disclosure was essentially a binary disclosure that could be answered with a yes or no: Does the attorney require the client to pay out-of-pocket costs? More complicated disclosures, such as how a contingency fee would be computed, may not have been "purely factual." *See*

Zauderer, 471 U.S. at 661 n.5 (Brennan, J., concurring and dissenting).

The Florida and Texas explanations obligations force publishers to explain their subjective editorial rationales. A publisher may properly determine that a content item simultaneously violates multiple editorial standards, has too high a chance that it violated an ambiguous or complicated rule, or didn't violate any specific editorial rule but is still unfit for its audience in the publisher's editorial judgment. Because there are many types of possible disclosures and picking the appropriate one(s) requires substantial discretion, the disclosures aren't "simple" like the cost disclosures in *Zauderer*. Compelled explanations of subjective judgment calls are not "purely factual."

3. The compelled disclosures are not limited to uncontroversial information.

The Court has not fully clarified what "uncontroversial" information means. In *Zauderer*, disclosures about the interaction between contingency fees and out-of-pocket expenses were uncontroversial; in *NIFLA*, disclosures regarding abortion services were about "anything but an 'uncontroversial' topic." 138 S. Ct. at 2372. There is a wide and unresolved gap between these two outer boundaries.

Explanations of editorial decisions, however, are intrinsically controversial. 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 this editorial decision inevitably will criticize the outcome and the decision-making process. It's impossible to make an editorial decision that isn't controversial.

This concern is heightened by partisan disagreements about pretty much everything nowadays. Partisans prefer content that champions them or their positions and object to content that champions their rivals or their rivals' views. As a result, partisan rivals diametrically disagree on their preferred publication outcomes. Partisans will routinely disagree whether an editorial policy has been violated—and partisans will routinely "work the refs" to change the editorial policies in their favor. Partisans will regularly find controversy in an editorial explanation if a dispute serves their partisan interests.

4. Explanation obligations compel speech that isn't about offer terms.

Zauderer's prerequisite that the regulation targets disclosures of offer terms makes sense in the context of advertising. This precondition becomes incoherent outside of "advertising" or any other circumstance where the speaker isn't proposing a commercial transaction.

A post-hoc explanation about the basis of an editorial decision is the opposite of the disclosure of offer terms. The publisher isn't "offering" anything—just like an invoice for past services rendered pursuant to contractually agreed-upon terms can't be considered "offer terms."

C. The opinions below disregarded the four preconditions to application of *Zauderer* scrutiny.

The explanations obligations thus don't fit *Zauderer*'s scope at all. The opinions below applied the *Zauderer* test only by ignoring its preconditions.

Specifically, 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. Att'y Gen.,* 34 F.4th 1196, 1227 (11th Cir. 2022). That assertion ignores the express statement in *Zauderer* that the speech at issue would have been "fully protected" had it not been in an advertisement. 471 U.S. at 637 n.7; *see also NIFLA,* 138 S. Ct. at 2374 (quoting *Zauderer* footnote 7). And it ignores the express statement in *Milavetz* that the "problem of inherently misleading commercial advertis[ing]" is an essential feature of the *Zauderer* test. 559 U.S. at 233.

The Eleventh Circuit also suggested that the *Zauderer* test applies to any corporate disclosure that might help consumers. This wrong recapitulation allowed the opinion to disregard entirely *Zauderer*'s preconditions that the disclosures are "purely factual," "uncontroversial," and related to offer terms.

In total, then, the Eleventh Circuit panel referenced only one of the four *Zauderer* preconditions and essentially treated that one as moot. This completely disregards what the Court has actually said about *Zauderer*.

The Fifth Circuit opinion also mishandled the *Zauderer* test. The opinion never really explained how it concluded that *Zauderer* applied, but the panel essentially disregarded all of the *Zauderer* precon-

ditions. The opinion doesn't show how Texas's explanations obligation satisfied *any* of *Zauderer*'s preconditions, let alone all of them.

Thus, both the Fifth and Eleventh Circuits misapplied the *Zauderer* precedent by making up legal tests that bear little resemblance to what the Court has actually said. The Court should correct these serious errors.

D. The explanations obligations would not survive even *Zauderer* scrutiny.

If a regulation qualifies for the *Zauderer* test, it nonetheless could "offend the First Amendment" if it is (i) unjustified, (ii) unduly burdensome, or (iii) not reasonably related to preventing consumer deception. *Zauderer,* 471 U.S. at 650–51.[6] Although *Zauderer* scrutiny is not heightened, the state must still show that it's satisfied. Florida and Texas cannot do this with respect to their explanations obligations.

The Eleventh Circuit reached the right conclusion that Florida's explanations obligation was unduly burdensome. The panel said the explanations obligation "imposes potentially significant implementation costs [and] exposes platforms to massive liability," *NetChoice*, 34 F.4th at 1230. That conclusion rendered it unnecessary to reach *Zauderer*'s other scrutiny factors, but the explanations obligation is also unjustified because compelling an explanation of an editorial choice doesn't advance *Zauderer*'s stated goal of preventing consumer deception. A publisher that says

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[6] Some key details about these factors remain undefined by the Court. For example, the Court has never explained when a disclosure is "unjustified" (as distinct from unduly burdensome) or clarified when a burden becomes "undue."

nothing at all about its editorial choices does not, by its silence, deceive anyone, and thus there is no *deception* that a compelled explanation needs to prevent.

The Fifth Circuit reached the wrong conclusion with respect to Texas's explanations obligation by paying scant attention to the scrutiny factors. It only analyzed the "unduly burdensome" factor. The opinion completely disregarded the "unjustified" factor, and equated "preventing consumer deception" with "enabling users to make an informed choice," a rhetorical move that functionally eliminated this factor because states can always argue that a compelled disclosure helps consumers make informed choices.

CONCLUSION

The Court should take this opportunity to reiterate, once again, that *Zauderer* scrutiny applies only if a law or regulation meets the four prerequisites set forth in that case. The explanations obligations provide a particularly easy case for the Court to do so, because they satisfy none of the *Zauderer* preconditions.

Respectfully submitted,

Michael S. Kwun
Counsel of Record
KWUN BHANSALI LAZARUS LLP
555 Montgomery Street
Suite 750
San Francisco, CA 94111
(415) 630-2350
mkwun@kblfirm.com

December 5, 2023